NOTES

DEFEATING A WOLF CLAD AS A WOLF[1]: FORMALISM AND FUNCTIONALISM IN SEPARATION-OF-POWERS SUITS AGAINST THE CONSUMER FINANCIAL PROTECTION BUREAU

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[1] Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting) ("Frequently an issue [regarding an administrative structure] will come before the Court clad, so to speak, in sheep's clothing . . . . But this wolf comes as a wolf.").

I. INTRODUCTION

Recall a familiar story: in an attempt to avoid death, Doctor Frankenstein creates a grotesque monster towering over eight feet tall.[2] After being rejected by his creator, the monster kills the Doctor's friends and family. The story ends with the Doctor expressing regret for ever having created the monster.

The Frankenstein narrative serves as a useful analogy for describing constitutional attacks against federal agencies. In these suits, plaintiffs in effect allege that an agency is so large, powerful, or unusual that it violates various structural or textual guarantees in the Constitution.[3] This fear of the Frankenstein organization animates plaintiffs' decisions regarding the claims they assert and the type of reasoning they employ to challenge the agency.

Plaintiffs challenging federal agencies often couch their claims in the separation of powers, which may be broadly defined as the horizontal system of checks and balances between the Executive, Legislative, and Judicial Branches of the federal government.[4] These suits frequently include a colorful assortment of constitutional claims. Plaintiffs have alleged, for example, that a statutory provision violates the Constitution by unduly restricting the President's power to remove agency heads.[5] Such claims rely on the principle that, under Article II and the Take Care Clause of the United States Constitution, the President must have some

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[2] *See generally* MARY W. SHELLEY, FRANKENSTEIN (J. Paul Hunter ed., W.W. Norton & Co. 2012) (1818). Andrew Guzman first used the Frankenstein narrative to illustrate the implications of creating organizations with expansive mandates. *See* Andrew T. Guzman, *International Organizations and the Frankenstein Problem*, 24 EUR. J. INT'L L. 999, 1000 (2013) (evaluating an international organization under this narrative).

[3] *See, e.g.*, Complaint for Declaratory and Injunctive Relief at 19–20, Free Enter. Fund v. Public Co. Accounting Oversight Bd., No. 06-cv-00217 (D.D.C. Feb. 7, 2006) (asserting that the Public Company Accounting Oversight Board is unconstitutional); First Amended Complaint for Declaratory and Injunctive Relief at 42–44, State Nat'l Bank of Big Spring v. Lew, No. 12-cv-01032 (D.D.C. Sept. 20, 2012) (alleging that the Consumer Financial Protection Bureau is unconstitutional due to its size and unprecedented power).

[4] BLACK'S LAW DICTIONARY 1487 (9th ed. 2009).

[5] *See, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3164 (2010) (invalidating a two-tiered removal structure); Myers v. United States, 272 U.S. 52, 176 (1926) (invalidating a provision requiring concurrence by the Senate for the removal of a postmaster).

ability to remove agency heads.[6] Plaintiffs also have asserted constitutional claims on the basis that the decisions of agency adjudicative bodies must be subject to review by Article III courts.[7] Although administrative judges have authority to issue certain kinds of judgments, the Supreme Court has recently reminded Congress that, under the Constitution's vesting of the judicial power in the Supreme Court and in inferior courts created by Congress,[8] Congress cannot confer the judicial power on entities not created under Article III.[9] Often, a nondelegation claim is thrown in for good measure. These claims assert that Congress has delegated its legislative authority to the President,[10] an administrative agency,[11] or even a private entity,[12] in contravention of Article I's vesting of the legislative power in Congress.[13] Lastly, agencies have been challenged on the basis that Congress lacks oversight of agency spending required by Congress's power of the purse.[14] Under the Appropriations Clause,[15] an agency structure may be unconstitutional if that agency may spend public funds without sufficient legislative permission.[16]

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[6] *See Free Enter. Fund*, 130 S. Ct. at 3153 (observing that the Court has upheld limited restrictions on the President's removal power); *Morrison*, 487 U.S. at 698–99 (Scalia, J., dissenting) (noting that the Founders "fortified" the Executive against legislative predominance by providing the removal power).

[7] *See* Stern v. Marshall, 131 S. Ct. 2594, 2608 (2011) (invalidating provisions of the Bankruptcy Act permitting bankruptcy judges to adjudicate claims with limited oversight by federal courts).

[8] U.S. CONST. art. III, § 1.

[9] *Stern*, 131 S. Ct. at 2609.

[10] *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935) (invalidating a delegation to the President to promulgate codes of fair competition).

[11] *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475–76 (2001) (upholding a delegation of rulemaking authority to the Environmental Protection Agency).

[12] *See* Ass'n of Am. R.R. v. U.S. Dep't of Transp., 721 F.3d 666, 677 (D.C. Cir. 2013) (invalidating a delegation to Amtrak, a quasi-private entity).

[13] For a summary of the doctrine, see Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2103–09 (2004).

[14] *See* U.S. CONST. art. I, § 9 (granting Congress authority to control federal spending through appropriations).

[15] *Id.*

[16] *See* Republic Nat'l Bank of Miami v. United States, 506 U.S. 80, 91 (1992) (noting that the Appropriations Clause requires that all public funds be spent according to congressional judgment). For an insightful overview of the power of the purse, see Kate Stith, *Congress's Power of the Purse*, 97 YALE L.J. 1343, 1344–46 (1988).

One issue stands out in separation-of-powers decisions and the literature discussing these decisions: the divide between formalist and functionalist reasoning.[17] Although Justices on the Court do not categorically define their reasoning in such terms,[18] commentators have often employed these theories to explain decided cases.[19] Formalism, often associated with textualism, favors clear rules that provide predictability.[20] Functionalism, by contrast, frequently involves determining which course of conduct may—in a normative or pragmatic sense—be the most appropriate.[21] Commentators have recognized that in separation-of-powers decisions, whether a court employs formalist or functionalist reasoning may be dispositive given that functionalism tends to privilege congressional assertions of power and formalism maintains that the Constitution provides clear rules regarding these assertions of power.[22] In the separation-of-powers context, these theories trace their roots to Peter Strauss,

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[17] *See* United States v. Polizzi, 549 F. Supp. 2d 308, 401 (E.D.N.Y. 2008) (recognizing that the Supreme Court's separation-of-powers reasoning generally falls into one of these categories). These categories are, however, imperfect labels. As explained *infra* Part II.B, judicial opinions often invoke both theories. *See also* William N. Eskridge, *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 22 (1998) (same). This Note will attempt to indicate when this occurs.

[18] John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1942 (2011).

[19] *See, e.g.*, Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited:* Free Enterprise Fund *and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1615–23 (2012) (arguing that formalist analysis permeates the decisions of the Roberts Court). Commentators may disagree whether these theories dictate outcomes or whether they are more properly seen as rhetorical devices that justify a decision. Harlan G. Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 GEO. WASH. L. REV. (forthcoming 2014) (manuscript at 21–22), *available at* http://papers.ssrn.com/sol3/papers.cfm S?abstract_id=2412103.

[20] Eskridge, *supra* note 17, at 21. See *infra* Part II.A for a more thorough discussion of these theories.

[21] Manning, *supra* note 18, at 1943. *Compare* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 667 (1984) ("[W]e can achieve the worthy ends of those who drafted our Constitution only if we give up the notion that it embodies a neat division of all government into three separate branches . . . ."), *with* Frank H. Easterbrook, *Formalism, Functionalism, Ignorance, Judges*, 22 HARV. J.L. & PUB. POL'Y 13, 15 (1998) ("[T]he Constitution *is* form; an appeal to 'function' is a claim that something else would be *better* than the Constitution . . . .").

[22] *See* Manning, *supra* note 18, at 1943 (asserting that "functionalists believe that Congress has substantially free rein to innovate" whereas formalists "draw[ ] sharply defined and judicially enforceable lines").

who first framed debates regarding agency constitutionality using the formalist-functionalist dichotomy.[23]

A word of caution is nonetheless in order: not all commentators agree that this categorical approach is useful or even correct. Some maintain that the text of the Constitution contains both formalist rules and functionalist ideas.[24] Others question the explanatory viability of this dichotomy.[25] Although these commentators undoubtedly express valid points, this Note will use these terms because commentators have generally recognized that the theories are useful frameworks for categorizing the Court's reasoning.[26]

This Note demonstrates that when federal agencies satisfy formalist separation-of-powers tests, regulated entities will frame their separation-of-powers arguments in functionalist language. It concludes that under *Free Enterprise Fund v. Public Company Accounting Oversight Board*[27] and other recent separation-of-powers decisions, a formalist court would likely reject the functionalist argument that an agency has been granted too much power or is politically unaccountable.[28] Because the newly-created Consumer Financial Protection Bureau (CFPB) has already defended against two complaints alleging defects of a Frankenstein nature, this Note will assess litigation strategy against the CFPB in particular.

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[23] *See* Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 491–92 (1987) (recognizing that separation-of-powers decisions may be categorized as functionalist or formalist).

[24] *See* Manning, *supra* note 18, at 2039–40 (arguing that the Constitution provides formalist rules, such as the Appointments Clause, and also expresses functionalist tendencies through open-ended provisions like the Necessary and Proper Clause).

[25] *See, e.g.*, Linda D. Jellum, *"Which is to be Master," the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 878 (2009) (arguing that the theories imperfectly describe separation-of-powers cases).

[26] *See* Krotoszynski, *supra* note 19, at 1611 (positing that "the distinction retains significant explanatory force").

[27] 130 S. Ct. 3138 (2010).

[28] Several commentators have observed that the Roberts Court's decisions prefer formalist rules to more functionalist analyses. *See* Krotoszynski, *supra* note 19, at 1615–23 (discussing three of the Roberts Court's formalist decisions); Michael P. Allen, *The Roberts Court and* How *to Say What the Law Is*, 40 STETSON L. REV. 671, 694 (2011) (arguing that the Roberts Court's decisions are noticeably formalist); Cohen, *supra* note 19, at 47–49 (arguing that in foreign affairs cases, the Court has announced a new formalism which attempts to constrain the political branches).

Although one might expect entities regulated by the CFPB to employ formalist reasoning given formalism's more scrutinizing approach to agency structures, the plaintiffs in the two CFPB suits have not done so.[29] Instead, they have framed their arguments in functionalist terms, broadly alleging that the CFPB's power violates the Constitution and upsets the system of checks and balances.[30] This Note focuses on the arguments asserted against the CFPB, but its analysis should prove useful in evaluating the arguments asserted against other federal agencies. Indeed, given Congress's recent efforts to strengthen the independence of agencies by creating novel structures such as the CFPB, it would not be surprising to see more constitutional claims similar to those asserted by the plaintiffs challenging the CFPB.

