

SEILA LAW AS SEPARATION-OF-POWERS POSTURING

EDWARD CANTU*

*The Court rarely decides separation-of-powers cases, and when it does, academics usually scramble to fit such decisions into a broader doctrinal narrative. Such was the case when in June of 2020 the Supreme Court decided *Seila Law LLC v. Consumer Financial Protection Bureau*. In short, the Court ruled that it is unconstitutional for Congress to restrict the President’s removal power of an agency head if that agency is headed by a single person. For some reason, the Court concluded that such removal restrictions are permissible when applied to multi-headed agencies but not single-headed agencies. This Article argues that an attempt to doctrinalize *Seila* is an attempt to see a forest where there are only trees. Ultimately, this Article argues that the decision makes most sense not as part of a broader principled doctrine but rather as a form of symbolic posturing the Court engages in to maintain the appearance that it takes the separation of powers seriously.*

INTRODUCTION.....	38
I. CONTEXTUALIZING <i>SEILA</i>	39
II. REMOVAL POWER JURISPRUDENCE AS PRAGMATIC ABDICATION.....	43
III. <i>SEILA</i> IN LIGHT OF STRUCTURAL NON-ENFORCEMENT AND JUDICIAL POSTURING....	48
CONCLUSION.....	53

INTRODUCTION

How should scholars try to make sense of the Supreme Court’s separation-of-powers decisions? The traditional answer in other contexts is that they should find common denominators or principled distinctions between decisions and thereby distill from them collectively a doctrinal coherence. But does this rubric work with separation-of-powers decisions? This Article argues that it does not, and that the Court’s recent decision in *Seila Law LLC v. Consumer Financial Protection Bureau*¹ illustrates why, despite other scholars’ arguments to the contrary. In short, the Court in *Seila* ruled that when Congress creates an independent agency headed by only a single person, and Congress limits the President’s ability to remove that person to only “for cause,” Congress has violated the separation of powers.²

* Associate Professor, University of Missouri-Kansas City School of Law. © 2021, Edward Cantu.

¹ 140 S. Ct. 2183 (2020).

² *Id.* at 2197.

This holding perplexed some.³ What constitutional difference does it make whether the President’s for-cause limitation is applied to a multi-headed agency as opposed a single-headed agency? This Article will ultimately argue that *Seila*, and attempts to make sense of it in doctrinal terms, are likely futile and that the best framing of the decision is that it is a part of a consistent practice by the Court of posturing about the separation of powers when the costs of doing so are relatively low. Just like in the federalism context, this has the effect of giving the impression that the Court takes the separation of power seriously but at once allows the Court to avoid the heavy costs associated with disturbing the current scheme of inter-branch power allocation by meaningful enforcement of the separation of powers.

Part I will briefly unpack the Court’s decision in *Seila*, and it will use that unpacking as a segue to discussing broader patterns in the Court’s structural constitutional law jurisprudence. In short, I argue that the Court has all but relegated enforcement of structural constitutional rules to the political process. Part II will focus on the Court’s removal power jurisprudence and show that it amounts to a story of “pragmatic abdication” of judicial responsibility, designed to disturb the administrative state as much as possible. Part III is devoted to demonstrating how *Seila* fits into the narrative sketched in Part II: that the decision is best characterized as judicial posturing over a constitutional mandate—the separation of powers—that the Court is not willing to meaningfully enforce.

I. CONTEXTUALIZING *SEILA*

Congress created the Consumer Financial Protection Bureau (“the Bureau”), an independent agency within the Federal Reserve system, after the 2008 financial crisis. Its charge is to ensure the integrity of consumer debt products, such as mortgages and student loans, in order to avoid another crisis.⁴ When creating the Bureau, Congress decided to limit its leadership to a single director, who wields the type of quasi-legislative, quasi-judicial, and enforcement powers common among administrative agency leaders but with little to no meaningful supervision by the Federal Reserve or the President.⁵

This was an unusual decision, because a vast majority of independent agencies are headed by multi-member boards.⁶ Further, Congress decided

³ See Lisa Schultz Bressman, *What Seila Law Says About Chief Justice Roberts’ View of the Administrative State*, 87 U. CHI. L. REV. ONLINE 37, 41 (2020) (describing Justice Breyer in his dissent as “perplexed”).

⁴ See *Seila Law*, 140 S. Ct. at 2192–93.

⁵ *Id.* at 2191.

