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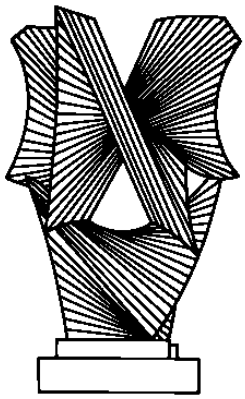

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ARTICLES

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When should courts be responsible for designing federal administrative agencies? In Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Supreme Court invalidated one specific mechanism that Congress employs to insulate agencies from presidential control. Lower federal courts have discerned wider implications in the decision's linkage of presidential power to remove agency officials with democratic accountability. Applied robustly, the* Free Enterprise Fund *principle casts doubt on many agencies' organic statutes. As the judiciary starts exploring those implications, this Article evaluates the effects of judicial intervention in administrative agency design in light of recent political science work on bureaucratic behavior, historical studies of state development, and comparative analyses of other countries' civil services. Judicial intervention in agency design, I conclude, will not generate consistent and predictable outcomes and instead risks diluting majoritarian control and fostering policy uncertainty. In light of the tenuous correlation between changes in presidential removal power and the underlying constitutional good of democratic accountability, I argue, removal power questions should be ranked as "political questions" beyond federal court competence.*

* Assistant Professor of Law, University of Chicago Law School. I am exceedingly grateful to Anne Joseph O'Connell, Eric Posner, David Strauss, and an anonymous University of Chicago reviewer for very valuable criticisms, and to Eileen Ho and Mishan Wroe for superlative research assistance. Great thanks are also due to Chris Hu, Manuel Possolo, Julia Reese, and their colleagues at the *Stanford Law Review* for their perceptive, helpful comments and careful supervision of the text through the editing process. I am pleased to acknowledge the support of the Frank Cicero, Jr. Faculty Fund. All errors are mine alone.

INTRODUCTION

Until now, federal courts have played only a small role in elementary design decisions about the regulatory state. Instead, the political branches select policies, while agencies created by the political branches interpret and enforce those policies on the ground.[1] Courts, to be sure, play a supporting part policing the use of delegated authority,[2] but their influence on the administrative state's basic architecture has to date been minimal.[3]

Suddenly, the status quo is in doubt. A recent Supreme Court decision portends a larger judicial role in drawing up blueprints for federal agencies. The holding of *Free Enterprise Fund v. Public Company Accounting Oversight Board*[4] is modest. But it rests on an underlying principle with wider potential

1. *Compare* Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, 57 LAW & CONTEMP. PROBS. 1, 11-15 (1994) (describing presidential incentives to influence bureaucratic structure), *with* Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989) (exploring congressional strategies for influencing administrative policy outcomes by exercising control over agency structures).

2. By, for example, enforcing procedural requirements pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 551-52, 702, 704 (2011).

3. For example, under longstanding precedent, federal courts lack power to impose procedural rules on agencies. Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 543 (1978) ("Absent constitutional constraints or extremely compelling circumstances the administrative agencies should be free to fashion their own rules of procedure . . . ." (internal quotation marks omitted)). An agency is also free to choose between rulemaking and adjudication as its form of policymaking. SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947).

4. 130 S. Ct. 3138 (2010).

implications. In *Free Enterprise Fund*, the Court invalidated a single provision in the Sarbanes-Oxley Act of 2002.[5] Among other reforms, the Act created the Public Company Accounting Oversight Board (PCAOB) to protect investors by supervising the audits of public companies.[6] The challenged provisions seriously restricted the President's authority to remove PCAOB members.[7] In the Court's view, the Act permitted removal of PCAOB members only by the Securities and Exchange Commission (SEC) and then only on a showing of good cause; SEC commissioners also could be removed only on a showing of good cause by the White House.[8] This "dual for-cause" regime created a buffer between the PCAOB and the President that, the Court held, conflicted with the promise of democratic accountability immanent in Article II of the Constitution.[9] This specific holding rested on a more general syllogism. First, the Court held that power to remove a bureaucrat was essential to establish control over that official's policy decisions.[10] Second, the Court reasoned that absent presidential control, the democratic accountability demanded by Article II would be wanting.[11] Based on these two premises, the Court concludes that Article II entails a quantum of presidential removal authority respecting agency officials in order to preserve democratic accountability.

If this principle could easily be cabined to the "dual for-cause" regime at issue in *Free Enterprise Fund*, it would warrant only passing attention.[12] But big things often have small beginnings. The *Free Enterprise Fund* principle cannot easily be limited to "dual for-cause" regimes. Rather, the decision's fundamental logic "calls into question the constitutionality of hundreds of other governmental positions" buffered from presidential control,[13] even those

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5. *See id.* at 3151.

6. Sarbanes-Oxley Act of 2002 § 101, 15 U.S.C. § 7211 (2011).

7. 15 U.S.C. §§ 7211(e)(6), 7219(d)(3).

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

9. *Id.* at 3151-55 (discussing the President's authority to exercise control over those who execute laws); *see also* U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

10. *Free Enter. Fund*, 130 S. Ct. at 3154 (identifying as a constitutional flaw the fact that "[n]either the President, nor anyone directly responsible to him, nor even an officer whose conduct he may review only for good cause, has full control over the Board").

11. *Id.* at 3164 ("The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties.").

12. The Court invalidated the Board's tenure rules without changing its substantive powers. *See id.* at 3161 ("The Sarbanes-Oxley Act remains fully operative as a law . . . ." (internal quotation marks omitted)).

13. Tom Goldstein & Amy Howe, *But How Will the People Know? Public Opinion as a Meager Influence in Shaping Contemporary Supreme Court Decision Making*, 109 MICH. L. REV. 963, 969 (2011) (book review); *see also* Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in* Free Enterprise Fund v. PCAOB, 79 FORDHAM L. REV. 2541, 2541 (2011) ("[T]he structure of the [*Free Enterprise Fund*] Court's argument, which focuses on the importance of presidential control and accountability through the removal power, logically calls into question the constitutionality of agency independence.").

positions protected by only a single layer of for-cause removal limitations. The opinion thereby invites judges to hunt through the U.S. Code, striking out tenure protection rules.[14] Hence, the limited scope of short-run consequences from *Free Enterprise Fund* for the PCAOB itself belies a more important long-term ramification: dramatic enlargement of judicial authority to dictate elementary parameters of agency design.

This is no idle hypothesis. In July 2011, Judge Brett Kavanaugh of the District of Columbia Circuit Court of Appeals published a striking concurrence arguing forcefully that *Free Enterprise Fund* impugned the constitutionality not only of dual for-cause rules, but also of the Nuclear Regulatory Commission and all other "independent agenc[ies] that operate[] free of presidential direction and supervision."[15] The latter are typically insulated from the White House's influence by single for-cause rules.[16] They are "specifically designed *not* to have the quality . . . of being subject to the exercise of political

14. Even read modestly, *Free Enterprise Fund* applies to other entities with dual for-cause protection. As Justice Breyer explained in dissent, this might encompass a large range of federal bodies. *Free Enter. Fund*, 130 S. Ct. at 3177-82 (Breyer, J., dissenting). Or it might not, depending on how many exceptions the Court carves out of the rule of decision employed in *Free Enterprise Fund*. The net result, in either case, is to vest large discretion in the Court's hands.

15. *In re* Aiken Cnty., 645 F.3d 428, 439-46 (D.C. Cir. 2011) (Kavanaugh, J., concurring).

16. Both Congress and the executive use the term "independent agency" to refer to an agency when its head may be removed by the President only in defined and limited circumstances. For example, the head of the Social Security Administration (SSA) is only removable for cause, *see* 42 U.S.C. § 902(a)(3) (2011), and the SSA is denominated by its organic act as "an independent agency," *id.* § 901. For a similar presidential usage, see, for example, Presidential Memorandum on Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 21, 2009) (using the term in that sense). The Government also uses the term to describe multimember commissions and boards in addition to agencies headed by a single person. *See* OFFICE OF THE FED. REGISTRAR, NAT'L ARCHIVES AND RECORDS ADMIN., THE UNITED STATES GOVERNMENT MANUAL 2011, at 76, 245, 311 (2011), *available at* http://www.gpo.gov/fdsys/pkg/GOVMAN-2011-10-05/pdf/GOVMAN-2011-10-05.pdf (labeling the U.S. Sentencing Commission, the Foreign Claims Settlement Commission, and the Administrative Conference of the United States as independent). In the academic literature, however, there is more awareness that agencies' independence from "political will" can be secured through other structural features, such as multimember composition and bipartisanship requirements. *See generally* Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1113, 1135-55 (2000) (cataloging five different elements that influence the independence of modern agencies, including appointments, removal (including tenure rules), organizational structure, congressional oversight, and litigation authority). In an important forthcoming article, Adrian Vermeule defines agency independence in terms of conventions, or "extrajudicial unwritten norms that are enforced by the threat of political sanctions." Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. (forthcoming 2013) (manuscript at 14), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2103338.

oversight."[17] A glitch in the Article III case-or-controversy requirements in the case in question precluded Judge Kavanaugh from pressing his argument.[18] But it is only a matter of time before an appropriate lawsuit raises the question of how far *Free Enterprise Fund* goes in shifting agency design authority to federal courts.[19]

In this Article, I focus on the broad reading of *Free Enterprise Fund* espoused by Judge Kavanaugh in order to investigate how authority to design agencies should be apportioned between the political branches and the judiciary. Assuming that Article II of the Constitution requires democratic accountability over agency actions, I ask, which branch bears responsibility for executing that mandate at the agency design stage through the regulation of removal authority? To investigate the viability of judicial supervision of agency design, the Article draws on the doctrinal framework of the "political question" doctrine. This is a tool for sorting constitutional disputes between the judiciary and the political branches.[20] To that end, the Court has employed a range of tests to sort constitutional questions based on their amenability for judicial resolution. Most relevant here is the Court's development of the political question doctrine, which, among its many applications, identifies the absence of a judicially manageable standard as a reason for treating a legal issue as nonjusticiable.[21] The Supreme Court has not been as clear as might be desirable about the necessary prerequisites of a judicially manageable standard. For the purposes of this Article, I proffer a relatively minimal and parsimonious test for discerning adequate rules of decision: will judicial enforcement of a rule promote the underlying constitutional values or goods that justify the rule in the first instance? If there is no reliable and stable correlation between a rule of decision and those underlying values, and if the results of a rule's application are instead ad hoc and unpredictable, then the Court has failed to identify a judicially manageable standard. In the absence of a plausible alternative doctrinal framework, courts should refrain from acting, with the resolution of a constitutional issue typically redounding to the political branches.

The central claim of this Article is that the rule of decision articulated in *Free Enterprise Fund* concerning presidential removal authority fails this test. It is not a judicially manageable standard because it does not reliably produce

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17. Freytag v. Comm'r, 501 U.S. 868, 916 (1991) (Scalia, J., concurring in part) (internal quotation mark omitted); *see also* Buckley v. Valeo, 424 U.S. 1, 133 (1976) (per curiam) (emphasizing that "members of such agencies were to be independent of the Executive in their day-to-day operations").

18. *See In re Aiken Cnty.*, 645 F.3d at 438 (dismissing the case for lack of jurisdiction).

19. For a discussion of a case filed in June 2012 that seeks to expand *Free Enterprise Fund*, see *infra* text accompanying notes 103-105.

20. *See infra* Part I.C.

21. *See* Baker v. Carr, 369 U.S. 186, 217 (1962). For an account of the political question doctrine, see generally Part I.C, below.

the constitutional good identified by the Court—democratic accountability. Drawing on a range of empirical and theoretical work in political science and institutional psychology, I aim to demonstrate why judicial enforcement of presidential removal authority will not reliably promote presidential control or democratic accountability. To that end, the Article decomposes the logic of *Free Enterprise Fund* into its two interlocking causal theses—the link between presidential removal authority and control, and the link between presidential control and democratic accountability—and analyzes them separately. For the Court's proposed rule to be judicially manageable, it must be the case that both premises of the syllogism employed in *Free Enterprise Fund* hold true.

Neither of the two causal connections necessary to link presidential removal authority with the constitutional good of democratic accountability, however, withstands close scrutiny. Roughly speaking, both fail because both ignore interactions with other design options and the strategic responses of other government actors. With respect to the first link in the *Free Enterprise Fund* causal claim, I argue that there is no strong correlation between removal authority and political control.[22] Empirical evidence and political science models instead show that the power to remove is sometimes unnecessary and sometimes ineffectual to the goal of political control of the bureaucracy. Worse, presidential removal authority often has perverse and undesirable effects quite apart from democratic accountability goals. As a result, Presidents have tended not to rely too heavily upon the removal power to secure control over bureaucratic subordinates, and have instead looked to other tools. Turning to the second component of the Court's causal argument, there is no stable positive correlation between presidential control and democratic accountability. Instead, judicial promotion of presidential control will sometimes have the paradoxical consequence of diminishing net democratic accountability.

Taken together, these critiques undermine the putative correlation between presidential removal authority and democratic accountability. Judicial interventions in favor of presidential removal authority can therefore either promote or retard, or even leave untouched, net democratic accountability. Courts simply have no way of knowing in advance what effect their intervention will have on the relevant constitutional good. In the argot of the political question doctrine, this means that the promotion of presidential removal authority is not a judicially manageable standard by which a constitutional value can be reliably achieved.

This Article concerns justiciability and takes no position on the underlying questions whether Presidents should have broad removal authority for any given agency, or whether there should be exceptions to allow, say, adjudicative autonomy or central bank independence. Indeed, assignment to the political branches of decisions concerning removal does not mean that either the

22. By "political control," I mean control by an official responsible to the public through periodic elections.

President or Congress will have free rein. Political control of the removal power question leaves the matter subject to interbranch negotiation and compromise by elected officials who are more attuned than judges to the complex interaction effects and strategic responses that can arise in response to changes in basic agency design.

To focus on justiciability in this fashion is to address a topic largely ignored in the oceanic literature on the removal power, a literature replete with relentless Ahabs and elusive white whales. There has long been lively controversy as to whether Article II of the Constitution vests Presidents with plenary authority to control officials who execute the laws in some fashion. Some scholars argue implacably for plenary presidential removal power.[23] Others take positions in defense of Congress's authority to take part in defining agency structures.[24] Resolution of the debate eludes the academy. But dueling scholars have taken for granted the suitability of removal power questions for federal court adjudication. Justiciability remains a matter of assumption, not proof. To be sure, two distinguished voices have counseled against judicial resolution of this structural constitutional issue.[25] But their categorical arguments rely on

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23. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 598 (1994) ("If the President is to have effective control of his constitutionally granted powers, he must be able to remove those who he believes will not follow his administrative agenda and philosophy."); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1167-68 (1992) (noting that unitary executive theorists, who believe that the Constitution envisions broad presidential power over administrative agencies, read the text of the Vesting Clause to give the President a substantive grant of power); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 102-03 (1994) (making a similar claim on functionalist grounds); *see also* Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779 app. at 1852 (2006) (illustrating a distinctive taxonomy of both congressional and executive removal powers).

24. *See, e.g.*, Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 597 (1984) ("The text and structure of the Constitution impose few limits on Congress's ability to structure administrative government.").

25. Arguing against nontextual arguments only, John Manning has recently proposed that "the Constitution adopts *no freestanding principle of separation of powers*" such that there is "no one baseline for inferring what a reasonable constitutionmaker would have understood 'the separation of powers' to mean in the abstract" and in the absence of a textual anchor. John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944 (2011). The argument turns on the rejection of Charles Black's interpretive method of drawing inferences from structure and relationships based on a commitment to principles of textualist interpretation. *Id.* at 1946-49; *see also* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 23-26 (1969) (introducing method of inference from constitutional structure). Given the persistence of Black's methodology, Manning's cogent claims are unlikely to find broad acceptance soon.

Almost three decades earlier, Jesse Choper argued that "[t]he federal judiciary should not decide constitutional questions concerning the respective powers of Congress and the President vis-à-vis one another" and instead such issues should be "remitted to the interplay of the national political process." JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT

contestable normative premises. However perceptive, scholars have had limited impact. Certainly, their views found no purchase with the *Free Enterprise Fund* Court. The one lonely precursor to my more tailored justiciability inquiry is a stray, conclusory comment by the great constitutional scholar Edward Corwin. In a 1927 essay, Corwin passingly said that allocations of the removal power should be treated as "a purely political question."[26] That unvarnished, unelaborated, and penetrating insight has, until now, lain idle, unnoticed, and unparsed.[27]

My inquiry in this Article diverges from past scholarship in a second way: It largely accepts the democratic accountability goal of the *Free Enterprise Fund* Court, whereas other scholars expend considerable energy developing their own first principles of agency design. They thus invoke goals such as the promotion of neutral expertise, the stabilization of market expectations, and the need for unbiased agency adjudications to vindicate agency insulation.[28] All such ends may well be laudable. But it is not clear that they respond to *Free Enterprise Fund*'s logic. In other words, if the Court views democratic accountability as a singularly important constitutional ideal, it is not at all clear why alternative normative theories should matter.

The Article proceeds in four Parts. Part I addresses doctrinal preliminaries: the history and jurisprudence of the removal power and the basic terms of the political question doctrine. Its aim is not to be comprehensive on either score but to supply sufficient salient details to render lucid ensuing arguments. Of

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263 (1980). My analysis differs from Choper's insofar as it is retail, and not wholesale, in its call for nonjusticiability. Moreover, whereas Choper relies on doctrinal and historical arguments, I rely on a different political-science-informed toolkit. *See also* Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 CALIF. L. REV. 887, 904-44 (2012) (using a similar toolkit to cast doubt on judicial presumptions founded on the separation of powers).

26. Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353, 398 (1927).

27. Indeed, in his subsequent study of the presidency, Corwin took a different view on the merits of the removal power question, and suggests that courts, "if Congress wishes," should be able to employ "*quo warranto* proceedings to test the title to office of successors of officers who claim to have been wrongfully removed." EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1984, at 110 (Randall W. Bland et al. eds, 5th rev. ed. 1984).

28. For an excellent survey of these arguments as applied to financial regulatory instruments, see Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 611-23 (2010). There are many articles that take issue with the Court's fixation on, and conception of, democratic accountability. *See, e.g.*, Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 480 (2003) (arguing for a focus on eliminating arbitrariness in agency actions); Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 565 (1998) ("Accountability is the means by which the entire people stands apart from the government, in all its segments, and enforces the people's compact with its government. . . . It is a means to enforce the trust placed in the representatives.").

central importance, I distinguish the limited holding of *Free Enterprise Fund* from the larger principle that animates it. My focus in this Article, to be clear, is on the latter, not the former. I take this approach because it is the latter principle, and not the former application, that has the greatest potential, as Judge Kavanaugh has presciently noted, to destabilize the regulatory state. Parts II and III, the Article's core, critically examine respectively the two links of the *Free Enterprise Fund* syllogism with the aim of testing the correlation between judicial promotion of presidential removal authority and democratic accountability. Part II considers the equation of removal authority with bureaucratic control and finds it wanting. Part III then challenges the linkage of presidential control with democratic accountability. Part IV returns to the political question doctrine to show how the analyses of Parts II and III undermine the plausibility of removal as a judicially manageable standard. It also explores the practical consequences of making removal a nonjusticiable political question, and suggests that they are less dramatic than might appear at first blush.

I. DOCTRINAL FOUNDATIONS

This Part sets forth doctrinal and historical scaffolding for the arguments that follow. It outlines first the development of debates about the removal power and sketches both the narrow *Free Enterprise Fund* decision and its more ambitious underlying logic. It then maps briefly the political question doctrine.

A. *Removal Before* Free Enterprise Fund

The Constitution's text does not speak clearly to the structure of federal bureaucracy. It details how federal "officers" are to be appointed,[29] but is silent as to how almost all such "officers" are to be removed.[30] The political branches

29. The term "officer" has been defined as a person holding a "public station, or employment, conferred by the appointment of government." United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1867); *see also* Freytag v. Comm'r, 501 U.S. 868, 881 (1991) (asking if a post involves "exercising significant authority pursuant to the laws of the United States" to determine whether it falls into the class of officers (quoting Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam))). The appointment process for officers differs based on whether an officer is "inferior" or "principal," with the latter being necessarily subject to a Senate confirmation vote. U.S. CONST. art. II, § 2, cl. 2. By contrast, Congress can choose to vest the appointment of inferior officers "in the President alone, in the courts of Law, or in the Heads of Departments." *Id.* Inferior officers are ones "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." Edmond v. United States, 520 U.S. 651, 663 (1997).

30. Removal of officers is only addressed in the Constitution with respect to federal judges. U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . . ."). The Constitution otherwise provides no guidance on removal. That is not to say, however, that the Framers of the Constitution were silent on this issue. *See, e.g.*, THE FEDERALIST NO. 77, at 459 (Alexander Hamilton) (Clinton

have historically taken the lead in filling that gap.[31] Judicial specification of the removal power, by contrast, has been historically late and exceptional.[32]

The first Congress gave a threshold answer to the removal power question when it created departments of war, foreign affairs, and treasury.[33] Federal legislators, including former Philadelphia Convention delegates, divided volubly on the question whether removal had a constitutional dimension.[34] The Senate split contentiously down the middle on the appropriate removal rule for the secretaries of war and foreign affairs, leaving Vice President John Adams to cast tiebreaking votes.[35] Congress settled on textual formulae that omitted specific mention of the removal rule for war and foreign affairs department heads.[36] By contrast, the statute establishing the Treasury specified in detail its functions and obligations and, significant here, shielded the office of Comptroller from presidential direction.[37] However these laws are glossed as evidence of original public meaning, they represent an unequivocal and "meaningful instantiation of

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Rossiter ed., 1961) ("The consent of [the Senate] would be necessary to displace as well as to appoint [officers].").

31. Some have relied on this lacuna alone to infer broad political discretion as to how to organize administrative functions. *See* DAVID E. LEWIS, PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946-1997, at 2 (2003) ("By neither describing nor empowering an administrative state, the Constitution's framers granted political actors in legislative and executive branches the power to create and design the administrative state based upon their own interests.").

32. *See* CORWIN, *supra* note 27, at 100 (noting that until 1926, "the Supreme Court . . . had contrived to side-step every occasion for a decisive pronouncement regarding the removal power, its extent and location").

33. For informative accounts of legislative debates in 1789 that emphasize the seriousness of legislative consideration of constitutional issues related to removal power, see DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801, at 36-41 (1997); Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1028-29, 1044-67 (2006).

34. *See* CURRIE, *supra* note 33, at 36-38 (describing arguments both for and against inherent presidential removal authority made during the debates); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1282-89 (2006) (describing the same debates and noting the varied views on removal of administrative officers represented in the First Congress).

35. LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 53 (Univ. Press of Kan., 4th ed., rev. 1997) (1978); Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 237 (1989).

36. *See* Act of Aug. 7, 1789, 1 Stat. 49 (establishing an executive department denominated the "Department of War"); Act of July 27, 1789, 1 Stat. 28 (establishing an executive department denominated the "Department of Foreign Affairs").

37. *See* Act of Sept. 2, 1789, §§ 1, 3, 8, 1 Stat. 65, 65-67 (establishing the Treasury Department); Lessig & Sunstein, *supra* note 23, at 27-28 & n.124 (explaining how the statute shielded the Comptroller from presidential control). For useful analyses of the treasury legislation, through which Congress retained more control of administration, see Casper, *supra* note 35, at 239-40; Mashaw, *supra* note 34, at 1284-87.

the departmentalist theory" that political branches can resolve constitutional questions arising from allocations of removal authority.[38]

Nor were these early statutes a last word from the political branches.[39] Roughly a quarter century later, Congress created the Second Bank of the United States with twenty-five directors, only five of whom were removable by the President.[40] Fifty years thereafter, Congress vested the Senate with a role in all removal decisions through the Tenure in Office Act.[41] Violation of that statute by President Andrew Johnson helped catalyze impeachment proceedings in the House.[42] Despite Johnson's acquittal in the Senate, allocations of removal authority remained a matter of controversy. As late as 1916, former President and future Chief Justice William Howard Taft could write that "[w]hether the President has the absolute power of removal without the consent of the Senate in respect to all offices, the tenure of which is not affected by the Constitution, is not definitely settled."[43]

Well into the twentieth century, federal courts remained conspicuous by their absence from these removal power debates.[44] A smattering of pre-1900 cases, to be sure, touched on removal, albeit never resolutely so.[45] Into the

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38. Prakash, *supra* note 33, at 1027.

