ABOVE REPROACH: HOW THE CONSUMER FINANCIAL PROTECTION BUREAU ESCAPES CONSTITUTIONAL CHECKS & BALANCES

WILLIAM SIMPSON*

Abstract

A constellation of constitutional provisions creates the separation of powers doctrine, which prevents the federal government from accumulating too much power under one branch or one department. Instead, each branch and department stands accountable to another entity through a series of checks and balances. The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), however, created the vanguard of powerful and independent agencies by establishing the Consumer Financial Protection Bureau (CFPB or Bureau). The CFPB enjoys a broad mandate of public-facing regulatory authority, but despite its ostensible role in the executive branch, the President of the United States cannot easily remove the CFPB's Director. Nor can Congress exercise its Appropriations Clause power to review the CFPB budget—the Dodd-Frank Act explicitly protects the bureau from such scrutiny. The CFPB drew several constitutional challenges, including one in which the U.S. Court of Appeals for the D.C. Circuit recently held that the CFPB's single agency director is structurally unconstitutional unless the director is removable by the President. This note briefly explains the administrative and constitutional law environment these litigants face and then contrasts the CFPB's structure with other regulatory agencies. In doing so, it considers how the D.C. Circuit's opinion should be reviewed en banc or on appeal and evaluates whether attributes of the CFPB are actually novel. In the end, the CFPB's unprecedented combination of structural characteristics, rather than any single one of its attributes, renders it incompatible with a constitutional separation of powers.

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* Boston University School of Law, J.D. 2017; University of Arkansas, Sam M. Walton College of Business, B.S.B.A. 2014. With special thanks to Professor Gary Lawson for initial thoughts and direction, as well as Brittany Cohen for thoughtful and patient drafting feedback.

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I. Introduction

This note explores one aspect of constitutional controversy surrounding the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). By creating vast, new regulatory apparatuses, Dodd-Frank granted expansive power to administrative agencies for the purpose of reshaping the financial services industry.[1]

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[1] *See The Laws that Govern the Securities Industry*, SEC. & EXCH. COMM'N (Oct. 1, 2013), https://www.sec.gov/about/laws.shtml#df2010 [https://perma.cc/UN2L-TT7J]; Philip Wallach, *The Administrative State's Legitimacy Crisis*, CTR. FOR EFFECTIVE PUB. MGMT. AT BROOKINGS INST. 8 (Apr. 2016),

One such agency, the Consumer Financial Protection Bureau (CFPB), is embroiled in litigation due to its insulation from checks and balances by Congress and the President of the United States.[2] Dodd-Frank specifically forbids Congress from reviewing the CFPB budget and forbids the President from exercising authority over how the CPFB chooses to define and implement the law.[3]

The CFPB claims that its independent structure is not wholly novel.[4] For example, many other financial regulatory agencies also use self-funding structures, such as the Federal Reserve System (the Fed) and the Federal Deposit Insurance Corporation (FDIC).[5] Since existing literature lacks a constitutional comparison of how these agencies function, this note will answer the following question: Does the CFPB's self-funding structure, when coupled with its unique independent status exempt from much executive and congressional oversight, contravene the separation of powers doctrine, particularly as applied through the Appropriations Clause of the United States Constitution? In the end, the CFPB's unprecedented combination of structural characteristics, rather than any single one of its attributes, renders it incompatible with a constitutional separation of powers.

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https://www.brookings.edu/wp-content/uploads/2016/07/Administrative-state-legitimacy-crisis_FINAL.pdf [https://perma.cc/M9ED-PWY9] ("Exponents of this view are increasingly comfortable having Congress empower expert bodies in the executive to develop substantive law . . . .").

[2] *See, e.g.*, State Nat. Bank of Big Spring v. Lew, 958 F. Supp. 2d 127, 151 (D.D.C. 2013), *aff'd in part, rev'd in part,* 795 F.3d 48 (D.C. Cir. 2015); PHH Corp. v. Consumer Fin. Prot. Bureau, No. 15-1177, 2016 WL 5898801 (D.C. Cir. Oct. 11, 2016).

[3] 12 U.S.C. § 5497(a)(2)(C) (2012); 12 U.S.C. § 5497(a)(4)(E) (2012); C. Boyden Gray, *Congressional Abdication: Delegation Without Detail and Without Waiver*, 36 HARV. J.L. & PUB. POL'Y 41, 46–47 (2013) ("Although the CFPB is housed in and financed by the Federal Reserve, the Federal Reserve is prohibited from interfering with the CFPB; and the White House cannot exert control over the CFPB because the CFPB is an independent agency with a director appointed to a five-year term and only removable for cause.").

[4] *See* Arthur E. Wilmarth, Jr., *The Financial Services Industry's Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31 REV. BANKING & FIN. L. 881, 905–06 (2012).

[5] *See* Brookley Born & William Donaldson, *Make Regulators Self-Funding*, POLITICO (Mar. 10, 2013), http://www.politico.com/story/2013/03/self-funding-of-regulators-would-help-fiscal-mess-088666#ixzz4KBeIG2FZ [https://perma.cc/3VSW-N655]. *See generally* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010).

Following this Introduction, Part II of this note will provide a broad introduction to the CFPB and its legislative origins. Part III will survey the separation of powers doctrine, Appropriations Clause, and non-delegation doctrines. Although virtually no courts curtail administrative power to its narrow role foreseeable in 1787, recent cases suggest more scrutiny than agencies have enjoyed since the Progressive Era and New Deal. The Supreme Court fully embraced a revival in the separation of powers doctrine six years ago,[6] and the CFPB's challengers hope that renaissance continues today. Part IV of this note will briefly explain the background of Dodd-Frank and the CFPB, which emerged out of the 2007–2008 financial crisis with a unique structure and funding system targeted to maximize the CPFB's regulatory power while minimizing Congressional oversight. Part IV will also explore the current constitutional challenges to the CFPB, both in their strategy and merit. In doing so, it will contrast the CFPB with other financial regulatory agencies, determining whether challengers can establish materially unique attributes of the CFPB. The U.S. Court of Appeals for the D.C. Circuit recently issued an opinion addressing constitutional arguments about the CFPB's structure, and that case may be reheard en banc.[7] Finally, Part V will summarize a conclusion constitutional case against the CFPB and offer prospective analysis on future litigation.

II. *A Republic, If You Can Keep It: The Separation of Powers Doctrine*

A. Legislative Power Vested in the Legislative Branch

Although the administrative state traces back to the first Congress, its early scope was limited—less than one dozen of America's modern federal agencies existed before the American Civil War.[8] The vision of a limited role for administrative agencies

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[6] *See generally Free Enter. Fund*, 561 U.S. 477.

[7] *See* State Nat. Bank of Big Spring, 795 F.3d 48 (D.C. Cir. 2015); PHH Corp., No. 15-1177, 2016 WL 5898801 (D.C. Cir. Oct. 11, 2016).

[8] *See generally Evolution of Administrative Law as a Legal Discipline*, 32 FED. PRAC. & PROC. JUDICIAL REV. § 8113 (1st ed. 2016) ("The national government was small in the years between 1789 and the Civil War but eleven agencies can trace their ancestry back to that period. The *first* Congress passed three statutes conferring administrative powers.").

evaporated in the twentieth century, beginning with an explosion of bureaucratic regulations in the Progressive Era under the Woodrow Wilson Administration.[9] The New Deal accelerated the administrative state's expansion, offering sweeping new powers to agency "experts."[10] James Landis, one of the most influential twentieth century administrative law scholars, argued that as the government grew it "no longer dare[d] to rely for its administration on the casual office-seeker," turning instead to judges applying law to circumstances before them.[11] Another influential legal thinker of the era, Joseph Eastman, embodied the era's spirit when he proposed that bureaucrats of the administrative state were the best alternative to judicial power, saying that bureaucrats "are clearly nonpartisan in their makeup, and party policies do not enter into their activities except to the extent that such policies may be definitely registered in the statutes which they are sworn to enforce."[12]

Powerful and independent regulators could, in this conception, rise above partisan concerns to craft "expert" solutions to problems.[13] In the era following Landis, scholars began wringing their hands about agency capture theory, which expressed concern that regulated industries grew to control the very agencies charged with their oversight.[14] As these warnings remind us, public agencies and private industry often hire from the same pool of talent, which may encourage

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[9] *See generally id.* ("The Wilson administration, in particular, turned to that concept. Several modern agencies were created under his administration including the Food and Drug Administration, Federal Trade Commission, Tariff Commission, the direct predecessors to the Maritime Commission and the Federal Reserve System.").