This Note proceeds in three parts. Part II defines functionalism and formalism and highlights decisions regarding the removal power, the nondelegation doctrine, and the novelty of an agency's structure. Part II also explains how *Free Enterprise Fund*, a 2010 decision guided by a formalist analysis, is indicative of how the Court now treats separation-of-powers claims. It next provides a brief history of the CFPB and summarizes the arguments asserted by the plaintiff, Morgan Drexen, in the most recent suit, filed in 2013. Part III.A analyzes two of Morgan Drexen's principal claims under formalist tests. It then outlines why Morgan Drexen has resorted to functionalist reasoning. Finally, Part III.B analyzes the likely outcome of Morgan Drexen's functionalist argument. It first explains how the Court has traditionally analyzed separation-of-powers principles. Next, it posits that *Free Enterprise Fund* indicates that agency novelty now plays a more prominent role in the Court's separation-of-powers analysis. This Part concludes by evaluating why the Court would nonetheless reject Morgan Drexen's functionalist argument.

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[29] The plaintiff in the first suit was a Texas bank. That suit was dismissed in 2012 for lack of standing. *See* State Nat'l Bank of Big Spring v. Lew, No. 12-1032, 2013 U.S. Dist. LEXIS 108308, at *113 (D.D.C. Aug. 1, 2013) (granting motion to dismiss for lack of standing). The plaintiff in the second suit is Morgan Drexen, a provider of legal services. *See infra* Part II.C (summarizing Morgan Drexen's claims).

[30] *See* Complaint at 19, Morgan Drexen, Inc. v. Consumer Financial Protection Bureau, No. 13-cv-1112 (D.D.C. July 22, 2013) [hereinafter MD Complaint] (arguing that the broad, undefined grant of power eliminates the system of checks and balances).

II. BACKGROUND

A. FUNCTIONALISM AND FORMALISM

Consider the differences between functionalism and formalism first by way of an example. In *Marbury v. Madison*, the Supreme Court denied a writ of mandamus to William Marbury on the basis that it lacked jurisdiction over the case.[31] Today's functionalists would have argued that it might be a good idea to give the Court original jurisdiction of mandamus cases where a newly elected President attempts to undo the nominations of his predecessor.[32] As Judge Easterbrook has noted, however, Chief Justice Marshall's formalist reasoning prevailed since "the *text* will not bear that [functionalist] reading, because the original jurisdiction of the Court is limited to cases involving ambassadors and states."[33]

The functionalist often engages in balancing tests: in analyzing assertions of power, the functionalist asks whether actions taken by one branch unduly undermine the responsibilities of another branch.[34] This theory favors standards over rules and involves a "flexible understanding of separation of powers."[35] Professor Eskridge explains that "[f]unctionalism might be understood as induction from constitutional policy and practice."[36] He further adds that unlike formalism, which promises continuity of analysis, "functionalist reasoning promises adaptability and evolution."[37] As a result, the functionalist generally seeks to provide the political branches with greater flexibility to achieve social benefits.[38]

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[31] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175–76 (1803).

[32] Easterbrook, *supra* note 21, at 15.

[33] *Id.* at 16 (emphasis added).

[34] Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 609 (2001); *see also* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977) (stating that "the proper inquiry focuses on the extent to which [a statute] prevents the Executive Branch from accomplishing its constitutionally assigned functions"); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3176 (2010) (Breyer, J., dissenting) (reasoning that courts should focus on whether one branch has aggrandized its power at the expense of another).

[35] Mistretta v. United States, 488 U.S. 361, 381 (1989).

[36] Eskridge, *supra* note 17, at 21.

[37] *Id.*

[38] Kathleen M. Sullivan, *Dueling Sovereignties:* U.S. Term Limits, Inc. v. Thornton, 109

Although functionalists recognize that the three branches of government are each granted unique powers and responsibilities, they maintain that the Framers never intended the three branches to be entirely separate.[39] Comingling of the functions of each branch is permissible so long as the scheme does not disrupt the proper balance between the branches.[40] Functionalists emphasis Congress's plenary authority through the Necessary and Proper Clause[41] to compose the government.[42] Because functionalists recognize that Congress may at times encroach on the responsibilities traditionally within the domain of the Executive or Judicial Branches, while nonetheless determining that the benefits provided by the agency justify such incursions, functionalist reasoning generally leads the Court to validate agency structures.[43]

Formalism, by contrast, takes a less flexible approach to separation-of-powers principles,[44] emphasizing the necessity of "bright-line rules that seek to place determinate, readily enforceable limits on public actors."[45] It emphasizes the text and structure of the Constitution, and the original intent of the Framers.[46] As a result, the formalist's analysis is often guided by rules that lead to relatively determinate answers.[47] Formalism thus values "transparency, predictability, and continuity in law."[48]

HARV. L. REV. 78, 93–94 (1995).

[39] *See* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 442 (1997) (arguing that the Framers favored "the more pragmatic, flexible approach").

[40] *Id.*; *see also Mistretta*, 488 U.S. at 426 (Scalia, J., dissenting) (stating that the functionalist determines whether the functions of the branch have been comingled too much).

[41] U.S. CONST. art. I, § 8, cl. 13.

[42] *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3165 (2010) (Breyer, J., dissenting) ("[T]he Necessary and Proper Clause affords Congress broad authority to 'create' governmental 'offices' . . . ." (citations omitted)); Manning, *supra* note 18, at 1951 (observing that functionalists rely on a broad interpretation of the Necessary and Proper Clause).

[43] *See* Manning, *supra* note 18, at 1950 ("[F]unctionalists tend to validate [statutory] schemes . . . .").

[44] *See id.* at 1944 (stating that formalists enforce the Constitution's formal lines of separation).

[45] Eskridge, *supra* note 17, at 21.

[46] *Id.*; *see also* Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (emphasizing the specific language of the Article II Vesting Clause).

[47] *See* Stephen L. Carter, *Constitutional Improprieties: Reflections on* Mistretta*,* Morrison*, and Administrative Government*, 57 U. CHI. L. REV. 357, 375 (1990) ("[D]ifferent

Formalists maintain that the Constitution has drawn judicially-enforceable lines between the branches and believe that a prescribed action must fall within the executive, legislative, or judicial power.[49] Because responsibilities granted to one branch belong solely to that branch, laws that push a branch beyond its "prescribed sphere of power" must be invalidated.[50] Formalists seek to guard against the assignment of power from one branch to another according to ad hoc evaluations of policy benefits.[51] Accordingly, this approach serves as a "prophylactic device, establishing high walls and clear distinctions."[52] Relative to functionalists, formalists thus tend to invalidate agency structures.[53]

B. DEVELOPMENT OF THE REMOVAL POWER, NONDELEGATION DOCTRINE, AND NOVELTY THEORY

The Court has vacillated between formalist and functionalist reasoning in its separation-of-powers decisions regarding agency structures.[54] This Part summarizes the Court's development of two separation-of-powers principles—the removal power and nondelegation doctrine—highlighting functionalist and formalist reasoning the Court has employed along the way. It concludes each summary with the most recent decision on the subject. Finally, it pays special attention to language regarding agency novelty in *Free Enterprise Fund* portending a new approach to separation-of-powers analyses.

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interpreters applying [formalist tests] in good faith will tend to reach similar results.").

[48] Eskridge, *supra* note 17, at 22. Formalists have traditionally promoted this form of reasoning as a tool for restricting the discretion of decisionmakers. *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988) (arguing that formalism benefits litigants by focusing on language).

[49] Krotoszynski, *supra* note 19, at 1605–06.

[50] United States v. Polizzi, 549 F. Supp. 2d 308, 401 (E.D.N.Y. 2008) (citation omitted).

[51] *See* Manning, *supra* note 18, at 1958 (noting that formalism is often associated with "textualist interpretive approaches"). As Justice Scalia has observed, "[t]he rule of law is *about* form . . . . Long live formalism. It is what makes a government a government of laws and not of men." ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 25 (Amy Gutmann ed., 1997).

[52] Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 (1995).

[53] Manning, *supra* note 18, at 1944.

[54] *See* Easterbrook, *supra* note 21, at 17 (describing trends in formalist and functionalist decisions).

1. The President's Removal Power. Although federal agencies may be located within any of the three branches,[55] most agencies are located within the Executive Branch.[56] The Constitution is silent on the President's power to remove agency heads.[57] Nonetheless, the Court's decisions have affirmed that the President must have some power to oversee executive officers through removal.[58]

In the first significant removal power decision, *Myers v. United States*, the Supreme Court held unconstitutional a statute providing that the President could only remove postmasters with the Senate's concurrence.[59] In formalist terms, the Court characterized dismissing an executive officer as "exclusively an executive function"[60] and asserted that "the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended."[61] The Court thus contemplated that all power must be divided into precisely three branches.[62]

Almost a decade later, the Court in *Humphrey's Executor v. United States*[63] clarified that this sweeping view of removal power did not extend to certain agencies. In that case, the Court upheld a provision in the Federal Trade Commission Act providing that the President could only remove commissioners of the Federal

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[55] Mistretta v. United States, 488 U.S. 361, 424 (1989) (Scalia, J., dissenting).

[56] *See id.* at 425 (recognizing that, in contrast to the Legislative and Judicial Branches, agencies within the Executive Branch are "well-established").

[57] *Ex parte* Hennen, 38 U.S. 230, 258 (1839).

[58] *See id.* at 259 (holding that this view had become the "settled and well understood construction of the Constitution"); Letter from James Madison to Thomas Jefferson (June 30, 1789), *in* 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 890, 893 (Charlene B. Bickford et al. eds., 2004) (stating that the appropriate view was that the executive power included a power to oversee officers through removal). The ability to remove agency heads ensures that the President is accountable for actions taken through the Executive Branch. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3154 (2010).

[59] 272 U.S. 52, 176 (1926).

[60] *Id.* at 170. Commentators have recognized that *Myers* adopted the "unitary executive" model, which maintains that the Constitution grants the President all executive power and that Congress cannot limit this grant. *See* Kent H. Barnett, *Avoiding Independent Agency Armageddon*, 87 NOTRE DAME L. REV. 1349, 1354 (2012).

[61] *Myers*, 272 U.S. at 116.

[62] *Id.*

[63] 295 U.S. 602 (1935).