39. *See* FISHER, *supra* note 35, at 54-55 (describing controversy over Andrew Jackson's removal of the Secretary of the Treasury).

40. *See* Act of Apr. 10, 1816, §§ 1, 8, 3 Stat. 266, 266, 269.

41. *See* Act of Mar. 2, 1867, 14 Stat. 430 (regulating the tenure of certain civil offices) (repealed 1887).

42. *See* MICHAEL LES BENEDICT, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON 89-180 (1973) (describing events leading up to trial, the articles of impeachment, and the trial).

43. William Howard Taft, *The Boundaries Between the Executive, the Legislative and the Judicial Branches of the Government*, 25 YALE L.J. 599, 608 (1916). As a Supreme Court Justice, Taft would go on to write *Myers v. United States*, 272 U.S. 52 (1926), described below in the text accompanying note 47.

44. This cannot be explained by positing a more general absence of federal court scrutiny of constitutional issues in this period. *See* Aziz Z. Huq, *When Was Judicial Self-Restraint?*, 100 CALIF. L. REV. 579 (2012) (documenting historical patterns in judicial willingness to invalidate federal statutes on constitutional grounds); *cf.* Mark A. Graber, *The New Fiction:* Dred Scott *and the Language of Judicial Authority*, 82 CHI.-KENT L. REV. 177, 181 (2007) (counting twenty pre-Civil War cases in which the Supreme Court imposed constitutional limits on congressional power).

45. *See, e.g.*, Parsons v. United States, 167 U.S. 324, 327, 343 (1897) (finding that Congress conceded to the President the power to remove a District Attorney of the United States); United States v. Perkins, 116 U.S. 483, 485 (1886) (holding that when Congress, by law, vests appointment of inferior officers in heads of departments, it may limit and restrict power of removal as it deems best for public interest); Butterworth v. United States *ex rel.* Hoe, 112 U.S. 50, 67 (1884) (holding that executive supervision that a head of department may exercise over subordinates in administrative and executive matters does not extend to matters in which a subordinate is directed by statute to act judicially); *Ex parte* Hennen, 38 U.S. (13 Pet.) 230, 258 (1839) (holding that appointment, and removal, of clerks of courts properly belongs to courts of law and is not governed by the Constitution). In addition to these cases, in 1854, the Court was confronted with a mandamus action filed by a former

1860s, Republican legislators "specifically argued that Congress was the appropriate court in which to try [removal] issues" and some "emphatically rejected the authority of the judiciary on the issue."[46] So perhaps it is unsurprising that the Supreme Court has seldom stepped into the fray, even in the twentieth century.

In the 1920s and the 1990s, the Court issued dramatic rulings supporting expansive presidential removal authority, and then retreated quickly. In 1926, Chief Justice Taft penned the Court's opinion in *Myers v. United States*, invalidating a statute that forced the President to seek Senate consent before removing regional postmasters on the ground 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, and the Constitution should be expounded to blend them no more than it affirmatively requires."[47] In the course of its extended discussion of history and precedent, Chief Justice Taft's opinion in *Myers* contained broad pro-presidential language that seemed to sweep away much of Congress's authority to limit presidential removal powers.[48] Yet within a decade, the Court in *Humphrey's Executor v. United States* upheld for-cause limits on the President's authority to remove members of the Federal Trade Commission (FTC) on the ground that the FTC, unlike a postmaster, was a "quasi-legislative or quasi-judicial" entity.[49] That opaque intervention was not welcomed. *Humphrey's Executor*, Attorney General Robert Jackson later reported, "made Roosevelt madder at the Court than any other decision."[50] In

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chief justice of the Supreme Court of the Territory of Minnesota, who had been fired before the end of his statutory term, and who claimed the salary owed to him for the part of his tenure that he did not serve. United States *ex rel.* Goodrich v. Guthrie, 58 U.S. (17 How.) 284, 284 (1854). Dodging the question whether the chief's removal was licit, the Court held that it lacked power to issue a writ of mandamus. *Id.* at 304-05 (identifying "no jurisdiction to entertain the application for a writ of *mandamus* in this instance"). Justice McLean dissented, addressed the removal question, and concluded that the magistrate had been unlawfully fired. *Id.* at 310-11 (McLean, J., dissenting).

46. KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 154 (1999).

47. 272 U.S. 52, 116, 176 (1926). The statute provided that the postmaster "shall be appointed and may be removed by the President by and with the advice and consent of the Senate." Act of July 12, 1876, § 6, 19 Stat. 78, 80.

48. *See Myers*, 272 U.S. at 163-64. The Court's decision leaned heavily on a pro-presidential reading of the Decision of 1789 and the fact that "no act of Congress, no executive act, and no decision of this court" contradicted presidential removal authority. *Id.* at 163. By contrast, the Court downplayed the fact that multiple presidents had signed into law legislative limitations on their own removal authority. *Id.* at 170. In this fashion, the Court read available evidence through an aggressively pro-presidential lens.

49. 295 U.S. 602, 627-28 (1935); *accord* Wiener v. United States, 357 U.S. 349, 356 (1958) (finding limits to the President's power to remove members of the War Claims Commission implicit in the preclusion of the President from influencing the Commission's decisions with respect to particular claims).

50. JEFF SHESOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT 143 (2010).

the aftermath of *Myers* and *Humphrey's Executor*, the scope of constitutionally compelled presidential removal authority seemed to rest on the character of the relevant office, and, in particular, on whether it was properly characterized as "executive," or "quasi-legislative or quasi-judicial."[51] The Court, however, subsequently showed no appetite for defining *Myers*'s protection of "executive" entities in a way that effectively shielded presidential authority.

The Court embarked on a second, similarly diffident, interventionary bout in the 1980s. In *Bowsher v. Synar*, a divided Court invalidated a provision that endowed the Comptroller General with the power to execute deficit-cutting directives, even though he or she could be removed only through a joint resolution of Congress and only for certain statutorily defined reasons.[52] Under this scheme, the President could not initiate removal, although he or she could veto a joint resolution and thus protect a Comptroller General at least in the absence of veto-proof congressional majorities.[53] Notwithstanding contrary dicta in Chief Justice Burger's majority opinion,[54] respected contemporaneous commentary concluded that "*Bowsher* should . . . have come out the same way if authority to administer the budget law had been given to an officer independent of congressional as well as Presidential control."[55] Two years later, the Court took a different tack in *Morrison v. Olson*.[56] It sustained the constitutionality of an "independent counsel" position insulated from White House control by good-cause protection.[57] To reconcile the seemingly contradictory rulings in *Myers* and *Humphrey's Executor*, Chief Justice Rehnquist disregarded formalist categories of executive and quasi-legislative or quasi-judicial functions in favor of a functional inquiry into whether a constraint on presidential removal "unduly trammels on executive authority."[58] By refusing to identify any undue trammeling in the independent counsel statute, the Court signaled its tolerance for large congressional control of the regulatory state. Only Justice Scalia

51. *See* Morrison v. Olson, 487 U.S. 654, 688-90 & n.28 (1988).

52. 478 U.S. 714, 726 (1986) ("[W]e conclude that Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment."); *id.* at 728 (listing the permissible grounds, defined by statute, for the Comptroller General's ouster pursuant to a joint resolution of Congress). The Court's main issue with the authority of the Comptroller General was that Congress is not permitted to execute laws, and so cannot constitutionally "grant to an officer under its control what it does not possess." *Id.* at 726.

53. *See id.* at 728 n.7.

54. *See id.* at 725 n.4 (claiming that the decision does not cast into doubt independent agencies).

55. David P. Currie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19, 36.

56. 487 U.S. 654 (1988).

57. *Id.* at 691.

58. *Id.* at 690-91.

dissented, arguing that "the statute vests some purely executive power in a person who is not the President of the United States [and so] is void."[59]

As the twentieth century came to a close, judicial control of the removal power's allocation remained tentative. The Court had invalidated a congressional limitation on presidential removal authority in only one instance, *Myers*, and that case proved to have scant lasting effect on the law. The precedential ground for fresh judicial supervision of removal questions seemed, at best, a distant prospect. History, though, may prove to be an untrustworthy guide.

B. Free Enterprise Fund

In the 2010 case of *Free Enterprise Fund v. Public Company Accounting Oversight Board*, a five-Justice majority of the Court invalidated the "for-cause" statutory removal protections of the PCAOB on the ground that they violated the constitutional separation of powers and the Vesting Clause of Article II.[60] The outcome in *Free Enterprise Fund* assumed a two-part syllogism: first, presidential removal authority creates presidential control of the bureaucracy; second, such presidential control is a prerequisite to the democratic accountability mandated by Article II. The holding of *Free Enterprise Fund* requires that Presidents have only *some* control and hence *some* removal power. But the case can be read as support for the larger proposition that Article II requires relatively unfettered presidential removal power across many federal offices and agencies beyond the PCAOB.

In 2002, Congress created the PCAOB in response to accounting scandals at Enron and WorldCom.[61] Congress modeled the board on self-regulatory entities long familiar in financial sector regulation.[62] But Congress also placed the Board under the control of the SEC, which appoints its members,[63] approves its budget,[64] and can generally oversee the performance of, and enforce, the

59. *Id.* at 705 (Scalia, J., dissenting).

60. 130 S. Ct. 3138, 3154 (2010) (holding that the Act "is contrary to Article II's vesting of the executive power in the President").

61. Peter L. Strauss, *On the Difficulties of Generalization*—PCAOB *in the Footsteps of* Myers*,* Humphrey's Executor*,* Morrison*, and* Freytag, 32 CARDOZO L. REV. 2255, 2268 (2011).

62. Richard H. Pildes, *Putting Power Back into Separation of Powers Analysis: Why the SEC-PCAOB Structure is Constitutional*, 62 VAND. L. REV. EN BANC 85, 86, 92, http://www.vanderbiltlawreview.org/articles/2009/11/Pildes-62-Vand-L-Rev-En-Banc-85.pdf (2009) (noting that Congress "borrowed" aspects of existing self-regulatory organizations such as the New York Stock Exchange and the National Association of Securities Dealers in creating the PCAOB).

63. 15 U.S.C. § 7211(e)(4) (2011) (vesting SEC with appointment power upon consultation with the Secretary of the Treasury and the Chairman of the Federal Reserve Board of Governors).

64. *Id.* § 7219(b).

Board's duties.[65] The PCAOB can compel document production or testimony only by securing a subpoena from the SEC.[66] Relevant here, a PCAOB member could be removed by the SEC alone, and only "in accordance with [statutorily-defined procedures], for good cause shown before the expiration of the term of that member."[67]

The *Free Enterprise Fund* litigation arose from a pre-enforcement challenge by a Board-registered accounting firm that had been investigated, but not sanctioned, by the PCAOB.[68] Litigation proceeded on two noteworthy assumptions. First, Chief Justice Roberts explained for the Court that none of the parties had asked the tribunal to "reexamine" precedent such as *Humphrey's Executor* and *Morrison*.[69] Hence, the case was decided on the assumption that those cases remained good law. Second, and more controversially, the Court followed the parties' briefs in assuming that SEC members could be removed by the President only for cause.[70] But the organic statute of the SEC, enacted in the wake of *Myers*, omitted any removal provision for fear of "jeopardizing the whole scheme" if a for-cause provision was included.[71] In effect, the Court thus "insert[ed] a protection of tenure that the legislature did not enact."[72] This unorthodox stipulation of law allowed the Court to frame the question presented as focused on the constitutionality of "dual for-cause limitations" on presidential control.[73] The Court could then write *Free Enterprise Fund* on an exceedingly narrow decisional canvas, ostensibly bracketing for another day questions about how its new principle would extend to the larger regulatory state.

The Court found the PCAOB's dual for-cause removal protection "incompatible with the Constitution's separation of powers"[74] in two steps. First, it viewed removal authority as a paradigmatic means to achieve presidential control of the bureaucracy.[75] Second, the Court took presidential control as the

65. *Id.* § 7217(a).

66. *Id.* § 7215(b)(2)(D).

67. *Id.* § 7211(e)(6); *see also id.* § 7217(d)(3) (detailing removal procedures).

68. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3149-50 (2010).

69. *Id.* at 3146-47.

70. *Id.* at 3148-49.

71. Strauss, *supra* note 61, at 2276.

72. *See id.* For divergent views on the propriety of relying on stipulations of law based on party agreement, compare Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 702-03 (2012) (criticizing the *Free Enterprise Fund* Court's reliance on the for-cause removal stipulation and arguing that Chief Justice Roberts, author of the majority opinion, "seems to have some explaining to do"), with Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191, 1218-34 (2011) (defending judicial use of legal stipulations).

73. *See Free Enter. Fund*, 130 S. Ct. at 3151.

74. *Id.* at 3155.

75. *See id.* at 3143-44, 3151-53.

unique vector for the democratic accountability that Article II commanded.[76] As a result of these two causal inferences, it invalidated the statutory provision limiting SEC removal authority over the Board but otherwise left the PCAOB's structure and functions intact.[77] Both steps merit further explanation.

In the syllogism's first step, the Court identified removal as a key mechanism for controlling the administrative state.[78] The "only issue in th[e] case," Chief Justice Roberts stated, "is whether Congress may deprive the President of adequate control over the Board."[79] The only mechanism of "control" the Court considered was removal authority. It described the Board as "substantially insulated from the Commission's control" solely on the basis of dual for-cause protection.[80] It also ranked the SEC as beyond the President's "direct control" based on the putatively limited White House removal authority.[81] Responding to Justice Breyer's suggestion that the President could use levers other than removal to secure control, the Court evinced scorn. "The Framers," explained Chief Justice Roberts, "did not rest our liberties on such bureaucratic minutiae."[82] Control, in the Court's analysis, turned exclusively on the allocation of removal power.

At the second step, the Court identified democratic accountability as a constitutionally compelled value and explained that presidential control was a vehicle to attain that value.[83] Indeed, it is worth emphasizing that the *Free Enterprise Fund* majority opinion is drafted as if the *only* constitutional good to be pursued in administrative agency design is democratic accountability. The Court, that is, ignored the pleadings of scholars who had pointed to the plurality of goods a reasonable designer could seek to vindicate in drawing up an administrative agency.[84] The Court rooted this laser-like focus in the assumptions of the Framers. Drawing on James Madison's arguments in *The Federalist No. 51*, the Court made a point of identifying "dependence on the people" as the

76. *See id.* at 3155.

77. *Id.* at 3161-62 (declining to invalidate the statute in its entirety, instead severing the unconstitutional dual for-cause removal provisions from the remainder of the statute). The Court also rejected three other constitutional challenges to the PCAOB. *See id.* at 3162-63 (addressing petitioner's arguments that PCAOB members were principal officers whose appointment required Senate advice and consent, that the SEC was not a "Departmen[t]" that can appoint inferior officers, and that appointment by the entire Commission rather than the SEC Chairman acting alone violated the Appointments Clause).

78. For passages of the opinion emphasizing the equation of removal and control, see *id.* at 3148, 3153, 3158, 3160.

79. *Id.* at 3161.

80. *See id.* at 3148.

81. *See id.* at 3153.

82. *Id.* at 3156; *accord id.* at 3157 ("Congress cannot reduce the Chief Magistrate to a cajoler-in-chief."); *id.* at 3158-59 (rejecting budgetary authority as a tool of general control).

83. *See id.* at 3156 ("Our Constitution was adopted to enable the people to govern themselves, through their elected leaders."); *id.* at 3164 (stating that the Court's remedy left the PCAOB "a constitutional agency accountable to the Executive").

84. *See generally* sources cited *supra* note 28.

"primary control on the government,"[85] and explained why such dependence was uniquely enabled by presidential control of the bureaucracy:

> The diffusion of power carries with it a diffusion of accountability. The people do not vote for the Officers of the United States. They instead look to the President to guide the assistants or deputies . . . subject to his superintendence. Without a clear and effective chain of command, the public cannot determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall. That is why the Framers sought to ensure that those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.[86]

The balance of the Court's opinion repeatedly underscored the Constitution's perceived command that the President "hold . . . to account" agency decisionmakers so as to achieve Article II's ultimate object of enabling democratic control through retrospective voting—that is, the exercise of the franchise based on an aggregative assessment of an incumbent presidential candidate's achievements while in office, including the actions of agencies such as the PCAOB.[87] Building on this architectural principle and, not incidentally, quoting *Myers*, Chief Justice Roberts explained that because "Article II confers on the President 'the general administrative control of those executing the laws,'" it follows that the White House "must have some 'power of removing those for whom he can not continue to be responsible.'"[88] Without such power, the Court implied, the public would lose its influence on federal policy.[89] Turning to the specific matter at hand, the Court invalidated the limitation on the SEC's power to remove PCAOB members, but treated the relevant removal provisions as severable and therefore upheld the balance of the Sarbanes-Oxley framework.[90] The Board accordingly survived unscathed except for a marginal increase in its exposure to now-unfettered SEC removal authority. It continues to operate much as it always did.

Chief Justice Roberts's ruling is amenable to both narrow and broad readings. The narrow reading of *Free Enterprise Fund* is that dual for-cause removal arrangements are unconstitutional. The Court did not overrule *Morrison v.*

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85. *Free Enter. Fund*, 130 S. Ct. at 3157 (quoting THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961)). In another passage linking presidential control to democratic accountability, the Court criticized the insulated agencies as being "immune from Presidential oversight, even as they exercised power in the people's name." *Id.* at 3154.

86. *Id.* at 3155 (omission in original) (citations and internal quotation marks omitted).

87. *Id.* at 3154 ("The President . . . cannot hold the Commission fully accountable for the Board's conduct, to the same extent that he may hold the Commission accountable for everything else that it does."). The classic exposition of retrospective voting is MORRIS P. FIORINA, RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS (1981).

88. *Free Enter. Fund*, 130 S. Ct. at 3152 (quoting Myers v. United States, 272 U.S. 52, 117, 164 (1926)).

89. *See id.* at 3155.

90. *Id.* at 3161-62.

Olson[91] or *Humphrey's Executor v. United States*,[92] cases involving single-level removal schemas. Even so limited, one commentator has argued that *Free Enterprise Fund*'s "implications" may well be "enormous."[93] Nevertheless, my aim in this Article is not to focus on that particular, narrow holding. Rather, the balance of this Article bores down to focus on the broader and more ambitious gloss on *Free Enterprise Fund*'s fundamental logic: that there is a tight nexus between constitutionally mandated democratic accountability and presidential removal authority. This logic seemingly applies to most officials who are insulated in some fashion from presidential control. The majority opinion in *Free Enterprise Fund* supplies no reason to limit that syllogism to dual for-cause removal arrangements. To the contrary, "*Free Enterprise Fund* reflects a robust principle of presidential entitlement to control administrative government"[94] that is violated as much by a single good-cause restriction with bite as by a dual for-cause restriction. Whatever "good lawyerly grounds" may exist for limiting it, the principle of presidential control cannot be "inherently confined to second-layer removal provisions."[95] Instead, *Free Enterprise Fund*'s "reasoning sets the foundation for challenging the constitutionality of agency independence"[96] and hence undermining the structural foundations for much of the current regulatory state.

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91. 487 U.S. 654 (1988).

92. 295 U.S. 602 (1935).

93. Strauss, *supra* note 61, at 2281.

94. Richard H. Pildes, Free Enterprise Fund*, Boundary-Enforcing Decisions, and the Unitary Executive Branch Theory of Government Accountability*, 6 DUKE J. CONST. L. & PUB. POL'Y 1, 5 (2010); *accord* Goldstein & Howe, *supra* note 13, at 969.

95. Kevin M. Stack, *Agency Independence After* PCAOB, 32 CARDOZO L. REV. 2391, 2417 (2011). Stack develops a distinct account of the decision, focusing on the fact that it treats agencies with both adjudicative and nonadjudicative functions as necessarily within the ambit of presidential control, whereas previous decisions had treated the presence of any adjudicative function as sufficient to negate the need for presidential control. *Id.* at 2414-15 (describing the "different baseline" after *Free Enterprise Fund*). Another limiting principle is offered by Kent Barnett, who argues that for-cause tenure protections can be sorted into strong, weak, and intermediate categories as a way of cabining the reach of *Free Enterprise Fund*. Kent H. Barnett, *Avoiding Independent Agency Armageddon*, 87 NOTRE DAME L. REV. 1349, 1352 (2012). As Barnett candidly recognizes, Chief Justice Robert's "paean to the unitary executive" provides little purchase for a more nuanced analysis. *Id.* at 1365. Although Barnett's limiting principle is carefully delineated and inventive, its strongest justification is that it closely hews to conventional expectations of what the Court's limited political capital would allow. This seems a somewhat unsatisfying ultimate justification for a rule of constitutional law.

96. Rao, *supra* note 13, at 2550; *see also* Victoria F. Nourse & John P. Figura, *Toward a Representational Theory of the Executive*, 91 B.U. L. REV. 273, 294 (2011) (reviewing STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008)) ("In plain English, the 'removal power' position comes down to the claim that independent agencies are unconstitutional.").

The opinion contains subtle harbingers of such ambition. Chief Justice Roberts conspicuously celebrated *Myers* as a "landmark" case.[97] In this and other ways, his opinion plausibly can be read as "self-consciously plant[ing] the seeds for further extensions" of the unitary executive view that the President should fully control the entire executive branch.[98] Such an interpretation finds support in the Roberts Court's habit of approaching disfavored precedents obliquely, gradually undermining them by "stealth overruling"[99] before an overt rejection of stare decisis. There is no reason to expect that the bread-crumbs conspicuously dropped in *Free Enterprise Fund* presage a different course.

The opinion has not escaped either lower courts' or litigants' attention. A July 2011 concurrence from the D.C. Circuit Court of Appeals signals *Free Enterprise Fund*'s potential for expansive interpretation. Judge Brett Kavanaugh explained that "[the *Free Enterprise Fund*] Court's rhetoric and reasoning are notably in tension with *Humphrey's Executor*."[100] Judge Kavanaugh identified and quoted at length ten passages of *Free Enterprise Fund* hinting at such wider repercussions.[101] To be sure, the D.C. Circuit cannot itself overrule Supreme Court precedent such as *Humphrey's Executor*. But Judge Kavanaugh's views are worth attending to in this context. It was, after all, his dissent that the *Free Enterprise Fund* Court cited and substantially tracked in 2010.[102]

Nor have interest groups capable of developing federal court litigation been resting on their laurels. In June 2012, a Texas bank, a retiree association, and an advocacy organization filed a complaint in the U.S. District Court for the District of Columbia asserting that the newly minted Consumer Financial

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97. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3152 (2010).

98. Pildes, *supra* note 94, at 8.

99. *See* Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 3-4 & nn.2-3 (2011) (collecting sources supporting the argument that the Roberts Court majority often "act[s] disingenuously, . . . overruling *sub silentio* what [it] would not overturn explicitly").

100. *In re* Aiken Cnty., 645 F.3d 428, 444 (D.C. Cir. 2011) (Kavanaugh, J., concurring); *accord id.* at 446 ("[T]here can be little doubt that the *Free Enterprise* Court's wording and reasoning are in tension with *Humphrey's Executor* and are more in line with Chief Justice Taft's majority opinion in *Myers*.").

101. *See id.* at 444-45.

102. *Compare Free Enter. Fund*, 130 S. Ct. at 3156-59 (citing Judge Kavanaugh's dissent in the lower court and discussing the legality of the PCAOB dual for-cause removal regime), *with* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 669, 709-12 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (discussing many of the same issues addressed in Chief Justice Roberts's Supreme Court opinion). Chief Justice Roberts repeatedly cited and quoted Judge Kavanaugh's dissent. *See Free Enter. Fund*, 130 S. Ct. at 3156, 3159, 3160 n.10. Such extensive and overt quotation evinces the Court's high regard of Judge Kavanaugh's analysis.