[10] *See* Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 415 (2007) ("New Dealers from 1933 to 1939, from Rex Tugwell to James Landis, envisioned the government as a profoundly prescriptive entity. Experts would formulate policy, agencies would implement it, and courts would stay out of the way.").

[11] GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 73 (2016) (quoting James Landis, THE ADMINISTRATIVE PROCESS 75–76 (1938)).

[12] *Id*. at 72 (quoting Joseph Eastman, *The Place of the Independent Commission*, 12 CONST. REV. 95, 101 (1928)).

[13] *See id.*

[14] *See id.* at 73–75 (citing various scholars). *See generally* Wentong Zheng, *The Revolving Door*, 90 NOTRE DAME L. REV. 1265 (2015) (discussing "concerns voiced about the revolving door" between the government and private sector and the risk of industry capture).

public officials to behave as potential job applicants, tailoring their behavior in office to appeal to private-sector employers in the future, or growing to rely on favors from regulated entities.[15] In structuring the Environmental Protection Agency (EPA), for example, environmental advocates feared that special interest groups would wield greater power over enforcement actions than the stated goals of Congress.[16] Consequently, Congress tried to quash these incentives by granting more independence to agencies in exercising their delegated powers.[17]

These agency powers, however, are not immune from constitutional challenges. As Article I, Section 1 of the U.S. Constitution stipulates, "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."[18] By exclusively vesting legislative power in Congress, the Constitution creates a negative inference that we know as the non-delegation doctrine.[19] Ostensibly, this doctrine should bar Congress from "cross[ing] the line from a necessary and proper implementing statute to an unnecessary and/or improper delegation of distinctively legislative power."[20] Unfortunately, courts struggle to find that line. They struggle so much, in fact, that no Supreme Court decision since the New Deal has struck down an agency power in response to a non-delegation challenge.[21] As a result, the non-delegation doctrine lives a "fugitive existence at the edge of constitutional jurisprudence."[22]

Separation of powers challenges found more success on grounds outside the non-delegation doctrine. In *Mistretta v. United States*, the U.S. Supreme Court considered a separation of powers challenge to the Sentencing Reform Act of 1984 (the Sentencing

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[15] *See generally* Zheng, *supra* note 14.

[16] *See* Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 51 LAW & CONTEMP. PROBS. 311, 316 (1991).

[17] *Id.* at 320 (explaining that by legislating more independence to agencies, Congress reduced executive influence over the agencies, thereby avoiding a reduction of Congressional leverage).

[18] U.S. CONST. art. I, § 1.

[19] *See generally* George I. Lovell, *That Sick Chicken Won't Hunt: The Limits of a Judicially Enforced Non-Delegation Doctrine*, 17 CONST. COMMENT. 79 (2000).

[20] Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1239 (1994).

[21] *Id*. at 1240.

[22] Lovell, *supra* note 19, at 79 (2000) (quoting Peter L. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 17 (1982)).

Act).[23] The Sentencing Act established the U.S. Sentencing Commission, a seven-member body to which Congress delegated power to set federal sentencing guidelines that were binding on federal courts.[24] The challengers claimed that Congress could not delegate its authority to write criminal sentencing rules to another body, namely the U.S. Sentencing Commission.[25] The Court rejected that argument, finding that although Congress cannot generally delegate its legislative power to another branch, the non-delegation doctrine does not prevent Congress from obtaining assistance from coordinate branches.[26] In conducting this analysis, courts do not expect the legislature to provide agencies explicit or step-by-step instructions on how to follow their delegated power, but courts do expect the legislature to provide agencies with an "intelligible principle" for policymaking that guides administrative decision makers.[27] The exact contours of this intelligible principle, however, grew increasingly elastic as cases began to flesh out its meaning.

Twelve years after *Mistretta*, the Supreme Court further explained the nondelegation doctrine and intelligible principle standard when it rejected a challenge to the Clean Air Act.[28] Justice Scalia, writing for the Court, marched through decades of precedent finding an "intelligible principle" in a smorgasbord of legislative delegations to find that the doctrine almost never actually precludes delegation to agencies.[29] Virtually any statute can be rationalized to provide an

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[23] *See* Mistretta v. United States, 488 U.S. 361, 367 (1989) ("[The Act] makes the Sentencing Commission's guidelines binding on the courts, although it preserves for the judge the discretion to depart from the guideline applicable to a particular case if the judge finds an aggravating or mitigating factor present that the Commission did not adequately consider when formulating guidelines.").
[24] *Id.* at 367.
[25] *Id.* at 371.
[26] *Id.* at 372.
[27] *See* J.W. Hampton, Jr., & Co. v. United States*,* 276 U.S. 394, 409 (1928).
[28] *See* Whitman v. Am. Trucking Ass'n, 531 U.S. 457 (2001) (holding that the Clean Air Act's delegation of authority to the EPA was not an unconstitutional delegation of legislative power).
[29] *Id.* at 474 ("The scope of discretion § 109(b)(1) allows is in fact well within the outer limits of our nondelegation precedents. In the history of the Court we have found the requisite "intelligible principle" lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire

"intelligible principle" for agency policymaking, leading Professor Gary Lawson to suggest that the Supreme Court would accept any delegation short of granting regulatory carte blanche to a national "Goodness and Niceness Commission."[30] Even then, the only doctrinal problem would be a matter of over breadth—the United States already has what amount to lots of little goodness and niceness commissions.[31] As a result, the Court held that Congress properly delegated legislative authority to the EPA to apply and enforce the Clean Air Act.[32]

For better or worse, judges acknowledge that America's modern federal government could not function if Congress made every single policy decision in-house, completely stripped of all power to delegate to its bean-counters and pencil-pushers.[33] So while the doctrine is not dead, strictly speaking, courts nonetheless tend to "now simply recite these past holdings and wearily move on."[34] As a result, the CFPB cannot be unconstitutional merely because its existence hangs on a statute delegating policymaking discretion to an agency. But the proper constitutional question is broader: did Dodd-Frank delegate public-facing regulatory authority to an independent agency, which is *itself* uniquely immune from checks and balances? Through its funding structure, its leadership composition, and its congressional mandate, could that agency exceed the delegation allowed by today's generous doctrine? This holistic consideration requires a broader look at the separation of powers crafted by the U.S. Constitution.

B. The Implicit Separation of Powers

President James Madison famously described the division of power in the federal government as distributed among several departments:

> The several departments of power are distributed and blended in such a manner as at once to destroy all symmetry and beauty of form, and to expose some of the essential parts of the edifice to the danger of being

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economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'").

[30] Lawson, *supra* note 20, at 1240.

[31] *Id.*

[32] *Whitman*, 531 U.S. at 476.

[33] *See* Lawson, *supra* note 20, at 1241.

[34] *See id*. at 1240.