⁶ See STAFF OF COMM. ON OVERSIGHT & REFORM, 116TH CONG., POLICY AND SUPPORTING POSITIONS 148–207 (Comm. Print 2016); see also *Seila Law*, 140 S. Ct. at 2191 (“In

to limit the President's ability to remove the Bureau director to only "for cause," meaning that a president cannot remove a director "at will" but only for "inefficiency, neglect, or malfeasance."⁷

The Court ruled that this restriction on the President's removal power violated the separation of powers. It ruled that Congress cannot limit the President's removal power to "for cause" when the relevant agency is headed by a single person.⁸ How much sense does the Court's decision make? Not much. What does this answer reveal about what the Court *did*, as opposed to what it *said*? Perhaps a lot. Deciding how to best frame the Court's decision cannot be adequately undertaken without first understanding how the Court generally approaches issues of structural constitutional law.

One of the reasons why the study of the separation of powers has been termed a "backwater"⁹ area of legal research is precisely because separation-of-powers decisions do not, as they do in other contexts, resemble datapoints that, if connected, reveal a discernable constellation. As such, much of separation-of-powers scholarship has focused on the historical and political contexts of famous decisions, or on what commentators have believed, for example, are the undesirable results of a particular decision. Although it is usual for scholars to attempt to "doctrinalize" separation-of-powers decisions,¹⁰ as I've written elsewhere,¹¹ those attempts have proven unpersuasive.

The lens employed herein centers on several key realities about the nature of the judiciary and its demonstrated inclinations since the founding. First, the more important a separation-of-powers issue is, the less likely the Court will decide it. Second, and consequentially, the Court has generally abdicated enforcement of structural values, relegating any enforcement to the political process. Third, the result of the previous realities is that, when the Court does invalidate a law as a violation of the separation of powers, it's usually of little consequence, such that the best way to make sense of the decision is to frame it as part of a broader pattern of the Court posturing about structural values without meaningfully enforcing them.

organizing the [Bureau], Congress deviated from the structure of nearly every other independent administrative agency in our history.").

⁷ *Seila Law*, 140 S. Ct. at 2191, 2194.

⁸ *Id.* at 2197.

⁹ E. Donald Elliott, *Why Our Separation of Powers Jurisprudence Is So Abysmal*, 57 GEO. WASH. L. REV. 506, 511 (1989) ("Today, separation of powers is a theoretical backwater, which until recently was hardly even included in most law school courses and casebooks about constitutional law.").

¹⁰ See, e.g., Jack M. Beermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 470 (2011); Harold H. Bruff, *On the Constitutional Status of Administrative Agencies*, 36 AM. U. L. REV. 491, 491–92 (1987).

¹¹ Edward Cantu, *The Separation-of-Powers and the Least Dangerous Branch*, 13 GEO. J. L. & PUB. POL'Y 1, 3 (2015).

As to the first point, the Court has generally avoided ruling on issues that most implicate the material basics of national health and survival. It just so happens that issues of structural constitutional law are more likely to implicate these sensitive matters than other types of cases. As a result, the Court is most hands-on in contexts that involve intuitively important but less systemically crucial matters, such as individual rights issues.

For example, although the Court frets about single-headed agencies, it has for years refused to decide more pressing issues, such as: the extent of the President's ability to commit acts of war without congressional approval;¹² the glaring reality that Congress regularly and unconstitutionally delegates its legislative power to agencies;¹³ presidents' use of executive agreements as a way of circumventing the Senate's role in ratifying treaties with other nations;¹⁴ and presidents' arguably unconstitutional suspension of the laws under the guise of "prosecutorial discretion."¹⁵ As such, Professor Paul Gewirtz's assertion was particularly on-point: "[I]n the spirit of realism, we should acknowledge that the separation of powers cases that come to the Supreme Court rarely if ever address the truly major separation of powers concerns of our time."¹⁶

Second, because the Court doesn't decide the most important separation-of-powers issues, the Court has relegated enforcement of constitutional structure to the political process. This becomes apparent upon a glance at the structural sibling of separation of powers, federalism, which has suffered the same non-enforcement fate.

¹² John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 171 (1996) ("According to . . . scholars, the post-World War II era has witnessed nothing less than 'the disappearance of the separation of powers, the system of checks and balances, as it applies to decisions to go to war.'") (quoting JOHN H. ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993)).

¹³ Jonathan Marcus & Daniel B. O'Connell, *Judicial Deference to Agency Interpretations of Laws and Regulations with Criminal and Administrative Applications: An Argument Overlooked?*, 5 ADMIN. L. REV. ACCORD, 187, 200 (2020) ("Given the Supreme Court's scant history of striking congressional delegations for lack of an intelligible principle, it is no wonder that some scholars have viewed the non-delegation doctrine as 'dead.'") (quoting Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315 (2000)).