Protection Bureau (CFPB) violated the separation of powers.[103] Citing *Free Enterprise Fund*, the complaint asserted that Congress had "eliminat[ed] . . . the necessary checks and balances upon the CFPB's exercise of . . . power" and thus had crossed a constitutional red line.[104] And there is no reason to believe this suit will be the last effort to expand the reach of *Free Enterprise Fund*. To the contrary, so long as litigants reckon that they can count five favorable votes, such litigation should be expected to persist.

In harmony with Judge Kavanaugh's analysis, the balance of this Article therefore focuses on the two more general claims that underlie *Free Enterprise Fund*: (1) that removal authority is a constitutionally privileged vector of bureaucratic control, and (2) that presidential control of the bureaucracy is necessary to achieve democratic accountability (or at least the level of democratic accountability that in the Court's view is constitutionally guaranteed). These propositions do not imply that the power to remove ensures plenary control. Nor do they provide a method of ascertaining how much removal authority is necessary in any given case. But they do imply that removal authority is sufficiently important for maintaining Article II values that it is an appropriate basis for close judicial review.

C. *The Political Question Doctrine*

Even if presidential removal authority falls within an Article II penumbra, does that mean federal courts should resolve challenges to statutory removal rules? Not necessarily. Federal courts long ago developed a "political question" doctrine to quarantine a domain of constitutional norms not enforced by federal courts. Intimated first by Chief Justice John Marshall in *Marbury v. Madison*,[105] the political question doctrine has evolved into a rather complex framework for sorting constitutional questions between judicial and political branch resolution.[106] It secured canonical formulation in the *Baker v. Carr* Court's enumeration of several factors that may independently trigger nonjusticiability.[107] While the resulting doctrine is not subject to easy summary, the Court's analysis underscored that the political question doctrine is "primarily a function of the separation of powers."[108]

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103. Complaint at 3, 25-27, State Nat'l Bank of Big Spring v. Geithner, No. 01-032 (D.D.C. June 21, 2012), *available at* http://cei.org/sites/default/files/SNB%20v%20Geithner%20-%20Complaint.PDF.

104. *Id.* at 27.

105. 5 U.S. (1 Cranch) 137, 170 (1803) ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.").

106. For a detailed account of the doctrine's evolution, see Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 248-73 (2002).

107. *See* 369 U.S. 186, 217 (1962).

108. *Id.* at 210.

Consistent with this view, the political question doctrine has been invoked frequently in cases touching on the design of political institutions. For instance, it has been employed to preclude the exercise of jurisdiction over challenges to impeachment proceedings,[109] the seating of delegates at national political conventions,[110] and regulation of the conduct of the National Guard.[111] And this is only a partial list.[112] As Chief Justice Marshall explained, such disputes tend to "respect the nation, not individual rights."[113] They also fit poorly into the federal courts' common law model of bilateral dispute resolution.[114] Judicial resolution of structural controversies may be especially undesirable given courts' inability to gather and aggregate the views of diverse actors potentially affected by a design decision. Such disputes are thought better resolved by the political branches, "each of which has resources available to protect and assert its interests."[115]

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109. Nixon v. United States, 506 U.S. 224, 228-35 (1993) (holding that the judiciary may not review the procedures used by Congress to impeach judges).

110. O'Brien v. Brown, 409 U.S. 1, 4-5 (1972) (granting a stay of a circuit court order that held a dispute over the seating of delegates at a national political convention to be justiciable).

111. Gilligan v. Morgan, 413 U.S. 1, 6, 11-12 (1973).

112. For further questions of political structure that have been ranked as political questions by the Supreme Court, see, for example, Coleman v. Miller, 307 U.S. 433, 452-56 (1939) (holding that the procedures for ratification of constitutional amendments are entirely within the discretion of Congress and therefore nonjusticiable); Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 149-51 (1912) (dismissing as a political question the issue whether a direct popular referendum violated the constitutional guarantee of republican government). Recent challenges to President Barack Obama's qualifications have generally been rejected as nonjusticiable. *See, e.g.*, Barnett v. Obama, No. SACV 09-0082, 2009 WL 3861788, at *14-15 (C.D. Cal. Oct. 29, 2009) (rejecting as a political question a challenge to President Obama's election on the ground that he was not a natural-born citizen), *aff'd on other grounds sub nom.* Drake v. Obama, 664 F.3d 774 (9th Cir. 2011) (focusing in large part on the plaintiff's lack of standing to bring suit rather than the political nature of the issue), *cert. denied sub nom.* Keyes v. Obama, 132 S. Ct. 2748 (2012). And commentators have suggested that the legal disputes over the line of presidential succession equally fall outside Article III competence. *See* Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 STAN. L. REV. 155, 156-57 (1995) ("Congress's power to specify what 'Officer' shall succeed to the presidency in the event of double death, incapacity, resignation, or removal is not subject to judicial review because of the political question doctrine.").

113. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803). The implication of this statement is that the courts are adept at addressing individual rather than national or public rights. Whether the judiciary is effective in protecting constitutionally guaranteed, judicially protected individual rights, however, is a matter of controversy. *See, e.g.*, Aziz Z. Huq, *What Good is Habeas?*, 26 CONST. COMMENT. 385, 401-03 (2010) (casting doubt on the utility of habeas corpus hearings in the recent and politically contentious Guantánamo military detention context).

114. *See* Vieth v. Jubelirer, 541 U.S. 267, 278 (2004) (Scalia, J., plurality opinion) (arguing that the Article III "judicial Power" solely comprises "the power to act in the manner traditional for English and American courts").

115. Goldwater v. Carter, 444 U.S. 996, 1004 (1979) (Rehnquist, J., concurring).

The relevant trigger here for nonjusticiability under political question rules is the potential "lack of judicially discoverable and manageable standards."[116] The Court has "never attempted to define" what it means by a judicially manageable standard.[117] It has suggested that a judicially manageable rule must be "principled, rational, and based upon reasoned distinctions," in contrast to a legislated rule, which "can be inconsistent, illogical, and ad hoc."[118] According to a plurality of the Court, a rule of decision fails this test when it relies excessively on jurists' subjective judgments,[119] or when it fails to generate predictable guidance.[120] By contrast, the mere fact that the policy-related effects of a rule of decision are clouded with uncertainty ex ante is insufficient to warrant a finding of nonjusticiability.[121] A leading scholarly account, offered by Richard

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116. Baker v. Carr, 369 U.S. 186, 217 (1962). The other possible triggers include a "textually demonstrable constitutional commitment" to another branch, "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion," an implicit expression through judicial resolution of a "lack of the respect due coordinate branches," "an unusual need for unquestioning adherence to a political decision already made," and potential embarrassment from "multifarious pronouncements by various departments on one question." *Id.* Another potential trigger for the political question doctrine not explicitly recognized in *Baker* but relevant to the removal question is the very absence of a textual assignment of removal authority. In *Goldwater v. Carter*, Justice Rehnquist suggested that the Constitution's silence as to how the United States could withdraw from treaties (by presidential action alone, or with the necessary involvement of the Senate), was a political question in part because the text was "silent as to [the Senate's] participation in the abrogation of a treaty." 444 U.S. at 1003 (Rehnquist, J., concurring). Justice Rehnquist's position implies that removal questions should not be settled by a federal court given the absence of textual specification.

117. Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1281 (2006); *accord id.* at 1278 ("In [deciding what is a judicially manageable standard], the Court, willy-nilly, conducts a startlingly open-ended inquiry in which, among other things, it weighs the costs and benefits of adjudicating pursuant to particular proposed standards.").

118. *Vieth*, 541 U.S. at 278 (Scalia, J., plurality opinion).

119. *Cf. id.* at 288 (stating that a judicial test for partisan gerrymandering was unmanageable when it required a court to determine first which party was in the majority in the state under circumstances in which both parties win some statewide offices).

120. *See id.* at 291 (rejecting a rule based on "[f]airness" because it is not sufficiently "solid and . . . demonstrably met" to "enable the state legislatures to discern the limits of their districting discretion" and fails to "meaningfully constrain the discretion of the courts").

121. An example of the Court's unwillingness to treat a controversy as nonjusticiable merely because of the complexity and magnitude of the policy consequences arose in the October Term 2011. In *Zivotofsky ex rel. Zivotofsky v. Clinton*, the Court considered a case justiciable despite the complex and uncertain impact that a judicial intervention might have on foreign policy and international relations. *See* 132 S. Ct. 1421, 1426, 1428, 1430 (2012) (holding the issue justiciable despite the lower courts' concerns that judicial intervention would require courts to weigh in on the political status of Jerusalem, a contentious foreign policy issue); *id.* at 1439-41 (Breyer, J., dissenting) (arguing that the claim should be considered nonjusticiable in light of the complex foreign policy issues involved and the likelihood that judicial intervention would result in "uncertain" political reactions in the Middle East). Consistent with *Zivotofsky*, this Article does not argue that merely because the

Fallon, has glossed the idea of a judicially manageable standard by observing that a rule may be underinclusive or overinclusive, but it cannot "diverge too far from the meaning of the constitutional guarantee that it implements."[122] Courts must be able to "generate predictable and consistent results," taking judges' epistemic constraints into account.[123]

Rather than essaying a comprehensive account of what a judicially manageable standard, I focus here on the minimal condition that a rule must be "principled" and "rational," and not generate "inconsistent, illogical, [or] ad hoc" results.[124] That condition does not require a perfect fit between a judicially crafted rule of decision and the underlying constitutional principle that justifies the rule. Manageable rules will often be somewhat over- or underinclusive in relation to those values.[125] Yet there must be some fit between a rule and the desired results. It cannot be, that is, that judges can select a rule of decision to enforce a given constitutional value when there is either no reliable causal link between the rule and the value, or where the link is so weak as to render that rule an "ad hoc" and unprincipled device for enforcing the value. To permit judges to select such rules would endow them with precisely the kind of unfettered discretion that the Court has condemned.[126] In short, I will assume that *where a rule of decision produces results that are systematically uncorrelated with its underlying constitutional justifications, there is an absence of judicially manageable standards*.

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underlying constitutional question of how removal power was allocated presents great complexity, it should be ranked as nonjusticiable. Unlike *Vieth*, however, *Zivotofsky* did not examine a specific rule of decision to ascertain its justiciability. Indeed, earlier precedent suggests that an inquiry into the meaning of a specific constitutional text can yield the conclusion that the latter supplies no judicially manageable standard. *See, e.g.*, Nixon v. United States, 506 U.S. 224, 230 (1993) (finding that the word "try" in the Impeachment Trial Clause "lacks sufficient precision to afford any judicially manageable standard of review of the Senate's actions").

122. Fallon, *supra* note 117, at 1282-84.

123. *Id.* at 1289-92 (italics and capitalization omitted).

124. *Vieth*, 541 U.S. at 278 (Scalia, J., plurality opinion).

125. In using the word "rule" in this context, I do not mean to exclude what in the context of another debate are distinguished as "standards." Both rules and standards can be judicially manageable or unfit for deployment in federal court depending on the circumstances.

126. Others have pointed to the scope of judicial discretion as a touchstone for the analysis of judicially manageable standards. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1786 (2012) (arguing that the nondelegation rule has been treated as a nonjusticiable rule because "[t]he danger is too grave that if courts attempted to police the boundaries of permissible delegation, they would approve of delegations that seemed to them necessary in light of policy realities, and disapprove of those that did not"). If courts could pick rules of decision with only weak connections to underlying constitutional justifications, their ability to pick and choose between potential rules would yield the same kind of impermissibly freewheeling judicial maneuvering.

The balance of the Article argues that *Free Enterprise Fund*'s doctrinal rule, which focuses on presidential removal authority as a mechanism for promoting democratic accountability, does not provide a judicially manageable standard. To be clear, making good on that claim means meeting no small burden of persuasion. I must show that there is no stable or reliable correlation between the promotion of presidential removal authority and democratic accountability. It is not sufficient to this end to point to mere slippage or a looseness of causal fit. This alone would not demonstrate that the rule of decision had strayed "too far."[127] Rather, I must demonstrate that there are systematic reasons for believing that the correlation between constitutional values and decisional rules is so fragile that it is implausible to hold up that rule as a stable and constant means of promoting the value.

The argument proceeds in two stages, which correspond to the following two Parts. First, in Part II, I show that the removal power is only weakly, if at all, correlated with presidential control, and that the chief executive will often reasonably prefer to use other technologies of control because the collateral costs of removal render it ineffectual. Therefore, removal authority is not the signal touchstone of presidential control that the *Free Enterprise Fund* Court assumes. Indeed, it will often be irrelevant to such control. Part III then shows that there is no consistent correlation between presidential control and democratic accountability. Perhaps counterintuitively, increasing presidential control has no reliable effect on democratic accountability. This is a result of interaction effects and strategic responses to judicial interventions. Put together, these two points sever the purported linkage between allocations of removal authority and democratic accountability. As Part IV develops at length, this means that the Court cannot use removal as a reliable proxy for democratic accountability, because the former has only an "inconsistent" and "ad hoc" effect on the latter. Stated in doctrinal terms, this means that the core syllogism of *Free Enterprise Fund* cannot yield a judicially manageable standard.

II. REMOVAL AUTHORITY AS A MEANS OF BUREAUCRATIC CONTROL

This Part takes up the first part of *Free Enterprise Fund*'s syllogism: the claim that the removal power is an important, even essential, tool in establishing control of an agency. By subjecting this causal assertion to careful scrutiny, I aim to take a first step toward showing that the Court's rule of decision is uncorrelated to the ultimate constitutional good of democratic accountability. To ascertain whether removal authority is indeed central to the problem of bureaucratic control, I begin by situating removal within the larger context of mechanisms available to the White House to influence administrative outcomes. Merely the existence of multiple mechanisms for presidential control of the

127. Fallon, *supra* note 117, at 1282-84 (internal quotation marks omitted) (quoting *Vieth*, 541 U.S. at 291 (Scalia, J., plurality opinion)).

bureaucracy provides a threshold reason for questioning the existence of any necessary nexus between removal and control. Moreover, attention to the interactions between these alternative mechanisms of presidential control suggests that the marginal effect of a judicial intervention invalidating a for-cause provision will vary from case to case. Further, my analysis suggests that replenished presidential removal power can interact with other design features to produce unintended and undesirable effects. All of this suggests that Presidents will not prioritize removal as a tool for reining in agencies.

Having compared removal with substitute technologies of control, I consider whether removal is indeed as powerful a tool as the *Free Enterprise Fund* syllogism suggests. I argue that it is not. An analysis that focuses on information asymmetries and transaction costs shows that the presidential power to remove will not necessarily cash out as control of an administrative agency. Indeed, removal can have positively undesirable collateral effects. In drawing Part II to a close, I marshal empirical evidence to show that this is more than a theoretical possibility. Both historical evidence from the United States and comparative evidence from the United Kingdom, where prime ministers have plenary removal authority, suggest that the possession of removal authority yields no guarantee of bureaucratic control. In short, it is wrong to assume that the removal power will always be an important or even effectual tool of agency control.

A. *The Plural Technologies of Bureaucratic Control*

To understand the relationship of removal power to the control of bureaucrats' policy decisions, it is helpful to start from the simple proposition that there is what economists term an agency relationship between the agency and its superiors. Implicit in the analysis offered by the *Free Enterprise Fund* Court is the model of an elected official, who is the principal, trying to ensure that the bureaucrat, who is the agent, complies with the former's wishes.[128] If the agent's acts diverge from the principal's preferences, a problem arises that is commonly called agency slack.[129] Hence, a way to frame the removal-control question here is whether the power of removal is so central to the mitigation of agency slack that it warrants a constitutional gloss. In pursuing this analysis, it is worth stressing at the outset that at issue is the President's possession of such power, not necessarily the frequent use of a removal power. Actual exercise of removal power may be unnecessary to abate substantial agency slack. A

128. *Cf.* ANTHONY DOWNS, INSIDE BUREAUCRACY 134 (1967) (characterizing bureaucracies in principal-agent terms).

129. For general discussion of the problems that arise in agency relations in the democratic context, see Gary J. Miller, *The Political Evolution of Principal-Agent Models*, 8 ANN. REV. POL. SCI. 203, 207, 209-10 (2005) (identifying numerous kinds of agency slack present under democratic governance); Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 756-57 (1984) (developing a similar analysis).

credible threat of removal induces a stable equilibrium in which agency slack takes a de minimis value. In the few instances an agent strays, removal power is flexed *pour encourager les autres*. Hence, the absence of observed removals is no reason to think that removal does not matter to the balance of power internal to government.

Viewing the link between removal and control in agency terms highlights a peculiar lacuna in the Court's analysis. Agency relationships are common currency in contract and corporate law. But in these private law contexts, it is rarely the case that agency slack is minimized solely by power to extinguish an agent's authority. Rather, agency costs in private contracting are mitigated by a range of strategies that include selection filters, monitoring, incentives, and insurance.[130] These tools operate both ex ante and ex post. In many private law contexts, the cost of monitoring agents outpaces the cost of selecting "good" agents initially. Wise principals hence can either invest in ex ante selection or in ex post monitoring and discipline.[131] In some cases, the former will dominate the latter. (Consider in this regard the academic practice of lateral hiring with tenure.) This is often true in employment situations where it can be too costly to monitor closely agents' efforts, but where job markets generate powerful signals to separate potential employees into good and bad types.[132] By contrast, *Free Enterprise Fund* focused narrowly on one control mechanism. It styled removal as the sine qua non of political control.[133] All else was relegated to the sidelines as irrelevant "bureaucratic minutiae."[134]

A threshold question, therefore, is whether the problem of agency slack must be analyzed differently in the private and public contexts because of the range of available control mechanisms in private law that have no analog in the public context.[135] This in turn invites an inquiry into alternative mechanisms that Presidents may have at their disposal to regulate agency action.[136] It takes

130. *See generally* Steven Shavell, *Risk Sharing and Incentives in the Principal and Agent Relationship*, 10 BELL J. ECON. 55, 55-57 (1979) (exploring agency models).

131. TIMOTHY BESLEY, PRINCIPLED AGENTS? THE POLITICAL ECONOMY OF GOOD GOVERNMENT 99 (2006) (identifying monitoring and selection as the principal difficulties in political agency problems). Legal scholars also assume that "[t]he key to independence is security of tenure." BERNARD SCHWARZ, ADMINISTRATIVE LAW § 1.10 (3d ed. 1991); *accord* CALABRESI & YOO, *supra* note 96, at 7; Calabresi & Prakash, *supra* note 23, at 596-97; Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 51-52.

132. On this class of sorting problems, see Michael Spence, *Job Market Signaling*, 87 Q.J. ECON. 355, 361-68 (1973).

133. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3153 (2010).

134. *Id.* at 3156.

135. *Cf.* JOHN BREHM & SCOTT GATES, WORKING, SHIRKING, AND SABOTAGE: BUREAUCRATIC RESPONSE TO A DEMOCRATIC PUBLIC 11 (1997) ("Production in public bureaucracies nearly always differs from production in private firms . . . .").

136. *Cf.* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 30 (2010) (emphasizing "the need to look beyond

only brief inquiry to suggest that the array of devices for presidential control of the bureaucracy is vast[137]:

- *Presidential appointment power*: Article II of the Constitution vests the President with indefeasible control over the selection of "principal officers" subject to possible rejection by the Senate.[138] "The power to appoint key personnel is one of the President's most important instruments for asserting his will over the executive branch."[139] Presidents greatly influence the pool of senior federal appointees.[140] President Reagan, for example, used appointments in a "systematic" way to "promot[e] political responsiveness."[141] To be sure, the power to appoint is no panacea. Appointees can "drift" from presidential preferences,[142] although there is some question about the magnitude of this phenomenon.[143] And independent agencies structured as multimember boards with staggered appointment schedules can make presidential control more costly.[144]

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removal if the goal is to create the strongest barrier possible against capture," but making points that apply more broadly).

137. *See* CALABRESI & YOO, *supra* note 96, at 7 (noting that removal is but "one among many factors that affect presidential control over executive branch officials"). In what follows, I focus on mechanisms available to White House actors, and not on mechanisms available to Congress, except where a legislative technology of control is fungible between the branches. Of course, many congressional tools to control the bureaucracy are not fungible. *See* Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 769-70 (1983) (noting how Congress can exert influence over agencies by favoring top performers, holding oversight hearings, and wisely using the existence of confirmation hearings to influence nominations).

138. U.S. CONST. art II, § 2, cl. 2; Buckley v. Valeo, 424 U.S. 1, 132-37 (1976) (per curiam) (describing effect of Appointments Clause and holding that Congress cannot appoint officers).

139. M. Elizabeth Magill, *The First Word*, 16 WM. & MARY BILL RTS. J. 27, 38 (2007).

140. *See generally* ADRIAN VERMEULE, THE SYSTEM OF THE CONSTITUTION 110-11 (2011) (providing a brief typology of selection mechanisms).

141. Terry M. Moe, *The Politicized Presidency*, *in* THE NEW DIRECTION IN AMERICAN POLITICS 235, 235 (John E. Chubb & Paul E. Peterson eds., 1985).

142. Magill, *supra* note 139, at 37.

143. For empirical and theoretical grounds for skepticism about the prospect of agency drift from the preferences of elected superiors, see Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2143-45 (2004); David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 119-23 (2000). Ideological shift in the views of Supreme Court Justices is said to be "pervasive," *see* Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1486 (2007), but that drift arises only in the space of what are several presidential terms, *see id.* at 1504-14.

144. Some agencies also have bipartisanship requirements in addition to multimember, staggered boards, *see, e.g.*, 2 U.S.C. § 437c(a)(1) (2011) (providing that no more than three of the six appointed members of the Federal Election Commission can be affiliated with the same political party), a structure that further increases the costs associated with establishing presidential control over agency leadership.

But this friction should not be overstated. Empirical studies suggest that it takes the White House on average only nine to ten months to obtain a party majority on such boards.[145] Presidents also exercise significant agenda control via their power to appoint the chairs of multimember commissions.[146] The FCC chair, for example, "serves at the President's pleasure, controls the agenda [and] bring[s] to a vote only those items for which he or she has support."[147]

- *Budgeting control*: The modern White House has distinct budgetary and regulatory control tools. Until 1921, Congress exercised substantial control over the bureaucracy by dint of its budgeting primacy.[148] Through legislation in 1921, as amended in 1939, Presidents gained substantial power to propose, supervise, and control the budget of even independent agencies.[149] Recently, however, Congress has exempted some (but

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145. Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 469 (2008); *id.* at 470 (reporting that it took on average twenty-six months for Presidents to secure an absolute majority of their own appointees). A President's ability to make recess appointments to fill vacancies, U.S. CONST. art. II, § 2, cl. 3, likely contributes to the ease with which Presidents can populate agency leadership with members of their own parties. Congress has attempted to limit this practice by exercising its appropriations authority. 5 U.S.C. § 5503 (limiting payment to recess appointees).

146. *See* Breger & Edles, *supra* note 16, at 1164-81 (discussing chairs' powers and noting that chairs of such bodies often align their agenda with that of their appointing President).

147. Keith S. Brown & Adam Candeub, *Independent Agencies and the Unitary Executive Debate: An Empirical Critique* 4 (Mich. State Univ. Coll. of Law Legal Studies Research Paper Series, Paper No. 06-04, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1100125. It is important to note that Brown and Canteub do not agree with my view of the appointment power. They argue that "unitary executive advocates *underestimate* the degree to which independent agencies frustrate presidential accountability." *Id.* at 5.

148. Pursuant to Article I, Section 9 of the Constitution, the "'power of the purse' lies in the Congress." Kenneth W. Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271, 278 (1977). Congress exercised this power through the nineteenth century not only through its appropriations power, but also through framework legislation regulating fiscal flows thorough the federal government. *See* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1364-77 (1988) (discussing the two major pieces of nineteenth century framework legislation to exercise control over budgeting). In 1919, the House Appropriations Committee established a Select Committee on the Budget that drafted a new budget framework that "vested responsibility for the preparation of the budget solely in the President and provided for the establishment in his office of a Bureau of the Budget to give him technical assistance." PAUL STUDENSKI & HERMAN E. KROOSS, FINANCIAL HISTORY OF THE UNITED STATES 323 (2d ed. 1963).