Trade Commission (FTC) for good cause.[64] Because the FTC was a "quasi-judicial and quasi-legislative" organ[65] and because the commissioners were not purely executive officers as was the postmaster in *Myers*, the Court reasoned, the good cause removal provision was valid.[66] Accordingly, the Court confirmed that the Constitution does not confer absolute removal power on the President.[67]

Disagreement exists whether *Humphrey's Executor* supports formalism or functionalism. Some commentators have argued that the decision is functional given its focus on the function of the FTC commissioners' duties, its creation of a quasi-legislative or quasi-judicial category separate from the three branches, and its emphasis on Congress's power to create agencies that are independent from the political process.[68] Others, however, have noted that the decision provides formalist lines between the quasi-legislative and executive categories.[69]

The next significant decision came in 1988, when the Court upheld a statute limiting the Attorney General's power to remove an independent counsel charged with investigating federal officials in *Morrison v. Olson*.[70] In functionalist language, the Court held that the removal analysis does not involve "defin[ing] rigid categories of those officials who may or may not be removed at will,"[71] but rather involves considering whether Congress "unduly trammels on executive authority."[72] Because the good cause standard allowed the President to ensure that the counsel was

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[64] *Id.* at 631–32.

[65] *Id.* at 624.

[66] *Id.* at 627–28.

[67] *Id.* at 629.

[68] *See* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1738 (1996) (classifying *Humphrey's Executor* as a functionalist decision); Peter P. Swire, Note, *Incorporation of Independent Agencies into the Executive Branch*, 94 YALE L.J. 1766, 1771 (1985) (arguing that *Humphrey's Executor* is grounded in a functional concern for allowing apolitical agencies the necessary independence from presidential oversight).

[69] *See* Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 13 (2013) (describing the executive and quasi-legislative or quasi-judicial categories as formalist designations); Morrison v. Olson, 487 U.S. 654, 725 (1988) (Scalia, J., dissenting) (reasoning that the decision draws lines between executive and quasi-legislative or quasi-judicial officers).

[70] 487 U.S. at 696–97.

[71] *Id.* at 689.

[72] *Id.* at 691.

competently performing her statutory responsibilities,[73] the Court explained, Congress had not aggrandized itself at the President's expense.[74] Notably, the Court analyzed both whether the removal limitation by itself was unconstitutional and whether the provisions of the statute, working together, unconstitutionally undermined the President's authority. In a celebrated formalist opinion, Justice Scalia in dissent stated that Article II, § 1 of the Constitution vests all executive power in the President and that the statute thus violated the separation-of-powers by "vest[ing] some purely executive power in a person who is not the President."[75]

With *Free Enterprise Fund* in 2010, the Court appeared to change course again, engaging in a substantially formalist removal analysis.[76] The suit there concerned the President's inability to directly remove the five members of the Public Company Accounting Oversight Board (PCAOB), an agency that Congress directed should govern the accounting industry.[77] Although the President could not directly remove members of the PCAOB, he could remove Securities and Exchange Commission (SEC) commissioners for good cause.[78] The commissioners, in turn, had authority to remove PCAOB members for good cause.[79]

Noting that the President must be held accountable for the actions of executive officials,[80] the Court held that this two-tiered

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[73] *Id.* at 692.

[74] *Id.* at 694. The Court emphasized the fluid "checks and balances" approach instead of the more formal separation of distinct powers. *Id.* at 693. *See generally* Manning, *supra* note 18, at 1952 ("[F]unctionalists view the Constitution as emphasizing the balance, and not the separation, of powers."); Mistretta v. United States, 488 U.S. 361, 381 (1989) (arguing that a system of "checked and balanced power" is critical to liberty) (quoting THE FEDERALIST NO. 51 (James Madison)).

[75] *Morrison*, 487 U.S. at 705. Further reinforcing his formalist approach, Justice Scalia also lamented that "[t]here are now no lines," *id.* at 726, and rejected "the folly of the new system of standardless judicial allocation of powers," *id.* at 715.

[76] *See* Krotoszynski, *supra* note 19, at 1615 (arguing that *Free Enterprise Fund* provides the most prominent example of the Roberts Court's shift to formalism).

[77] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3147 (2010).

[78] *Id.* at 3148.

[79] *Id.*

[80] *Id.* at 3154 ("Article II 'makes a single President responsible for the actions of the Executive Branch.' " (quoting Clinton v. Jones, 520 U.S. 681, 712–13 (1997) (Breyer, J., concurring)). For an argument that the President should have the ability to remove executive officers for policy disagreements, see Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 597 (1994).

scheme violated Article II's vesting of the executive power in the President.[81] The Court also hinted that the President must have plenary power to control those in the Executive Branch.[82] In so holding, the Court rejected the notion that a law's convenience or utility "will . . . save it if it is contrary to the Constitution,"[83] and discarded the dissent's functionalist argument that a two-tier limitation should stand where Congress grounds agency independence on the need for technical expertise.[84] The Court also rejected the plaintiffs' functionalist argument that the removal limitation rendered the entire PCAOB unconstitutional, instead electing to modify only the restriction on the removal of PCAOB members.[85] Even though the opinion contains primarily formalist language,[86] functional concerns about political accountability were also present in the analysis.[87]

In a functionalist dissent, Justice Breyer disagreed with the majority. Arguing that separation-of-powers decisions should focus on whether a statute "disrupts the proper balance between the coordinate branches"[88] and whether "one branch[ ] aggrandize[s] its power at the expense of another branch,"[89] he would have found the two-tier limitation constitutional because it did not significantly interfere with executive power.[90] Notwithstanding these criticisms, *Free Enterprise Fund* did not limit or overrule *Morrison* or *Humphrey's Executor*.[91]

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[81] *Free Enter. Fund*, 130 S. Ct. at 3147. The Court also acknowledged that a single layer of good cause protection was constitutionally permissible. *Id.* at 3161.

[82] *See id.* at 3156–57 (explaining that the Constitution vests certain powers in the President which Congress cannot diminish and that a key constitutional power vested in the President is the power to control those who execute the laws).

[83] *Id.* at 3156 (quoting Bowsher v. Synar, 478 U.S. 714, 736 (1986)).

[84] *Id.* at 3155–56.

[85] *Id.* at 3161.

[86] *See, e.g.*, *id.* at 3154 ("That arrangement is contrary to Article II's vesting of the executive power in the President."); *id.* at 3155 ("[T]his Act subverts the President's ability to ensure that the laws are faithfully executed . . . .").

[87] *See id.* at 3155 (noting that presidential oversight is critical to political accountability).

[88] *Id.* at 3175 (Breyer, J., dissenting) (quoting Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977)).

[89] *Id.* at 3176 (Breyer, J., dissenting) (alterations in original) (quoting Freytag v. Comm'r, 501 U.S. 868, 878 (1991)).

[90] *Id.* at 3164 (Breyer, J., dissenting).

[91] *See id.* at 3157–58 (distinguishing *Humphrey's Executor* and *Morrison*).

2. The Nondelegation Doctrine. The nondelegation doctrine is also a staple in suits against federal agencies. The basic premise is straightforward: Article I of the Constitution vests all legislative power in Congress.[92] Accordingly, Congress may not delegate its legislative power to Executive Branch entities because doing so would necessarily vest some of the legislative power in that Branch.[93] An action is generally not, however, a forbidden delegation of legislative power if Congress has provided an intelligible principle to which the entity authorized to exercise the delegated authority is directed to conform.[94] As a result, the doctrine does not prevent Congress from constructing a "workable government."[95] Indeed, although decisions frequently observe that the doctrine is a foundational principle of the separation-of-powers,[96] the Court has only invalidated federal statutes on nondelegation grounds twice.

Both instances occurred in 1935. In *A.L.A. Schechter Poultry Corporation v. United States*,[97] the Court invalidated a statute delegating power to President Roosevelt to approve, modify, and prescribe codes of "fair competition."[98] The statute only directed that he refrain from creating monopolies in promulgating codes.[99] Because the statute prescribed no procedure for ascertaining what methods of competition were unfair,[100] the Court reasoned, the authority it granted to the President to make codes was unlimited and therefore unlawful.[101] In *Panama Refining Company v. Ryan*, the Court invalidated another statute authorizing the President to issue regulations regarding the transportation of petroleum.[102] There, the Court also found no intelligible principle in the delegation: "Congress has declared no policy, has established no

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[92] U.S. CONST. art. I, § 1.

[93] Field v. Clark, 143 U.S. 649, 692 (1892).

[94] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

[95] Mistretta v. United States, 488 U.S. 361, 381 (1989) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

[96] *See, e.g.*, *id.* at 371 (finding the doctrine rooted in the principle of separation of powers).

[97] 295 U.S. 495 (1935).

[98] *Id.* at 521–22 n.3.

[99] *Id.* at 538.

[100] *Id.* at 541.

[101] *Id.* at 542.

[102] 293 U.S. 388, 430 (1935).

standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited."[103]

Since 1935, numerous attempts to invalidate delegations have failed. For example, the Court has upheld a delegation to the Federal Trade Commission to determine what is unfair or deceptive.[104] The Court has also found that a standard directing an agency to effectuate the purposes of an act is not unconstitutionally indeterminate.[105] More recently, the Court upheld a delegation of rulemaking authority to the Sentencing Commission in *Mistretta v. United States*.[106] There, the Court noted that Congress had provided the Commission with objectives that the Commission was required to pursue in carrying out its mandate,[107] in contrast to the statutes in *Schechter Poultry* and *Panama Refining*, which the Court observed had failed to articulate any standard that would confine the discretion of the authorities to whom Congress had delegated power.[108] In a separate opinion, Justice Scalia noted that upholding vague delegations defers to Congress's authority regarding public policy.[109]

Most recently, in 2001, the Court reversed a decision by the D.C. Circuit which held that the Clean Air Act's guidance to the EPA to set ambient air quality standards "requisite to protect the public health"[110] in issuing regulations was insufficiently determinate.[111] In *Whitman v. American Trucking Associations*, the Court held that "in sweeping regulatory schemes," it had never demanded a determinate criterion.[112] The Justices thus suggested that the nondelegation doctrine now operates as a statutory construction principle: if an interpretation appears to present a

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[103] *Id.*

[104] *See* Federal Trade Comm'n v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) (noting that Congress may allow the Federal Trade Commission to determine what is "fair").

[105] Yakus v. United States, 321 U.S. 414, 423 (1944).

[106] 488 U.S. 361 (1989).

[107] *Id.* at 374.

[108] *See id.* at 373 n.7 (distinguishing *Schechter Poultry* and *Panama Refining*).

[109] *Id.* at 416 (Scalia, J., dissenting).

[110] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 465 (2001).

[111] *Id.* at 476.