¹⁴ Detlev F. Vagts, *The Treaty-Making Process: A Guide for Outsiders*, 17 ILSA J. INT'L & COMP. L. 127, 130 (2010) ("An argument was developed a few years ago to the effect that the Senate's treaty power is exclusive and that executive agreements violate the Constitution. This view was hotly contested and did not achieve a victory in the courts. The choice is regarded as a political question and not one in which the courts have the deciding authority." (footnotes omitted)).

¹⁵ See Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 673–74 (2014) (arguing that President Obama likely exceeded his constitutional prosecutorial discretion via his implementation of DACA).

¹⁶ Paul Gewirtz, *Realism in Separation of Powers Thinking*, 30 WM. & MARY L. REV. 343, 345 (1989).

It was relatively easy for the Court in the Republic's early days to strictly enforce federalism principles against Congress's increasingly aggressive invocation of the Commerce Clause as a basis for regulation. Hence, in early stand-taking decisions, such as *United States v. E. C. Knight Co.*,¹⁷ *Carter v. Carter Coal Co.*,¹⁸ and *Hammer v. Dagenhart*,¹⁹ the Court, with uncompromising formalism, struck down federal laws passed pursuant to the Commerce Clause. But in 1937, the Court made an about-face and upheld laws it would have invalidated a few years prior, laws, for example, designed to jump-start the economy during the Great Depression.²⁰

Law students are generally taught that this deference lasted until the so-called "Rehnquist revolution," wherein the Court ostensibly reinvigorated federalism via *United States v. Lopez*²¹ and *United States v. Morrison*.²² But those decisions were fairly inconsequential. As Professor Ernie Young asserted years later, "Dual federalism remains hardly less dead than it was the day after the Court decided *Wickard v. Filburn*."²³ And it's fair to say that the Roberts Court has not handed down any decision that represents a carrying of the Rehnquist torch on federalism.

The reason for the fizzling out of decisions such as *Lopez* and *Morrison*—if they ever fizzled in the first place—is that they were symbolic. Neither of these decisions had the effect of curtailing Congress's Commerce Clause power in any meaningful way, and it is difficult to conclude that this was indeed the intended effect. Never has the Court demonstrated a genuine willingness to drastically alter the basics of the nation's regulatory scheme in order to enforce an abstraction such as federalism.

Of course, the Court cannot give up on the notion of federalism, given that it's a supposedly crucial constitutional value. Pragmatism wins out outside the context of individual rights, and thus the Court hands down decisions that have the primary (and likely intended) effect of genuflecting

¹⁷ 156 U.S. 1 (1895).

¹⁸ 298 U.S. 238 (1936).

¹⁹ 247 U.S. 251 (1918).

²⁰ See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (reversing course in the Court's Commerce Clause jurisprudence and thus ushering in the modern era of extreme deference toward congressional power generally). And, of course, the posterchild for this deference is the Court's decision in *Wickard v. Filburn*, 317 U.S. 111 (1942).

²¹ 514 U.S. 549, 549 (1995) (invalidating the Gun Free School Zones Act for regulating activity that was not sufficiently economic so as to justify its regulation under the Commerce Clause).

²² 528 U.S. 598, 598 (2000) (striking down provisions of the Violence Against Women Act that regulated conduct not sufficiently economic to be a proper object for regulation under the Commerce Clause).

²³ Ernest A. Young, *The Puzzling Persistence of Dual Federalism*, in *NOMOS LV: FEDERALISM AND SUBSIDIARITY* (James E. Fleming & Jacob T. Levy eds., 2014).

to structural values while at once not risking the costs of enforcing them.²⁴ As Orin Kerr has written, “If there is a federalism issue that doesn’t have a lot of practical importance, there’s a decent chance five votes exist for the pro-federalism side.”²⁵

The separation of powers has suffered the same fate as federalism, in that its enforcement has been relegated to the political process, and ostensible enforcement by the Court occurs only when the stakes are relatively low, thus enabling the Court to posture about the sacredness of the separation of powers without meaningfully enforcing it. A good illustration of this reality is the body of removal power jurisprudence, on which the Court in *Seila* based its decision.