149. Budget and Accounting Act, 1921, Pub. L. No. 67-13, tit. II, 42 Stat. 20, 20-23 (granting greater budgetary powers to the President), *amended by* Reorganization Act of 1939, Pub. L. No. 76-19, § 201, 53 Stat. 561, 565 (expanding the President's budgetary control to include "any regulatory commission or board"). With the post-1921 shift of greater budgetary control to the President, the White House could use its influence over the budget to influence and discipline both executive and independent agencies. *Cf.* Susan Bartlett Foote, *Independent Agencies Under Attack: A Skeptical View of the Importance of*

not all) independent agencies from White House fiscal control.[150] Nevertheless, independent agencies such as the Federal Reserve and the SEC still "cannot afford to flout the views of the President," who continues to exercise substantial control as a consequence of his effective power of the purse.[151] To date, it is worth noting, few agencies have been endowed with both budgetary independence and good-cause protection. The new Consumer Financial Protection Bureau possesses both qualities,[152] a status that might be thought to conduce an unusual degree of autonomy.[153]

- *Regulatory control*: Regulatory control by the White House of agency rulemaking is secured through an executive order that compels agencies to submit certain proposed rules to the Office of Information and Regulatory Affairs (OIRA) for review.[154] Independent agencies do not need ex ante approval for regulations, but still must submit regulatory plans to OIRA annually.[155] Presidents have also long taken the view that they could bring independent agencies under greater OIRA supervision.[156] Indeed, President Clinton amended the executive order pursuant to which OIRA operates to extend the White House's coordination

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the Debate, 1988 DUKE L.J. 223, 233-34 (discussing the Reagan Administration's efforts in this regard). For a discussion that emphasizes the President's power to channel spending to political allies through these means, see Christopher R. Berry et al., *The President and the Distribution of Federal Spending*, 104 AM. POL. SCI. REV. 783, 787-88 (2010).

150. *See* Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 963-64 & n.106 (1980) (noting trend); Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 HARV. L. REV. 1822, 1829 (2012) ("The recent history of the SEC (specifically, the chairmanship of Arthur Levitt from 1993 to 2001) illustrates the primacy of congressional control through the budget and the influence of appropriations over independent agencies.").

151. Bressman & Thompson, *supra* note 28, at 633-34; *see also* Haoran Lu, *Presidential Influence on Independent Commissions: A Case of FTC Staffing Levels*, 28 PRESIDENTIAL STUD. Q. 51, 51 (1998).

152. *See* 12 U.S.C. §§ 5491(c)(3), 5497(a) (2011) (providing removal protection and financial independence).

153. For an insightful discussion, see Note, *supra* note 150, at 1840-43.

154. *See* Exec. Order No. 12,866, § 6, 3 C.F.R. 638, 644-48 (1993), *reprinted in* 5 U.S.C. § 601. Executive orders more generally can be used as instruments of control. *See* Frank B. Cross, *Executive Orders 12,291 and 12,498: A Test Case in Presidential Control of Executive Agencies*, 4 J.L. & POL. 483, 489-98 (1988) (explaining how executive orders serve as controlling directives for how members of the executive branch administer federal law).

155. Exec. Order No. 12,866, § 4, 3 C.F.R. at 642-43.

156. Strauss, *supra* note 24, at 592 ("Both President Carter and President Reagan were advised . . . that they had authority to include the independents in their executive orders promoting economic analysis of proposed rules as an element of regulatory reform."); *see also* Barkow, *supra* note 136, at 31 ("It is an open constitutional question whether the President could require traditional independent agencies . . . to submit cost-benefit analyses of proposed regulations to OIRA for review.").

mandate to independent agencies.[157] There is also an argument, albeit not one uniformly endorsed, that "the President has the legal authority to dictate the substance of regulatory decisions entrusted by statute to agency heads."[158] Finally, in August 2012, Senator Rob Portland introduced into the Senate a bill entitled the Independent Agency Regulatory Analysis Act of 2012 that would have extended OIRA review to independent agencies by statute.[159]

- *"Presidential administration"*: Presidents exercise significant directive influence on agencies' policy decisions even without formal decisional override power. In addition to leveraging the ample public prestige of the White House to "jawbone" agencies,[160] Presidents also use preregulatory directives in the form of official memoranda and postregulatory statements to claim "ownership" of agency decisions. These tactics have been labeled by then-Professor Kagan "presidential administration."[161]
- *Litigation authority*: Although independent agencies usually determine their own litigation positions before lower courts,[162] it is increasingly common for Supreme Court briefs on behalf of the federal government

157. Exec. Order No. 12,866, 3 C.F.R. at 642; Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1507 (2002) (discussing President Clinton's change).

158. Robert V. Percival, *Who's In Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2488, 2538 (2011) (noting that most scholars do not believe that the President has this authority); Nina A. Mendelson, *Another Word on the President's Statutory Authority over Agency Action*, 79 FORDHAM L. REV. 2455, 2457-58 (2011) (noting that then-Professor Elena Kagan has argued that "a reasonable interpretive principle is to understand a delegation [of authority] to an executive branch agency as Congress leaving open, rather than foreclosing, the possibility of presidential directive authority").

159. *See* Independent Agency Regulatory Analysis Act of 2012, S. 3468, 112th Cong. § 3(c) (as introduced by Sen. Robert Portman, Aug. 1, 2012). At the time of this writing, this bill has not been enacted into law.

160. Verkuil, *supra* note 150, at 943 (internal quotation marks omitted) (describing the practice). Informal contacts may be an important channel for threats of removal, permitting the President to have more direct pre-removal influence. *Id.* at 957 ("To be effective, the power to remove must imply the lesser power to counsel subordinates privately and to consult before the axe falls."). Interestingly, empirical evidence suggests that formal presidential statements have an aversive effect on agencies. B. Dan Wood & Richard W. Waterman, *The Dynamics of Political-Bureaucratic Adaptation*, 37 AM. J. POL. SCI. 497, 524 (1993) ("Presidential statements alter the tone of executive-bureaucratic relations to produce movements that suggest a reaction against, rather than a response to, presidential influence.").

161. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2250, 2290-99, 2301-02 (2001).

162. *See generally* Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 278-79 (1994) (identifying and discussing various arrangements for some independent agency control over litigation efforts).

to be filed jointly with the Solicitor General, who functions to some extent as a vehicle for White House control over federal agencies.[163] Even where an agency has independent litigation authority, moreover, the Solicitor General has the power to lodge a brief opposing that agency's views in federal court, thereby effectuating some measure of presidential control.[164] As a consequence, the White House exercises considerable control in the most important tier of legal disputes. There is no reason, beyond easily remedied capacity constraints, why the Solicitor General could not take greater control of litigation in the courts of appeals.

- *Controlling interactions between agencies*: Presidents promulgate rules regulating interagency interactions in complex regulatory areas so as to amplify White House control of policy outcomes.[165] The White House here follows a congressional strategy of tasking one agency with "lobbying" another to secure policy outcomes that are not necessarily the second agency's priority.[166] Such interagency interactions are feasible because of ubiquitous overlap in existing regulatory entities' jurisdictions.[167] Complicating the picture, the same sort of jurisdictional complexity may also function as a barrier to presidential control if Congress uses "administrative diversity and fragmentation . . . to insulate new administrative agencies from political control."[168]
- *Reorganization authority*: Presidents have often exercised broad power to reorganize the federal bureaucracy to achieve policy goals they cannot secure through existing structures. For example, the National Security Agency, the Welfare Administration, and the Bureau of Alcohol, Tobacco and Firearms are all creatures of executive fiat.[169] A 2002 study found that fifty-eight percent of entities obtain a line in the

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163. *See* Devins & Lewis, *supra* note 145, at 497 tbl.1 (reporting almost uniform practice of filing joint agency-Solicitor General briefs from 1995 to 2004); *see also* Bressman & Thompson, *supra* note 28, at 644-45 (explaining how the Solicitor General can overrule the SEC's view of what position to take in litigation). To be sure, the Solicitor General also has a reputation for independence from political control, but this only occasionally matters in White House-agency conflicts. During the Carter Administration, for example, Attorney General Griffin Bell defended agency prerogatives against White House control. Breger & Edles, *supra* note 16, at 1161.

164. See examples developed in Aziz Z. Huq, *Enforcing (but Not Defending) 'Unconstitutional' Laws*, 98 VA. L. REV. 1001, 1031-34 (2012).

165. *See* Keith Bradley, *The Design of Agency Interactions*, 111 COLUM. L. REV. 745, 748 (2011).

166. J.R. DeShazo & Jody Freeman, *Public Agencies as Lobbyists*, 105 COLUM. L. REV. 2217, 2221 (2005).

167. *See* Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 185, 218-44 (2011).

168. LEWIS, *supra* note 31, at 9.

169. William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. POL. 1095, 1096-97 (2002).

> presidentially created legislative budget.[170] This suggests that unilateral presidential action has significant stickiness. It is, however, arguable that the White House no longer possesses authority over agency creation and redesign. Between 1932 and 1984, federal statutes endowed the White House explicitly with such power.[171] Federal statutory law no longer empowers the President in this way. Even in the absence of reorganization authority, Presidents can in the alternative appoint White House-based "czars" with directive or hortatory influence over policy outcomes. This trend, much remarked upon during President Barack Obama's administration, seems to have substituted for the historical use of White-House-based task forces, such as former Vice President Richard Cheney's "energy task force" and Vice President Dan Quayle's Council on Competitiveness.[172]

This list is long, but not necessarily comprehensive. It shows that removal is not the only mechanism available to a political principal seeking influence over a bureaucratic agent. Many other alternatives exist. Most are available whether an agency is denominated independent or executive.[173] And some, such as the power over commission chairs, are available only with respect to independent agencies.

Given the observed varieties of political control technologies, *Free Enterprise Fund*'s insistence on removal as central to agency control is hardly self-evident. It instead calls for closer investigation.

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170. *Id.* at 1097.

171. *See* HAROLD C. RELYEA, CONG. RESEARCH SERV., RL33441, EXECUTIVE BRANCH REORGANIZATION AND MANAGEMENT INITIATIVES: A BRIEF OVERVIEW 3-4 (2008), *available at* http://www.fas.org/sgp/crs/misc/RL33441.pdf (documenting history of statutory authorizations for presidential reorganization authority).

172. Consider President Obama's appointments to two White House offices created during his administration: Tom Daschle as the head of an Office of Health Reform and Carol Browner as head of the White House Office of Energy and Climate Change Policy. Aaron J. Saiger, *Obama's "Czars" for Domestic Policy and the Law of the White House Staff*, 79 FORDHAM L. REV. 2577, 2577-78 (2011). On the energy task force, see Cheney v. U.S. Dist. Court, 542 U.S. 367, 373 (2004). On the Quayle task force, see PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION 94 (2002). Such White House bodies intervene directly in discrete regulatory decisions. For example, one of the Council on Competitiveness's first major interventions involved disapproval of an EPA rule banning incineration of lead acid batteries and requiring recycling of a quarter of waste streams by municipal incinerators. Michael Weisskopf, *EPA Proposal on Recycling Is Trashed: White House Panel Opposes Agency Plan*, WASH. POST, Dec. 20, 1990, at A17.

173. Some are currently not used against independent agencies (for example, regulatory review by OIRA) but are in theory available. *Cf.* Strauss, *supra* note 24, at 593 ("The President's effective power over the independents would counsel against excluding his concerns even if political loyalties did not command attention.").

B. *The Removal Power in Institutional Context*

Situating the removal power within a larger array of political control mechanisms reveals two threshold reasons for doubting its centrality. First, the *marginal effect* of judicial enforcement of presidential removal authority is not fixed. Its magnitude depends instead on the available substitute mechanisms of control at the time of a court's intervention. Second, *interaction effects* between removal authority and other control mechanisms may have perverse, unintended effects inconsistent with the Court's North Star of democratic accountability.

It is important, at the threshold, to emphasize that my point in this Subpart is *not* that Presidents never remove any executive branch officials. It is surely possible to diagnose some cases of resignation, for example, as de facto firings,[174] such that the mere observation of low rates of removal would not be probative. Rather, my aim in this following Subpart is to raise doubts about the presumptive centrality of removal as an instrument of presidential control.

1. *Variable marginal effects*

The variety of viable presidential control mechanisms strongly suggests that the marginal effect of eliminating statutory for-cause protection in favor of White House supervision is not constant but will instead vary dramatically depending on ex ante institutional specifications. A focus on marginal effects does not undermine wholly the intuition that removal is pivotal to political control—but it attaches a significant asterisk.

Recall first that *Free Enterprise Fund* conceptualizes political control as a binary variable.[175] Either it is present in the form of removal authority or it is wholly absent. Binary characterization of political control allowed the Court to ignore other mechanisms of political control. But this is too simplistic. The coexistence and overlap of various oversight mechanisms means that control is not a discrete, dichotomous variable but a continuous one with diverse etiologies. Its variegated causes operate on different objects via distinct pathways. Some control mechanisms, including appointment and removal powers, operate upon the officeholder. Others, such as OIRA review, have policies as their focus. Yet others—think of the reorganization power—target the institutional

174. For example, in April 2012, the Head of the Government Services Administration (GSA), Martha Johnson, resigned in the wake of a damning Government Accounting Office report on GSA waste. Jonathan Weisman, *Agency Administrator Fires Deputies, Then Resigns Amid Spending Inquiry*, N.Y. TIMES, Apr. 3, 2012, at A11, *available at* http://www.nytimes.com/2012/04/03/us/politics/general-services-administration-chief-resigns.html. It is very likely that had Johnson not resigned, she would have been expeditiously shown to the exit. I am grateful to Anne Joseph O'Connell for drawing this example to my attention.

175. *See supra* text accompanying notes 73-82.

ecology of the bureaucracy. The fact that mechanisms of political control operate along different causal pathways with wholly different objects suggests these mechanisms are cumulative in effect. Elected officials, in other words, can be allotted any combination of the control of persons, policies, or even institutions. With each additional form of control, the ability to influence policy increases, with each tool bringing subtly different forms of influence. Granular tools would enable targeted micromanagement, for example, while more molar ones would enable broad, low-information-cost control.

The continuous, multifactor nature of control is reflected in the longstanding uncertainty about the boundary between independent and executive agencies.[176] "[O]ne . . . may search both the law and the literature on congressional-bureaucratic relationships . . . in vain for an indication that the relationships between these overseers and the agencies var[y] in any regular way in accordance with agency structure."[177] If there are too many factors in play to allow some binary test for control to work well, it is hard to see why control should be reduced exclusively to the removal power.

Moreover, if control is a continuous—not a binary—variable, it follows that the judicial addition of removal authority to a supervising official's toolkit cannot be presumed always to have a transformative effect. For any given agency, the magnitude of a removal-promoting decision's marginal impact will be a partial function of what levers an official already possesses to control an agency. Roughly speaking, the more tools an official already has, the less difference removal authority will make. In some cases, judicial installation of removal authority will bolster political control significantly. But in other circumstances, the same decision will have a negligible effect because an official already has an arsenal of control mechanisms on hand. In short, the marginal effect of judicial interventions on the removal power is contingent and highly variable.

Each additional increment of control will also likely be subject to diminishing marginal returns. It seems likely that removal power makes a large difference if an official has no other mechanisms for controlling an agency. With each additional tool the official has before judicial intervention, it seems likely that the official will be increasingly indifferent to the additional marginal gain in control, if only because elected officials will generally be concerned with only a subset of sporadic policy decisions by different agencies, rather than having an ongoing interest in micromanaging that agency. So a failure to take the

176. *See* Breger & Edles, *supra* note 16, at 1136-37 (observing that "notions of independence have varied considerably and indeed have often transmigrated substantially"); Bressman & Thompson, *supra* note 28, at 603.

177. Strauss, *supra* note 24, at 591; *see also* Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2081-82 (2005) (emphasizing how much control of independent agencies even President Carter had prior to Reagan-era centralizing reforms, "which tends to contradict the idea that the president must possess the removal power in order to exercise control over these agencies").

last few steps to perfect control will have a relatively small effect on an official's ability to shape agency policy decisions.[178] The resulting utility function of removal power for elected officials will therefore be convex.

Could courts take account of the complex, continuous nature of control, and award removal authority only when its marginal effect exceeds a specific threshold of significance? It is hard to see how. Courts are ill-positioned to make the sort of nuanced, synoptic judgments about institutional context necessary to assess accurately the effect of adding one increment of political control. Nor is it clear how control would even be measured in this enterprise. Should it be judged from the perspective of the Oval Office or from the perspective of the agencies?[179] The choice matters. Agency reactions to the exercise of political control may not be instantaneous, since agencies may be uncertain as to the precise nature of the desired policy, or find it difficult to change course quickly.[180] What an agent perceives as a timely response, however, may be construed as obstreperous foot-dragging by a principal.

The facts of the *Free Enterprise Fund* case only further undermine confidence in the Court's ability to assess accurately the marginal value of its interventions. In his dissent, Justice Breyer highlighted evidence that expanding SEC control of the accounting board would have no marginal effect on the PCAOB's behavior because of the ample de facto authority already exercised by the Commission through appointment powers, budgetary powers, and control of investigations.[181] The majority's formalist approach meant it saw no need to respond to Justice Breyer's empirical argument. Whether or not Justice Breyer was correct, it should be troubling that the majority did not even acknowledge the problem of variable marginal effects. This means lower courts wishing to employ removal as a proxy for political control have no guidance in grappling with the complex institutional ecology questions precedent to the

178. Are there counterexamples in which the President would value the incremental change allowing perfect control as much as the initial incremental unit allowing a first measure of control? It is hard to conjure examples.

179. For an argument that the agency perspective should prevail, see Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 49 (2010) (arguing that "agency insiders are the right people to ask about the messages they receive from the White House").

180. There is evidence that agencies do not respond immediately to presidentially or congressionally initiated budgetary shifts, even when those constitute "powerful signals" of politically desirable reorientation. *See* Daniel P. Carpenter, *Adaptive Signal Processing, Hierarchy, and Budgetary Control in Federal Regulation*, 90 AM. POL. SCI. REV. 283, 285, 296-98 (1996) (identifying signaling function of budgets and lagged responses by the FCC and the FDA).

181. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3173 (2010) (Breyer, J., dissenting) (describing the SEC's powers over PCAOB). Recall that the SEC appointed the PCAOB's board, approved its budget, and examined its records as necessary and appropriate. Further, PCAOB's mundane operations were subject to close SEC control because the latter had to endorse the Board's decisions as to whether to compel document production or testimony. *See supra* text accompanying notes 63-67.

project of promoting democratic accountability. And it means that it cannot be said with confidence that a given judicial intervention in favor of increased presidential removal authority will have any meaningful effect on the magnitude of presidential control. At least sometimes, it seems likely that the effect of judicial intervention will be nugatory.

2. *Interaction effects*

The assumption that adding removal to the White House's toolkit necessarily increases presidential power also ignores the potential for interaction effects between different levers of political control. Interaction effects in complex government bureaucracies arise when "the fates of units and their relations with others are strongly influenced by interactions at other places."[182] Such interconnectedness "can defeat purposive behavior" because the immediate and predicted consequences of a reform may be outweighed by more indirect and less predictable downstream effects.[183] In particular, institutional designers must look not only to the immediate effects of a proposed change, but also cast an eye downstream to ask how other elements in the system will respond strategically to a change.

There are two relevant complications—the result of interaction effects and strategic responses—that suggest judicial intervention may generate less, not more, White House control. A substantial possibility of either one casts doubt on the assumed linearity of the removal-to-political-control relationship.

The first problem arises because adding removal authority to a President's arsenal may change the incentives of agency officials in ways that make achievement of a President's agenda *less* likely. The intuition is as follows. Once the President has removal authority (say, as a result of judicial intervention), risk-averse bureaucrats trim their sails even when pursuing an incumbent White House's agenda because they anticipate the possibility of future regime change. That is, the possibility of removal increases the potential downstream cost of staking out policy positions far from the political median, and as a consequence dampens bureaucrats' ardor on projects that, at least in some instances, will conform to a given President's policy agenda.

Bureaucrats can be plausibly modeled with only a pinch of stereotyping as having long time horizons and low discount rates. As a result, the fact of tighter presidential control means that they must attend not only to current preferences, but also account for the possibility of later change at the White House that would render their past exertions politically distasteful. If they wish to remain at their posts regardless of shifting political fortunes, agency officials who otherwise would aggressively pursue a President's agenda will, under a regime of

182. ROBERT JERVIS, SYSTEM EFFECTS: COMPLEXITY IN POLITICAL AND SOCIAL LIFE 17 (1997).

183. *Id.* at 18.

broad presidential removal authority, hold back at the margin out of concern that a subsequent President may exercise that removal authority to change the composition of agency leadership.[184] Bureaucrats, in other words, will decline to take as many risks on outlying policies. By contrast, if the agency is buffered from political change, it may be easier for an otherwise eager bureaucrat to promote a policy sought by a like-minded White House without fear of future retaliation.[185] As a result, in the short term—which is the only time frame that matters to a term-limited official such as the President—removal can dampen the ability of elected officials to secure desired policy actions.

It is hard to know in advance, to be sure, whether Presidents will find this ideologically dampening mechanism desirable or a hindrance. Sometimes, Presidents' policy goals may converge with those of moderate agencies. Other times, a President may welcome the opportunity to work with an agency that is unconcerned with later retribution. Yet other times, that same agency may be a barrier to presidential policy ambitions. Notwithstanding this variance, the important point here is that removal authority has ambiguous and contingent effects on presidential policy ambitions. Its relationship to White House control, in short, is not as linear as the *Free Enterprise Fund* Court implies.

The second problem arises through dynamic selection effects. It is not only the threshold criteria for selecting government officials that influences the pool of applicants for a job opening. Back-end rules regulating employment also change that pool. For example, official immunity against tort liability for constitutional violations might encourage risk-averse candidates to apply for government jobs or might select for those who enjoy violating the rights of others.[186] In a similar vein, robust presidential removal authority may foster deleterious selection effects. Potential bureaucrats come in many stripes, from

184. There is often in institutional design a "tradeoff between impartiality and motivation or energy." ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL 62 (2007). Removal sharpens the incentive to respond to political motivations, and as such might undercut impartiality. This is clearly a concern with respect to agencies that engage in adjudications. Indeed, the *Free Enterprise Fund* Court excluded such agencies from its analysis. *See Free Enter. Fund*, 130 S. Ct. at 3160 n.10. Impartiality, however, is valuable not only when agency officials are engaged in adjudication. On many policy matters—think of estimates of future national security threats—a rational policymaker may wish for impartiality over influence. An advocate of mandatory removal authority, of course, may reject this argument by saying the loss of impartiality is a necessary cost of the democratic control mandated by the Constitution.

185. The possibility of such bureaucratic hedging may be a function of presidential control mechanisms that focus on persons and not policies. This may be a reason for the White House to prefer policy-focused, not people-focused, mechanisms.

186. VERMEULE, *supra* note 140, at 106-07. Following one of Vermeule's models, I assume here "that the pool of officeholders changes over time, that officials' motivations are heterogeneous, and that those motivations are at least in part an endogenous product of the selection process." *Id.* at 115.

the power-hungry empire builder to the policy zealot to the wastrel slacker.[187] Different removal rules influence which among these types applies to a bureaucratic post. Strong presidential removal authority signals to prospective applicants that their tenure will be more, rather than less, subject to scrutiny on transient partisan grounds. It is plausible to posit that candidates with deeper expertise on a policy issue will be less likely to apply for such positions. At the margin, they may prefer positions in the lobbying and advocacy domains in which they could express their preferences more candidly, especially if they cannot be certain that potential political superiors will always be sympathetic to their views. As a result, a position subject to plenary presidential removal authority may be less likely to attract qualified, highly skilled candidates than one insulated from such potentially partisan control. In this way, a judicial ruling endowing the President with removal authority can paradoxically prove self-defeating from the perspective of a White House seeking to effectuate policy outcomes. If the effect of diminishing the appointment power's utility is greater than the gain obtained from increased removal authority, the net consequence of the latter may be negative.