> crushed by the disproportionate weight of other parts. . . . The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.[35]

The "separation of powers" is a descriptive term for an idea, not a titular quote of constitutional text, such as the "establishment clause" or "commerce clause."[36] That is to say, anyone call pull out a pocket Constitution and point to specific passages that say "Congress shall make no law respecting an establishment of religion . . . ." or "Congress shall have the power to . . . regulate Commerce . . . among the several states . . . ."[37] But even the most pious Federalist Society devotee will be unable to produce a single reference to "separation of powers" in the Constitution. Although the phrase itself does not appear in the Constitution, its substance rests in an amalgamation of constitutional passages and negative inferences that protect the people's liberty by diffusing power among individuals rather than allowing power to accrue in the hands of any one tyrant.[38]

This system of checks and balances promotes limited government and keeps public servants accountable to the populace.[39] Formalists and functionalists bicker about whether the barrier separating branches of government is waterproof or semi-permeable.[40] Either way, the Constitution's distinction between these roles "reflects many particular decisions about how to allocate and condition the exercise of federal power."[41]

After federalism and the separation of powers lay somewhat dormant during the Progressive Era and New Deal, the second half of the twentieth century ushered them back into focus.[42] The horizontal separation of powers between branches of government and the vertical

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[35] THE FEDERALIST NO. 47 (James Madison).
[36] *See* U.S. CONST. amend. I; U.S. CONST. art. I, § 8, cl. 3.
[37] *Id.*
[38] *See generally* Lawson, *supra* note 20, at 1248.
[39] *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1952 (2011).
[40] *See id.* at 1942.
[41] *Id.* at 1945.
[42] *See* Steven G. Calabresi, *The Structural Constitution and the Countermajoritarian Difficulty*, 22 HARV. J.L. & PUB. POL'Y 1, 3 (1998).

separation of powers between states and the federal government are mutually beneficial, because as Professor Bradford Clark argued, "[M]any of the Supreme Court's most significant separation-of-powers decisions also safeguard federalism by preventing each branch of the federal government from circumventing federal lawmaking procedures."[43]

Supreme Court jurisprudence on separation of power questions runs the gamut from dismissive to restrictive. The Court's justices have spilled much ink on the doctrine in both functionalist and formalist language.[44] In a classic example of successful challengers, the Supreme Court found that President Harry Truman and the executive branch could not seize private steel mills without congressional authorization.[45] Over thirty years later, the Court struck down the legislative veto because it ran athwart the Presentment Clause and the separation of powers doctrine in *I.N.S. v. Chadha*.[46] The Court held that the Presentment Clause reflects distinctions between executive and legislative power that are "integral parts of the constitutional design for the separation of powers."[47] In doing so, Justice Burger's opinion also quoted *Buckley v. Valeo* disclaiming any attempts to downplay or dismiss the doctrine: "The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787."[48] More recently, in 2010, the Supreme Court once again resurrected interest in the separation of powers doctrine by finding an administrative agency, the Public Company Accounting Oversight Board (PCAOB), unconstitutional because its chief could not be appointed or removed in a way that comported with the separation of powers doctrine.[49]

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[43] Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1326 (2001).

[44] *See generally* William Eskridge, "Relationships between Formalism and Functionalism in Separation of Powers Cases," 22 HARV. J.L. & PUB. POL'Y 21, 24–28 (1998–99) (discussing, *inter alia*, *Morrison v. Olsen*, 487 U.S. 654 (1988)).

[45] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[46] 462 U.S. 919, 944 (1983).

[47] *Id.* at 946.

[48] *Id.* (internal quotations removed).

[49] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 483–84 (2010).

With a similar focus on the separation of powers, the CFPB's challengers ask how much leeway Dodd-Frank granted the CFPB to insulate itself from checks and balances.[50] That question is particularly potent when posed in conjunction with other concerns, including the Appropriations Clause.

C. The Power of the Purse

The Constitution grants Congress the power of the purse.[51] Article I, Section 9 of the Constitution forbids the government from withdrawing money from the Treasury except by Congressional appropriation.[52] "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."[53] The Supreme Court affirmed that the appropriations power provides Congress with a basic check on the power that it delegates: "Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury."[54]

The CFPB operates independent from congressional appropriations.[55] The CFPB Director simply demands an amount "reasonably necessary to carry out the authorities of the Bureau," which the Federal Reserve Board of Governors must then transfer to the CFPB from its earnings.[56] Is the CFPB, as its defenders insist, exempt from Appropriations Clause scrutiny because its budget comes from the Federal Reserve instead of tax revenue appropriated by Congress?[57] Not necessarily, because not all expenditures of public money begin as tax revenue—the government can raise money any number of ways, including income taxes, service fees, tariffs, sales of

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[50] Brief of Petitioner at 45, PHH Corp. v. Consumer Fin. Prot. Bureau, No. 15-1177, 2016 WL 5898801 (D.C. Cir. 2016).
[51] U.S. CONST. art. I, § 9, cl. 7.
[52] *Id.*
[53] *Id.*
[54] Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 425 (1990).
[55] *See* 12 U.S.C. § 5497(a)(1) (2012).
[56] *Id.*
[57] *See generally* Susan Block-Lieb, *Accountability and the Bureau of Consumer Financial Protection*, 7 BROOK. J. CORP. FIN. & COM. L. 25, 339–40 (2012).

assets, or leases of federal land.[58] In fact, even money raised by agency fees may also be captured by the constitutional requirement as part of the public fisc, and thus bound to oversight by the Appropriations Clause.[59]

As Professor Kate Stith from Yale Law School summarizes, the Appropriations Clause establishes two basic principles.[60] First, the Principle of the Public Fisc establishes that "all monies received from whatever source by any part of the government are public funds . . . ."[61] Second, the Principle of Appropriations Control bars "expenditure of any public money without legislative authorization."[62] In addition to being a negative rule prohibiting unauthorized expenditures, the Principle of Appropriations Control also imposes an affirmative duty on Congress "to exercise legislative control over federal expenditures."[63] Both of these principles pose a problem for federal agencies that attempt to elude Congressional authority by raising their own funds, and then sequester those funds away from Congressional checks or oversight.

D. *Free Enterprise Fund* and Insulation from Oversight

Even though post-New Deal administrative power reigns largely unchecked,[64] one groundbreaking case proved there are limits to constitutionally permissible agency structure. Much like the Dodd-Frank Act followed on the heels of the financial crisis, Congress passed the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act) in response to a spate of high-profile corporate scandals during the Enron era.[65] One of the bill's provisions created PCAOB, a five-member

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[58] *See generally* Betsy Gallup, *Examples of Non-Tax Revenue*, HOUSTON CHRON. (Sep. 28, 2016), http://smallbusiness.chron.com/examples-nontax-revenue-37673.html [https://perma.cc/YW2G-XCTX] (providing non-exhaustive examples of ways the government can raise money other than taxes).

[59] *See generally* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1345 (1988).

[60] *See id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *See supra* notes 6–34 and accompanying text.

[65] *See generally* William W. Bratton, *Enron, Sarbanes-Oxley and Accounting: Rules Versus Principles Versus Rents*, 48 VILL. L. REV. 1023 (2003).

body charged with power to regulate the entire accounting industry.[66] The presidentially-appointed Securities and Exchanges Commission (SEC) had power to appoint the PCAOB, but unlike most presidential appointees, neither SEC commissioners nor PCAOB members could be removed by the President at will.[67] The law required all public auditors to register with the PCAOB, and the PCAOB had power to hold investigations and issue punishments or sanctions against accounting firms.[68]

An advocacy group called the Free Enterprise Fund legally challenged this agency structure in *Free Enterprise Fund v. Public Company Accounting Oversight Board*.[69] The plaintiffs successfully argued that the PCAOB structure provided bureaucrats with double-insulation from accountability: the case featured both (1) a principal officer (the SEC) not removable by the President, and (2) an inferior officer (the PCAOB) removable neither by the President nor the principal officer.[70] Even more troubling, this inferior officer carried a congressional mandate to set national policy and enforce laws.[71]

The Supreme Court agreed with the Free Enterprise Fund: "We hold that the dual for-cause limitations on the removal of Board members contravene the Constitution's separation of powers."[72] The Court was unimpressed by arguments that the agency functioned independently, with employees not considered government employees for statutory purposes because they still enjoyed "expansive powers to govern an entire industry."[73] Although Congress can create agency heads only removable "for cause," the double insulation between the executive and the PCAOB policymakers pushed the boundary too far.[74]

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[66] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010).
[67] *Free Enter. Fund*, 561 U.S. at 477 ("While the SEC has oversight of the Board, it cannot remove Board members at will, but only 'for good cause shown,' 'in accordance with' specified procedures. . . . The parties also agree that the Commissioners, in turn, cannot themselves be removed by the President except for 'inefficiency, neglect of duty, or malfeasance in office.'").
[68] *Id.*
[69] *Id.*
[70] *See id.* at 483–84.
[71] *See id.* at 477.
[72] *Id.* at 492.
[73] *Id.* at 485.
[74] *See id.* at 493.