II. REMOVAL POWER JURISPRUDENCE AS PRAGMATIC ABDICATION

Historically, Congress has attempted to limit the President’s ability to remove, at will, officers operating in the Executive Branch but not within the President’s cabinet. Some of the earliest and most recent decisions have centered on this issue. Such confrontations are inevitable. Congress understandably seeks to limit the degree to which an administrative actor—say, a commissioner for the Federal Trade Commission—will be at the mercy of a president’s partisan whims rather than technocratically focused on advancing public policy. In turn, presidents have invoked the “unitary executive” theory of the presidency, the idea that because agency actors are under the Executive Branch, Article II of the Constitution enables the President to control, including remove, those actors at will.²⁶

One of the earliest removal power decisions was *Myers v. United States*.²⁷ President Wilson appointed Myers to be a postmaster.²⁸ In 1920,

²⁴ See Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 159 (2001) (asserting that “[t]he [Rehnquist] Court’s most prominent federalism cases . . . all have involved fairly minor federal regulatory efforts with mostly symbolic impact”); Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1665 (2006) (describing some Rehnquist Court decisions as manifestations of “symbolic federalism”); cf. Anthony Johnstone, *Commandeering Information (and Informing the Commandeered)*, 161 U. PA. L. REV. ONLINE 205, 217 (2013) (“[J]udicial safeguards of federalism typically have more bite in narrow, symbolic cases . . . than in larger cases that threaten to undermine long-settled national policies . . .”).

²⁵ Orin Kerr, *The Rehnquist Court and Symbolic Federalism*, SCOTUSBLOG, (June 6, 2005, 1:52 PM), <https://www.scotusblog.com/2005/06/the-rehnquist-court-and-symbolic-federalism/> [<https://perma.cc/D2L2-2AYF>].

²⁶ See David B. Rivkin, Jr., *The Unitary Executive and Presidential Control of Executive Branch Rulemaking*, 7 ADMIN. L.J. AM. U. 309, 310 (1993) (arguing that the executive has the inherent constitutional power to control agency regulation).

²⁷ 272 U.S. 52 (1926).

²⁸ *Id.* at 56.

President Wilson changed his mind and demanded Myers's resignation.²⁹ Myers refused and was removed despite an 1876 federal law requiring the advice and consent of the Senate for postmaster removals.³⁰ In striking the removal restriction, the Court pronounced that the President enjoyed "the general administrative control" of those executing the laws, and thus the power to remove them at will.³¹ The Court decided *Myers* at a time when it was not yet clear that it would eventually have to yield to experimentation with bureaucratic arrangements. Thus, *Myers* represents an unusual, categorical, and formalistic enforcement of the separation of powers, but the Court almost immediately began backing away from it.

*Humphrey's Executor v. United States*³² followed, and it is often seen as the Court's first recognition of the constitutional legitimacy of independent agencies. President Hoover appointed William Humphrey as a Commissioner of the Federal Trade Commission.³³ When President Roosevelt took office, he sought to replace Humphrey.³⁴ Humphrey invoked a law that restricted the President from removing a commissioner only "for cause," meaning "inefficiency, neglect of duty, or malfeasance in office."³⁵ The government argued that this removal restriction was unconstitutional citing, understandably enough, *Myers*.³⁶ The Court, however, asserted that the operative language in the *Myers* opinion was dicta, concluding that the opinion was only relevant to the President's authority to "remove a postmaster of the first class."³⁷ The Court then asserted that sentiments in *Myers* conflicting with its conclusion were "disapproved."³⁸

The Court described a new rule: *Myers* applied only to "executive officers."³⁹ Because Humphrey was a member of "an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed,"⁴⁰ he was not an "executive officer" but acted only "quasi-legislatively."⁴¹

Things got worse. Although *Humphrey's* is generally understood as the Court backtracking from the anti-pragmatism of *Myers*, the Court would backtrack from *Humphrey's* as well in light of the changing nature of modern government. That is, it was clear by the 1980s that the executive

²⁹ *Id.* at 106.

³⁰ *Id.* at 107–08.

³¹ *Id.* at 135.

³² 295 U.S. 602 (1935).

³³ *Id.* at 618.

³⁴ *Id.*

³⁵ *Id.* at 620.

³⁶ *Id.* at 626.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 627–28.

⁴⁰ *Id.* at 628.

⁴¹ *Id.*

versus quasi-legislative distinction from *Humphrey's* might not always be sufficient to legitimize administrative arrangements necessary to meet modern national needs. As such, the Court's decision in *Morrison v. Olson*⁴² clarified that the watering down of prior stand-taking would continue.

In *Morrison*, the Court addressed the Ethics in Government Act of 1978, which established a system for the appointment of an independent counsel to investigate possible criminal activity within the Executive Branch.⁴³ The Act granted the independent counsel "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice."⁴⁴ Under the Act, an independent counsel was removable by the Attorney General only "for good cause."⁴⁵ In other words, the independent counsel performed quintessentially executive duties, but the relevant statute limited the President's removal power to for-cause.