Both the dampening effect and the dynamic selection effect suggest that the question whether an increase in presidential removal authority augments or diminishes White House control of an agency cannot be answered in the abstract. Rather, it all depends on the empirics of a given case. This means that Presidents will not always welcome judicial promotion of presidential removal authority. On occasion, the latter may convey to the voting public an impression of more fulsome presidential control than in fact is the case. When a White House wishes to communicate clearly the limitations upon its ability to secure policy goals, judicial insistence on presidential removal authority may well have the perverse effect of *distorting* perceptions of political accountability in ways that render elections less accurate as retrospective judgments on politicians' performance. This would not be a problem if judges were well situated to sift background circumstances to gauge accurately the effect of endowing the President with removal power. But the specific facts of *Free Enterprise Fund* amply show that judges are ill-equipped or ill-disposed to make accurate judgments of the marginal effect of promoting presidential removal authority. At the very least, these arguments demonstrate that it cannot be said that removal is necessarily a central tool in a President's arsenal. Pressed further, they are a first rupture in the causal chain between removal and democratic accountability.

187. *See* Ronald Wintrobe, *Modern Bureaucratic Theory*, *in* PERSPECTIVES ON PUBLIC CHOICE 429, 429-39 (Dennis C. Mueller, ed., 1997) (identifying different theories of bureaucratic behavior).

C. *Theorizing Removal's Limits*

Free Enterprise Fund's equation of removal and control suffers a further deficiency. As a method of exercising control over an agent, removal is simply not all it is cracked up to be. Removal may not only be unnecessary given the extant instruments of agency control wielded by a supervising official; it may also be ineffectual because it is too costly, too clumsy, and too molar a tool for attaining desired policy results. As a result of these limitations, even a supervising official who has no other instruments of agency control will not necessarily find her ability to elicit desirable policy outcomes increased in any meaningful way by a judicial intervention reallocating removal power. Accordingly, for a court to treat removal as a unique Archimedean lever that can move the bureaucratic world would be quixotic. Again, where removal authority is a nugatory addition to the presidential arsenal because of its costs, judicial action in the vein of *Free Enterprise Fund* may have the perverse effect of creating a semblance of presidential control where little exists, thereby hindering, rather than advancing, democratic accountability. This Subpart explains the theoretical basis for this counterintuitive claim. The following Subpart supplies empirical support for it.

Developing the limitations on removal power, I draw again on the economic literature on agency costs. Specifically, that literature identifies *information asymmetries* and *transaction costs* as reasons to believe that removal will be a systematically less attractive control device in comparison to other generally available tools such as the appointment power.[188]

1. *Information asymmetries*

The principal-agent literature identifies informational asymmetries as an important constraint on principals' ability to police agency slack ex post. Principals typically face two asymmetries that make removal an unreliable crutch: hidden information and hidden action problems.[189] Hidden information problems arise when an agent knows more about the exogenous conditions that affect output independent of effort than the principal.[190] Hidden action problems

188. This is not to say that other control mechanisms do not also have costs. For example, "presidents can get into very deep trouble when they do end-runs around the bureaucracy," or alternatively "when command replaces deliberation." Joel D. Aberbach & Bert A. Rockman, *Mandates or Mandarins? Control and Discretion in the Modern Administrative State*, 48 PUB. ADMIN. REV. 606, 610 (1988). So "presidential administration" at least is no panacea.

189. John D. Huber & Charles R. Shipan, *The Costs of Control: Legislators, Agencies, and Transaction Costs*, 25 LEGIS. STUD. Q. 25, 27-28 (2000); *see also* BREHM & GATES, *supra* note 135, at 25-26; Kenneth J. Arrow, *The Economics of Agency*, *in* PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 37 (John W. Pratt & Richard J. Zeckhauser eds., 1985).

190. *See* JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 35 n.63 (1988).

arise when (1) agents' effort cannot be directly observed and (2) outcomes are imperfectly correlated with effort.[191] Under either set of conditions, a principal's use of removal alone will be suboptimal because the principal will not be able to discern accurately the class of cases in which the agent should be ousted for failing to follow instructions as opposed to cases in which the agent has fallen short for exogenous reasons out of his control.

Both kinds of epistemic asymmetries occur frequently in public bureaucracies. Agencies often possess more information about external conditions that bear on the optimal selection and performance of policy instruments. Presidents are often unable to ascertain independently whether a given policy failure is caused by agency slack or by an external constraint. Further, agency officials frequently possess subject-specific skills and knowledge that the White House lacks.[192] Given either kind of informational asymmetry, Presidents' exercise of the removal power will be imprecise. Vigorous use of removal risks being overbroad, while its parsimonious employment will be underinclusive.[193] More generally, it will not always be the case that a bureaucrat's task will lend itself to the formulation of "detailed instructions,"[194] such that a White House principal can ascertain compliance after the fact.

Attention to information asymmetries again underscores the virtues of alternatives to removal. In particular, it is plausible that the appointment power will in fact often have lower epistemic costs. As employers can identify desirable candidates by their qualifications and achievements in the private job market context, so the White House can screen potential appointees to mitigate the need for later supervision and discipline. Partisan cues, past employment, and formal qualifications all provide information about preference alignment at the appointments stage. Such information may be easier to obtain and interpret than the noisy signals about agency performance upon which removal decisions rest. Of course, Presidents' appointment power is tempered by the Senate's confirmation role. But empirical evidence suggests that the White House still wields considerable influence.[195]

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191. *Cf.* Moe, *supra* note 129, at 755 (distinguishing problems that arise when a principal lacks knowledge of an agent's type or an agent's behavior).

192. Indeed, it may be that elected officials and their agents are effectively embedded within a bilateral monopoly situation because of asset-specific epistemic and skill investments, in which either can hold up the other. *See* OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING 90-91 (1985) (describing the hold-up problem in bilateral contracts).

193. Canonical contractual solutions such as assignment of residual profits to one of several agents or the use of interagent competition do not necessarily fit the public administration context. Moe, *supra* note 129, at 763.

194. Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 590 (2011).

195. A 2009 study, though, attributes almost three-quarters of the delay in filling vacant offices to nomination lags as opposed to confirmation delays. Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 966-67

In sum, informational asymmetries between a President and an agency impose a cap on the value of removal authority. Whether or not the power to select in a given case is available, there will be a subset of cases in which a President's inability to observe directly an official's actions imposes a constraint on her ability to use (or even credibly threaten) removal in a way that provokes desirable actions. In those cases, it is not clear that removal does much work.

2. *Transaction costs*

The second cluster of reasons to think the appointment power will systematically dominate the removal power as a tool of presidential control turns on transaction costs. These frictional costs come in several forms: political costs, costs to agency performance, epistemic costs, and harmful dynamic effects.

First and most importantly, the political costs of removal may negate its utility from the White House's perspective. Recent accounts of the presidency have emphasized that it is not so much legal constraints, but the need to maintain favorable "public opinion," that curbs executive discretion.[196] "Without credibility," it is claimed, "the president is a helpless giant."[197] Although some formulations of this claim may be somewhat overstated,[198] it is surely the case that Presidents are highly sensitive to the perception of their actions in the electorate, and to what might be termed the political costs of a given action. Indeed, it is hardly implausible to think that Presidents will frequently be more sensitive to political costs than to policy outcomes.

Removal often has large political costs, and these may render it an ineffectual supplement to the President's arsenal.[199] Removal is a high-profile means of influencing policy outcomes in comparison to tools such as presidential administration, reorganization, and litigation control. Its use may draw public

(2009). Although this suggests floor fights on confirmations are less significant than commonly believed, it cannot settle the relative influence of the Senate and the President. Large nomination delays may reflect Presidents' efforts to identify candidates who conform to Senate preferences or may indicate time-consuming searches for technically qualified candidates.

196. ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 61, 209-10 (2010).

197. *Id.* at 153. Posner and Vermeule here are ably tapping an idea that goes back to Richard Neustadt, who focused on Presidents' "power to persuade" as central to their success. *See* RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN 10 (rev. ed. 1990).

198. My own view is that the scope of presidential authority is a complex function of exogenous political and legal forces, such that dichotomous labels of "strong" and "weak" may be misleading. *See* Aziz Z. Huq, *Binding the Executive (by Law or by Politics)*, 79 U. CHI. L. REV. 777, 781-83 (2012) (reviewing POSNER & VERMEULE, *supra* note 196) (developing a theory of when Presidents are confined either by legal or political constraints).

199. *See* Magill, *supra* note 139, at 39 ("Removal of an official is also more constrained by political considerations than some other mechanisms Presidents can rely on to exert their control.").

attention to the fact that a chief executive is attempting to control policy against the wishes of expert agency leadership. Hence, it creates political costs for the President.[200] Consequent transaction costs may be so great in some cases that it is the agent, not the principal, who exercises larger de facto control. By way of illustration, consider the threat in March 2004 by a group of senior Justice Department officials to resign unless changes were made to then-ongoing electronic surveillance programs.[201] President George W. Bush's decision to back down on a program he apparently believed to be central to national security can plausibly be ascribed to the political costs of being seen to have constructively dismissed senior officials with area-specific expertise. The political costs of de facto removal provided subordinates with a lever to prevail against White House influence. This suggests that a subset of cases exists in which transaction costs effectively insulate an official from presidential control by removal. To the extent that appointees are aware that political costs sometimes preclude effective presidential action via removal, a judicial decision awarding the removal power to the White House is ineffectual in terms of the *Free Enterprise Fund* Court's putative goal of democratic accountability.

Attention to political costs might suggest that the judicial allocation of removal to the White House might not always improve the President's position, but it also does not show that the addition of removal power makes him worse off. On this view, judicial addition of removal authority to the presidential toolkit is warranted on the ground that, at least in some set of cases, it will be useful in promoting White House control and thereby democratic accountability. At a minimum, the *threat* of removal (even without its execution) will have a salutary effect on the distribution of policy control within the executive.

But this moves too quickly. Removal, even if not employed, can have a second set of transaction costs that undermine a President's ability to secure desirable policy actions. The *Free Enterprise Fund* rule may thus not merely be nugatory, but sometimes positively harmful by fostering a false impression of White House suzerainty that misleads voters.

Recent empirical work in social psychology finds that "authorities and institutions that exercised authority fairly and that communicated sincere and benevolent intentions encouraged their members to develop supportive dispositions."[202] The use or threat of removal undermines supportive dispositions. It thereby risks rendering agencies across the board less effective in their

200. *See* STEPHEN BREYER, REGULATION AND ITS REFORM 359 (1982) ("[A]gency heads in practice have considerable autonomy, for presidents are unwilling to fire a major public official except over a very important matter.").

201. *See* BARTON GELLMAN, ANGLER: THE CHENEY VICE PRESIDENCY 305-14 (2008) (recounting the incident).

202. TOM R. TYLER, WHY PEOPLE COOPERATE: THE ROLE OF SOCIAL MOTIVATIONS 167 (2011). Tom Tyler's study includes both workplaces and governmental institutions. That is, it is not limited to those institutional contexts in which individuals might be expected to anticipate pro-social behavior by others.

appointed tasks. Moreover, the availability of an effective removal power may impose costs in terms of diluted agency initiative and a diminished willingness to use expertise.[203] It is, indeed, well documented that eliminating agency discretion decreases the incentives of agencies to acquire information and take policy initiatives.[204] "[B]ureaucratic expertise is endogenous, costly, and relationship specific"; it will be developed only when government induces its agents to invest in relationship-specific skills by granting job security and "some measure of control."[205] Any effectual increase in control, in short, has a price. It reduces the internal stock of epistemic capital within the administration that is often necessary to secure policy goals. There is no a priori reason to believe, moreover, that the loss in terms of agency expertise, initiative, and support will be offset by any gains associated with increased presidential control.

A third, but related, transaction cost merits highlighting: the epistemic costs of removing an official. There is a tendency to view the President as a unitary actor. Today, however, the White House is now a sprawling and complex bureaucracy. Each new administration faces correspondingly high start-up costs. When a new President enters the Oval Office for the first time, "it is empty. . . . All of the files are gone. Even the secretaries are gone."[206] But the demands on the new administration are already bearing down hard.[207] Presidents thus pay steep costs in assembling a team, learning policy context, understanding bureaucratic structures, and identifying the optimal path to policy outcomes. It should be no surprise that the White House can find itself reliant on permanent agency staff from inauguration day onward.[208] Even once a White

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203. These costs are likely to vary from agency to agency. One study of the Justice Department's Civil Rights Division and the National Traffic Safety Administration found that the efficacy of "presidential control efforts" depended, inter alia, on the extent of careerist ideology, professional orientations, and agency esprit de corps. Marissa Martino Golden, *Exit, Voice, Loyalty, and Neglect: Bureaucratic Responses to Presidential Control During the Reagan Administration*, 2 J. PUB. ADMIN. RES. & THEORY 29, 34-35 (1992).

204. *See* Philippe Aghion & Jean Tirole, *Formal and Real Authority in Organizations*, 105 J. POL. ECON. 1, 3, 27 (1997) (arguing that transferring authority to an agent "will both facilitate the agent's participation in the organization and foster his incentive to acquire relevant information about the corresponding activities").

205. Sean Gailmard & John W. Patty, *Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise*, 51 AM. J. POL. SCI. 873, 874, 886 (2007).

206. Martha Joynt Kumar, *The White House as City Hall: A Tough Place to Organize*, 31 PRES. STUD. Q. 44, 44 (2001) (quoting Interview by Martha Joynt Kumar and Nancy Kassop with Bernard Nussbaum, Counsel to President Clinton, in N.Y.C., N.Y. (Nov. 9, 2000) (internal quotation marks omitted)).

207. *Id.* at 45.

208. *See id.* at 51 (emphasizing the importance of internal institutional knowledge for an incoming administration). A President's choice to internalize a decision within the White House or allocate it to an agency resembles a firm's decision whether "the costs of organizing within the firm" will be greater or less than "the costs involved in leaving the transaction to be 'organized' by the price mechanism." R.H. COASE, THE FIRM, THE MARKET, AND THE LAW 55 (1988) (describing the internal-versus-external deliberative process for

House is up and running, a President may find that the plurality and complexity of that institution can generate transaction costs. Different components of the White House, that is, may diverge in their policy assessments. Agencies can exploit such differences to defer or deflect presidential attention,[209] leveraging their superior information over executive branch dynamics.

These dynamics suggest that the use of removal authority diminishes the internal epistemic stock of an administration in ways that might preclude successful policymaking quite apart from its effect on agency performance. If expertise is at a premium, especially in the first hundred days of an administration when Presidents tend to be both most able and most interested in achieving policy change, then an institutional design modification that dissipates expertise in order to obtain control may be an unhelpful tool for chief executives. Further, if there is a temporal constraint on executive action, removal has the additional disadvantage of "disrupt[ing] the action that official oversaw and directed."[210]

These arguments from political, agency performance, and epistemic costs of removal may be deepened with another observation: removal typically operates at one scale and one scale only—a person unit. The President cannot fire a policy decision; he or she must fire a person. This means that when an agency official has made several decisions, only one of which the President finds objectionable, removal is by definition an overbroad remedy. The absence of granularity in removal means that the political, epistemic, and agency performance costs will be all the greater given the spillover effect of a given removal decision or threat.

Finally, a transaction cost critique of removal as a tool of political control is confirmed by attending to the dynamic effect of removal on congressional incentives. That dynamic perspective reveals yet another strategic response problem. A President seeking to use an agency to pursue aggressively a policy agenda necessarily depends on Congress for funding. Presidential authority to remove an agency head might give appropriators pause. Legislators may worry that such authority creates the risk that, having secured durable funding, a President might remove an agency head, leaving in place a deputy or recess appointee more sympathetic to the White House.[211] In anticipation, limits on removal

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firms). Presidents, unlike firms, will look to the political costs and benefits of control rather than to profits.

209. *See, e.g.*, Bressman & Vandenbergh, *supra* note 179, at 69 ("The EPA used other White House offices to combat OIRA, and other offices and agencies used OIRA to combat the EPA.").

210. Magill, *supra* note 139, at 38-39.

211. *See* Nolan McCarty, *The Appointments Dilemma*, 48 AM. J. POL. SCI. 413, 414 (2004); Daniel F. Spulber & David Besanko, *Delegation, Commitment, and the Regulatory Mandate*, 8 J.L. ECON. & ORG. 126, 133-38 (1992) (identifying the same potential commitment strategy). Note that Presidents, especially in their second terms, may cease to be repeat players, such that they are more willing to renege on deals embedded in appropriations measures. Or Presidents might bet on changes to the composition of Congress in midterm elections.

power "increase the ability of presidents to commit not to politicize the agency either through replacements or threats of removal" and thereby increase Presidents' capacity to commit to certain policy courses.[212] Once more, that is, strategic responses to judicial interventions complicate the case for presidential removal power.

D. *Empirical Evidence of the Removal Power's Limits*

These limits on removal's efficacy are not merely theoretical. Empirical, historical, and comparative evidence shows that removal in practice can be an ineffectual control tool. I draw here on historical and contemporary data from the United States, comparative evidence from the United Kingdom (where chief executives have long wielded untrammeled power to remove all heads of department), and evidence from the private law context of employment contracting. These three sources of evidence suggest it may be unwise to relegate nonremoval control mechanisms to the scrap heap of "bureaucratic minutiae."[213]

1. *Historical and contemporary U.S. evidence*

We profitably begin with history. History matters because it demonstrates how much the achievement of policy goals depends on agency initiative and expertise—qualities that are diminished by the availability of removal authority. The historical path of the American regulatory state also suggests that formal powers such as removal are not the main vector for the exercise of bureaucratic influence.

At its inception, the now-familiar federal regulatory state was a product of mid-tier bureaucratic initiative as much as White House pressure. Notwithstanding inklings of an administrative state through the republic's first century, it was only in the Progressive Era that the national state moved from "an ingenuous extraconstitutional framework of courts and parties" to a true "national bureaucracy."[214] Presidents certainly played an important role in that transformation,[215] but bureaucratic expansion was also the work of entrepreneurial

212. McCarty, *supra* note 211, at 423.

213. Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3156 (2010).

214. STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877-1920, at 287 (1982).

215. *See id.* at 169-76 (summarizing the roles of Presidents Theodore Roosevelt, William Howard Taft, and Woodrow Wilson in state formation). Congressional politics also played an important role in making bureaucratic expansion possible. *See* SCOTT C. JAMES, PRESIDENTS, PARTIES, AND THE STATE: A PARTY SYSTEM PERSPECTIVE ON DEMOCRATIC REGULATORY CHOICE, 1884-1936, at 7-9 (2000) (identifying internal shifts in the Democratic Party's ideology and political goals as a result of congressional elections as key to the expansion of the Progressive Era state).

mid-level bureaucrats who made vocal claims on fiscal and legal resources, built independent support networks among the public, and pressured Congress into establishing new bureaucratic institutions.[216] It was not independent agencies that led this institutional growth.[217] Rather, it was executive agency officials such as Gifford Pinchot and Harvey Wiley within the U.S. Department of Agriculture who propelled it.[218] Even though these catalysts of bureaucratic growth worked inside executive agencies, they did not act at the White House's behest. To the contrary, Presidents had to be "spurred"[219] into action and sometimes offered "resistance" to mid-level bureaucrats' empire-building initiatives.[220] Rather than depending on fickle presidential leadership, bureaucrats employed "a politics of legitimacy" in which "agency leaders buil[t] reputations for their organizations—reputations for efficacy, for uniqueness of service, for moral protection, and for expertise"[221]—and used those reputations to secure institutional resources.

This historical trajectory is important not solely because it shows the importance of agency expertise and initiative—values that removal dissipates. It also suggests that the capacity for independent action by an agency, whether denominated as independent or executive, has never been a simple function of tenure rules. The foundation of bureaucratic autonomy lies not in formal legal relationships, but in informal networks, norms, and reputations. Given this history, it seems unlikely that Presidents would rely solely on legal-institutional tools such as removal to control such agencies.[222] Consistent with this interpretation, there is relatively scant evidence that Presidents persistently use, or threaten to use, their good-cause removal authority, which can be read quite aggressively,[223] to maximize control over agency officials.

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216. DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928, at 260-85, 353-62 (2001) (summarizing the development of bureaucratic autonomy through congressional lobbying, the fostering of "long-lasting national esteem" for agencies, and support from the "popular press").

217. *Id.* at 9.

218. *See id.* at 255-89 (describing Pinchot's and Wiley's groundbreaking efforts to expand the power and reach of the USDA).

219. *Id.* at 255.

220. *Id.* at 271-73 (noting resistance from cabinet officials and Presidents that was thwarted by reliance on a "ready-made lobby" among the public).

221. *Id.* at 353.

222. *See* BREHM & GATES, *supra* note 135, at 3, 7-9 (summarizing historical research that shows the influence of "the bureaucrat's own preferences, peer bureaucrats, supervisors, and the bureaucrat's clients" on agency work choices). Note that influence by supervisors, which would include removal power, is but one of the four potential sources of influence over bureaucratic behavior.

223. *See* John F. Manning, *The Independent Counsel Statute: Reading "Good Cause" in Light of Article II*, 83 MINN. L. REV. 1285, 1288 (1999) (arguing that "good cause" removal provisions with respect to the independent counsel "may authorize . . . removal for disobeying the President's legal directives, at least on matters of reasonably contestable legal

Turning to the contemporary American bureaucracy, the available empirical research confirms that removal is not a significant control tool for the White House (even though its use is certainly not unknown).[224] As an initial matter, political scientists have long been aware that removal is not necessary to bureaucratic control. It has long been "well known that independent regulatory commissions are not truly independent of presidential direction and control" on the ground.[225] Numerous empirical studies of the interaction between the White House and independent agencies bear this out. An early study of the NLRB, the SEC, and the FTC, for example, found that "measures of regulatory performance . . . vary systematically with presidential partisanship."[226] Time-series studies looking at both independent and executive agencies also find that policy "responsiveness [to partisan change in the White House] permeates the U.S. bureaucrac[ies]" regardless of agencies' tenure regimes.[227] While independent regulatory commissions generate the "most stable" policy outputs, it is the initial "political appointment" process that appears to influence policy outcomes.[228] One study looking solely at the notionally independent Federal Reserve found that a President's ability to make appointments was effective in "build[ing] consensus" behind policy measures.[229] It concluded by finding "significant evidence for presidential influence on consensual decision making" by the Reserve's Board of Governors,[230] an institution typically thought beyond White House control.

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judgment"); *see also* Bowsher v. Synar, 478 U.S. 714, 729 (1986) (describing good-cause-like removal provisions as "very broad").

224. Note that the following empirical work may actually underestimate the effects of some nonremoval tools, lending further support to my conclusions regarding the efficacy of nonremoval control mechanisms. Empirical studies tend to focus on appointments and removals as discrete and observable points of political control. Other control mechanisms, such as presidential administration and litigation control, tend to receive short shrift because they are more difficult to isolate temporally and hence present greater identification challenges. Accounting for the full range of presidential controls likely points to an even more modest role for removal.

225. Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197, 197 (1982); *accord* Kagan, *supra* note 161, at 2274 (noting that "in the absence of [removal] power, [the President] retains other methods of exerting influence over administrative officials").

226. Moe, *supra* note 225, at 197-98.

227. B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801, 806, 821 (1991). To be clear, Wood and Waterman find that both executive and independent agencies are responsive to some degree to both presidential and congressional efforts to direct policy. They offer no finding with respect to whether there is any significant differentiation with respect to the degree of each kind of responsivenes.

228. *Id.* at 822-23.

229. Gregory A. Krause, *Federal Reserve Policy Decision Making: Political and Bureaucratic Influences*, 38 AM. J. POL. SCI. 124, 135-36 (1994).

230. *Id.* at 140. The study found no analogous influence over the Reserve's regional bank presidents. *Id.*

Intra-agency norms should also influence the choice of political control tools. One study of peer effects within federal bureaucracies found that bureaucrats' responses to uncertainty turn less on supervisory instructions and more upon what they perceive peer bureaucrats to be doing.[231] At the same time, "intersubordinate contacts" and "[s]olidary preferences were consistently strong determinants of the reasons why a subordinate would work."[232] Use of the appointment power to stock an agency with like minds up front thus does more to dampen agency slack than downstream removal decisions.