[112] *Id.* at 475.

nondelegation issue, the Court will seek a more appropriate interpretation.[113]

3. The Constitutionality of Creating Novel Agency Structures. Until recently, few decisions insinuated that agency novelty may have constitutional significance.[114] Yet several decisions since 2010 have acknowledged that combining features that independently are constitutional may be unconstitutional. The decision that pioneered the use of this novelty language was *Free Enterprise Fund*, in which the Court noted twice that the novelty of the agency carries weight in the analysis of the structure's constitutionality.[115]

First, the Court recognized that the novel structure of the PCAOB transformed the agency's independence.[116] Following this observation, the Court expressed skepticism about the growth of the administrative state[117] and rejected the functionalist argument that the PCAOB's novel structure represented a practical accommodation between Congress and the President.[118] Second, the Court cited to the dissenting opinion in the decision below for the proposition that the lack of historical precedent for the two-tiered structure provided significant cause for concern:

> Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity. [No party] . . . has located any historical analogues for this novel structure. They have not identified any independent agency other than the PCAOB that is appointed by

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[113] Merrill, *supra* note 13, at 2103.

[114] Indeed, Professor Huq argues that the "influence [of courts] on the administrative state's basic architecture has . . . been minimal." Huq, *supra* note 69, at 2. *Free Enterprise Fund*, though, may portend a "larger judicial role [for the Court] in drawing up blueprints for federal agencies." *Id.*

[115] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3154, 3159 (2010).

[116] *Id.* at 3154.

[117] *See id.* at 3156 (noting that agencies may enable power to slip from the President's hands).

[118] *Id.* at 3155.

> and removable only for cause by another independent agency.[119]

A recent D.C. Circuit decision indicates that at least one court, adopting a broad reading of *Free Enterprise Fund*, has caught on to this novelty language. In *Association of American Railroads v. United States Department of Transportation* (*AAR*),[120] the court ruled on the constitutionality of a statute allocating joint regulatory authority over freight trains to Amtrak, a quasi-private passenger rail corporation, and the Federal Railroad Administration.[121] Noting that the rule forbidding delegation of congressional authority to a private entity is a "cousin" of the nondelegation doctrine,[122] the court held the provision of the statute granting regulatory authority to Amtrak unconstitutional.[123]

The court also cited to *Free Enterprise Fund* for two propositions. "[J]ust because two structural features raise no constitutional concerns independently," the court reasoned, "does not mean Congress may combine them in a single statute."[124] The court explained that with the PCAOB, Congress blended two removal limitations which independently were constitutional: shielding principal officers of agencies from dismissal without cause and protecting inferior officers from removal by principal officers directly accountable to the President.[125] Although protecting PCAOB members from removal is permissible, that the members were removable by SEC commissioners who were not directly accountable to the President made combining these two limitations invalid.[126]

Second, the court stated that novelty may, in certain circumstances, signal unconstitutionality, again citing to *Free*

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[119] *Id.* at 3159. The Court also noted that the statute's two-tier scheme was "highly unusual." *Id.*

[120] 721 F.3d 666 (D.C. Cir. 2013).

[121] *Id.* at 668.

[122] *Id.* at 670.

[123] *Id.* at 677.

[124] *Id.* at 673.

[125] *Id.*

[126] *Id.*

Enterprise Fund.[127] Notably, though, the novelty language in *Free Enterprise Fund* and *AAR* appears to be in tension with *Mistretta*, an earlier separation-of-powers decision which stated that "constitutional principles of separated powers are not violated . . . by mere anomaly or innovation."[128]

4. Summary of the Removal Power, Nondelegation Doctrine, and Novelty Theory. In *Free Enterprise Fund*, the Court held that a two-tier removal scheme was invalid.[129] It also upheld limitations on the President's removal power and affirmed the holdings of *Humphrey's Executor* and *Morrison*.[130] While the Court expressed functionalist concerns about presidential oversight, in rejecting the functionalist arguments of the dissent, the government, and the plaintiffs, it suggested that weighing practical costs and benefits is not the proper approach. Instead, the Court strongly hinted that it would look for a rule to guide its analysis. Indeed, several commentators have recognized that *Free Enterprise Fund* is part of the Roberts Court's broader disposition to formalist analyses that strictly enforce lines of separation between the branches.[131] The opinion also contained language indicating that the Court is apprehensive of novel agency structures, a tone that was picked up by the D.C. Circuit in *AAR*.[132] In nondelegation cases, *American Trucking Associations* and other decisions prove that the Court only analyzes the doctrine in the context of the delegation of rulemaking power. Additionally, the reversal of the lower court's decision in *American Trucking Associations* indicates that the Court will weakly enforce the nondelegation doctrine. After briefly summarizing the structure of the CFPB, this next Part will demonstrate how those

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[127] *Id.* *See generally* Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109, 111 (1984) (arguing that the Court has often relied on tradition and custom as a source of authority).

[128] Mistretta v. United States, 488 U.S. 361, 385 (1989).

[129] 130 S. Ct. 3138, 3151 (2010).

[130] *Id.* at 3152.

[131] *See supra* note 28 and accompanying text. Cases that these commentators cite include, among others, Stern v. Marshall, 131 S. Ct. 2594 (2011), New Process Steel, L.P. v. Nat'l Labor Relations Bd., 130 S. Ct. 2635 (2010), Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010), District of Columbia v. Heller, 554 U.S. 570 (2008), and Medellin v. Texas, 552 U.S. 491 (2008).

[132] *See supra* notes 116–18 and accompanying text.

separation-of-powers decisions and their functionalist or formalist reasoning play into the arguments asserted against the CFPB.

C. FUNCTIONAL CONCERNS OF THE REGULATED: THE CFPB

1. An Overview of the CFPB. During the financial crisis of 2007, Professor Elizabeth Warren proposed a new agency to regulate consumer financial products.[133] That agency, the CFPB, came into being in 2010 with the passage of Title X of the Dodd-Frank reform legislation.[134] The CFPB proved controversial from the beginning.[135] Created as an independent agency within the Federal Reserve System,[136] its purpose is to "implement and . . . enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for [these] products and services are fair, transparent, and competitive."[137]

Under Title X, the CFPB is authorized to promulgate any rule that it deems necessary or appropriate to enable the CFPB to carry out the purposes and objectives of the federal consumer financial laws.[138] The CFPB also may issue regulations relating to consumer financial products, including regulations that prohibit any "unfair, deceptive, or abusive acts and practices" by a service provider.[139] This power includes the authority to promulgate rules describing what constitutes unfair, deceptive, or abusive acts.[140] In addition to its regulatory power, the CFPB is authorized to take appropriate enforcement action to address violations of federal

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[133] *See* Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY J. (Summer 2007), http://www.democracyjournal.org/5/6528.php?page=all (proposing agency regulation of this industry).

[134] *See* 12 U.S.C. § 5491(a) (2012) (creating the CFPB).

[135] *See* Carl Hulse, *House Approves Tougher Rules on Wall Street*, N.Y. TIMES, Dec. 11, 2009, at A1 (discussing opposition to the CFPB from Republican congressmen and twenty-seven Democrats); Richard Shelby, *The Danger of an Unaccountable 'Consumer Protection Czar,'* WALL ST. J. (July 21, 2011), *available at* http://online.wsj.com/news/articles/SB10001424053111903554904576457931310814462 (expressing concern about the CFPB's power and proposing structural changes to make the CFPB more accountable to voters).

[136] 12 U.S.C. § 5491(a).

[137] *Id.* § 5511(a).

[138] *Id.* § 5512(b)(1).

[139] *Id.* § 5511(b)(2).

[140] *Id.* § 5531(b).

law, including action to prevent a service provider from committing unfair, deceptive, or abusive practices in connection with the provision of a consumer financial product.[141]

The CFPB has a single director, who is appointed by the President with the advice and consent of the Senate and is removable by the President for good cause.[142] It is funded outside the normal annual appropriations process; Title X authorizes the CFPB to obtain from the Federal Reserve Board funds reasonably necessary to carry out its mission, up to an annual limit.[143] Lastly, the statute directs that courts must defer to CFPB interpretations of federal consumer law "as if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law."[144]

2. Challenging the CFPB's Constitutionality: Morgan Drexen v. CFPB. After learning that it was the subject of a CFPB enforcement action, on July 22, 2013, Morgan Drexen filed suit against the CFPB. It alleged that Title X violated the separation-of-powers "[b]y delegating effectively unlimited powers to CFPB, by eliminating Congress's power of the purse over CFPB, by eliminating the President's power to remove CFPB's Director at will, and by limiting judicial review of CFPB's actions and legal interpretations . . . ."[145] The complaint also stated that Title X is unconstitutional because it eliminates the necessary checks and balances on the CFPB's exercise of power.[146]

Regarding the President's removal power, Morgan Drexen's complaint implied that because the Director receives a five-year term and may be removed only for good cause, Title X vests power in the Director without sufficient presidential oversight.[147] In

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[141] *Id.* § 5511(c)(4). Paralleling the fears expressed by Morgan Drexen, *see infra* Part II.C.*3*, commentators have alleged that the uncertainty created by the broad reach of the CFPB's enforcement powers generates significant compliance concerns. *See, e.g.*, Martin Bishop, *Amorphous New Statutory Provisions Create Serious Compliance Risks*, INSIDE COUNSEL, July 27, 2011, http://www.insidecounsel.com/2011/07/27/regulatory-unfair-deceptive-or-abusive-acts-or-pra?t=regulatory&page=2.

[142] 12 U.S.C. § 5491(c)(3) ("The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office.").

[143] *Id.* § 5497(a)(2)(A).

[144] *Id.* § 5512(b)(4)(B).

[145] MD Complaint, *supra* note 30, at 19.

[146] *Id.*

[147] *See id.* at 12 (describing how "all of CFPB's power is vested in its Director, without the

addition, although it later conceded that good cause removal provisions may be permissible in certain circumstances, it argued that the Title X removal restriction is impermissible because the CFPB is not headed by a multimember commission, as are many other agencies with similar powers.[148]

Morgan Drexen also argued that Congress unlawfully delegated legislative power in authorizing the CFPB to prescribe rules identifying unfair, deceptive, or abusive practices, failing to define what acts are unfair, deceptive, or abusive, and allowing the CFPB to exempt any service provider from the scope of any rule promulgated under Title X.[149] In its delegation claim, Morgan Drexen also noted that the CFPB could conduct adjudicative proceedings and commence civil actions against any entity it believes has violated federal consumer law.[150]

Morgan Drexen further stated that Title X eliminates congressional oversight because the statute violates Congress's power of the purse.[151] It argued that this constitutional feature was violated by the manner in which the CFPB may requisition funds from the Federal Reserve Board, the size of the CFPB's operating budget, and the prohibition on review of the CFPB's budget by House and Senate Committees.[152]

After filing the original complaint, Morgan Drexen refined its separation-of-powers argument. While it initially focused on individual separation-of-powers principles—the removal power, nondelegation doctrine, power of the purse, and Article III—it also added two theories that integrated these arguments. The first is that the CFPB's structural features, considered together, render

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moderating influence of other commissioners, officials, or governors").