The Court reframed its precedent in terms of pure functionalism. It noted that *Myers* and *Humphrey's* seemed to turn on conceptual categories such as "executive" and "quasi-legislative." But the Court asserted that what the *Myers* and *Humphrey's* Courts were really doing was using these labels as proxies for the degree to which the given removal provisions excessively "impede[d] the President's ability to perform his constitutional duty."⁴⁶ The Court had to admit that the independent counsel exercised purely executive power; it just subsequently claimed that this reality did not mean excessive interference in the President's ability to function as an effective executive. Thus, *Morrison* implicitly overruled the reasoning in *Humphrey's* in pursuit of even greater pragmatism. This is obvious, despite the Court's pretense of merely unpacking precedent.⁴⁷

More recently, the Court decided *Free Enterprise Fund v. Public Company Accounting Oversight Board*.⁴⁸ Unlike in most of the relevant precedent, here we saw the Court invalidating a law in the name of the

⁴² 487 U.S. 654 (1988).

⁴³ *Id.* at 659–60.

⁴⁴ *Id.* at 662.

⁴⁵ *Id.* at 686.

⁴⁶ *Id.* at 691.

⁴⁷ See MARTIN N. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 115 ("The intellectual bankruptcy of a doctrinal approach that measures the validity of branch usurpations in terms of the particular threat of undue concentration of power posed in each case is well illustrated by the Court's most recent use of such a standard in *Morrison v. Olson*."); Theodore B. Olson, *The Advocate as Friend: The Solicitor General's Stewardship Through the Example of Rex E. Lee*, 2003 BYU L. REV. 1, 64 (2003) (describing the Court in *Morrison* as "overruling in a very *ipse dixit* fashion *Humphrey's Executor*").

⁴⁸ 561 U.S. 477 (2010).

separation of powers; why? The likely reason is that invalidating the laws at issue in *Humphrey's* and *Morrison* would have come with excessive costs. But in *Free Enterprise Fund*, the law in question was hardly crucial to the healthy functioning of the administrative state, meaning it was an opportunity for the Court to take a stand, in a posturing sense, in the name of the separation of powers. In this sense, the case is a telling precursor to *Seila*.

Free Enterprise Fund involved the Sarbanes-Oxley Act of 2002.⁴⁹ Congress created the Public Company Accounting Oversight Board (the Board). The Commissioners of the Securities and Exchange Commission (SEC) were charged with appointing five members of the Board.⁵⁰ Importantly, the President could remove SEC Commissioners only “for good cause,” and the SEC Commissioners, in turn, could remove Board members only for cause as well.⁵¹ Hence, the arrangement presented *two* layers of for-cause removal; should this nuance matter?

The Court deemed this arrangement unconstitutional. Justice Roberts, writing for the Court, strived to demonstrate why two layers made a constitutional difference:

The point is not to take issue with for-cause limitations in general; we do not do that. The question here is far more modest. We deal with the unusual situation . . . of two layers of for-cause tenure. And though it may be criticized as “elementary arithmetical logic,” two layers are not the same as one.⁵²

The opinion was peppered with quotes from the Federalist Papers and sober declarations such as “[the] arrangement [at issue] is contrary to Article II’s vesting of the executive power in the President,” and “Article II ‘makes a single President responsible for the actions of the Executive Branch.’”⁵³

But what role might the decision play in protecting executive power to manage the Executive Branch? Justice Breyer, dissenting, incisively showed that the answer is: practically none. In discussing “[t]o what extent . . . is the Act’s ‘for-cause’ provision likely, as a practical matter, to limit the President’s exercise of executive authority,” he noted first that “no President has ever actually sought to exercise that power by testing the scope of a ‘for-cause’ provision.”⁵⁴ He then attacked the basic logic of the majority’s opinion:

⁴⁹ *Id.* at 484.

⁵⁰ *Id.*

⁵¹ *Id.* at 483, 486.

⁵² *Id.* at 501 (citation omitted).

⁵³ *Id.* at 496–97 (quoting *Clinton v. Jones*, 520 U.S. 681, 712–13 (1997) (Breyer, J., concurring)).

⁵⁴ *Id.* at 524 (Breyer, J., dissenting).

[T]he Court fails to show why *two* layers of “for cause” protection . . . impose any more serious limitation upon the *President’s* powers than *one* layer. Consider the four scenarios that might arise:

1. The President and the Commission both want to keep a Board member in office. Neither layer is relevant.
2. The President and the Commission both want to dismiss a Board member. Layer 2 stops them both from doing so without cause. The President’s ability to remove the Commission (layer 1) is irrelevant, for he and the Commission are in agreement.
3. The President wants to dismiss a Board member, but the Commission wants to keep the member. Layer 1 allows the Commission to make that determination notwithstanding the President’s contrary view. Layer 2 is irrelevant because the Commission does not seek to remove the Board member.
4. The President wants to keep a Board member, but the Commission wants to dismiss the Board member. Here, layer 2 *helps the President*, for it hinders the Commission’s ability to dismiss a Board member whom the President wants to keep in place.⁵⁵

“Thus, the majority’s decision to eliminate only *layer 2* accomplishes virtually nothing”⁵⁶ to meaningfully protect executive power.