Some political scientists go further. They doubt agency independence is possible given the available range of presidential control tools. One recently suggested that "the supposed constitutional rule limiting Presidents to mere oversight of agencies is incapable of neutrally circumscribing either presidential or administrative behavior."[233] Given the depth of Presidents' toolkits to stymie agency slack, they argue, the better question to ask is why, if ever, the President would *not* control agencies' policy directions. That is, they stress reasons why Presidents choose not to influence agency actions so as to escape political accountability or to attain policy goals that would be frustrated by tight political control.

2. *Comparative evidence*

A second approach to gauging the efficacy of removal is comparative.[234] One useful comparator is the United Kingdom, where British prime ministers "can appoint and dismiss more or less whomever they like."[235] The *Free*

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231. *See* BREHM & GATES, *supra* note 135, at 73-74; *id.* at 93-108 (using data from 1979, 1983, and 1992 surveys of federal employees to confirm model).

232. *Id.* at 196; *see id.* at 108 (studying federal bureaucrats and finding that "recognition and association with their peers yield strong positive returns for many employees").

233. Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate over Law or Politics?*, 12 U. PA. J. CONST. L. 637, 645 (2010). Other scholars take a diametrically opposite view, albeit one that also conduces to treating removal as irrelevant. *See* BREHM & GATES, *supra* note 135, at 11-12 ("[I]t is largely meaningless to think of agencies as organizations under centralized control. The bureaucrats studied . . . exercise wide latitude over policy.").

234. For an influential comparative analysis of European and American political-bureaucracy relations, see JOEL D. ABERBACH ET AL., BUREAUCRATS AND POLITICIANS IN WESTERN DEMOCRACIES 1-23 (1981) (positing four possible models for the interaction and suggesting convergence toward a "hybrid" model wherein politicians and bureaucrats increasingly resemble each other).

235. Anthony King & Nicholas Allen, *'Off with Their Heads': British Prime Ministers and the Power to Dismiss*, 40 BRIT. J. POL. SCI. 249, 250 (2010); *see also* R.K. Alderman & J.A. Cross, *The Reluctant Knife: Reflections on the Prime Minister's Power of Dismissal*, 38 PARLIAMENTARY AFF. 387, 387 (1985) (describing "a Prime Minister's virtually absolute dominance over his ministerial colleagues"). Like the American government, the British government is structured into issue-bundled ministries, each headed by a cabinet official. *See* Nicholas Allen & Hugh Ward, *"Moves on a Chess Board": A Spatial Model of British*

Enterprise Fund logic of treating removal as the touchstone of control would suggest that British prime ministers exercise both broad and deep policy control thanks to their authority over Ministers. The British experience, although not exactly analogous with the American context, suggests that removal is no panacea for a chief executive seeking control over the bureaucracy.

Prime ministers certainly do exercise their removal authority. Out of 132 cabinet departures between January 1957 and June 2007, 87 were "dismissed outright, resigned pre-emptively or else [were] constructively dismissed."[236] This is in contrast to the U.S. experience, where removal is a rare occurrence.[237] But prime ministerial removal authority is still "typically wielded . . . with reluctance" such that "exercise of the power may be characterised more by discretion than by imperiousness."[238] Obviously, the frictions on prime ministerial exercise of dismissal authority cannot be legal. Rather, they reflect removal's high political transaction costs. Certain of these transaction costs are unique to the parliamentary context. Some prime ministers, for example, are constrained by a parliamentary coalition, which make them vulnerable to cabinet defections in a way that U.S. Presidents are not.[239] Prime ministers can also be boxed in with the independent political standing of cabinet members, the so-called "big beasts" of national politics, each of whom has a freestanding reputation and network.[240] Despite the difference in electoral contexts, the U.K. experience still has some lessons for understanding the U.S. context.

The British experience demonstrates that major cabinet reshuffles have imposed significant costs on prime ministers. Harold Macmillan's elimination of seven cabinet ministers in July 1962—perhaps the most dramatic use of prime ministerial power after World War II—induced a "sharp increase in Macmillan's unpopularity."[241] Macmillan also aggravated the "uncertainty" of his remaining cabinet members to "impracticable and counter-productive" effect.[242] Rather than generating loyalty, Macmillan found that removing officials fostered distrust and imposed a friction on his capacity for robust action. Just as

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Prime Ministers' Powers over Cabinet Formation, 11 BRIT. J. POL. & INT'L REL. 238, 240-41 (2009).

236. King & Allen, *supra* note 235, at 259-60.

237. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3170 (2010) (Breyer, J., dissenting).

238. Alderman & Cross, *supra* note 235, at 388.

239. *See* VERNON BOGDANOR, THE NEW BRITISH CONSTITUTION 128-29 (2009) (describing interaction of parliamentary coalitions and cabinet formation during Gordon Brown's Government). Nevertheless, it is worth noting that the U.K. government has witnessed long periods of stable, one-party government as well as periods of more fluid and fragmented coalition building. *Id.* at 121-22. I could identify no empirical work that examined the difference in removal dynamics between these two periods.

240. King & Allen, *supra* note 235, at 268-70 (internal quotation marks omitted).

241. Alderman & Cross, *supra* note 235, at 393.

242. *Id.* at 394.

the literature on trust in organizations suggests,[243] the aggressive use of removal power erodes beliefs in the fairness of institutions. Post-Macmillan prime ministers have internalized this insight and been chary in using the removal power.[244]

It is important not to read too much into this comparative evidence, which concerns only senior officials with linkages to a parliamentary coalition—a condition precedent that, it is worth emphasizing again, has no exact analog in the American context.[245] It is almost certainly the case that the firing of a postmaster, even one first-class in rank, is unlikely to attract as much political ire as the firing of a cabinet-rank official. Despite incompleteness in the analogy, the British experience nevertheless suggests that precisely when the stakes are highest, the President will be most constrained from acting against a putative subordinate. Further, the British experience hints that the availability of removal can be demoralizing in the medium term. These are additional reasons to be skeptical about the notion that removal occupies pride of place, or even any necessary room, in any chief executive's administrative toolkit.

3. *Private contracting*

One final source of empirical evidence derives from the private law context of employment contracts. At first blush, the well-known dominance of at-will arrangements in private contracting seems to cut against the argument that removal is not a significant instrument of control.[246] On the other hand, recent empirical work demonstrates that an overwhelming number of both the currently employed and those seeking work believe employment to be regulated by a just-cause rule.[247] Regardless of the regnant legal rule, expectations and practice are seemingly guided by "the norm" of "no discharge without cause."[248]

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243. *See supra* note 202 and accompanying text.

244. *See* Alderman & Cross, *supra* note 235, at 396-97 ("Churchill found it so distasteful that, whenever possible, he did the deed by letter or delegated it to someone else . . . . Thatcher . . . described dismissing ministers as something you have to grit your teeth to do." (citation and internal quotation marks omitted)).

245. Note though that one way in which Presidents lose or gain support is through the credibility vel non of the cabinet officers. One reason to select a former senator as a cabinet officer—think of John Ashcroft's appointment as U.S. Attorney General—is a belief that sound relations between departmental heads and legislators will ease the way for presidential policy actions. Even in the United States, that is, there is *some* connection between legislative politics and cabinet dynamics.

246. *See* J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837, 867-70 ("Slightly more than one-half of all employers (52%) contract explicitly for an at will relationship.").

247. *See* Jesse Rudy, *What They Don't Know Won't Hurt Them: Defending Employment At-Will in Light of Findings that Employees Believe They Possess Just Cause Protection*, 23 BERKELEY J. EMP. & LAB. L. 307, 330 (2002) (finding, based on a survey of the employed, that "[n]ot only do [employees] not know about or misapply the at-will doctrine, they hold beliefs about their current level of legal job security that are simply

The best explanation of this evidence is that "[e]mployers already have sufficient incentives to follow a just-cause course of conduct."[249] On the one hand, employers can draw on norms and fair treatments to elicit desired conduct from employees far more effectively than they can rely on formal hierarchical controls.[250] On the other hand, even in an at-will world, discharges are costly in terms of transaction costs and demoralization effects.[251] The dominance of at-will contracts, on this account, does not lead to the conclusion that firing is in fact a central control mechanism. The infrequency of firing, by contrast, is telling. As a result, the real lesson of the private contracting comparison is that removal often tends to be superfluous as an instrument of hierarchical control.

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There is a commonsense appeal to the notion that removal authority is necessarily useful, and even sometimes vital, to a President seeking to control a wayward agency. But theory and evidence from historical, empirical, and comparative sources suggest that this intuition should be resisted. The correlation between removal authority and control is far weaker than the *Free Enterprise Fund* Court allows. Not only is removal a comparatively ineffectual instrument of presidential control, but in some instances judicial promotion of presidential removal authority will result in less, rather than more, desirable outcomes for the President. Given these dynamics, it should hardly be surprising that Presidents, as Justice Breyer noted, do not always argue for unfettered removal authority.[252] A rational occupant of the White House will on occasion wish to

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wrong"); *see also* Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105, 127-28, 133 (1997) (finding similar results among a survey population comprised of unemployed job seekers).

248. Edward B. Rock & Michael L. Wachter, *The Enforceability of Norms and the Employment Relationship*, 144 U. PA. L. REV. 1913, 1930 (1996) (internal quotation marks omitted); *accord* Rudy, *supra* note 247, at 345-46 (confirming Rock and Wachter's conclusion based on empirical work).

249. Rudy, *supra* note 247, at 312.

250. *See* Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOC. 481, 500-01 (1985) ("[T]he oversocialized view that orders within a hierarchy elicit easy obedience . . . cannot stand scrutiny against . . . empirical studies . . . .").

251. Rudy, *supra* note 247, at 312.

252. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3169-70 (2010) (Breyer, J., dissenting). Inspection of the signing statements regarding the twenty-four agencies that Justice Breyer lists in his dissent reveals only two instances in which a President raised constitutional concerns about limits on a removal power. This unwillingness to expend the meager effort necessary to include objections to removal-related restrictions in signing statements suggests that Presidents do not see that much utility in the removal power.

ensure that the public does not misallocate political responsibility due to a false belief in the extent of presidential control of agencies.

These arguments speak directly to the viability of a judicially manageable rule based on removal authority. As Part IV will elaborate, they suggest that there is only weak reason to believe that when a court intervenes in favor of presidential removal authority, it will further presidential control. That means that there is only weak reason to believe it will deepen democratic accountability. Without a correlation of this kind, the outcomes from the *Free Enterprise Fund* rule of decision seem ad hoc and unprincipled—precisely the result that the political question doctrine is meant to forestall.

III. THE WEAK LINK BETWEEN PRESIDENTIAL CONTROL AND DEMOCRATIC ACCOUNTABILITY

This Part takes up the second element of *Free Enterprise Fund*'s syllogism: its equation of presidential control with democratic accountability. In the Court's eyes, White House control exercised via the removal power fosters "a clear and effective chain of command" over administrative agencies.[253] Absent presidential control, the Court warned, "the public [cannot] pass judgment on [the President's] efforts" or federal policy consistent with the Constitution's command of democratic accountability.[254] Given these premises, the Court's rule also must stand or fall on the strength of the causal connection between presidential control and democratic accountability.

There are three reasons for doubting *Free Enterprise Fund*'s elegant equation of presidential control of administrative agencies with democratic accountability. First, the Court's argument again fails to account for potential *interaction effects*, this time between presidential control and other democratic accountability mechanisms. Second, the presidential control / democratic accountability nexus is *causally weaker* than the Court's narrative suggests. Amplifying presidential control consequently does not create a predictable quantum of greater democratic control of administrative policymaking. Finally, the Court's conception of democratic accountability is *too imprecise* to do the necessary analytic work. Accountability is a multifaceted and contested idea. Augmenting presidential control promotes some kinds of accountability while simultaneously undermining others. Without a robust normative description of accountability, the Court cannot ascertain what net accountability-related effect its interventions will have.

253. *Id.* at 3155 (majority opinion).

254. *Id.*

A. *Interaction Effects of Presidential Control*

To equate presidential control of agencies with democratic accountability, as the Court does, is to downplay or ignore other democratic accountability mechanisms within the Constitution. But those other mechanisms might also impinge on the control-accountability equation. Other actors in the constitutional framework may, for example, respond strategically to *Free Enterprise Fund* in ways that undermine its effects. Predicting the net effect of any judicial intervention therefore requires "an explicit theory of how the president, Congress, bureaucracy, and the courts interact to make public policy."[255] *Free Enterprise Fund* offers no such theory. Articulating that theory casts doubt on the promajoritarian credentials of presidential control.

Strategic response effects arise because the Constitution creates plural avenues—not least the Senate, the House of Representatives, and the White House—through which public preferences influence bureaucratic actions. Like the President, Congress can influence agency choices either ex ante or ex post. On the front end, legislators erect legal frameworks for agency action and impose mandatory duties.[256] After the fact, they employ the committee oversight and annual appropriations processes to nudge or shove agencies.[257] The relative strength of presidential and congressional influence is much debated. Early scholarship underscored congressional influence.[258] More recent work subjects the congressional dominance thesis to theoretical critique[259] and empirical

255. Thomas H. Hammond & Jack H. Knott, *Who Controls the Bureaucracy?: Presidential Power, Congressional Dominance, Legal Constraints, and Bureaucratic Autonomy in a Model of Multi-Institutional Policy-Making*, 12 J.L. ECON. & ORG. 119, 120 (1996).

256. It has long been clear that Congress can impose nondiscretionary duties on federal officials in a way that precludes presidential overrides. *See* Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 610 (1838) (holding that a writ of mandamus was available directing the postmaster general to release a sum of money that Congress had by special statute ordered paid, but that the President had directed be withheld); *see also* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 16 (1983) (describing consistent usage of mandamus to regulate nineteenth-century administration).

257. *See, e.g.*, M. Elizabeth Magill, *Temporary Accidents?*, 106 MICH. L. REV. 1021, 1023-24 (2008) (book review) ("Politicians can control the bureaucrats—by, for instance, controlling the bureaucrats' budgets or jurisdiction, which bureaucrats want to maximize—and hence make sure that agencies deliver on the promises made in the legislation."). I believe that Magill's statement here has most force with respect to legislators.

258. The theory of legislative dominance of agencies was originally set forth in a series of articles by Mathew McCubbins and collaborators. *See* Randall L. Calvert, Mathew D. McCubbins & Barry R. Weingast, *A Theory of Political Control and Agency Discretion*, 33 AM. J. POL. SCI. 588, 589 (1989); Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

259. *See, e.g.*, Terry M. Moe, *An Assessment of the Positive Theory of 'Congressional Dominance,'* 12 LEGIS. STUD. Q. 475 (1987).

assault.[260] Whatever the precise balance of interbranch control, the literature makes it clear that some *mix* of congressional and presidential influences impinges on the bureaucracy.[261]

Beyond electoral channels, the public also acts directly upon federal agencies by lobbying and invoking interests in notice-and-comment rulemaking or adjudication. Both notice-and-comment requirements in federal rulemaking and statutory provision for judicial review of agency action create opportunities for the public to influence agency actions. These opportunities are more readily accessible to some interest groups than others. Scholars have long disagreed about how to characterize the resulting effects on agencies' deliberations. Some invoke concern about agency capture by private groups.[262] Fears of agency capture date from the late 1960s, and reflect broader "populist" critiques of the federal government.[263] Other scholars put a more optimistic gloss on private influences on administrative agencies. They contend that agency officials are selected and subjected to demands for rational action through statutory constraints in ways that conduce to public-regarding actions.[264] They argue that information acts as a "currency of administrative decisionmaking" so as to mitigate the collective action problems that enable capture.[265] And, they argue, judicial review "level[s] the interest-group playing field."[266] However this debate is resolved, its participants agree that nonelectoral channels provide the public with some opportunities to influence policy outcomes.[267]

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260. *See* Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 824 (2003).

261. *See, e.g.*, Hammond & Knott, *supra* note 255, at 120 (emphasizing interactions between different mechanisms of popular control).

262. *See* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 5 (1998) (describing agency capture in terms of administrative catering to the regulatory needs of the best-organized interest groups).

263. Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1050-51 (1997).

264. *See* STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT 92-96 (2008) (arguing that administrators are not beholden to Congress and generally have benign or public-regarding motivations); *id.* at 96-101 (contending that institutional structures conduce to desirable outcomes through the *mix* of legislative and executive control levers); *see also* Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617, 1620 (1985) (describing an interest group representation model in which administrators are "accessible to all organized interests while making no independent judgment of the merits of their claims"); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1670 (1975) (describing a shift in administrative law to "the provision of a surrogate political process to ensure the fair representation of a wide range of affected interests in the process of administrative decision").

265. CROLEY, *supra* note 264, at 135-36 (italics and capitalization omitted).

266. *Id.* at 140.

267. Yet another channel for public influence is the judiciary. "[I]ncreasing the lawmaking power of courts will . . . encourage interest groups to invest more resources in litigation," thus reproducing the distortive effects of political inequality in the outcomes of

The availability of both electoral and nonelectoral channels for public influence on agencies complicates and ultimately compromises the equation of presidential control and democratic accountability. Most importantly, drawing attention to these channels illuminates a fallacy of composition in treating presidential control as equivalent to democratic control. A fallacy of composition is a mistaken assumption that "if the components of an aggregate or members of a group have a certain property, the aggregate or group must also have that property."[268]

Here, it is a mistake to assume that absent presidential control of an agency, any connection between public preferences and policy actions will be severed. A move from a baseline of limited to broad presidential control might instead leave the quantum of democratic influence unchanged if the public viewed Congress and the executive as substitutes.[269] To see this, consider the aftermath of a judicial decision that reallocates control of the administrative agencies from Congress to the White House. Observing such a decision, a rational, informed member of the public will understand that the intragovernmental distribution of bureaucratic control has changed. Incorporating her evaluation of the agency's actions into choices at the ballot box, the voter will assign those actions less weight in casting a congressional ballot and more weight in casting a presidential ballot.[270] The net effect of the initial court decision, as a result, may be a shuffling of the reasons for which voters cast congressional and presidential ballots. But it will not yield a change in the overall strength of the signal received by elected actors concerning agency actions. Rather, the effect of judicial intervention is to shuffle around accountability without increasing its net quantum.

To focus on the public's voting behavior may strike some as implausible. Given the public's impoverished knowledge about politics, perhaps this claim rests on unrealistic assumptions.[271] Even if the public cannot respond in a nuanced way to judicial decisions, though, legislators may nevertheless act

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judicial review. Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 71 (1991).

268. VERMEULE, *supra* note 140, at 9. For instance, "it is a fallacy of composition to assume that because each lawmaking institution is undemocratic, taken individually, therefore the overall system that arises from their interaction must be undemocratic." Adrian Vermeule, *Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 6, 33 (2009).

269. This is an application of the principle that "strategies depend on the strategies of others." JERVIS, *supra* note 182, at 44 (italics and capitalization omitted).

270. This assumes that voters can combine a heterogeneous bundle of policy preferences into a much smaller number of votes. For the purpose of this argument, I take this as given. *But see infra* Part III.B (exploring the effects of bundled preferences in voting).

271. Of course, if you are skeptical that voters are sufficiently informed to make judgments about discrete agency actions in the first place, it is not clear why the project of enhancing democratic accountability over bureaucratic actions is a worthwhile project at all. That is, if voters' actions at the ballot box are a function of some epistemically undernourished gestalt view of the nation's conditions, why bother building hierarchical channels of accountability within the executive in the first place?

strategically to undermine the desired effect of judicial intervention. After a judicial decision assigning more control of agencies to the President, for example, legislators' incentives to expend effort gathering information and influencing an agency are diminished because they cannot plausibly claim credit for the latter's decisions. They therefore allocate less time and energy to agency oversight and control. At election time, they emphasize alternative accomplishments and goals. The public hence not only loses a means of bureaucratic control, but also ceases to benefit from the informational effect of congressional campaigns. The marginal cost of learning about agency actions rises, and there is no reason to believe that interest groups, or other substitute monitors, will step in to fill the gap.

But perhaps even this account is excessively optimistic. It assumes legislators respond to increased presidential control of agencies with a precisely calibrated reduction of effort devoted to influencing agencies. But it is possible, even likely, that legislators will overcompensate for judicial intervention. They may reason that a high-salience decision from a federal court assigning more control to the President crowds out public awareness of residual congressional control. Such crowding-out may de facto absolve legislators of public-regarding responsibility for wise use of their appropriations and oversight authorities. The executive instead bears the full weight of public anger or appreciation for agency actions, while rational legislators assign no further time or effort to agency supervision. This may be especially undesirable if, as noted above, an official's possession of removal authority does not conduce to perfect control.[272] If the gain from stronger presidential control is less than the loss from legislative slacking, the net consequence of a judicial decision assigning removal authority to the President may be a *weaker*—not a stronger—link between public preferences and agency actions.[273]

Formal political science models of congressional-executive competition for agency control confirm the significance of interaction effects. Graphical, spatial models can be used to explore the effects of a decision to shift from exclusive congressional control of agencies to a situation of joint control. By analyzing the shift from a single principal to multiple principals in spatial terms, one such model identifies precisely the changing scope of agency discretion. It shows that a move from a single principal to multiple principals who must concur in an agency decision will often leave the agency with more policy freedom.[274]

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272. *See supra* Part II.B.

273. In essence, this is a team production problem, which arises when multiple agents—here, both Congress and the executive—are assigned a single task. *See* Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 779-81 (1972) (defining the team production problem).

274. KENNETH A. SHEPSLE, ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS 425-28 (2d ed. 2010) (illustrating graphic model spatially). This is a kind of "empty core" phenomenon. *See* Tracey E. George & Robert J. Pushaw, Jr., *How Is Constitutional Law Made?*, 100 MICH. L. REV. 1265, 1270 n.21 (2002) ("A bargaining

The intuition, simply stated, is that when one principal can veto the other, there is a space created in which the agency has discretion to make policy choices in between the principals' ideal points. The wider the gap between the policy preferences of the two principals, the more discretion an agency will have. In this way, it is quite possible that installation of presidential removal power will generate more, not less, agency insulation from political control. The sole way for courts to remedy this unintended effect would be to eliminate congressional influence entirely—which they cannot realistically do. At minimum, Congress always has a power to "pass legislation inimical to the agency," a power that has been shown to influence agency actions.[275]

Other models of the political control of agencies draw attention to the importance of intertemporal effects. For example, consider a dampening mechanism somewhat akin to the one described in Part II.B.2. Over time, it is inevitable that the public's policy preferences can move in and out of sync with those of elected actors. If this happens, agency insulation can produce policy outcomes closer to public preferences than exclusive presidential control of agencies.[276] A gap between elected officials' preferences and those of the public can emerge for many reasons, including demographic changes to the electorate, exogenous policy shocks, or learning by a new executive. Anticipating this drift, the electorate may rationally prefer to limit presidential influence on the administrative state because "bureaucratic insulation biases the expected policy away from the median voter's ideal [and at the same time] reduces the variance in outcomes relative to what would occur under absolute presidential control."[277] This variance-dampening effect of bureaucratic insulation can over time induce a closer match of policies to public preferences than perfect presidential control.[278]

There is a further intertemporal wrinkle in the mechanisms of bureaucratic control. Agencies typically implement laws enacted not by the sitting Congress, but by earlier Congresses. Despite the inertial drag from incumbency-favoring gerrymanders in the House, it remains the case that the House and Senate do change compositions biannually. As a result, the median member of an enacting legislature almost certainly has divergent preferences from the median member of the later Congress that is capable of overseeing and funding an

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situation requiring a majority agreement contains an empty core when a participant may be persuaded to defect from an agreement by the offer of a bigger share and such defection changes the majority agreement.").

275. Charles R. Shipan, *Regulatory Regimes, Agency Actions, and the Conditional Nature of Congressional Influence*, 98 AM. POL. SCI. REV. 467, 467, 475 (2004).

276. *See* Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 55 (2008).

277. *Id.* at 94.