Free Enterprise Fund neither reversed any earlier Supreme Court precedents, nor meaningfully pushed back against the modern administrative state beyond the issue of officer removal. The case nonetheless generated attention among court-watchers, demonstrating that the Roberts Court would not blindly accept every growth of the administrative state.[75] The case also demonstrated that the Court is willing scrutinize agency behavior against separation of powers requirements.[76] That scrutiny is critical to the success of the CFPB's challengers today.

III. No Good Crisis Wasted: Dodd-Frank and the Establishment of the CFPB

A. Scope of Delegated Rulemaking Power

In the wake of the 2008 financial crisis, Congress passed Dodd-Frank along a near-straight party-line vote.[77] In the eyes of its supporters, the law reined in Wall Street's excessively risky balance sheets by putting distance between investment banks' house accounts and their clients' assets, implementing new standards for banks, and by creating new, consumer-focused regulatory oversight.[78] One of Dodd-Frank's most important regulatory offspring was the CFPB, which consolidated responsibilities from seven separate federal agencies into one centralized consumer watchdog.[79] In this role, the White House

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[75] *See generally* Kevin Russell, *Provisions of Sarbanes-Oxley unconstitutionally interferes with presidential authority*, SCOTUS BLOG (June 28, 2010, 9:00 PM), http://www.scotusblog.com/2010/06/provision-of-sarbanes-oxley-unconstitutionally-interferes-with-presidential-authority/ [https://perma.cc/BC5P-ZB8M].

[76] *See generally* Charles Kruly, *Self-Funding and Agency Independence*, 81 GEO. WASH. L. REV. 1733 (2013).

[77] *See H.R. 4173 (111th): Dodd-Frank Wall Street Reform and Consumer Protection Act*, GOVTRACK, https://www.govtrack.us/congress/votes/111-2010/s208 [https://perma.cc/NR3F-9PKZ] (highlighting that over 90 percent of the votes in favor of Dodd-Frank came from senators within the democratic party).

[78] *See generally Wall Street Reform: The Dodd-Frank Act*, WHITE HOUSE, https://www.whitehouse.gov/economy/middle-class/dodd-frank-wall-street-reform [https://perma.cc/JNM9-ZYM5].

[79] *See generally* Megan Slack, *Consumer Financial Protection Bureau 101: Why We Need a Consumer Watchdog*, WHITE HOUSE: BLOG (Jan. 4, 2012, 11:03 AM), https://www.whitehouse.gov/blog/2012/01/04/consumer-

sold the CFPB to voters as a neighborhood "cop on the beat," whipping up new regulations for the financial services industry to serve the needs of consumers.[80] In the eyes of its critics, on the other hand, Dodd-Frank represented a sweeping new open-ended power grant to the administrative state, erecting new barriers to credit access, drying up liquidity, and driving local community banks out of business with burdensome compliance costs.[81]

In either scenario, Dodd-Frank charges the CFPB with broad responsibility to write rules cracking down on "unfair, deceptive, or abusive" practices throughout the entire financial services industry.[82] The statutory language offers a broad grant of power:

> The Bureau may take any action authorized under part E to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.[83]

In that context, "unfair" encompasses any injury not outweighed by benefit,[84] and the mandate to curb "abusive" behavior allows CFPB to determine any time someone "takes unreasonable advantage of" another person.[85] Finally, in an elastic turn of phrase analogous to the necessary and proper clause of the Constitution,[86] Dodd-Frank grants the CFPB Director power to "prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof."[87] Dodd-

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financial-protection-bureau-101-why-we-need-consumer-watchdog [https://perma.cc/KB7Q-AQTR].

[80] *Id.*

[81] *See* Jeb Hensarling, *After Five Years, Dodd-Frank Is a Failure*, WALL ST. J. (July 19, 2015), http://www.wsj.com/articles/after-five-years-dodd-frank-is-a-failure-1437342607 [https://perma.cc/2C6Y-2PH7].

[82] 12 U.S.C. § 5531(a) (2012).

[83] *Id.*

[84] *See* § 5531(c).

[85] § 5531(d).

[86] U.S. CONST. art. I, § 8, cl. 18.

[87] 12 U.S.C. § 5512 (2012).

Frank also granted as much power as possible to the CFPB enforcement mechanisms, mandating that courts grant deference to the CFPB on challenges as if it is the only agency enforcing the statute.[88]

Taken together, these measures suggest the extraordinary lengths that the CFPB creators were willing to go to ensure the agency stood above and apart from accountability and checks from other branches of government.

B. Self-Funding Structure and Congressional Oversight

In Dodd-Frank, Congress went beyond the Treasury Department's recommendation for a stable funding stream, and instead created an entirely self-funding agency that could essentially write its own budget.[89] One scholar described the remarkable structure by saying, "Dodd-Frank 'one-upped' the Treasury Department's proposal. As currently configured, the agency allocates funds to itself essentially in amounts it chooses."[90] This unlimited amount is not subject to normal considerations of the democratic process, so it avoids the generally understood Principle of the Public Fisc and Principle of the Public Purse.[91]

The CFPB's intellectual forbearers were deeply concerned about agency capture, meaning industry groups' ability to win control of the agencies ostensibly responsible for their regulation.[92] Some of the CFPB's defenders argue that unique insulation from Congressional oversight is an asset to the Bureau by protecting it from not only industry influence, but also from congressional politics.[93] Even if we set aside that argument's problematic disregard for the Appropriations Clause, it does not offer a compelling reason why CFPB is effectively

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[88] *Id.*
[89] *See* Eric Pearson, *A Brief Essay on the Constitutionality of the Consumer Financial Protection Bureau*, 47 CREIGHTON L. REV. 99, 103 (2013).
[90] *Id.*
[91] 12 U.S.C. § 5497(a)(2)(C) (2012); *see also* Stith, *supra* note 59, at 1345.
[92] *See generally The Dodd-Frank Act Five Years Later: Are We More Free?: Hearing before H. Comm. on Fin. Servs*, 114th Cong. (2015) (statement of Deepak Gupta, Founding Principal, Gupta Wessler PLLC) ("But the CFPB—which was specifically designed to resist capture by narrow industry interests—is at least as accountable to the public as were the existing prudential banking regulators, from which the CFPB inherited much of its authority over consumer protection.").
[93] *See* Block-Lieb, *supra* note 57, at 27.

exempt from oversight by the Office of Management and Budget (OMB).[94] Escaping oversight once again may further reinforce Congress's goal of independence, but it continues to do so at a cost to accountability.

In the law's most aggressive hedge against checks and balances, it specifically requires that "the funds derived from the Federal Reserve System pursuant to this subsection shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate."[95] These requirements strip Congress of any "meaningful authority" over the CFPB.[96] Because the benefits of consumer protection are "widely diffused," while the costs are borne heavily by a few individuals and financial institutions, the beneficiaries may be less politically vocal than the latter, who bear the more acute costs.[97] The drafters of Dodd-Frank feared this asymmetry, and attempted to ward off its effects by tying the hands of Congress as much as possible, hoping to avoid future political meddling that could water down consumer financial protection.[98]

In theory, Congress cannot wholly ban itself from budgetary oversight, because it could always reverse its Dodd-Frank policy decision to forbid Congressional review of the CFPB budget. Doing so, however, would entail passing an entire new law to supersede the old law, which would require presidential approval.[99] Setting aside the current political dynamic, in which President Obama is firmly supportive of the CFPB and its mission, the logistical hurdle in passing a law specifically to amend Dodd-Frank's CFPB provisions would be herculean. This challenge is amplified in the modern era of political disunion and gridlock, which further insulates the CFPB from the ordinary budgetary pressures of Appropriations Committee hearings and routine review.