As I have written previously,⁵⁷ it is extraordinarily unlikely that what drove the majority’s position was a genuine concern about two layers of restriction rather than one, for reasons Justice Breyer underscored. Rather, the opinion is best read as an expression of the conservative majority’s concern about expanding the independence of administrative personnel and a recognition that *Free Enterprise Fund* provided an opportunity for the Court to issue a holding symbolically expressing that concern with little cost.

Notably, the Court refused to commit to a holding that two layers of removal restrictions are *always* prohibited. The Court stated that the inquiry would always depend on the contextual details of each case, a position for which Justice Breyer criticized the majority:

[S]uch a mechanical [two-layer] rule cannot be cabined simply by saying that, *perhaps*, the rule does not apply to instances that, at

⁵⁵ *Id.* at 525–26.

⁵⁶ *Id.* at 526.

⁵⁷ *See Cantu, supra* note 11, at 23.

least at first blush, seem highly similar. A judicial holding by its very nature is not “a restricted railroad ticket, good for” one “day and train only.” . . . I understand the virtues of a common-law case-by-case approach. But here that kind of approach . . . (when applied without more specificity than I can find in the Court’s opinion) threatens serious harm.⁵⁸

In other words, the implications of *Free Enterprise Fund* are at most narrow. It is best explained as a facially assertive line-drawing decision in a context where Congress has little need to cross the given line in order for modern government to continue to robustly function. The decision thus capstones a century of judicial acquiescence with a toothless pretense of formalistic separation-of-powers enforcement.⁵⁹ As such, the decision makes sense as establishing a prudential pattern that would lead to the decision in *Seila*.

III. *SEILA* IN LIGHT OF STRUCTURAL NON-ENFORCEMENT AND JUDICIAL POSTURING

Consistent with how the Court has always approached separation-of-powers decisions, *Seila* should be viewed not as anti-pragmatic formalism but as pragmatic posturing. This is true for several reasons.

First, unsurprisingly, the stakes were pretty low in the case. Independent agencies headed by a single person are rare, such that the Court’s ruling will affect few agencies. *Collins v. Mnuchin* is currently in the Court’s pipeline, and it involves the same for-cause removal restrictions and an agency with only a single director, the Federal Housing Finance Agency.⁶⁰ The Fifth Circuit declared this structure unconstitutional.⁶¹ But this agency structure is nevertheless unusual, and, in any event, the Court’s position on the matter will only be marginally disruptive, because Congress can cure the problem simply by replacing the single-headed structures with multi-member boards or commissions. Per the Court’s holding, this will allow Congress to impose on the President the very for-cause removal limitation it believes is important to maintain regulatory integrity.

⁵⁸ *Free Enter. Fund*, 561 U.S. at 537–39 (Breyer J. dissenting).

⁵⁹ Peter Strauss notes, “In the end, the [*Free Enterprise Fund*] majority’s solution . . . appears to have avoided large disruptions to the institutions whose responsibilities were immediately before them, rescuing every element of the [Board]’s authority save the formal tenure protection of its members.” Peter L. Strauss, *The Role of the Chief Executive in Domestic Administration* (Colum. L. Sch. Pub. L. & Legal Theory Working Paper Grp., Paper No. 10-252, 2010), <http://ssrn.com/abstract=1693163>; see Rick Pildes, *The Free Enterprise Decision: A Symbolic Victory for the “Unitary Executive Branch” Vision of the Presidency, but of Limited Practical Consequence*, BALKINIZATION (June 28, 2010), <http://balkin.blogspot.com/2010/06/free-enterprise-decision-symbolic.html> [<https://perma.cc/ZN43-3VRJ>].

⁶⁰ *Collins v. Mnuchin*, 896 F.3d 640, 646 (5th Cir. 2018).

⁶¹ *Id.*

Second, and most importantly, the distinction that the Court claimed was constitutionally dispositive was a next-to-meaningless distinction in terms of protecting executive prerogatives. This fact betrays the Court's conclusion as one scurrying for a veneer of legal import, which in turn suggests that the majority Justices did not genuinely understand themselves to be enforcing a constitutionally important principle.