[148] Plaintiffs' Reply in Support of Motion for Summary Judgment at 5, Morgan Drexen, Inc. v. Consumer Financial Protection Bureau, No. 13-01112 (D.D.C. Sept. 13, 2013) [hereinafter MD Brief].

[149] MD Complaint, *supra* note 30, at 9–10. Morgan Drexen later abandoned the argument that Congress had unlawfully delegated legislative power to the CFPB. *See* Defendant's Reply in Support of Motion to Dismiss or, in the Alternative, for Summary Judgment at 17, Morgan Drexen, Inc. v. Consumer Financial Protection Bureau, No. 13-cv-01112 (D.D.C. Sept. 25, 2013) [hereinafter CFPB Brief] (noting that the argument had been abandoned).

[150] MD Complaint, *supra* note 30, at 11.

[151] *Id.*

[152] *Id.* at 12.

the agency unconstitutional.[153] The second, related theory is that the novelty of the agency may provide prima facie evidence of its unconstitutionality.[154] In rejecting the CFPB's defense to this "novelty theory,"[155] Morgan Drexen provided the following functionalist justification for its separation-of-powers claim:

> CFPB's "one at a time" analysis of the structural features suggests that the Court should not consider, from a functional separation-of-powers perspective, the broader context of how CFPB's powers and safeguards work together. However . . . a constitutional challenge to agency structure should be informed by the overall context and comparing the scope of agency power to the accompanying structural protections (checks, balances, and oversight).[156]

Thus, Morgan Drexen maintained that apart from the individual separation-of-powers principles, combining the CFPB's structural features with its regulatory and enforcement power violates the separation-of-powers. The functionalist reasoning is that the benefits of creating an agency that regulates an entire industry and is insulated from the political branches are outweighed by the costs incurred by the public, regulated entities, and the political branches.[157]

III. ANALYSIS

The principal arguments regarding the CFPB's constitutionality may be grouped as follows. First, Title X unconstitutionally delegates legislative power to the CFPB.[158] Second, the limitation

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[153] MD Brief, *supra* note 148, at 1 (arguing that the lack of checks, including presidential at-will removal, congressional appropriations oversight, and commission voting, makes the CFPB unconstitutional).

[154] *See id.* (noting that the "CFPB's structure was entirely novel in that no other comparable agency aggregated its constitutionally troubling features together").

[155] This Note will refer to the arguments relating to the combination of structural features and the novelty of the agency collectively as the "novelty theory."

[156] MD Brief, *supra* note 148, at 3.

[157] *Id.* at 14–15 (summarizing the lack of political control over the CFPB and charging that the agency has "Herculean authority" over the economy).

[158] MD Complaint, *supra* note 30, at 19.

on the President's ability to remove the Director is invalid because the President must have complete ability to remove an agency head who is vested with powers comparable to those granted to the CFPB's Director.[159] Third, Congress does not have the required oversight through the power of the purse because the CFPB is funded outside the normal appropriations process.[160] Fourth, Title X limits the power of judicial review.[161] Lastly, the novelty of the CFPB's structure, which is a function of the agency's mandate over the consumer financial industry and the combination of the four features listed above, renders the agency unconstitutional.[162]

Part III.A analyzes the removal and nondelegation arguments separately under the formalist tests that the Court would likely employ. It then illustrates how Morgan Drexen has challenged the CFPB under functionalist reasoning and why it has done so. Next, Part III.B evaluates the likelihood that the functionalist argument will prevail. In doing so, this Part first analyzes whether the Court will consider structural features one-at-a-time or whether it will determine if the features considered together undermine the broader separation-of-powers principle. It then evaluates whether language in *Free Enterprise Fund* indicates that agency novelty has constitutional significance. Ultimately, Part III.B concludes that the Court would likely reject Morgan Drexan's functionalist novelty argument.

A. DIVIDED THE ARGUMENTS FAIL: THE CFPB'S COMPLIANCE WITH THE REMOVAL POWER AND NONDELEGATION DOCTRINE

Separation-of-powers claims may be framed in two ways. In the first way, the "one-at-a-time" approach, a court addresses each separation-of-powers principle independently. In the second, more functionalist approach, a court analyzes whether a statute taken "as a whole" violates the separation-of-powers. In evaluating separation-of-powers claims, the Court has traditionally analyzed

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[159] *Id.* at 11, 19.
[160] *Id.* at 11–12.
[161] *Id.* at 12.
[162] *See id.* at 19 (summarizing the lack of checks on the CFPB's power). Morgan Drexen exclusively focused on this last argument after the complaint was filed.

individual separation-of-powers principles.[163] This more formalist approach is thus more likely to result in the Court applying an established rule to an agency structure. The following two sections demonstrate how under this approach, the Court will likely reject Morgan Drexen's removal and nondelegation arguments.

1. Removing the CFPB's Director. In evaluating the removal power, the Court has historically analyzed a removal limitation independent of other structural features. None of the removal decisions indicate that the analysis changes when a director instead of a multimember commission heads an agency, or when a director has authority to requisition funds from another agency. Thus, the Court would likely evaluate the Title X removal limitation independent of other separation-of-powers principles.

A removal analysis must focus on *Free Enterprise Fund*, the Court's most recent articulation on the subject.[164] That decision, which invalidated a provision creating two tiers of good cause protection between the President and PCAOB members, may be read as announcing the formalist rule that one layer of good cause protection is generally permissible, but that two is not.[165] Indeed, language in the opinion suggests that the majority considered that all two-tier limitations might be invalid.[166]

Unlike the PCAOB members, who were only removable by SEC Commissioners answerable to the President, the CFPB Director enjoys just one layer of tenured protection: the Director is appointed by the President and is directly removable by the President for good cause. Applying the formalist rule from *Free Enterprise Fund* indicates that the CFPB limitation is valid

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[163] *See, e.g.*, Morrison v. Olson, 487 U.S. 654, 685 (1988) (discussing the removal limitation "by itself"). Part III.B discusses the functionalist argument that the removal limitation should be considered alongside the CFPB's other structural features.

[164] As explained *infra*, the Court in *Free Enterprise Fund* carefully navigated *Myers*, *Humphrey's Executor*, and *Morrison* in its removal analysis. *Free Enterprise Fund*'s discussion of these decisions will therefore likely inform the removal analysis related to the CFPB's Director.

[165] Justice Breyer denounced this formal approach of counting the layers of removal as "elementary arithmetical logic." Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3176 (2010) (Breyer, J., dissenting).

[166] *See id.* at 3156 ("[T]he multilevel protection . . . 'provides a blueprint for extensive expansion of the legislative power.' " (quoting Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, 501 U.S. 252, 277 (1991))).

because no other agency head stands between the Director and the President. The limitation also passes muster under the rule set forth in *Myers*, a decision that *Free Enterprise Fund* celebrated as the "landmark case" of removal power.[167] Unlike the limitation in *Myers,* which protected postmasters from removal by requiring the concurrence of the Senate, Title X did not give Congress an active role in the removal of the CFPB's Director.

However, *Free Enterprise Fund*'s analysis of the removal power may consist of more than simply endorsing the formalist rules that Congress cannot insert itself into the removal process and that a two-tier scheme is invalid. The Court did not question the holding of *Humphrey's Executor*—that Congress may restrict the President's removal power.[168] But by endorsing *Myers*, the Court called into question the rejections by the functionalist *Morrison* and *Humphrey's Executor*, which favored functionalist analyses over *Myers*' unitary executive theory that the President should have unrestricted ability to remove Executive Branch officers.[169] Indeed, the majority emphasized four times that it is the President's responsibility to take care that the laws be faithfully executed.[170] In classic unitary executive rhetoric, it also noted that this responsibility requires a "clear and effective chain of command" between the President and executive officers.[171] This decision thus marks a step toward acceptance of the formalist unitary executive theory.

Fleshing out this broad interpretation of *Free Enterprise Fund* likely provides the only opportunity for invalidating the CFPB's removal limitation apart from the novelty theory.[172] A unitary executive argument would posit that any limitation on the

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[167] *Id.* at 3152.

[168] This standard is understood to preclude the President from removing officers because of policy disagreement. It has frequently been approved. *See id.* at 3153 (recognizing that the Court has "previously upheld limited restrictions on the President's removal power").

[169] *See* Barnett, *supra* note 60, at 1364 ("The Court has plainly, if not expressly, [ ]adopted the unitary executive rhetoric . . . .").

[170] *See, e.g.*, *Free Enter. Fund*, 130 S. Ct. at 3152 ("It is *his* responsibility to take care that the laws be faithfully executed."); *id.* at 3155 (noting that the structure prevents the President from executing the laws).

[171] *Id.* at 3155.

[172] Morgan Drexen appears to have initially suggested a unitary executive theory but did not develop the argument. *See* MD Brief, *supra* note 148, at 19 (stating that *Myers* indicates that Executive Branch officials must be removable at will).

President's removal power is invalid because all executive power has been expressly vested in the President. In addition, providing the CFPB's Director with executive power while maintaining the removal limitation frustrates the prerogative of the democratically elected President to execute the laws.[173] Notably, Morgan Drexen's novelty theory also expresses concern about political oversight and accountability. The novelty theory, though, demands much more than the unitary executive theory by arguing that the entire CFPB is unconstitutional because of its unprecedented structure. By contrast, under a unitary executive theory, the Court would only invalidate the good cause removal provision.[174]

Even if the CFPB's opponents did develop a formalist unitary executive argument, this argument would likely encounter several obstacles. First, although the Court appeared sympathetic to the unitary executive theory in *Free Enterprise Fund*, it did not expressly adopt this theory.[175] Second, the Court has often upheld good cause limitations,[176] and "[n]o one doubts Congress's power to create a vast and varied federal bureaucracy."[177] Third, the Court may be reluctant to embrace a theory that would threaten to invalidate all exhibiting good cause removal restrictions. For example, this theory would invalidate the removal restriction protecting the head of the Social Security Administration, an official who, like the CFPB Director, does not share power with a commission or board.[178] An alternative to the blanket application of the theory is a case-by-case application, but such an application would require a functionalist inquiry into the nature of the organization, the degree of power granted to the agency head, and

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[173] Justice Scalia's classic statement that the President is the repository of "*all of* the executive power" supports this theory. Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting).

[174] *See infra* Part III.B (discussing the novelty theory).