In addition to eyebrow-raising limits on Congress's power of the purse, Dodd-Frank also raised hedges around the CFPB Director to

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[94] Pearson, *supra* note 89, at 114.
[95] 12 U.S.C. § 5497(a)(2)(C) (2012).
[96] *See* Gray, *supra* note 3, at 43 (footnote omitted).
[97] *See* Block-Lieb, *supra* note 57, at 27.
[98] *See generally id*.
[99] *See* I.N.S. v. Chadha, 462 U.S. 919, 921 (1983) (finding a Congressional veto of agency decisions unconstitutional because the presentment clause requires presidential approval, even though the veto could be construed as Congress clarifying or amending its earlier delegation).

insulate him or her against executive oversight.[100] The CFPB Director does not serve at the pleasure of the President; instead, the Director can only be removed for cause.[101] The statute explains, "The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office."[102] The statute provides no special definition for its causes of removal.[103] That limits the reasons upon which a President may legally remove the Director, thereby limiting the checks and balances from within the executive branch. These narrow criteria intentionally preclude policy objections by the executive, further reinforcing the agency's independence—both as a policy matter and a constitutional matter.

Once the CFPB is removed from both Congressional and Executive oversight, it is difficult to determine which branch is responsible for checking the CFPB's power. If the separation of powers doctrine stands for anything, it should require that no one agency or bureau can promulgate, enforce, and adjudicate rules with no accountability to other government bodies.

C. Constitutional Challenges to the CFPB

In 2013, a local bank near Abilene, Texas named State National Bank of Big Springs joined forces with Attorneys General from eleven states to wage a frontal constitutional attack against the CFPB.[104] The plaintiffs argued that the CFPB was unconstitutional because its structure violated the separation of powers for a variety of reasons, including that its singular agency head was impermissibly insulated from accountability.[105] The plaintiffs also argued Dodd-Frank violated the non-delegation doctrine in creating the CFPB.[106]

The plaintiffs lost at the district court level on standing issues, with the Court ruling that the bank's Dodd-Frank-related compliance costs could not establish an injury-in-fact giving rise to a valid claim.[107] The D.C. Circuit reversed on appeal.[108] First, the Circuit

[100] *See* Gray, *supra* note 3, at 46–47.
[101] 12 U.S.C. § 5491 (2012).
[102] § 5491(c)(3).
[103] *Id.*
[104] *See* State Nat. Bank of Big Spring v. Lew, 795 F.3d 48 (D.C. Cir. 2015).
[105] *Id.* at 51.
[106] *Id.*
[107] State Nat. Bank of Big Spring v. Lew, 958 F. Supp. 2d 127, 151 (D.D.C. 2013), *aff'd in part, rev'd in part,* 795 F.3d 48 (D.C. Cir. 2015).

Court held that Big Springs Bank had standing to bring a claim as an agency regulated by the CFPB; and second, that the challenge was ripe even before the CFPB took any enforcement action because the plaintiffs challenged the legality of the regulating agency itself.[109] On remand, the district court ruled only on issues related to the appointment of the CFPB Director, and deferred judgment on the CFPB constitutional merits until after the D.C. Circuit ruled on a similar case—*PHH Corp.n v. CFPB*.[110]

In *PHH Corp. v. CFPB*, plaintiff PHH Corporation was a lender in New Jersey that faced a $6.4 million penalty for violations of the Real Estate Settlement Procedures Act (RESPA).[111] Few observers would object to punishing guilty lenders for fraud, but some might be surprised to learn that the penalty came from neither a jury nor a settlement agreement.[112] Instead, an administrative law judge handed down the $6.4 million penalty ruling.[113] But that is not the end of the administrative state's involvement, because CFPB Director Richard Cordray unilaterally raised the ruling's sum to $109 million.[114]

By serving as judge, jury, and executioner in the dispute, Director Cordray inadvertently locked horns with John Locke, who famously warned against one man judging his own case.[115] Although

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[108] State Nat. Bank of Big Spring v. Lew, 795 F.3d 48, 48 (D.C. Cir. 2015).
[109] *Id.*
[110] State Nat'l Bank of Big Spring v. Lew, No. CV 12-1032 (ESH), 2016 WL 3812637, at *1 (D.D.C. July 12, 2016) ("Given the likelihood that this issue will soon be decided by the Circuit, this Court will hold this matter in abeyance until the Court of Appeals rules in *PHH Corp*.").
[111] Paul Barrett, *As Dodd-Frank Fight Continues, the Resistance Scores Some Victories*, BLOOMBERG (Apr. 21, 2016), http://www.bloomberg.com/news/articles/2016-04-21/dodd-frank-court-challenges-may-eat-away-at-wall-street-reforms [https://perma.cc/WYN2-J34S]; *PHH Corporation v. CFPB*, CHAMBER LITIG. CTR., http://www.chamberlitigation.com/phh-corporation-v-cfpb [https://perma.cc/2ABL-BRCF].
[112] *See generally* Barrett, *supra* note 111 (explaining that the order came from an administrative law judge); CHAMBER LITIG. CTR., *supra* note 111 (objecting to Cordray's alteration of the penalty).
[113] *See* Barrett, *supra* note 111.
[114] *Id*.
[115] Richard Epstein, *Tyranny Within the Administrative State*, HOOVER INST. (May 31, 2016), http://www.hoover.org/research/tyranny-within-administrative-state [https://perma.cc/U6D3-B8NS] ("Locke then noted, in connection with monarchs, the risk that 'one man . . . is free to be the judge in his own case.' These words apply with special force to Cordray given that he

this administrative process might be fairly routine for the SEC, its enforcement actions do not come from an agency with the CFPB's novel structure and insulation from oversight.[116] Consequently, PHH Corporation immediately sued with a volley of claims, which included a broad constitutional argument that Director Cordray and the CFPB cannot legitimately exercise such authority under the separation of powers doctrine.[117]

Therefore, in *PHH Corp.*, the challengers made essentially the same constitutional claim as *Big Springs National Bank*.[118] The plaintiffs in *PHH Corp.* were represented by high-profile appellate litigator Theodore Olson, the former U.S. Solicitor General who successfully argued cases ranging from *Bush v. Gore* to the challenge against Proposition 8 in California, *Hollingsworth v. Perry*.[119] During oral arguments, Olson called the CFPB an "unconstitutional agency that has more power than Congress and the President put together."[120] When the D.C. Circuit ruled in favor of the challengers in a 2-1 opinion in October 2016 it represented a strong rebuke to the agency in favor of a robust, modern application of the separation of powers doctrine.[121]

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has the sole power of final decision inside the CFPB to disregard precedent, adopt novel interpretations of well understood terms, impose retroactive fines nearly 20 times greater than those imposed by his own administrative law judge, and mount a militant defense of his near royal prerogative in federal court." (quoting JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 9 (Barnett ed., 2008), available at http://www.earlymoderntexts.com/assets/pdfs/locke1689a.pdf [https://perma.cc/Y64V-34ZJ])).

[116] *See* Brief for Petitioner at 21, PHH Corp. v. Consumer Fin. Prot. Bureau, No. 15-1177, 2016 WL 5898801 (D.C. Cir. 2016).

[117] *See generally id.*

[118] *See generally id.*

[119] GIBSON DUNN, THEODORE B. OLSON SELECTED APPELLATE LITIGATION, http://www.gibsondunn.com/lawyers/Documents/TOlson-CaseList2016.pdf [https://perma.cc/M2B6-GUCV].

[120] Paul Barrett, *As Dodd-Frank Fight Continues, the Resistance Scores Some Victories*, BLOOMBERG (Apr. 21, 2016), http://www.bloomberg.com/news/articles/2016-04-21/dodd-frank-court-challenges-may-eat-away-at-wall-street-reforms [https://perma.cc/WYN2-J34S].

[121] *See* Scott Cammarn et al., *D.C. Circuit Brings CFPB Under Presidential Control*, CADWALADER (Oct. 13, 2016), http://www.cadwalader.com/resources/clients-friends-memos/dc-circuit-brings-cfpb-under-presidential-control [https://perma.cc/398L-JJZ4].