278. *Cf. id.* ("The majoritarian interest in strong presidential control is stronger when expected presidential responsiveness to majoritarian preferences is stronger, when political parties are less polarized, when bureaucratic preferences are more distant from majoritarian preferences, and when the majority's political interests change relatively rapidly.").

agency's ongoing implementation of a law. Two distinct versions of the public's legislative representatives therefore have plausible claims upon agency fidelity. Normative and positive accounts of legislation tend to diverge on which one matters more. Most normative theories of statutory interpretation assume that the deal struck by the enacting Congress is dispositive of a law's meaning.[279] Positive accounts of congressional control of the bureaucracy by contrast tend to focus on a present-day, not a historical, Congress.[280] To be sure, the two versions of Congress may not conflict if earlier legislators, aware of the potential for "coalitional drift," construct institutional frameworks to insulate agencies "against undoing" the work of an enacting coalition.[281] But it is difficult for an enacting Congress to insulate wholly an agency from later legislative influences. Empirical studies show that as the legislative coalitions behind laws decay, Congress becomes increasingly likely to reduce spending on the law's implementation, to modify its substance, or to do away with a regulatory program entirely.[282] Intertemporal tension is, for all practical purposes, inevitable.

Decisions such as *Free Enterprise Fund* intervene in this intertemporal competition by favoring contemporary over former generations of officials in a way that favors policy flux over policy stability. While there will be occasion on which a President involved in enacting a law does remain in office during its enactment, in most cases, including *Free Enterprise Fund*, the White House will have changed hands by this point. The new administration likely has different views about a law's implementation from the enacting White House. The new administration also has a relatively free hand in interstitial statutory construction, and so can peel away from all but the clearest instructions embedded in legislation's text.[283] Viewed from this perspective, amplifying presidential control through an award of removal power is revealed to be simply a redistribution of political control from past political coalitions to presently enfranchised representatives. It may also lead to a switching out of relatively durable policies in favor of more frequently fluctuating policies. To be sure, there may

279. *See* WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 219-31 (2d ed. 2006) (describing intentionalist theories of statutory interpretation); *see also id.* at 231-45 (describing textualist theories).

280. *See, e.g.*, Hammond & Knott, *supra* note 255, at 145; McCubbins et al., *supra* note 1, at 431; Shipan, *supra* note 275, at 475.

281. SHEPSLE, *supra* note 274, at 436 (italics and capitalization omitted).

282. Christopher R. Berry et al., *After Enactment: The Lives and Deaths of Federal Programs*, 54 AM. J. POL. SCI. 1, 10-13 & tbls.1-2 (2010) (reporting regression studies of the predictors of program "mutation," "death," and fiscal support, and finding changes in enacting coalition presence in Congress to have the strongest effect).

283. *Chevron* deference to agency interpretations of ambiguous laws in part rests on a theory of presidential accountability to the public. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984). At issue in *Chevron* was the Reagan Administration's interpretation of the statutory term stationary "source," which was sharply at odds with the Carter Administration's views of the law. *Id.* at 857-58. Hence, the result in *Chevron* itself ratified an interpretive change motivated by turnover in the Oval Office.

be reasons to favor current "enactable preferences" over previously enacted preferences.[284] It may even be that some of those reasons have a democratic pedigree. But it is not clear why *Article II* should be read to endow present democratic factions with maximal ability to alter past democratic majorities' hard-won statutory accomplishments.[285]

It is possible to imagine responses to these interaction effects arguments. First, it could be argued that the presidency plays an "offsetting"[286] representational function if congressional committees, which exercise the lion's share of oversight and appropriations authority, are especially vulnerable to capture by regionally concentrated interests from "the so-called Farm State Lobby [and] the Tobacco Growers Lobby [to] the Rust Belt Lobby."[287] Presidential control, on this account, injects a revivifying nationalist perspective into agency decisionmaking that negates the corrosive influence of congressional committees.[288] Second, presidential control might mitigate agencies' tendency to overregulate when "regulation tends to favor narrow, well-organized groups at the expense of the general public," a dynamic that is claimed to arise with, for example, environmental advocacy groups.[289]

These defenses of presidential control improve considerably on the acontextual analysis of *Free Enterprise Fund*. They take seriously the complex institutional ecosystem in which the White House interacts with agencies. But they are not, in my view, sufficient to redeem the claim that presidential control reliably translates into greater public influence. As a threshold matter, such defenses are selective in their use of political science data. For example, a jaundiced perspective of congressional committees as engines of tawdry redistributive politics is incomplete. Recent work in political science shows that congressional committees in fact serve multiple roles. They are consciously designed as "counterweight[s] to executive branch policy making."[290] They also play an "informational" function of enabling "informed decision making along-

284. *Cf.* EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 23-38 (2008) (defending a judicial goal of "maximizing enactable preferences" in statutory interpretation).

285. Indeed, consider a moral hazard argument to the effect that enabling lower-cost policy change diminishes the ex ante incentives for Congress to enact durable legislation. Rather than accountability, the result would be legislative stagnation.

286. VERMEULE, *supra* note 140, at 51 (emphasis omitted).

287. Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 85 (1995) [hereinafter Calabresi, *Some Normative Arguments*]; *see also* Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696, 1703 (2009) (exploring the problem of agency capture).

288. *Cf.* Calabresi, *Some Normative Arguments*, *supra* note 287, at 85-86 ("When it comes to policy implementation, the national check must come from the President of the United States and his closest and most trusted aides." (emphasis omitted)).

289. Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1080-81 (1986).

290. David Epstein & Sharyn O'Halloran, *Legislative Organization Under Separate Powers*, 17 J.L. ECON. & ORG. 373, 373 (2001).

side distributional conflict."[291] If committees do have these positive, non-rent-seeking functions, it cannot be assumed that presidential control should be promoted as a means of negating wholly their influence.[292]

The claim that Congress takes a parochial view while the White House adopts the national view is also empirically fragile. To be sure, early presidential elections did generate "presidential-vice presidential pairs balanced by geography."[293] But the structure of the Electoral College may now force Presidents to focus on a small number of specific, geographically distinct constituencies, which may or may not have views close to the national mean.[294] It is also difficult to predict in advance whether the median voter in the median federal legislative election is closer or farther from the national median voter than the median Electoral College voter.[295] The claim that Presidents are necessarily nationally representative is further undermined by the fact that only a slice of the eligible electorate casts votes in presidential elections.[296] Presidential boosters must prove, not simply assume, the superior democratic credentials of their institutional favorite.

The second defense of presidential control as a cure for agency capture also rests on fragile empirical and theoretical ground. To begin, the literature's claims of agency capture by proregulation organizations are "wholly implausible" as a political economy matter.[297] Moreover, regulation perceived as the

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291. KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION 122-23 (1991); *see also* Kenneth A. Shepsle & Barry R. Weingast, *Positive Theories of Congressional Institutions*, 19 LEGIS. STUD. Q. 149, 158-59 (1994) (describing Krehbiel's model as a correction to earlier exclusively demand-side models of committee functioning).

292. *Cf.* KREHBIEL, *supra* note 291, at 247-48 (concluding that the description of congressional committees as composed of "high-demanders"—that is, legislators whose preference intensities are higher for the issues within the committee's jurisdiction, and who tend to be ideological outliers—is "probably not true").

293. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 150 (2005).

294. *See* Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1235-38 (2006).

295. *Cf. id.* at 1238-39 (exploring possible differences between presidential and median legislator preferences). That said, one recent study finds little partisan bias in the Electoral College. DAVID R. MAYHEW, PARTISAN BALANCE: WHY POLITICAL PARTIES DON'T KILL THE U.S. CONSTITUTIONAL SYSTEM 20 fig.1.2 (2011). Mayhew's analysis shows a surprisingly tight connection between vote shares nationwide and in the median state, the median House district, and the median Electoral College unit. This analysis suggests that Congress and the President will not offset each other's preferences, although it leaves on the table arguments about the distorting effect of committees.

296. Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357, 385 (2010) ("In recent decades, the successful [presidential] candidate has won the presidency on the votes of, on average, fewer than 30% of adult Americans." (emphasis omitted)).

297. Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1286-87 (2006). For a recent and comprehensive debunking of the DeMuth-Ginsburg claim that pro-regulatory groups dominate Capitol Hill, see KAY LEHMAN SCHLOZMAN, SIDNEY VERBA & HENRY E. BRADY, THE UNHEAVENLY CHORUS: UNEQUAL POLITICAL VOICE AND THE BROKEN PROMISE OF AMERICAN DEMOCRACY

outcome of capture can be observationally equivalent to interest-group-neutral "consumer" regulation.[298] Posited examples of capture may thus not show countermajoritarian interest group politicking but instead reasonable regulation. Even when an interest group does capture an agency or a committee, this is not necessarily countermajoritarian. It may instead be a case of a "politically astute" enacting Congress "cho[osing] structural features" to support a particular interest group's agenda.[299] If Congress intended to facilitate an interest group's dominance in this way, it is hard to see the offense against democracy. Concerns about capture finally assume a baseline of appropriate interest group influence against which "improper" instances of influence are gauged. As the Supreme Court has explained in the campaign finance context, though, it is not clear the Constitution supplies a normative baseline for this enterprise.[300] Thus, even if it is the case that concentrated and capital-rich interest groups do have influence out of proportion to their numerosity in the electorate,[301] it is not clear this is constitutionally troublesome given current First Amendment doctrine.[302] Absent some stronger theory of democracy that the Constitution as interpreted by the Supreme Court appears to warrant, it is not clear why unfettered presidential control can be defended on capture-related grounds.

The claim that presidential control offsets agency bias also assumes that the White House is less vulnerable to lobbying and "capture" than either agencies or congressional committees. But it is not clear this is so.[303] Intense interest group lobbying of the presidency has been a staple of national political life since the New Deal.[304] The White House has even created an Office of Public

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19-20, 265-446 (2012) (documenting comprehensively the power of wealth and business lobbies).

298. *See* Daniel P. Carpenter, *Protection Without Capture: Product Approval by a Politically Responsive, Learning Regulator*, 98 AM. POL. SCI. REV. 613, 613 (2004).

299. *See* Moe, *supra* note 141, at 267, 288 (discussing commissions created during the New Deal).

300. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876, 922 & n.2 (2010) (rejecting equality-based grounds for campaign finance regulation); *accord* Davis v. Fed. Election Comm'n, 554 U.S. 724, 740, 744 (2008).

301. Empirical studies of which social groups are represented in the Beltway have been confirming this premise for more than a half-century. *See, e.g.*, KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 171-72 (1986); E.E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA 35 (1960) ("The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent.").

302. To be clear, I take no position on this normative question here; nor do I take a position here on whether current doctrine is incorrect.

303. *See* Bagley & Revesz, *supra* note 297, at 1305 ("Like any elected official, the President will be particularly attentive to those groups that can provide him with the resources, support, or votes to win elections or promote his political agenda.").

304. John Orman, *The President and Interest Group Access*, 18 PRESIDENTIAL STUD. Q. 787, 787 (1988) (endorsing the idea that "interest group activity to lobby the President has become a virtually permanent feature of the modern presidency since Franklin Roosevelt"

Liaison to interact with interest groups.[305] The result, unsurprisingly, is not equal access for all voices across the political spectrum, but differential access for favored voices.[306] Equally problematic for the offsetting claim is the White House's lack of transparency. The relative obscurity of some kinds of White House action, for instance through channels such as OIRA, may lower the transaction costs of presidential capture as opposed to committee capture.[307] Substantiating that concern, a recent study of a decade's worth of OIRA actions found that "65 percent of the 5,759 meeting participants who met with OIRA represented regulated industry interests—about five times the number of people appearing on behalf of public interest groups."[308] This finding (and others) led the authors of that analysis to conclude that OIRA review is "a highly biased process that is far more accessible to regulated industries than to public interest groups."[309] Another study of White House influence on the Environmental Protection Agency, for example, found the President "intervened on behalf of regulated entities more often than environmental interests."[310] The same study also reported that "White House involvement seldom was transparent to the public."[311]

Empirical evidence, in sum, does not support the claim that presidential control of agency action will have a prodemocracy offsetting effect. Rather, as the critics of President Obama's czars and Vice President Cheney's energy task force have alleged from different sides of the political aisle, presidential control

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(internal quotation marks omitted)); *see* Neil Scott Cole, *Pursuing the President: White House Access and Organized Interests*, 37 SOC. SCI. J. 285, 290-91 (2000).

305. Heath Brown, *Interest Groups and Presidential Transitions*, 38 CONGRESS & PRESIDENCY 152, 154 (2011).

306. *See, e.g.*, Mark A. Peterson, *The Presidency and Organized Interests: White House Patterns of Interest Group Liaison*, 86 AM. POL. SCI. REV. 612, 617-18 (1992) (finding that twenty-eight percent of organizations with very conservative views on the provision of federal services had frequent access to the Reagan White House, compared to only four percent of groups with very liberal views).

307. Hence, the claim that "the President is highly visible" and thus not vulnerable to capture, Calabresi, *Some Normative Arguments*, *supra* note 287, at 86, is premised on a clearly erroneous assimilation of all White House action into the single person of the President.

308. RENA STEINZOR ET AL., CENTER FOR PROGRESSIVE REFORM, BEHIND CLOSED DOORS AT THE WHITE HOUSE: HOW POLITICS TRUMPS PROTECTION OF PUBLIC HEALTH, WORKER SAFETY, AND THE ENVIRONMENT 8 (Nov. 2011), *available at* http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf.

309. *Id.* at 5.

310. Bressman & Vandenbergh, *supra* note 179, at 52. *But see id.* at 88 ("Although the White House sought parochial results, it nevertheless served a nationalizing role."). Because Bressman and Vandenbergh rely on agency officials' subjective perceptions in respect to this question, rather than on their knowledge of objective extrinsic facts, it is not clear whether this last result is endogenous to normative expectations of the presidency as the locus of "national" interests.

311. *Id.* at 82.

can be just as pernicious, just as corrupting, and just as inconsistent with democracy as anything an agency or congressional committee does.

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To summarize, presidential control is necessarily exercised in a complex institutional environment. Its interactions with other democratic mechanisms can generate both static and intertemporal interaction effects that undermine any tight nexus between White House control and democratic accountability. The effect of increasing presidential control on policy outcomes is therefore uncertain before the fact.

B. *Presidential Control as a Democratic Accountability Mechanism*

Aside from interaction effects, does presidential control provide a reliable mechanism for the transmission of the public's preferences? As originally drafted, the Constitution does not compel a positive response. The 1787 text required no popular vote for the Electoral College.[312] It was the states that fixed on popular vote mechanisms to pick electors.[313] The presidency's democratic credentials hence rest on subconstitutional foundations, not Article II. But even taking for granted the enfranchising nature of presidential selection, there remain three reasons for skepticism about claims of a strong causal connection between presidential control and democratic accountability.

The first ground for concern picks up on a theme raised in the previous Subpart: presidential influence on agency actions is not necessarily observable to the public[314] and therefore does not necessarily provide a foundation for retrospective voting. Interactions between the White House and agencies are rarely exposed to public view. A subclass of these contacts is insulated by executive privilege.[315] Other forms of presidential influence may be especially hard to discern. When the White House signals to agencies that they should not regulate, for example, the public may find it hard to distinguish the resulting

312. Moreover, the Constitution slants representation in favor of small states and thus diverges seriously from a majoritarian benchmark. *See* U.S. CONST. art. II, § 1, cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . .").

313. States had largely adopted popular vote systems by 1804. AMAR, *supra* note 293, at 152.

314. *Cf.* Bressman & Vandenbergh, *supra* note 179, at 52 (arguing for increased transparency with respect to White House involvement in agency decisionmaking).

315. *See* MARK J. ROZELL, EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY 19-53 (2d ed., rev. 2002) (developing case for executive privilege).

inaction from an agency's refusal to regulate on policy grounds.[316] Even when White House influence is overt, Presidents have means to diffuse accountability. In consequence, the December 2011 decision to override the FDA's permission of emergency sales of Plan B One-Step contraceptives to those under seventeen was made public by Secretary of Health and Human Services Kathleen Sebelius, not the President.[317] Rather than embracing a policy, the White House presented it so as to obfuscate, at least somewhat, its potential political roots. Just as "presidential administration" enables the White House to take ownership of issues, so technologies of presidential persuasion can be employed to raise information costs for the public.

The second problem with aligning presidential control with democratic accountability is the assumption that the presidential ballot provides an adequate mechanism for the expression of voters' preferences on an unfettered range of federal administrative actions. The logic of *Free Enterprise Fund* assumes that members of the electorate use the presidential ballot (assuming they reside in a contested state) to express views on a plenary range of past federal policies (assuming an incumbent is running). This claim runs into what might be called a "bundling" problem. Federal administration comprises a vast array of entities taking on an incalculable number of decisions each year on distinct policy questions. How can voters use a single quadrennial ballot to express preferences on that enormous range of policy decisions?[318] As one political scientist has noted, "[i]n a multi-issue world congruence [between the interests of voters and the actions of elected representatives] is difficult to achieve and even to define."[319] Compounding the signaling problem, voters in the federal system must sift through the distinct contributions of legislators and the executive toward discrete policy outcomes.[320] Accounting for these epistemic capacity constraints, one scholar has argued that an alternative institutional regime in which legislative and executive functions are combined, but in which distinct policy

316. The formally independent Consumer Product Safety Commission, for example, was pressured in the early 1980s to refrain from regulating cigarette lighters even though they were a "major cause of child deaths." Foote, *supra* note 149, at 234.

317. Gardiner Harris, *F.D.A. Overruled on Availability of After-Sex Pill*, N.Y. TIMES, Dec. 8, 2011, at A1, *available at* http://www.nytimes.com/2011/12/08/health/policy/sebelius-overrules-fda-on-freer-sale-of-emergency-contraceptives.html.

318. *See* Farina, *supra* note 296, at 383 ("Given the very large number of policy issues potentially within the President's sphere of influence, and the need to choose between only two (very rarely, three) serious contenders, the real surprise would be if many reasonably informed voters could find a candidate whose bundle of policy positions corresponds perfectly to their own set of issue preferences."); Rubin, *supra* note 177, at 2080 (noting that most agency decisions "are simply too fine-grained to become factors in an electoral campaign"); *see also* Jacob E. Gersen, *Unbundled Powers*, 96 VA. L. REV. 301, 324-26 (2010) (developing the same point).

319. BESLEY, *supra* note 131, at 173.

320. *Cf.* Gersen, *supra* note 318, at 326 ("Presidential regimes tend to produce stronger incentives because institutional actors can be selected and sanctioned separately, conditional on different sources of information.").

competencies are separately elected, may produce a more robustly democratic system.[321] It is not necessary to go that far to conclude that the bandwidth of current presidential elections is insufficient to convey accurately complex views on plural, incommensurable, and simultaneous policy choices. Viewed in this light, presidential elections—even assuming away the distortive influence of the Electoral College—are hardly paradigmatic mechanisms for the promotion of democratic accountability.

But perhaps bundling is an illusory problem. Perhaps Presidents can simply respond to the variance in public preferences by "adjust[ing] the bundle of their positions over time as circumstances change" such that "relatively permanent minority positions on various issues will always enjoy periods where presidential power is friendly and periods where it is not."[322] This optimistic story is implausible. If presidential elections do not provide a sufficiently granular signal of public preferences, there is no reason to think that the White House has the necessary information to change course in line with voters' preferences. Worse, presidential policy mutability may well sap accountability to the public. Such mutability means voters cannot be certain when casting their ballots that a candidate's positions will remain stable when in office. Hence, the claim that presidential cycling over issues generates democratic fidelity in the long run cannot be sustained without large and empirically unsupportable assumptions about presidential sensitivity to latent public preferences—and even if the assumption could be sustained, it would not unambiguously support the presidentialist case.[323]

Third, to assert a causal linkage between presidential control and democratic accountability is to assume that voters cast their ballots on the basis of realized federal policy choices rather than on exogenous variables or unreliable proxies for the chief executive's performance. Many empirical studies, however, demonstrate that voters understand only poorly how to translate policy preferences into voting choices.[324] Ignorance is not spread evenly across the

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321. *See id.* at 328. This assumes voters have sufficient information to cast separate ballots on each different governance function. If they do, it is possible that unbundled elections will in effect constitute plebiscites of particularly interested subpopulations. *Id.* at 342-44. This echoes the kind of selective participation observed in agency lobbying and rulemaking, although the different cost profiles of lobbying and voting may conduce to different distributional consequences in the two settings.

322. Calabresi, *Some Normative Arguments*, *supra* note 287, at 68-69.

323. This is a sort of "invisible-hand mechanism" that lacks any underlying mechanism to explain causation. *See* VERMEULE, *supra* note 140, at 16-17, 70 (discussing invisible-hand mechanisms).

324. *See, e.g.*, Richard R. Lau et al., *An Exploration of Correct Voting in Recent U.S. Presidential Elections*, 52 AM. J. POL. SCI. 395, 406 (2008) (finding that about one-quarter of voters cast ballots in a way that sends "a misleading message about the direction of their preferences"). Such voters, for example, might have preferences over outcome but not policies, and might be underinformed as to the optimal choice of policy given their preferred outcome. R. Douglas Arnold, *Can Inattentive Citizens Control Their Elected*

population but is "most likely to be found among those who arguably have the most to gain from effective political participation: women, blacks, the poor, and the young."[325] Uneven distributions of epistemic advantage will not conduce to the accurate transmission of general public preferences. Other empirical work finds voters engaging in "economic voting": casting ballots on the basis of national economic indicators over which the White House has at best imperfect control.[326] However partial presidential control over the national economy might be, that is, the public views the White House as an economic command center[327] and accordingly evaluates candidates based on national economic performance.[328] Presidential voting patterns thus do not fully reflect noneconomic policies even as they disproportionately reflect economic trends.[329] Under these circumstances, reliance on the presidential franchise as the sole channel of democratic accountability in the manner of the *Free Enterprise Fund* Court seems unwise.

C. *Unpacking Democratic "Accountability"*

The constitutional foundation for the *Free Enterprise Fund* syllogism is democratic accountability. The Court defines accountability parsimoniously as

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Representatives?, *in* CONGRESS RECONSIDERED 401, 402-06 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 5th ed. 1993).

325. MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 177 (1996).

326. *See* FIORINA, *supra* note 87, at 25-26 (noting the common perception that the electorate "treats elections . . . as referenda on the incumbent administration's handling of the economy"); Daniel Eisenberg & Jonathan Ketcham, *Economic Voting in U.S. Presidential Elections: Who Blames Whom for What*, 4 TOPICS ECON. ANALYSIS & POL'Y 1, 1 (2004) (stating that "[t]he incumbent party's fortunes depend significantly on how the economy has performed recently"); Michael S. Lewis-Beck & Mary Stegmaier, *Economic Determinants of Electoral Outcomes*, 3 ANN. REV. POL. SCI. 183, 191-96 (2000) (summarizing studies that show "economic voting is a regular feature of US presidential elections"). *But see* David F. Damore, *Issue Convergence in Presidential Campaigns*, 27 POL. BEHAV. 71, 88-90 (2005) ("While macro-level variables such as the state of the economy or presidential approval shape the context in which a campaign is occurring, these factors do not determine outcomes. Rather, elections are determined by the interplay between campaign strategy and the receptiveness of undecided voters to candidates' messages." (citations omitted)).

327. Richard Nadeau & Michael S. Lewis-Beck, *National Economic Voting in U.S. Presidential Elections*, 63 J. POL. 159, 178 (2001).

328. Michael B. MacKuen et al., *Peasants or Bankers? The American Electorate and the U.S. Economy*, 86 AM. POL. SCI. REV. 597, 606 (1992) (concluding that the electorate responds with the sophistication of a banker, by "evaluating the president on the basis of an informed view of the nation's economic prospects, rather than its current standard of living").