[175] *See* Barnett, *supra* note 60, at 1365 ("[T]he Court's acceptance of a strong unitary executive and presidential accountability appears only rhetorical. The Court's holding did little to fuse the fragmented Executive Branch. The Court did not overrule *Humphrey's Executor*.").

[176] *See, e.g.*, *Morrison*, 487 U.S. at 694 (upholding a good cause limitation).

[177] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3155 (2010).

[178] *See Organizational Structure of the Social Security Administration*, SOCIAL SECURITY, http://www.ssa.gov/org/index.htm (last visited Mar. 11, 2014) (describing the SSA's organizational hierarchy).

the extent of other checks on that agency's power. In theory, such an unpredictable approach is the formalist's nightmare.[179]

Morgan Drexen's removal argument is consistent with *Free Enterprise Fund*'s skepticism of the administrative state. That the Court declined to functionally examine the benefits of protecting PCAOB members by two removal limitations, however, also indicates that it will not functionally consider the restraints on executive power imposed by a removal limitation where the limitation satisfies the formalist rules. Under *Free Enterprise Fund*, the removal argument should therefore fail.

2. Delegating Discretion to Regulate an Industry. Morgan Drexen's nondelegation argument appears to be more plausible than its removal argument. Indeed, if one understands that Congress may delegate excessive legislative power to an agency and that Congress has given the CFPB authority to regulate *any entity* that provides consumer financial products,[180] one might justifiably conclude that this delegation comes close to the line distinguishing valid delegations from invalid delegations.

In developing the nondelegation doctrine, the Court has adopted the quasi-formalist test that as long as Congress provides standards to guide rulemaking, it has not unconstitutionally delegated its authority.[181] This doctrine is primarily formalist because a court must only find a standard to validate a delegation.[182] It also defers to the textual grant to Congress in Article I, § 1 to exercise the legislative power and implement congressional policy through agencies.

The Court's most recent nondelegation decision, *Whitman v. American Trucking Associations*,[183] provides guidance as to how the Court now analyzes nondelegation claims. In determining whether a provision requiring that the EPA promulgate rules for

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[179] *See supra* notes 47–48 and accompanying text. *Free Enterprise Fund* supports the assumption that the Roberts Court may be reluctant to make such case-by-case determinations because there, the majority refused to consider the importance of the functions the PCAOB fulfilled. *Free Enter. Fund*, 130 S. Ct. at 3155–56.

[180] This regulatory authority is subject to certain exceptions that this Note does not discuss.

[181] *See supra* notes 94–95 and accompanying text.

[182] Functionalism may influence the doctrine to the extent a court finds a standard but judges that the nature of the agency requires more detailed standards.

[183] 531 U.S. 457 (2001).

the public health provided sufficient guidance to that agency, the Court noted that it virtually always defers to Congress regarding the permissible degree of judgment left to agencies.[184] It further stated that in the two cases in which the Court invalidated delegations, Congress had either provided "literally no guidance for the exercise of discretion" or had provided that the President could promulgate codes of fair competition, a directive understood to grant the President authority to rehabilitate the entire economy.[185]

Applying the intelligible principle standard from *American Trucking Associations* and prior decisions to Title X confirms the constitutionality of the Title X delegation. Title X delegates authority to the CFPB to enact any regulation necessary to enable the CFPB to carry out the purposes of the federal consumer financial laws[186] and to issue regulations defining and prohibiting any "unfair, deceptive, or abusive act or practice."[187] Allowing the CFPB to determine what constitutes an unfair, deceptive, or abusive act leaves significant room for the CFPB to make policy decisions. However, this delegation appears no less determinate than standards the Court has recently approved, including standards directing agencies to regulate in the public interest or to determine what is generally fair and equitable.[188] This standard is also as specific as the direction in *American Trucking Associations* that the EPA must regulate for the public health. Moreover, the Court has previously approved a similar delegation under the Federal Trade Commission Act to determine what is unfair or deceptive.[189]

There are, in addition, limiting principles to Title X's delegation of legislative power. For example, Title X requires that for an act to be abusive, the CFPB must first determine that the act materially interferes with the ability of a consumer to understand

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[184] *Id.* at 474–75.

[185] *Id.* at 474.

[186] 12 U.S.C. § 5512(b)(1) (2012).

[187] *Id.* § 5531(a)–(d).

[188] *See, e.g.*, Nat'l Broad. Co. v. United States, 319 U.S. 190, 226 (1943) (upholding a delegation to regulate for the public welfare); Yakus v. United States, 321 U.S. 414, 427 (1944) (upholding a delegation to determine fair and equitable prices).

[189] *See* Federal Trade Comm'n v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) (noting that Congress may allow the FTC to determine what is "fair").

the terms of a product.[190] In enacting regulations that implement other federal consumer financial laws, the CFPB is constrained by the purposes of those laws.[191] Its rulemaking authority is further limited by the agency's objectives as defined in Title X, which include providing consumers with understandable information.[192] Finally, its authority is limited by rulemaking standards, including the requirements that the CFPB consider the potential reduction of access to consumer financial products resulting from an enacted rule and that it consult with other agencies to reconcile policies.[193]

Even with these limitations in place, one could argue that the direction in *Schechter Poultry* that the President promulgate codes of fair competition, which the Court held provided insufficient guidance for the exercise of legislative power, sounds similar to the Title X direction to regulate unfair, deceptive, or abusive practices.[194] Like in *Schechter Poultry*, Congress has delegated authority to regulate an entire industry based on what the CFPB thinks is fair. Like the statute in *Schechter Poultry*, Title X does not define several of the delegation's key terms. Moreover, the statute in *Schechter Poultry* was struck down even though it contained a principle other than the fair competition standard, the condition that the President could not promote monopolies.[195]

Important differences nonetheless exist between the delegation in *Schechter Poultry* and Title X. Context surely informed the Court's decisions in *Panama Refining* and *Schechter Poultry*: both of those delegations involved attempts by the President to revive the national economy after the Great Depression, and in *Schechter Poultry*, the government admitted that the statute was understood to provide the President the power to rehabilitate the entire economy.[196] Even though the CFPB was created in the aftermath of the Great Recession, Title X did not purport to revive the economy. Instead, it sought to protect consumers from certain industry practices by consolidating power that previously resided

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[190] 12 U.S.C. § 5531(d); *see also id.* § 5531(c) (setting standards for determining fairness).
[191] *Id.* § 5512(b)(2).
[192] *Id.* § 5511(a).
[193] *Id.* § 5512(b)(2).
[194] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935).
[195] *Id.* at 522, 523.
[196] *Id.* at 543.

in numerous agencies. Congress has also provided agency objectives and rulemaking standards that the CFPB must consider in promulgating rules, in contrast to the sparse standards in *Schechter Poultry*.[197] Finally, in the seventy-five years between *Schechter Poultry* and the creation of the CFPB, the Court has often approved indeterminate standards. Indeed, in ruling on the EPA standards in *American Trucking Associations*, the Court confirmed that it would narrowly interpret statutory delegations that might otherwise appear unconstitutional.[198]

The strongest nondelegation argument is the functionalist argument that the Title X delegation should be treated differently because of the scope of the CFPB's mandate. According to *American Trucking Associations*, broader delegations require decreased agency discretion in rulemaking.[199] The consumer financial product industry is no small industry; agency regulation of this industry affects every business that markets regulated products to consumers. While the CFPB's opponents may assert that the scope of the delegation requires decreased discretion for CFPB rulemaking, the Court in *American Trucking Associations* appeared to nullify this requirement in a subsequent sentence by asserting that it has never demanded specific standards in large regulatory schemes.[200] Together with the holding that the statute was not invalid under the nondelegation doctrine, this statement suggests that the Court will not invalidate a delegation unless the standards guiding the exercise of discretion are so lacking as to be essentially nonexistent. Because the functionalist approach provides no rule for determining when the scope of an agency's power demands increased standards, and given that Title X provides numerous standards for rulemaking, the Court would likely reject a nondelegation argument.[201]

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[197] *Id.* at 541.

[198] *See supra* note 113 and accompanying text; *see also* Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989) (stating that the Court will narrowly interpret what might otherwise be an impermissible delegation).

[199] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475 (2011) ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.").

[200] *Id.*

[201] For an analysis of Title X's compliance with two versions of the nondelegation doctrine, see Raghav Ahuja, Comment, *Constitutional in Name: The Bureau of Consumer Financial Protection and the Obama Administration's Treatment of the Nondelegation Principle and*

Morgan Drexen's nondelegation argument is also incorporated into the novelty argument, which asserts that combining the delegation of rulemaking power with other features makes the CFPB unconstitutional.[202] The argument that the delegation of rulemaking authority is invalid because it is combined with other structural features, however, is better addressed outside of the traditional nondelegation doctrine given that the nondelegation decisions have only analyzed the doctrine in the rulemaking context.[203] These decisions did not address whether other features of an agency—such as its ability to self-fund—factored into the nondelegation analysis.

The foregoing indicates that Congress has checked the respective boxes regarding the removal power and nondelegation doctrine. Although addressing other separation-of-powers principles is outside the scope of this Note, Congress has likely checked those boxes as well.[204] As a result, opponents of the CFPB thus find themselves in a peculiar position: unable to successfully challenge the CFPB under individual separation-of-powers principles, they must functionally allege that combining the structural features with the agency's mandate renders the agency unconstitutional and that the agency thus undermines the "democratic control of government."[205] This argument is premised on the functional concern that the costs to business and the political branches of granting the CFPB broad powers outweigh

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the Appointments Clause, 14 U. PA. J. CONST. L. 271, 286–91 (2011) (arguing that Title X satisfies one version of the doctrine but fails the other).

[202] *See* MD Complaint, *supra* note 30, at 11 ("Title X of the Dodd-Frank Act eliminates the Constitution's fundamental checks and balances that would ordinarily limit or channel CFPB's use of power.").

[203] *See, e.g.*, *Schechter Poultry*, 295 U.S. at 529–30 (discussing the delegation of authority to issue codes); *Am. Trucking Ass'ns*, 531 U.S. at 472–73 (discussing nondelegation only as it relates to the Environmental Protection Agency's rulemaking authority).

[204] This Note only discusses the power of the purse and Article III arguments as they relate to the novelty theory. Decisions have recognized that courts must defer to reasonable agency interpretations of statutes within their mandate, *see Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984), and that Congress may fund agencies outside the normal appropriations process by creating self-financing programs, *see AINS, Inc. v. United States*, 56 Fed. Cl. 522, 539 (2002).

[205] *See* MD Brief, *supra* note 148, at 14–15 (arguing that the CFPB undercuts the democratic control of government because it has a single director with rulemaking, adjudicatory, and enforcement authority over an industry, as well as insufficient political oversight).

the benefits of creating such an independent agency. In asserting this argument, Morgan Drexen has thus proposed the CFPB's demise employing reasoning that functionalists often use to validate agency structures.