Judge Brett Kavanaugh penned a mammoth 101-page opinion that offered a tour de force on separation of powers and constitutional safeguards to individual liberty.[122] After establishing that the Constitution created checks and balances to "mitigate the risk to individual liberty,"[123] the Court went on to establish that "the [CFPB] Director enjoys more unilateral authority than any other officer in any of the three branches of the U.S. Government, other than the President. . . . Never before has an independent agency exercising substantial executive authority been headed by just one person."[124] As a result, the Court ruled that the "CFBP is unconstitutionally structured," and accordingly severed "the statute's unconstitutional for-cause provision from the remainder of the statute," leaving the Director removable at-will by the President.[125]

The following section of this note offers policy arguments and legal reasons why Judge Kavanaugh's decision should be upheld en banc and on possible appeal. The D.C. Circuit panel's decision focused specifically on the issue of a single-agency head, but the CFPB is also relatively unique in the scope of its regulatory authority, its self-funding structure, and its policymaking independence.[126] Unless courts strip away at least one of these attributes, as the D.C. Circuit panel chose to do by addressing Director removability, the CFPB structure will continue to stand athwart the Constitution's separation of powers.

IV. Settled Law or Serious Argument: Does the CFPB Insulate Itself from Checks and Balances more than Other Financial Regulatory Agencies?

The CFPB's defenders liken the agency's structure to other independent regulatory agencies, arguing that the CFPB follows a well-established constitutional model.[127] Specifically, they point to the

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[122] *See* PHH Corp. v. Consumer Fin. Prot. Bureau, No. 15-1177, 2016 WL 5898801 (D.C. Cir. Oct. 11, 2016).
[123] *Id.* at *2.
[124] *Id.* at *2–3.
[125] *Id.* at *4.
[126] See *infra* notes 122–26 and accompanying text.
[127] *See* Wilmarth, *supra* note 4, at 885 ("CFPB's single-Director model of leadership is similar to the governance structure for the Office of the Comptroller of the Currency ("OCC") and the Federal Housing Finance Agency ("FHFA"). CFPB's regulatory and enforcement powers are

Office of the Comptroller of Currency (OCC), the Federal Housing Finance Agency (FHFA), the FDIC, and the Fed itself.[128] Each of these agencies claims to serve as an independent regulator, insulated from typical political processes by their funding or leadership.[129] In this vein, some scholars defend Congressional use of a vague mandate to delegate broad powers to the CFPB by citing the Clean Air Act, which also offered a vague mandate that the Supreme Court later upheld.[130] But with the broad grant of power from Congress came traditional mechanisms of accountability—for example, the EPA is a down-the-middle traditional federal agency with a budget approved by Congress.[131]

The CFPB's challengers, by contrast, appeal to First Principles of the Constitution, [132] reaffirming the importance of a robust separation of powers and relating their vision back to the founding fathers.[133] They argue that the CFPB vests power in the hands of a single person unaccountable to any democratic process, quoting James Madison in Federalist No. 47 to warn against that arrangement as the

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comparable to those exercised by OCC, FHFA, the Federal Deposit Insurance Corporation ("FDIC") and the Federal Reserve Board ("FRB").").

[128] *Id*.

[129] *See About the OCC,* OFF. COMPTROLLER CURRENCY http://www.occ.gov/about/what-we-do/mission/index-about.html [https://perma.cc/L8KX-WNTG]; Charles Kruly, *Self-Funding and Agency Independence*, 81 GEO. WASH. L. REV. 1733, 1735–36 (2013).

[130] *See* Deepak Gupta, *The Consumer Protection Bureau and the Constitution*, 65 ADMIN. L. REV. 945, 958 (2013). Gupta, former litigation counsel for the CFPB, also argues that Dodd-Frank established "detailed definitions" for what constitutes unfair or abusive practices. *Id*. at 958. But the law defines these practices in terms of broad policy goals, such as labeling unfairness as acts which are "likely to cause substantial injury" that is unavoidable and not outweighed by its benefits. *Id.* According to Gupta, the statute creates a limit on bureau power by precluding it from acting outside the Act's standards. Because those very standards create the vague policymaking powers exempt from outside checks and balances, the circularity of that limiting factor is hoisted by its own petard. *Id.*

[131] *See generally* Devin Henry, *Spending Bill Keeps EPA Funding Flat*, THE HILL (Dec. 16, 2015), http://thehill.com/policy/energy-environment/263411-spending-bill-keeps-epa-funding-flat-in-2016 [https://perma.cc/Y4P9-XP7H].

[132] *See generally* Devin Henry, *Spending Bill Keeps EPA Funding Flat*, THE HILL (Dec. 16, 2015), http://thehill.com/policy/energy-environment/263411-spending-bill-keeps-epa-funding-flat-in-2016 [https://perma.cc/Y4P9-XP7H].

[133] Brief for Petitioner at 45, PHH Corp. v. Consumer Fin. Prot. Bureau, No. 15-1177, 2016 WL 5898801 (D.C. Cir. 2016).

"very definition of tyranny."[134] In addition to the Article I, Section 1 legislative power granted to Congress, the challengers also point to the take care clause to argue that the power of all branches is diluted when the CFPB is so insulated from checks and balances.[135] But few, if any, advocates expect a complete restoration of formalist separation of powers. Instead, a pragmatist or functionalist could compare the CFPB's structure with well-established agency structures to see if it affronts the separation of powers more directly.[136]

Defenders of the CFPB may defend any one of its attributes by finding an analogue among existing agencies, but they struggle to find another entity that so potently combines the attributes outlined in this section. In the words of Judge Kavanaugh, the CFPB's "combination of power that is massive in scope" triggers constitutional questions.[137] Taken together, these combined methods of insulation accumulate to form an agency with an unprecedented lack of accountability.

A. The CFPB and *Free Enterprise Fund* Double-Insulation

CFPB supporters also attempt to distinguish the agency from the PCAOB structure invalidated by the Supreme Court. The CFPB's former litigation counsel argues that because the President can remove the CFPB head for cause, the CFPB lacks the second layer of insulation critical to the ruling in *Free Enterprise Fund*.[138]

Nonetheless, in *Free Enterprise Fund* the PCAOB Director could also be removed "for good cause."[139] "Good cause" in the context of PCAOB procedures meant willful violation of the statute or willful abuse of authority, while "cause" in the context of Dodd-Frank

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[134] *Id.*
[135] *Id.* at 47.
[136] *See generally* Lee A. Deneen, *Defeating a Wolf Clad as a Wolf: Formalism and Functionalism in Separation-of-Powers Suits Against the Consumer Financial Protection Bureau*, 48 GA. L. REV. 579, 613 (2014).
[137] PHH Corp. v. Consumer Fin. Prot. Bureau, No. 15-1177, 2016 WL 5898801, at *4 (D.C. Cir. Oct. 11, 2016).
[138] *See* Gupta, *supra* note 130, at 959.
[139] *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 486 (2010).

means "inefficiency, neglect of duty, or malfeasance in office."[140] This distinction may be less important than the PCAOB's procedural requirements, which mandated a formal SEC finding of good cause for removal, which must be on the record and after notice and opportunity for a removal hearing.[141] But all these differences are a matter of degree—Congress placed both the PCAOB and CFPB under independent agencies, and neither director serves at the pleasure of the President as an ordinary political appointee.[142]

Even still, this laser focus on director removability misses the mark because it ignores the CFPB's cumulative, structural tools of insulation that may violate the separation of powers. Rather than double-insulation against director removability alone, the CFPB enjoys double-insulation against accountability in funding or enforcement decisions.[143] As covered in Part III of this note, the President cannot influence CFPB decisions, not unless the Director acts with malfeasance or neglect creating cause for removal.[144] Although the CFPB is nestled under the Fed, Congress forbids the Fed from influencing CFPB decisions.[145] Specifically, the Dodd-Frank Act stipulates that the Fed may not "intervene in any matter or proceeding before the Director, including examinations or enforcement actions, unless otherwise specifically provided by law," nor may any CFPB orders be subject to review by the Fed.[146] Considered alone, this might describe an extremely independent agency. Considered along with the CFPB's funding structure and other attributes, it begins to describe an unaccountable, autocratic policymaking process.