329. *See* Lewis-Beck & Stegmaier, *supra* note 326, at 183 (noting that economic issues are generally weighted "more heavily" than other issues). Hence, noneconomic factors are not wholly crowded out. *See* Arthur H. Miller & Thomas F. Klobucar, *The Role of Issues in the 2000 U.S. Presidential Election*, 33 PRESIDENTIAL STUD. Q. 101, 108 (2003).

the public's capacity to "pass judgment" on federal policy decisions at the ballot box.[330] But studies of institutional behavior show accountability to have more complex causes and to manifest in more diverse institutional ways. Accountability, this literature suggests, cannot be reduced to the bare ability to "pass judgment" every fourth November. To rely on an impoverished conception of accountability may have the perverse result of diminishing the public's ability to influence federal policy outcomes.

As a threshold matter, *Free Enterprise Fund* does not crisply define the sort of democratic accountability it reads into Article II. This would not be a problem if the Constitution embodied a single principle of majoritarian accountability. But it does not. Instead, the Constitution encompasses plural conceptions of representation,[331] including a majoritarian one and a deliberative, republican one.[332] Early scholars of the administrative state also flagged "three overlapping accountability regimes: political accountability to elected officials; hierarchical or managerial accountability to administrative superiors; and legal accountability to individuals and firms through judicial review."[333]

More salient here, studies suggest that large institutions such as bureaucracies respond to diverse and plural constituencies in complex ways that resist reduction to a single metric. To the contrary, the ample literature on organizational design underscores the need to treat accountability as "protean" in terms of how it is produced and how it is institutionalized.[334] One recent study defined accountability to include either external or internal constraints on an institution, and identified five potential causal mechanisms behind it: transparency (revealing information), liability (facing consequences for actions), controllability (limiting agency slack), responsibility (following ex ante rules), and

330. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3155 (2010).

331. An example of such an argument is Rebecca Brown's claim that the Constitution demands not majoritarian democracy, but a form of oversight accountability that precludes abuse and corruption. *See* Brown, *supra* note 28, at 564-65.

332. Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1495 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1564 (1988). For contrasting views, see AMAR, *supra* note 293, at 276-81 (arguing that the aim of the Guarantee Clause of Article IV was to "shore up popular sovereignty"); Richard A. Epstein, *Modern Republicanism—Or the Flight from Substance*, 97 YALE L.J. 1633, 1639-43 (1988) (developing pluralist responses to republican claims).

333. Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1378 (2010) (citing FRANK J. GOODNOW, THE PRINCIPLES OF THE ADMINISTRATIVE LAW IN THE UNITED STATES 371-72 (1905)).

334. Jerry L. Mashaw, *Structuring a "Dense Complexity": Accountability and the Project of Administrative Law*, ISSUES LEGAL SCHOLARSHIP, art. 4, 2005, at 15, *available at* http://www.iilj.org/courses/documents/Mashaw.IssuesinLegalScholarship.pdf; *see also* Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 DUKE L.J. 679, 767-73 (1997) (identifying different kinds of constitutional accountability).

responsiveness (meeting constituency demands).[335] Accountability, that is, can be produced in several quite different ways. The choice between mechanisms may turn not on a deep theory of democracy, but more simply on the sort of goods an agency produces. For instance, an agency tasked with preserving the status quo might be best designed using ex ante rules and high transparency, while notice-and-comment regimes and reasoned-explanation demands may be a better fit for agencies tasked with responding to shifting constituency preferences. Depending on whether "predictability" or "change" is the desired goal, that is, designers of an agency must make "difficult trade-offs" about the appropriate selection of accountability instruments.[336]

Even if accountability is defined in purely majoritarian terms, the Court's claim that such accountability is maximized by periodic presidential elections is at best incomplete. Studies of institutional accountability demonstrate that rather than being substitutes, the various mechanisms for eliciting accountability interact in ways that can either be complementary or conflictive. Consider the banal observation that transparency may be a prerequisite for effective public use of the ballot.[337] This truism ignores the fact that transparency can also render officials more vulnerable to interest group capture, reducing their responsiveness to diffuse publics and generating new forms of agency slack.[338] If interest group capture is thought to make decisional transparency impractical, liability rules may be a better instrument for attaining accountability. Treating electoral control as the single metric of accountability perilously ignores such interactive dynamics.

Worse, an emphasis on a hierarchical control device such as an elective mechanism may generate perverse outcomes.[339] The perils of hierarchical

335. Jonathan G.S. Koppell, *Pathologies of Accountability: ICANN and the Challenge of "Multiple Accountabilities Disorder,"* 65 PUB. ADMIN. REV. 94, 96 (2005); *see also* MELVIN J. DUBNIK & BARBARA S. ROMZEK, AMERICAN PUBLIC ADMINISTRATION: POLITICS AND THE MANAGEMENT OF EXPECTATIONS 76-77 (1991) (arguing that "[a]ccountability is another of those widely used terms that we hear so often and in so many different contexts that it is difficult to define," but setting forth a four-part typology depending on whether accountability is internal or external and high or low intensity (italics omitted)); RICHARD MULGAN, HOLDING POWER TO ACCOUNT: ACCOUNTABILITY IN MODERN DEMOCRACIES 7-14, 18-20 (2003) (noting that investigation, rectification, and ex post—but not ex ante—control are all elements of accountability); Rubin, *supra* note 177, at 2075 (identifying "hierarchy, monitoring, reporting, internal rules, investigations, and job evaluations" all as elements of accountability).

336. Andrew B. Whitford, *Adapting Agencies: Competition, Imitation, and Punishment in the Design of Bureaucratic Performance*, *in* POLITICS, POLICY, AND ORGANIZATIONS: FRONTIERS IN THE SCIENTIFIC STUDY OF BUREAUCRACY 160, 162 (George A. Krause & Kenneth J. Meier eds., 2003).

337. *Cf.* Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741, 1751-53 (2009) (discussing the connection between electoral accountability and transparency).

338. *See* VERMEULE, *supra* note 184, at 183-200 (developing the costs of opacity through an examination of the federal budgetary process).

339. *Cf.* Koppell, *supra* note 335, at 99 (suggesting that the imposition of multiple forms of accountability can conduce to undesirable outcomes).

control are illustrated by a study of the April 1996 military plane crash in which then-Commerce Secretary Ron Brown perished. This study identified the "complicated web of overlapping accountability relationships" as a central cause of the accident.[340] It further identified a tension between responsiveness and potential liability—between "the rhetoric of a 'can do' mind set and a 'gotcha' culture of accountability"—that generated "cross pressures of initiative and command."[341] Strict hierarchical control induced intense pressure on the junior officers responsible for the flight plan to achieve results based on difficult-to-execute commands. Those junior officers made risky decisions, and then simply copied superior officers on e-mails to secure expeditious "authorization." The resulting volume of e-mails meant that senior officers rarely read or replied to e-mails. Junior officers took the absence of a countermanding response to imply authorization rather than engaging in costly and time-consuming verification.[342] The result was catastrophic. More limited hierarchical control, which would not have flooded senior officers with information and which clearly vested junior officers with a more defined quantum of discretion about certain risks, may have elicited better outcomes.[343]

To be sure, elections do not operate like the military chain of command at issue in the Brown crash. There is no reason to expect the precise failure of communication seen in that incident to be repeated in the political context. But the foregoing analysis demonstrates that tight hierarchical control by a principal in some instances can generate perverse outcomes. In particular, it highlights the potential unintended effects of bundling accountability for many decisions into one channel that is vulnerable to bottlenecks. The result of such bottlenecks can be the loss or distortion of crucial information. At a minimum, this shows that vertical hierarchical control does not always generate desirable outcomes, and that its desirability must instead be evaluated on a case-by-case basis. Given the complexity and contingency of this inquiry, it is hard to see how the project of democratic accountability in the regulatory state is furthered through the sort of mechanical decision rules preferred by federal courts. Rather, democratic accountability may be best pursued by the political branches, which are more capable than the federal bench of solving the complex optimization problems implicated in institutional design decisions.

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340. Barbara S. Romzek & Patricia Wallace Ingraham, *Cross Pressures of Accountability: Initiative, Command, and Failure in the Ron Brown Plane Crash*, 60 PUB. ADMIN. REV. 240, 242, 250 (2000).

341. *Id.* at 249.

342. *Id.* at 248.

343. For a more general argument against the efficacy of vertical, command-and-control forms of accountability, see Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 292-314 (1998).

This Part has critically examined the nexus between presidential control and democratic accountability and generated three results. First, interaction effects undermine the purported control-accountability link. Second, the causal nexus between presidential control and public preferences is weaker than the Supreme Court assumes. And third, studies of accountability suggest the Court's identification of a single accountability-eliciting mechanism is incomplete. All three of these results bear directly—and negatively—on the purported causal linkage between presidential removal authority, White House control, and democratic accountability. Together, they affect a second rupture in that causal chain and generate yet another ground for predicting that the effects of the *Free Enterprise Fund* rule will be ad hoc and unprincipled.

IV. THE REMOVAL POWER WITHOUT COURTS

This Part applies the conclusions developed in Parts II and III to the justiciability question that lies at this Article's heart. I argue here that the analyses developed in the previous Parts demonstrate that presidential removal authority does not generate a judicially manageable standard that enables effective promotion of democratic accountability. Hence, removal should be ranked as a political question. Having established this doctrinal conclusion, I explore its practical consequences and suggest that my proposal effects no large change in government ordering, even if it slices the feet from under a species of pointless and needlessly baroque Supreme Court jurisprudence.

Recall first that in Part I, I canvassed the rather unsatisfying precedent concerning the "judicially manageable standard" prong of the political question doctrine and suggested one minimal condition that judicially created rules of decision had to satisfy in order to rank as manageable: Does the rule produce results that are systematically correlated with its underlying constitutional justifications? And are there judicially manageable standards? Perfect congruence, I have stressed, is not required. Instead, I accepted that arguments for nonjusticiability on unmanageability grounds had a higher burden of persuasion to meet. They had to show a more systematic absence of correlation between a rule and the values it putatively promotes.

Removal fails to provide a reliable rule for the federal courts to employ in promoting democratic accountability because neither of the two causal claims upon which the *Free Enterprise Fund* syllogism rests can withstand analysis. First, as Part II demonstrated, the nexus between removal and presidential control is either weak or nonexistent. Even Presidents implicitly acknowledge as much by acceding without a murmur of complaint to the overwhelming majority of statutes creating agencies lacking at-will removal rules.[344] Second, Part III developed reasons for concluding that democratic accountability is not secured through the promotion of presidential control. Put these conclusions together,

344. *See supra* note 252 and accompanying text.

and it becomes clear that the *Free Enterprise Fund* rule of decision is not merely under- or overinclusive. It is instead wholly unreliable as a tool for attaining democratic accountability. Any specific judicial intervention in favor of presidential removal authority might (1) increase democratic accountability, (2) decrease democratic accountability, or (3) leave that variable wholly unchanged. The positive, negative, or de minimis character of intervention's effect depends, inter alia, on (1) extraneous background design features of an agency, (2) the specific partisan political landscape at the moment of an intervention, and (3) the strategic responses of both other elected actors and also bureaucrats within an agency. In consequence, when a judicial decision affects more than one agency, it is likely that democratic accountability will be increased in some parts of the executive branch and decreased in other parts of the administrative state simultaneously. At least in some significant tranche of cases, judicial promotion of presidential removal authority will foster a false aura of White House control that conduces to misallocations of political responsibility. In these cases, the *Free Enterprise Fund* rule undermines the constitutional good that the Court professes to be promoting. A court permitted to conjure up and enforce rules of this kind, so untethered from their underlying justifications, is simply not a tribunal whose discretion is meaningfully bounded.

Rather than "principled, rational, . . . reasoned distinctions," judicial enforcement of presidential removal power will generate "inconsistent" or "ad hoc" results.[345] Those results will predictably and inevitably "diverge . . . from the meaning of the constitutional guarantee" being implemented.[346] It bears emphasis that what Parts II and III demonstrate is not a mere occasional slippage between rule and desired outcome—the problem here is of a quite different order of magnitude. It is the pervasiveness and magnitude of the *Free Enterprise Fund* decision rule's unpredictability, and courts' inability to mitigate the problem, that distinguishes a removal-related rule from the mine run of judicial doctrines that have some variance—some under- and some overinclusiveness—in their consequences. Unlike those rules, a removal-related rule is wholly ill-suited to its purported constitutional end. Accordingly, judicial rules that employ presidential removal power as a means to promote democratic accountability are within the heartland of the political question doctrine because they are not capable of principled and stable application through a judicially manageable standard.

A subsidiary reason for ranking removal as a political question also emerges from Parts II and III: the comparative epistemic advantage of the political branches as compared to federal judges in identifying when and how allocations of removal authority matter. On several occasions, I have touched on the fact that removal's effects depend on political costs, the strategic responses of other political actors, relevant norms within bureaucratic institutions, and the

345. Vieth v. Jubelirer, 541 U.S. 267, 278 (2004) (plurality opinion).

346. Fallon, *supra* note 117, at 1284.

efficacy of other political instruments (such as the appointment power). There is every reason to expect that the political branches have information about these factors that courts systematically lack. On this count, the *Free Enterprise Fund* Court's tin ear to institutional context is instructive.[347] Political actors' nuanced and contextual understanding of the effect of control mechanisms suggests that the design of agencies should be relegated to elected hands. That their institutional interests are directly implicated in such decisions only compounds the case for treating removal as a political question. It is also consistent with the Framers' general strategy of hardwiring solutions to governance problems into the multipolar structure of the new American government, rather than relying on entitlements such as a presidential "right" to control removal.[348] To the extent that agency design is influenced by strategic political calculation, this is simply consistent with the Framers' general approach to constitutional design problems. And finally, if the Court's ultimate goal is democratic accountability, it is hard to see why decisions about agency design should be insulated from democratic choice: there is no reason supplied in *Free Enterprise Fund* to believe that the electorate is incapable of observing and responding at the polls to wise or foolish design decisions.[349] In short, the calculus of institutional interest and insight also tilts in favor of treating removal as a political question.

A possible counterargument to this position rests on the observation that elected officials might act strategically based on short-term political motives in ways that did not conduce to optimal structures. There are two responses to this point. First, it is up to the political branches to balance short-term goals—which are also part of the democratic calculus—with longer-term aspirations. Courts have no clear vantage point to second-guess legislative judgments of this sort, even with respect to institutional design decisions. Second, if voters disagree with how politicians strike a balance between short- and long-term interests in agency design, they can employ the ballot box to express their displeasure.[350]

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347. *See supra* note 181 and accompanying text.

348. The separation of powers doctrine is famously predicated on the idea that "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition." THE FEDERALIST NO. 51 (James Madison), *supra* note 30, at 321-22. I do not address here the ample literature criticizing Madison's logic, but rather draw attention to the consistency of my position with the Framers' general institutional design strategies.

349. If Part III's criticisms of democratic mechanisms are accepted, one might query whether the electorate will punish on the basis of bad agency design decisions either. The point here is that the *Free Enterprise Fund* Court's assumption that solo presidential control conduces to democratic control is certainly not more reasonable than the assumption that agency design by Congress and the President, exemplified in the form of a publicly available statute, conduces to effective political control.

350. As noted previously, *see supra* note 271, if you are skeptical that voters are competent to do this, it is not clear why you would support the equally fine-grained democratic aspirations behind the *Free Enterprise Fund* rule.

To call off removal-related litigation is not to award the laurel to either Congress or the White House. Rendering removal nonjusticiable leaves the underlying constitutional question to be resolved through contestation between democratically credentialed actors. What it does not do, however, is translate into any large immediate shift in either the doctrine or practice. Recall that the Court, with the exception of two brief periods of inconclusive intervention, has generally regulated congressional decisions concerning agency design with only a light touch.[351] Cases such as *Morrison* and *Humphrey's Executor*, where the Court has endorsed congressional limitations on presidential removal authority, remain in effect good law. Challenges to those constraints would be dismissed as nonjusticiable with much the same end result. The only precedent that would be disturbed is *Myers*'s protection of "purely executive" offices.[352] Yet it is hardly clear what practical difference that would make, since—at least until *Free Enterprise Fund*—*Myers* has had scant generative influence upon federal court jurisprudence.[353] As a result, it is worth emphasizing that under the instant proposal of nonjusticiability, matters of agency design would be resolved much as they are now—through informed and contextually sensitive negotiation between the political branches. The proposal's most important consequence may be to curtail a budding line of jurisprudence, nascent in *Free Enterprise Fund*, that promises much but that can deliver little or nothing by way of democratic accountability. Otherwise, the status quo remains basically unchanged.

To see how the proposed nonjusticiability of removal would work in practice, it is helpful to notice that removal-related challenges arise in two distinct postures. First, a private litigant may lodge a pre-enforcement challenge to a federal statutory scheme on the ground that it does not conform to Article II's prerequisites. Often that plaintiff will be potentially or currently subject to federal regulation. For example, the challenge to the PCAOB's regulatory authority in *Free Enterprise Fund* arose before any enforcement action began,[354] while the challenge to the independent counsel statute was lodged in the midst of an investigation.[355] A second possibility is that an issue of removal authority arises in litigation initiated by a disgruntled former official. Having been removed from office, he or she might seek damages for the dismissal. The Department of Justice would then resist the suit on the ground, inter alia, that Article II rendered the dismissal constitutional notwithstanding the statutory

351. *See supra* text accompanying notes 44-59.

352. *See* Morrison v. Olsen, 487 U.S. 654, 689-90 & n.28 (1988) (discussing this category in *Myers*).

353. By contrast, *Myers* has proved a reliable source of academic conflict. No doubt, overruling it would do nothing but elicit yet more wrangling in the law reviews.

354. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3149 (2010) (describing plaintiffs' pre-enforcement suit for declaratory and injunctive relief).

355. *See Morrison*, 487 U.S. at 667-69 (explaining that the case arose on the expedited appeal of a contempt order).

restraints on presidential removal authority. Both *Myers* and *Humphrey's Executor* arose from this sort of postdismissal challenge.[356]

In the first class of cases, nonjusticiability has the effect of eliminating ex ante challenges by regulated entities to agency actions. As Part I demonstrated, successful challenges on the basis of insufficient removal authority have always been few and far between. This means that elimination of this category of litigation would, in practice, mean ousting *Myers* and a handful of other precedent. Indeed, some might argue that it would be a positive service to extinguish the residual uncertainty about the scope of *Myers* and the opaque category of "purely" executive officials. As a practical matter, that decision would no longer be a free-floating license for the invention of new reasons to seek modification of Congress's agency design decisions through the courts.

In the second class of cases, federal courts would simply not recognize a defense to liability based on Article II of the Constitution. The effect of this would be much the same as declining to recognize a defense to impeachment based on alleged procedural defects in the Senate's actions.[357] The refusal to treat a defense based upon nonjusticiability leaves a defendant in both cases with one less instrument in the toolkit to deflect a penalty. This would leave the operative rule of *Morrison* and *Humphrey's Executor* in place. Under those cases, as under the rule proposed here, agencies could continue functioning notwithstanding any debate on their compliance with Article II. Just as at present, if the President wishes to claim an Article II power of removal, he or she is able to do so, but at the cost of having to expend fiscal resources on back pay and litigation costs in a suit lodged by a dismissed officer.[358] Whereas the first class of cases yields a victory for the executive, in the sense that it can continue to apply regulations unhindered by pre-enforcement challenges, in the second class of cases, the President loses, in the sense of having to pay something for broad assertions of Article II's scope—much as it has to now.[359] Given the infrequency of money judgments against the executive to date under a regime where good-cause removal has been pervasive, there is no reason to expect this to have a large fiscal impact.

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356. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 618 (1935); Myers v. United States, 272 U.S. 52, 106 (1926). It is worth noting that the President has, as a historical matter, both defended and attacked removal limits depending on the posture of the litigation.

357. *See* Nixon v. United States, 506 U.S. 224, 228-35 (1993).

358. But injunctive relief against an executive branch official in the form of a reinstatement order would raise substantial constitutional issues. *Cf.* Steffan v. Perry, 41 F.3d 677, 720 n.27 (D.C. Cir. 1994) (Wald, J., dissenting) (considering constitutional implications of the reinstatement remedy requested by the plaintiff). For the purposes of the present discussion, it is enough to say that dismissed employees seem reluctant to seek reinstatement and courts seem very unlikely to grant such relief. Indeed, I have found no ruling granting such relief.

359. Nonjusticiability, as a result, would not result in merely an increase in presidential authority, as is the case with some other applications of the political question doctrine.

The net effect of nonjusticiability, in short, is to leave in place whatever statutory framework Congress and the President have already converged upon, while effectuating little change to the de facto doctrinal status quo. Importantly, this means that courts will enforce the political decisions embodied in statutes about agency design, decisions that voters can easily and reliably use as a guide for retrospective voting. And it is to avoid a situation in which voters must engage in the epistemically complex process of reconciling statutory texts with disparate strands of Supreme Court jurisprudence and then making fine-grained judgments about the resulting balance of interbranch powers. For it is not at all clear how the latter situation—which *Free Enterprise Fund* invites—creates a more robust form of democratic accountability.

It is not the case that eliminating Article III jurisdiction over questions of removal authority necessarily tilts the scales in favor of either the White House or Congress. Courts will enforce whatever arrangements Congress and the White House agree upon. There is no reason to think that a principle of respect for clear political settlements would favor either one branch or the other. Rather, the downstream effect of nonjusticiability will be a function of how much a President values removal authority over a given official, how aggressively Congress is willing to push for constraints on that power, and what kind of constitutional norms crystallize via open political debate. Further, where a White House occupant believes that a limit on removal hinders his or her policy agenda—which, it is worth noting, is not the same as perceiving it as friction on democratic accountability—then the presidency has ample tools to influence Congress to change the rule or alternatively to exploit the flexibility implicit in even a just-cause regime.[360]

Moreover, my proposal makes no implicit assumption about the agency design principle that Congress and the President will follow in the absence of judicial enforcement. At present, the observed ecology of federal agency structures contains a variety of different arrangements respecting removal authority and political control. There is no reason to believe that the political branches, in reaching these design decisions, are hewing mechanically to any implicit and unspoken understanding of Article II. Rather, they are making contextually informed decisions about how best to serve democratic accountability, as well as many other vital policy goals such as impartiality and expertise, in light of knowledge about existing agency operations, the play of democratic forces, and the particular circumstances of a policy area. To be sure, these decisions may be inflected by strategic political concerns—but so too may almost any important decision respecting federal governance.[361] My proposal conduces to judicial respect for the ensuing political branch decisions and does not imply any

360. *See supra* note 223 and accompanying text.

361. Consider in this regard Supreme Court appointments. No matter what Presidents claim, such appointments are not fairly described as reflecting only concerns about expertise and skill.

sub rosa agenda, rule, or principle for the settlement of those agency design decisions.

Nevertheless, the analysis developed in Parts II and III provides strong reasons to believe that treating removal as a political question will also have no large effect on interbranch relations or bureaucratic practice. Most importantly, as Part II emphasized, chief executives already have a wide array of substitutes to removal as a means of control, many of which have lower transaction costs. If private employment contexts are any guide, the absence of an at-will employment rule also may well not make much difference to quotidian bureaucratic practice. Like private employers, political officials likely do better in any event eliciting desirable behavior through nonhierarchical means.

Nonjusticiability and merits, in short, are acoustically separate when it comes to the removal question. There is no reason to repudiate application of the political question doctrine out of concern that it would de facto settle the underlying constitutional question or that it would have a destabilizing effect on current institutional arrangements. To the contrary, the historical fragility of judicial constructions of the removal power suggests any effect upon the interbranch equilibrium would be small in scale and hardly dispositive.

CONCLUSION

The primary claim of this Article is that allocations of removal authority should be considered political questions. To that end, this Article has analyzed the two-part syllogism at the foundation of *Free Enterprise Fund* and found neither link to be robust. Judicial enforcement of presidential removal authority is hence too erratic and unreliable a means of securing democratic accountability to be ranked as a judicially manageable standard. The Article's larger ambition is to demonstrate that agency design more generally is not an appropriate matter for judicial resolution. In particular, I have emphasized interaction effects and strategic responses to judicial interventions as grounds to think that the sort of simple decision rules preferred by courts will tend to fail. The federal bench, in short, has no mandate for piecemeal meddling in agency design as a means for promoting majoritarian values. Democratic accountability is best promoted instead by leaving agency design to democratic choice.

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