B. EMPLOYING FUNCTIONALISM TO DEFEAT THE CFPB: WEIGHING COSTS AND BENEFITS IN NOVEL AGENCY STRUCTURES

Morgan Drexen's functional theory is perhaps, as Professor Eskridge has noted, grounded in a libertarian fear that an entity should not be unrestricted "by normal fiscal, political, and fairness limits."[206] There is no question that the CFPB is novel in its structure and in the scope of its jurisdiction over consumer finance law.[207] The issue is whether this novelty is actionable under the Court's separation-of-powers jurisprudence.

1. Framing the Separation-of-Powers Analysis. The first issue is whether, under the command of a formalist majority, the Court would consider how the provisions of Title X taken together affect the separation-of-powers principle.[208] Morgan Drexen's brief asserted that a one-at-a-time analysis of structural features ignores how the Court would, "from a functional separation-of-powers perspective," consider how these features work together.[209] It also asserted that an agency's constitutionality turns on the scope of the agency's authority and on the relevant checks and balances considered in the aggregate.[210] This appeal to functionalism is anomalous given that in suits against federal agencies, the Court has historically considered structural features

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[206] Eskridge, *supra* note 17, at 27.

[207] *See* Memorandum from the U.S. Chamber of Commerce on Enhanced Consumer Financial Protection After the Financial Crisis to the U.S. Senate Committee on Banking, Housing, and Urban Affairs at 4 (July 19, 2011) ("[T]here is no other agency head who exercises sole decisionmaking authority with regard to rulemaking, enforcement and supervision actions . . . and need not obtain the concurrence of colleagues on a multi-member commission; and who also has policy independence from the President . . . and who also has plenary power to appoint every one of the agency's employees; and who also has the ability to spend more than half a billion dollars without congressional approval . . . ." (alteration in original)).

[208] *See supra* note 163 and accompanying text.

[209] MD Brief, *supra* note 148, at 3. In Morgan Drexen's language, the functional approach accounts for the "cumulative impact" of Title X's provisions on the separation-of-powers. *Id.* at 1.

[210] *Id.* at 15.

one-at-a-time. It did so in *Free Enterprise Fund* by first examining the constitutionality of the removal limitation and then evaluating the Appointments Clause claim.[211] It took a similar approach in *Mistretta* in first examining the nondelegation doctrine, and then separately analyzing three separation-of-powers arguments related to the location of the Sentencing Commission, the composition of the Commission, and presidential control.[212] Morgan Drexen asserted that *Humphrey's Executor* supports the more functionalist approach because although the Court upheld the removal limitation protecting the FTC commissioners in that case, it did so only because the FTC is a multimember commission.[213] That decision contains no indication, however, that the Court considered the multimember commission relevant to its removal analysis. *Humphrey's Executor* thus provides little support for the functionalist approach.[214]

Yet one decision supports that approach. After analyzing the restriction on the President's removal of the independent counsel in *Morrison*, the Court stated that the second issue was "whether the Act, taken as a whole, violates the principle of separation of powers by unduly interfering with the role of the Executive Branch."[215] Not surprisingly given this functionalist framing, the Court held that the statute did not violate the separation-of-powers because it did not unduly impede the President's Article II powers.[216] Although that analysis indicates that the Rehnquist Court was willing to evaluate the constitutionality of a statute apart from the individual separation-of-powers tests, it provides limited insight into the analysis the current Court would adopt given its tendency to analyze individual separation-of-powers principles.[217]

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[211] *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3152, 3162 (2010).

[212] *See* Mistretta v. United States, 488 U.S. 361, 372, 391, 397, 409 (1989).

[213] MD Brief, *supra* note 148, at 2.

[214] The Court only referred to the FTC's multimember nature in describing the FTC, *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935), before its analysis of the constitutionality of the removal limitation, *id.* at 626.

[215] Morrison v. Olson, 487 U.S. 654, 693 (1988). Morgan Drexen did not include this quote in the constitutional test it proposed. *See* MD Brief, *supra* note 148, at 4 (asserting that the "CFPB fails [a] constitutional test").

[216] *Morrison*, 487 U.S. at 694–96.

[217] *See supra* note 131 and accompanying text.

Assuming the Court adopted the functionalist approach, however, the second issue is whether it would consider the impact of Title X on all three branches of government rather than only considering its constitutionality relative to the Executive Branch. The Court in *Morrison* did not determine whether the independent counsel undermined a broad separation-of-powers principle, the democratic control of government.[218] Instead, it determined whether the structure undermined the President's authority. Indeed, *Morrison*'s analysis suggests that even if the Court functionally considers Title X's provisions together, it may only consider whether the statute undermines the authority of a particular branch. Morgan Drexen could probably reframe its argument to assert that Title X undermines only the President's power under Article II. But this would require omitting issues such as the delegation of rulemaking authority and the power of the purse that do not affect the Executive Branch but are nonetheless integral to the concerns of regulated entities. Additionally, analyzing Title X as it relates to all three branches would require a court to determine whether Title X violates an abstract separation-of-powers principle with little guidance about how to conduct this inquiry.[219] Thus, even if it adopted the functionalist approach, the Court would likely only consider whether the CFPB undermines the powers of a particular branch.

2. Free Enterprise Fund *and Beyond: The Significance of Agency Novelty.* Even though the Court has typically analyzed individual separation-of-powers principles, language in *Free Enterprise Fund* and subsequent decisions indicates that the novelty of an agency's aggregate structure may now be constitutionally significant. *Free Enterprise Fund* provides guidance regarding the effect of combining independently constitutional features in creating a novel agency structure. In that case, the Court did not say that one level of removal protection would be insufficient if a director instead of a five-person board headed the PCAOB. It did indicate, however, that

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[218] This is one of the structural theories asserted by Morgan Drexen. *See* MD Brief, *supra* note 148, at 14 ("CFPB's structure violates the constitutional requirement of democratic control of government.").

[219] *See infra* Part III.B.*3.* Indeed, without a focus on established rules, it is unclear how a formalist Court would proceed.

the lack of historical precedent for the two-tiered structure was "perhaps the most telling indication of [a] severe constitutional problem" and emphasized that the government had not "located any historical analogues for [that] novel structure."[220] The decision also noted that the novel structure transformed the PCAOB's independence.[221]

These statements appear to suggest a novelty rule that has formalist undertones: if a court determines that an agency combines structural features in a way not present in other agencies, that agency would violate the novelty rule. This rule would thus invalidate all novel agency structures.

Rather than asserting a far-reaching, formalist version of the novelty rule, Morgan Drexen asserted a primarily functionalist novelty argument which asks a reviewing court to determine whether, in light of the agency's mandate, its novel structure renders the agency politically unaccountable or upsets the system of checks and balances.[222] Morgan Drexen's novelty argument appears to proceed as follows. Congress has never vested regulatory, investigative, and enforcement power over consumer financial products in a single agency. Similar agencies such as the FTC, SEC, and OCC are subject to more congressional oversight, are headed by multimember commissions, or have agency heads that are removable at will. Because the CFPB is different from each of these agencies in structure and the scope of its mandate, and because the agency's structure may allow it to negatively impact business, Morgan Drexen asserts it is unconstitutional.[223] This novelty argument is thus a functionalist argument wary of the perceived dangers involved in creating an agency with the CFPB's power.

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[220] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3159 (2010) (quoting 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)).

[221] *Id.* at 3154.

[222] *Accord* Mistretta v. United States, 488 U.S. 361, 381 (1989) (highlighting the role of checks and balances in the separation-of-powers doctrine). *See also* Neal K. Katyal, *Rethinking Legal Conservatism*, 36 HARV. J.L. & PUB. POL'Y 949, 951 (2012) (acknowledging the novelty language in *Free Enterprise Fund* and arguing that "[t]he antinovelty canon, which holds that something is presumptively unconstitutional simply because it has not been done before, is not anchored in the text, structure, or history of the Constitution").

[223] *See infra* Part III.B.*3*.

Before *Free Enterprise Fund*, *Mistretta* also addressed the significance of agency novelty. In sanctioning the structure of the Sentencing Commission, an independent body within the Judicial Branch, the Court noted that even though the Commission was a peculiar institution, "constitutional principles of separated powers are not violated . . . by mere anomaly or innovation."[224] This statement appears to be in tension with *Free Enterprise Fund*. In one decision, novelty signals unconstitutionality, while in the other, novelty is inconsequential. One interpretation of *Free Enterprise Fund* might maintain that the concept of agency novelty does not play a central role in the decision. Even though the dual good cause limitation was a novel structural feature, the Court's comments on novelty may consist merely of dicta reinforcing the reasoning that the PCAOB undermined the President's Article II powers. Indeed, the Court only discussed the historical uniqueness of the CFPB after it had already explained why the removal limitation was unconstitutional. Moreover, the removal limitation was not unconstitutional because it was novel, but because it restricted the President's Article II powers.

The view more consistent with the language of the opinion and with other recent decisions, however, is that the Court's discussion of agency novelty consisted of more than additional support for its holding. *Mistretta* was decided more than twenty years before *Free Enterprise Fund* and validated an agency by functionally weighing the "practical consequences" of creating an agency with its structure, an approach *Free Enterprise Fund* indicates the current Court would not adopt.[225] Although the Court in *Free Enterprise Fund* discussed agency novelty after stating its holding and reasoning, it allocated several pages to determining whether historical and contemporary analogues of the dual good cause limitation existed.[226] In addition, the Court's statement that the government had failed to identify another agency like the PCAOB indicates that it may expect more substantial justifications for an

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[224] Mistretta v. United States, 488 U.S. 361, 385 (1989).
[225] *Id.* at 393.
[226] *Free Enter. Fund*, 130 S. Ct. at 3159–61.

agency's structure than it has previously required.[227] Readers may observe that the majority was noticeably circumspect regarding the administrative state: the opinion cautions against agencies removing power from the democratically elected President[228] and admonishes "the dissent's paean to the administrative state."[229] In heralding the plenary nature of the President's Article II power in *Free Enterprise Fund* and invalidating other agency structures in recent decisions,[230] the Court announced that agency novelty should play a more prominent role in separation-of-powers analyses.

The view that agency novelty may now be significant independent from individual separation-of-powers principles also finds support in *AAR*, the D.C. Circuit Court of Appeals decision which invalidated a delegation of rulemaking authority to Amtrak. In that case, the Court extrapolated two principles from *Free Enterprise Fund*. The first principle was that the independent constitutionality of two structural features does not prove that combining these features is constitutional.[231] The second principle was that novelty may signal unconstitutionality, and this principle appeared to operate as a presumption against the validity of the delegation to Amtrak.