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[140] *Compare Free Enter. Fund*, 561 U.S. at 486, *with* 12 U.S.C. § 5491(c)(3) (2012) ("Removal for cause: The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office.")
[141] *Free Enter. Fund*, 561 U.S. at 486.
[142] *See* William Safire, *At the Pleasure*, N.Y. TIMES MAG. (May 13, 2007), http://www.nytimes.com/2007/05/13/magazine/13wwln-safire-t.html?_r=0 [https://perma.cc/GZB3-W7MN].
[143] *See supra* notes 89–97 and accompanying text.
[144] § 5491(c)(3).
[145] § 5492(2)–(3).
[146] *Id.*

B. The Scope of Regulatory Authority

Advocating for the CFPB in one highly regarded journal, Professor Arthur Wilmarth defends the bureau structure by comparing it to the OCC, the FHFA, and the FDIC:

> In contrast to the single-agency-head model of CFPB, OCC and FHFA, the FDIC and FRB are administered by multi-member boards. All five of the foregoing financial regulators have substantial budgetary autonomy. OCC, FDIC, and FHFA fund their operations primarily by collecting fees and assessments from the institutions they regulate.[147]

Each of the agencies Wilmarth identifies, however, lacks the CFPB's public-facing regulatory authority.[148] The multi-member boards of the FDIC and the Fed are also unlike the CFPB. First, the FDIC operates its regulatory program in cohort with member banks paying fees for its service.[149] The FDIC thus couches its regulatory reach within its operation as an insurer of bank deposits. Second, the Fed is an agency uniquely occupying a quasi-public role, deriving revenues in a fee model that Congress considered for the CFPB, but explicitly rejected before passing Dodd-Frank.[150] Under this fee structure, banks within the Fed pay fees in banking transactions and for services such as overnight lending, while the Fed maintains regulatory authority over banks.[151] The CFPB is not so limited.[152] It exerts unprecedented

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[147] Wilmarth, *supra* note 4, at 905–06.
[148] *See infra* notes 150–159 and accompanying text.
[149] *See Who Is the FDIC?*, FED. DEPOSIT INS. CORP. (Oct. 30, 2014), https://www.fdic.gov/about/learn/symbol/ [https://perma.cc/YS5H-TBSP].
[150] *See* Pearson, *supra* note 89, at 110–11.
[151] FED. RESERVE, THE FEDERAL RESERVE SYSTEM PURPOSES & FUNCTIONS 59 (9th ed. 2005) http://www.federalreserve.gov/pf/pdf/pf_5.pdf [https://perma.cc/KVU8-C98N]. *See generally What does it mean that the Federal Reserve is "independent within the government"?*, FED. RESERVE, https://www.federalreserve.gov/faqs/about_12799.htm [https://perma.cc/4YZR-48SM].
[152] *See generally Recent Legislation: Administrative Law-Agency Design-Dodd-Frank Act Creates the Consumer Financial Protection Bureau-Dodd-Frank Act,* 124 HARV. L. REV. 2123 (2011).

unilateral power over whomever it may desire in the name of consumer financial fairness.[153]

Nor do the OCC and FHFA establish precedents for the CFPB's regulatory authority and agency composition. The scope of actors subject to CFPB enforcement simply exceeds the scope of these regulatory bodies. The OCC regulates liquidity, disclosures, and reporting of financial institutions by applying rules to state and federal banks.[154] Along with the FDIC, its reach is thus limited to banks instead of an unchecked public-facing regulatory authority.[155] Likewise, the FHFA oversees housing loans through a finite set of "regulated entities,"[156] such as the best-known Government Sponsored Enterprises (GSEs) Fannie Mae and Freddie Mac.[157] This mandate constitutes a "unique mission" with a clearly defined purview.[158] The Fed regulates banks and financial institutions, the same institutions with which it transacts as a lender of last resort and provider of overnight loans.[159]

The CFPB stands in sharp contrast to each of these limited institutional jurisdictions. Instead, it wields power over "any person" who violates its consumer finance rules.[160] The CFPB assumes power from eighteen enumerated consumer financial protection laws to enforce them against a broad array of individuals and institutions."[161]

This power over "any person" offers unsupervised bureaucrats the opportunity to "regulate virtually every credit provider in America—including the most local pawnshops and payday lenders—

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[153] *See generally id.*

[154] *See* 12 C.F.R. § 1.1(c) (2016).

[155] *See generally* § 1.1.

[156] § 1201.1 ("*Regulated Entity* means the Federal Home Loan Mortgage Corporation and any affiliate thereof, the Federal National Mortgage Association and any affiliate thereof, and any Federal Home Loan Bank.").

[157] *See Fannie Mae and Freddie Mac*, FED. HOUS. FIN. AGENCY, http://www.fhfa.gov/SupervisionRegulation/FannieMaeandFreddieMac [https://perma.cc/9XSD-LLRH].

[158] *The Ombudsman*, FED. HOUS. FIN. AGENCY, http://www.fhfa.gov/AboutUs/pages/about-the-ombudsman.aspx [https://perma.cc/MW8W-2E4N].

[159] *The Structure and Functions of the Federal Reserve System*, FED. RESERVE EDUC., https://www.federalreserveeducation.org/about-the-fed/structure-and-functions [https://perma.cc/9QRJ-N2P2].

[160] 12 U.S.C. § 5564 (2012).

[161] *See Recent Legislation*, *supra* note 152, at 2123.

and to enforce [their] mandates by imposing massive penalties."[162] The CFPB's vague and loosely defined "abusive" mandate could allow the CFPB to simply declare some financial products dangerous on their face, with no further deliberations or recourse.[163] As result, Congress has vested tremendous discretion in an independent agency without providing any means of continued accountability for that agency's decisions.

C. The Lone Wolf Atop the CFPB

In his defense of the CFPB, Professor Wilmarth correctly admits that the Fed and the FDIC operate under multimember boards.[164] Although a single head leads the OCC, along with an executive committee, that cannot technically be removed at-will by the President, scholars suggest that as a matter of practice, the Comptroller of the Currency serves at the pleasure of the President.[165] Ministerial bodies are better suited to multimember boards because their role is not to serve as policymaker; therefore, they need not be as immediately subject to republican oversight by the electorate.[166]

The President, by contrast, is an elected official.[167] His agency heads, particularly those charged with policymaking responsibility, should be removable at will by the President. Removability would contain the administrative state within the executive branch rather than leaving it a constellation of free-floating czars answerable to no republican form of government. Dodd-Frank midwifed a hybrid animal, borrowing the multimember headship of ministerial agencies and embedding it in a new bureau charged with broad policymaking power.

Multimember boards allow for bipartisan membership that lends credibility, particularly when the entity directly regulates consumers. Scholars hail the durability of the FTC as an example of one such regulatory body.[168] In addition to bringing diversity and

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[162] Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. 856, 917 (2013).
[163] *See id*. at 919–20.
[164] Wilmarth, *supra* note 4, at 905–06.
[165] Zywicki, *supra* note 162, at 873.
[166] Pearson, *supra* note 89, at 115.
[167] *See* U.S. CONST. art. II.
[168] *See* Zywicki, *supra* note 162, at 894.

credibility, multimember boards also help smooth out short-term political swings, leading to agency efficacy and longevity.[169]

At oral arguments before the D.C. Circuit, the CFPB's attorney cited the FTC as an example of an agency led by commissioners removable only for cause.[170] But, this illustrates just how slippery the Administration's defense of the CFPB continues to feel. If the *PHH Corp.* or *Big Springs* plaintiffs rested their challenge exclusively on removability for cause, then FTC could be a powerful counterexample. But, on the other hand, if the plaintiffs instead rooted their challenge in the CFPB Director's solo position atop an entity with total freedom to set its own policy, then the FTC would instead be a damning counterexample—an administrative agency led by a flourishing bipartisan commission.[171]

Additionally, the D.C. Circuit ordered the CFPB to produce a comprehensive current and historical list of "all independent agencies headed by a single person removable only for cause."[172] The CFPB could only produce three examples, and the Circuit Court found none of them to be a compelling parallel.[173] The emerging image is one of an agency that cherry-picks precedents for each component part while erecting a wholly novel structure altogether. A bespoke bureau, perfectly designed to maximize regulatory power while minimizing accountability through checks and balances. It may simultaneously fulfill the fantasies of law professors seeking to tie the hands of

[169] *See id*. at 895; Richard Epstein, *Tyranny Within the Administrative State*, HOOVER INST. (May 31, 2016), http://www.hoover.org/research/tyranny-within-administrative-state [https://perma.cc/6N85-FJU3].