The Court premised its analysis on a discussion of the intended nature of the Executive Branch wherein power is, unlike in Congress, concentrated rather than divided.⁶² As the Court explained, this concentration of power is important not only because it allows the President to execute the laws relatively unimpeded by diffusions of his power, but also, more importantly, because the concentration of power allows for the concentration of political accountability in one person.⁶³

According to the Court, the single-director Bureau arrangement was unconstitutional because it vested “significant governmental power in the hands of a single individual accountable to no one. The Director is neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is.”⁶⁴ If it were important to the Court that the Bureau was headed by a single director, one would imagine that the Court would go on to explain precisely what difference it would make in terms of accountability if the Bureau were headed by a multi-member board. But it didn't. On this score, it noted only that the single director has “no colleagues to persuade” before making decisions that can significantly affect people's lives.⁶⁵

It is not at all clear how the concentration of agency control in one director means less *presidential* accountability. Certainly, the concentration of this power in one director can raise serious concerns about fairness to those who are subject to the director's power. But *Seila* was not an individual rights decision brought by a plaintiff claiming that the director, say, imposed a fine in a manner that was arbitrary and capricious. Rather, it was a separation-of-powers case, which means the operative question was not whether too much power was concentrated in the director, but whether restrictions on the President's ability to remove the director meant lessened control by the President, and thus less political accountability.

So how would multiple directors mean greater presidential control? The only hint the Court gave was the following explanation (the Court, as Justice Kagan pointed out in her dissent, did not rely on the following reasoning, which was provided after the announcement of unconstitutionality):

⁶² *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2202–03 (2020).

⁶³ *Id.*

⁶⁴ *Id.* at 2203.

⁶⁵ *Id.* at 2204.

Because the CFPB is headed by a single Director with a five-year term, some Presidents may not have any opportunity to shape its leadership and thereby influence its activities. A President elected in 2020 would likely not appoint a CFPB Director until 2023, and a President elected in 2028 may *never* appoint one. That means an unlucky President might get elected on a consumer-protection platform and enter office only to find herself saddled with a holdover Director from a competing political party who is dead set *against* that agenda. To make matters worse, the agency's single-Director structure means the President will not have the opportunity to appoint any other leaders—such as a chair or fellow members of a Commission or Board—who can serve as a check on the Director's authority and help bring the agency in line with the President's preferred policies.⁶⁶

But this is selective logic. One could emphasize in response that if a president gets a chance to replace a single director, that president can exercise more control over the agency than if she merely has the opportunity to replace one or two board members on, say, a five-member board. In the Court's hypothetical, the “unlucky President” could, under the Bureau's original structure, completely control who heads the Bureau, something the President could not likely do with a five-member board made up of members with staggered terms. This is especially true given that Congress has designed some multi-member boards such that they must be roughly bipartisan, limiting the President's ability to appoint members of his own party.⁶⁷

In her dissent, Justice Kagan drove the point home further. She noted that Congress often resorts to multi-member boards or commissions because they mean *less* presidential control over agencies. “[M]ultiple membership,” an influential Senate Report concluded, is ‘a buffer against Presidential control’ So, for example, Congress constructed the Federal Reserve as it did because it is ‘easier to protect a board from political control than to protect a single appointed official.’”⁶⁸ She added:

A multimember structure reduces accountability to the President because it's harder for him to oversee, to

⁶⁶ *Id.*

⁶⁷ For example, of the five Commissioners of the Federal Trade Commission, no more than three can be of the same political party. *See* Fed. Trade Comm'n, *Commissioners* (last visited Mar. 26, 2021), <https://www.ftc.gov/about-ftc/commissioners> [<https://perma.cc/U86W-VUVJ>].

⁶⁸ *Seila Law*, 140 S. Ct. at 2243 (Kagan, J., dissenting) (citing S. Comm. on Governmental Affs., Study on Federal Regulation, S. Doc. No. 95-91, at 75 (1977); ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 153 (1941)) (first alteration in original).

influence—or to remove, if necessary—a group of five or more commissioners than a single director. . . . In short, the majority gets the matter backward: Where presidential control is the object, better to have one than many.⁶⁹

So, there is no reason to think that a lone director of the Bureau is less under a president's control than a multi-member board, and it is quite telling that the Court failed to provide good reasons for claiming otherwise. What exactly is told is the question. Other scholars have offered their theories.