Under the Court of Appeals' analysis, the CFPB's argument that the agency is constitutional because it "synthesizes elements approved by [other decisions]" is entitled to little weight.[232] Thus, that the removal limitation satisfies the removal tests and the delegation of rulemaking authority satisfies the nondelegation doctrine does not mean that combining the delegation with the removal protection is constitutional. Admittedly, *AAR* involved a single separation-of-powers principle, the nondelegation doctrine. It is nonetheless significant that the court distilled two principles regarding agency novelty from *Free Enterprise Fund* and applied

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[227] *Id.* at 3159; *cf.* City of Arlington v. Federal Commc'ns Comm'n, 133 S. Ct. 1863, 1877–78 (2013) (Roberts, C.J., dissenting) (expressing profound skepticism of the administrative state).

[228] *Free Enter. Fund*, 130 S. Ct. at 3155.

[229] *Id.* at 3156.

[230] *See generally* Stern v. Marshall, 131 S. Ct. 2594, 2608 (2011); New Process Steel v. Nat'l Labor Relations Bd., 130 S. Ct. 2635, 2645 (2010).

[231] Ass'n of Am. R.R. v. United States Dep't of Transp., 721 F.3d 666, 673 (D.C. Cir. 2013).

[232] *Id.*

these principles in a context different from the removal analysis in that decision. In addition, the Court has since reaffirmed that novelty may be significant. In *National Federation of Independent Business v. Sebelius*, the majority cited to *Free Enterprise Fund*'s novelty language in holding that the individual mandate could not be upheld under the Commerce Clause, reasoning that novelty indicates that there is a severe constitutional problem with a statute.[233]

3. The Court's Likely Rejection of the Functionalist Novelty Argument. Decisions such as *Free Enterprise Fund* and *AAR* indicate that despite the tendency to analyze individual separation-of-powers principles, courts may now accord more weight in the separation-of-powers analysis to the novelty of agency structures. Even so, the Court would likely reject Morgan Drexen's functionalist novelty argument because this argument provides no rules which could guide the Court's formalist favoring analysis.

In *Free Enterprise Fund*, the Court did not focus on the novelty of the entire PCAOB. Instead, it focused on one particular novel structure within that agency—the dual good cause limitation on the President's removal power.[234] Morgan Drexen, by contrast, does not assert that any one feature is novel. In addition, *Free Enterprise Fund* assessed the novel limitation relative to one branch, the Executive Branch. Similarly, *AAR* analyzed how combining structural features may violate the grant of legislative powers to the Legislative Branch.[235] In the Morgan Drexen suit, it is unclear whose power the plaintiffs asserted that the CFPB undermines. Indeed, the CFPB's briefs indicated confusion in this respect. In attempting to counter whatever Morgan Drexen challenged is unconstitutional, the CFPB's brief addressed the contention that the CFPB undermines democratic control of government[236] as well as the contentions that the authority of the

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[233] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2586 (2012) (stating that although the "novelty [of a statute] is not necessarily fatal," it indicates that there may be a serious constitutional problem).

[234] *Free Enter. Fund*, 130 S. Ct. at 3154. Certainly, an entire agency is novel if it contains one novel element. This observation simply focuses on the scope of the Court's analysis.

[235] *See Ass'n of Am. R.R.*, 721 F.3d at 670–71 (addressing the novelty of a delegation of rulemaking authority).

[236] CFPB Brief, *supra* note 149, at 20.

President, Congress, or the judiciary has been constitutionally impaired.[237] Even if the Court were to functionally consider the impact of the CFPB's structure on the separation-of-powers, Morgan Drexen's functionalist argument is weakened by the fact that unlike in *Free Enterprise Fund* and *AAR*, it is difficult to find a separation-of-powers principle relating to one of the three branches that the CFPB's novelty would violate. Although agency novelty may now be relevant to the separation-of-powers analysis, novelty alone is not yet a separation-of-powers principle. Moreover, it is far from clear how the *Free Enterprise Fund* majority's focus on novelty will factor into—or be reconciled with—its formalist analyses of separation-of-powers issues.

Under *Free Enterprise Fund*, the Court would also question the novelty argument's assertion that combining the structural features undermines executive oversight. The CFPB is, like the PCAOB, the primary law enforcement authority for an important section of the economy and therefore deserves adequate presidential oversight.[238] Notwithstanding this consideration, if Morgan Drexen in fact alleged that Title X's combination of structural features usurps executive power, it is difficult to understand how structural features unrelated to the Executive Branch usurp that Branch's power. The CFPB's funding mechanism and the judicial deference provision do not undermine the President's ability to ensure that the laws are faithfully executed. Additionally, it is unclear how having a single director instead of a multimember commission usurps presidential authority. Multimember commissions or a single director removable at will are not separation-of-powers requirements—at least not yet.[239] This reinforces a critical difference between Morgan Drexen's reasoning and the reasoning of the Court in *Free Enterprise Fund*: in *Free Enterprise Fund*, the Court grounded its holding in the undermining of executive power. In the Morgan

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[237] *Id.* at 13–19 (arguing that the CFPB does not impair the President's powers, Congress's powers, or the judiciary's powers, and that it does not undercut democratic control of government).

[238] *Free Enter. Fund*, 130 S. Ct. at 3161.

[239] This Note does not address whether multimember commissions in fact provide more checks on an agency's power. For a policy discussion of multimember commissions, see Brenden D. Soucy, Note, *The Consumer Financial Protection Bureau: The Solution or the Problem?*, 40 FLA. ST. U. L. REV. 691, 711–15 (2013).

Drexen suit, however, the plaintiff challenged the CFPB under a much more abstract separation-of-powers principle.

In functionally asserting that the CFPB is unconstitutional because it is too powerful and unaccountable to the political branches, the CFPB's opponents have altered what might otherwise be a formalist novelty rule. *Free Enterprise Fund* indicated that the Court would not functionally analyze the benefits of an agency's structure. In that case, one of the functionalist arguments the plaintiffs asserted was that the PCAOB's removal limitation rendered the entire statute unconstitutional.[240] The Court squarely rejected this argument. Its response is relevant to Morgan Drexen's novelty argument because it demonstrates that the Court may be unwilling to accept functionalist arguments that do not focus on a specific separation-of-powers principle such as the removal power.

Additionally, the response demonstrates the Court's reluctance to invalidate an entire statute based on the scope of the authority exercised by an agency.[241] In *Free Enterprise Fund*, as in other recent decisions such as the *Sebelius* decision, the Court invalidated only the provision that caused the constitutional violation. Applying this approach to the CFPB would be difficult. If the Court determined that the CFPB is unconstitutional, on what basis would that be? That it violates the broad separation-of-powers principle? That too many "checks" together have been eliminated? Moreover, the functionalist approach does not supply the Court with a rule for determining what provisions should be modified. Would curbing the delegation of rulemaking authority cure the CFPB? Would abolishing the removal limitation? Again, *Free Enterprise Fund* provides valuable insight: Although the Court recognized that the removal provision was only one of a number of provisions that together rendered the limitation unconstitutional, it declined to modify those other provisions by,

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[240] *Free Enter. Fund*, 130 S. Ct. at 3161.

[241] *Id.* This view is consistent with judicial minimalism, a theory some have associated with the Roberts Court. *See* Cass R. Sunstein, *John Roberts, Minimalist*, UNIVERSITY OF CHICAGO LAW SCHOOL (Sept. 1, 2005), http://www.law.uchicago.edu/news/sunstein090105 (arguing that decisions by then-Judge Roberts are decidedly minimalist).

for example, making the PCAOB a panel that could only issue recommendations.[242]

Holding that the CFPB is unconstitutional would require that the Court identify provisions that Congress could modify. If the CFPB violates the separation-of-powers under Morgan Drexen's functionalist theory, Congress would have little guidance regarding what is constitutional in reforming the CFPB or creating new agencies beyond that an agency cannot combine jurisdiction over consumer financial products, a good cause removal limitation, a single director, judicial deference to agency decisions, and the ability to self-fund. This holding would foster a degree of uncertainty in separation-of-powers cases that would be unacceptable to a formalist court. Thus, although the functionalist argument asserted against the CFPB is consistent with the Court's skepticism of the growth of agencies and the increased weight given to agency novelty, the Court would likely reject Morgan Drexen's functionalist argument because it provides no rules for determining whether the CFPB is unconstitutional and what renders it unconstitutional.

IV. CONCLUSION

Opponents of the CFPB face an uphill battle. On the one hand, some might think that the structure of the CFPB surely violates some constitutional principle. On the other hand, it appears that Congress has satisfied the individual separation-of-powers tests in creating the CFPB. *Free Enterprise Fund* and subsequent decisions indicate that agency novelty may now have increased relevance. These decisions also express a concern, shared by Morgan Drexen, about the growth of the administrative state.

The functionalist argument asserted by the CFPB's opponents, however, modifies the novelty rule suggested by these decisions. This argument asks a reviewing court to determine, on a case-by-case basis, whether a particular combination of structural features and an agency's jurisdiction is unconstitutional because that combination makes the agency excessively large and unaccountable. A court engaging in this analysis would be

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[242] *Free Enter. Fund*, 130 S. Ct. at 3161–62.

required to consider all of the provisions of a statute together, which the Supreme Court has not historically done. The Court's decisions, as well as *Free Enterprise Fund*'s novelty language, also provide little guidance as to what separation-of-powers principle may have been violated under the functionalist argument. Absent rules guiding the Court's analysis, the congruence between the fears of the CFPB's opponents and the majority's concerns in *Free Enterprise Fund* is likely insufficient to overcome the Court's reluctance to functionally examine the costs and benefits associated with agency structures. Alleging that the costs an agency imposes on business are too great does not provide such a rule.

This Note has not purported to determine whether the CFPB's structure represents a wise policy choice. Others have addressed this issue.[243] Going forward, arguments about the CFPB's structure are probably better directed at Congress, which may respond to industry concerns and edit the CFPB accordingly. While regulated entities should have little success in asserting broad functionalist arguments such as the one asserted by the CFPB's opponents, they should also consider challenging agencies under existing formalist rules or proposing new rules that would allow the Court to identify separation-of-powers principles that an agency may have violated. Applying these rules, in turn, would foster the predictability that the Roberts Court has suggested it seeks.

Lee A. Deneen

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[243] *See* Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. 856, 927 (2013) (arguing that Congress ignored historical lessons in creating the CFPB); Memorandum from the U.S. Chamber of Commerce, *supra* note 207, at 4–5 (arguing that the CFPB will negatively affect the economy).