For example, according to Professor Lisa Schultz Bressman, *Seila* is “remarkable” because it “offered a vision of separation of powers that finally allows us to see fully how [Justice Roberts] views the administrative state.”⁷⁰ Through a rational reconstruction of several of Justice Roberts's stated positions in various administrative law decisions, Bressman concluded that one can distill an implicit doctrine. In this way, according to Bressman, *Seila* makes sense when one frames Roberts's opinions as offering Congress two choices, both of which allegedly advance separation-of-powers values: Congress can design an agency with a single head who is removable at will by the President, thus ensuring political accountability, or the agency can be hydra-headed, with for-cause removal restrictions, because the multiple-head leadership provides “structural protections that substitute[] for political accountability as a means of preventing abuse of power.”⁷¹ According to Bressman, *Seila* thus “makes a stunning change to removal law.”⁷²

Accepting Bressman's framing seems to require the view that Roberts believed that the “structural protections” provided by board leadership is a method of enforcing the separation of powers, but it seems Bressman reads too much into Roberts's logic. Roberts's focus was not “abuse of power,” because preventing abuses of power has little inherently to do with political accountability for the President.

In his *Seila* opinion, Roberts made quite clear—and he was correct in doing so given our constitutional structure—that presidential control of executive underlings is what is necessary to ensure the type of political accountability that maintains the separation of powers under the Framers' vision. That is, Roberts repeatedly and methodically rested the Court's holding on the idea that the “structural protection” of the division of power was one the Framers *did not* impose on the Executive Branch. Rather, the Framers provided a structure wherein the *concentration* of power in the executive would make political accountability of the President the proper

⁶⁹ *Id.* at 2243.

⁷⁰ Bressman, *supra* note 3, at 37.

⁷¹ *Id.* at 39.

⁷² *Id.* at 40.

check against executive aggrandizement:

The Executive Branch is a stark departure from all this division [of power strategy for protecting liberty]. . . . The resulting constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections. In that scheme, individual executive officials will still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President. Through the President's oversight, "the chain of dependence [is] preserved," so that "the lowest officers, the middle grade, and the highest" all "depend, as they ought, on the President" ⁷³

Thus, a fair reading of the opinion cuts against reading Roberts as endorsing the view that the structural protections commensurate with board control are an alternative to protecting the separation of powers. If Roberts believed this, he was certainly capable of making this clear in the opinion, but he instead emphasized that presidential control of those working in the Executive Branch is key. ⁷⁴ Holding that board control could substitute for this check would have made little sense, because it would undermine the key premise of Roberts's apparent reasoning. Multi-member board protection and control by the President, then, are contradictory, not alternatives that have the same separation-of-powers effect.

Bressman seems to argue that the relevant separation-of-powers effect is the protection of individual liberty. If we accept this premise, her framing of the *Seila* opinion would be more persuasive, but, again, the Roberts Court made clear that the operable effect was specifically *executive control of underlings* to protect liberty, not just the protection of liberty in the abstract.

It is true that, at times, the Court made references to the benefits of board control, but these remarks were overwhelmingly not in the portion of the opinion wherein the Court explained the basis of unconstitutionality but rather appeared after the fact. As the Court put it, "[t]he CFPB Director's insulation from removal by an accountable president is enough to render the agency's structure unconstitutional." ⁷⁵ Bressman's framing is thoughtful and interesting, but it is too charitable; that is, it superimposes a logic to Roberts's opinion that the opinion doesn't deserve.

With this understanding, we run headlong into the point made above:

⁷³ *Seila Law*, 140 S. Ct at 2203 (quoting 1 Annals of Cong. 499 (J. Madison)) (alteration in original).

⁷⁴ *Id.*

⁷⁵ *Id.* at 2204.

that Roberts's focus on the number of agency heads makes little, if any, sense, because it hardly follows that the President has more control over a board than a single director. In fact, as Justice Kagan pointed out, the assumption should cut the other way.

CONCLUSION

Presidential power has been on the rise for decades as Congress has found it increasingly necessary to delegate powers to the President in order to tackle modern exigencies. One way to mitigate this trend is to allow Congress to make it difficult for presidents to control agency personnel. The Roberts Court appears to be suspicious of this mitigation strategy but only in situations wherein the Court's vigilance does not meaningfully serve to protect presidential prerogatives and thereby disrupt the general scheme Congress has set up. Consistent with this, *Seila* presented the Court with an opportunity to wax sententiously about the importance of the separation of powers without doing anything much to disturb the various ways in which our current national life depends on separation-of-powers non-enforcement. It decided the case using transparently weak logic, thus betraying that the majority did not genuinely believe that the number of agency heads makes any constitutional difference. Because John Roberts is an extremely smart man who knows what he's doing, invalidating the single-director structure makes the most sense when framed as a taken opportunity to posture disapprovingly about the nation's reliance on separation-of-powers non-enforcement, while at once doing nothing meaningful to lessen that reliance.

Seen this way, what appears to be a formalistic enforcement of the separation of powers may be better framed as a pragmatic symbolism: the separation of powers is, in a sense, honored rhetorically so that the Court can continue to leave undecided the most important separation-of-powers decisions of our time.