[170] *See* Chris Bruce, *CFPB Faces Tough Questioning by D.C. Circuit Panel*, BLOOMBERG (Apr. 12, 2016), http://www.bna.com/cfpb-faces-tough-n57982069778/ [https://perma.cc/DPC9-REZZ].

[171] *See Commissioners*, FED. TRADE COMM., https://www.ftc.gov/about-ftc/commissioners [https://perma.cc/5PPN-RU5H].

[172] PHH Corp. v. Consumer Fin. Prot. Bureau, No. 15-1177, 2016 WL 5898801, at *13 (D.C. Cir. Oct. 11, 2016).

[173] *See PHH Corp.,* 2016 WL 5898801, at *13 (distinguishing the CFPB from the Social Security Administration, the Office of Special Counsel, and the Federal Housing Finance Agency, noting that none have deep historical roots, the SSA and OSC have been constitutionally contested by the executive branch, and none of them "exercise the core Article II executive power of bringing law enforcement actions or imposing fines and penalties against private citizens").

Congress[174] and the nightmares of James Madison seeking to prevent the "accumulation of power."[175]

D. Uniqueness of the CFPB's Self-Funding Provision

The CFPB's self-funding structure does not grant it blanket immunity from Appropriations Clause scrutiny. As Professor Stith persuasively argues, when any agency of government collects fees, taxes, or other income, the law considers it to be deposited into the Treasury, at least for purposes of constitutional protection.[176]

> Agencies and officials of the federal government may not spend monies from any source, private or public, without legislative permission to do so. Even where unauthorized spending by the Executive would impose no additional obligation on the Treasury—because it is made with private or other non-governmental funds—the Constitution prohibits such spending if it is not authorized by Congress.[177]

The principle of the public fisc is at play, so when the CFPB uses public money to implement public policy regulations it can no more claim private funding than the PCAOB could declare its regulators were not government employees. The power of the purse is "Congress's most effective weapon" to check the expansive discretionary power of agencies.[178] Therefore, even CFPB spending drawn exclusively from the Fed is unauthorized if Congress does not authorize the appropriation. This budget is no trifling figure—the CFPB continually increased the amount it awarded itself, growing from $162 million in 2011 to $646.2 million in 2017.[179] Dodd-Frank's framework is far more egregious than simple unauthorized spending—

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[174] *See* Block-Lieb, *supra* note 57, at 27.
[175] *See* THE FEDERALIST NO. 47 (James Madison).
[176] Stith, *supra* note 59, at 1345; *see also* Pearson, *supra* note 89, at 108.
[177] Stith, *supra* note 59, at 1345.
[178] Pearson, *supra* note 89, at 108.
[179] *See generally* Zywicki, *supra* note 162, at 873; CONSUMER FIN. PROT. BUREAU, THE CFPB STRATEGIC PLAN, BUDGET, AND PERFORMANCE PLAN AND REPORT (Feb. 2016), at 9, http://files.consumerfinance.gov/f/201602_cfpb_report_strategic-plan-budget-and-performance-plan_FY2016.pdf [https://perma.cc/3XTT-JMT9].

the law expressly prohibits Congress from ever reviewing the CFPB budget.[180] The statute declares, "Notwithstanding any other provision in this title, the funds derived from the Fed pursuant to this subsection shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate."[181]

Scholars who support the CFPB dismiss these claims by sidestepping the constitutional text itself in favor of two other arguments: (1) the existence of other self-funded agencies, and (2) the lack of Appropriations Clause case law, especially cases striking down agencies on such a broad scale.[182] Of course, if the CFPB's novelty offers courts their first opportunity to rule on such a structure, neither argument advances a compelling basis for the Bureau in constitutional law.

In fact, supporters of Dodd-Frank explicitly sought this extra-constitutional insulation from Congressional oversight in order to protect it from political influence.[183] Lawmakers, such as Senator Elizabeth Warren, wanted a powerful CFPB[184] that would stand up against the mammoth financial services industry, rather than succumb to its political influences through agency capture.[185] The statutory language is remarkable for the deference it grants the CFPB to set its own payday:

> Each year (or quarter of such year), beginning on the designated transfer date, and each quarter thereafter, the Board of Governors shall transfer to the Bureau from the combined earnings of the Federal Reserve System, the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law, taking into account such other sums made available to the Bureau from the preceding year (or quarter of such year).[186]

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[180] 12 U.S.C. § 5497 (2012).
[181] *Id*.
[182] *See* Gupta, *supra* note 130, at 959; Wilmarth, *supra* note 4, at 885.
[183] *See* Wilmarth, *supra* note 4, at 885.
[184] *See Recent Legislation*, *supra* note 152, at 2124.
[185] *See* Pearson, *supra* note 89, at 103.
[186] 12 U.S.C. § 5497(a)(1) (2012).

In short, the CFPB is a "new agency like no other."[187] Its constitutionality hinges on whether these factors taken together—sweeping regulatory power, insulation from executive oversight, and exemption from Appropriations Clause supervision—establish an agency free to float unmoored from checks and balances.[188]

E. The CFPB's Use of Its Policymaking Independence

In the six years since Congress passed Dodd-Frank, and the five years since President Obama appointed the first CFPB Director, the agency's purview has already grown rapidly.[189] The D.C. Circuit acknowledged "the Director of the CFPB possesses enormous power over American business, American consumers, and the overall U.S. economy."[190] Industry critics claim that consumers bear the brunt of compliance costs for the CFPB's regulatory activities.[191] As economists study the consequences of these regulatory frameworks, some discoveries are alarming. Along with climbing fees for commercial banking and a decline of Americans with access to traditional commercial banking, far fewer Americans have access to free checking accounts than before Dodd-Frank—falling from 76 percent to 38 percent.[192]

Additionally, the CFPB launched a data-mining program that expanded on congressional authorization to gather market data, and now tracks individual transactions.[193] Economists have questioned the

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[187] Pearson, *supra* note 89, at 103.
[188] *See id.* at 104.
[189] *Assessing the Effects of Consumer Finance Regulations: Hearing Before S. Comm. on Banking, Hous. & Urb. Aff.,* 114th Cong. (2016) (statement of Todd Zywicki, George Mason University Foundation Professor of Law, Mercatus Center Senior Scholar) [hereinafter Zywicki Testimony].
[190] PHH Corp. v. Consumer Fin. Prot. Bureau, No. 15-1177, 2016 WL 5898801, at *2 (D.C. Cir. 2016).
[191] Opening Brief for Petitioners at 1, PHH Corp. v. Consumer Fin. Prot. Bureau (No. 15-1177), 2015 WL 8530553 (D.C. Cir. Dec. 11, 2015).
[192] Zywicki Testimony, *supra* note 189, at 3–4.
[193] *Examining the Consumer Financial Protection Bureau's Mass Data Collection Program: Hearing Before H. Comm. on Fin. Serv. Subcomm. on Oversight and Investigations*, 114th Cong. (2015) (testimony of Mark Calabria, Director of Financial Regulation Studies, CATO Institute), http://www.cato.org/publications/testimony/examining-consumer-financial-

CFPB's broad reading of its statutory power to include mass data collection across transactions, especially because they offer "almost nothing about the overall functioning" of a regulated market.[194]

Along with controversial programs that push the bounds of Congressional authorization (yet are immune from Congressional oversight), the CFPB is also staking out a political position on tort reform. It is attempting to protect consumers from mandatory arbitration clauses that short-circuit class-action suits, but in doing so, may raise the cost of litigation borne by businesses and consumers.[195] By the CFPB's own estimates, the agency is exposing 53,000 new companies to class action liability.[196] Practitioners routinely warn that these lawsuits serve to enrich attorneys as much as victims.[197]

The CFPB is also moving past its attention on banks, which served as the original justification for Dodd-Frank, to regulate entirely different and smaller creditor relationships.[198] Because the CFPB exercises its public-facing regulatory authority over any credit relationship, the Bureau exercises authority over entities beyond the banks and large institutions within the scope of the Fed and FDIC.[199] Instead, the CFPB regulates routine personal finance decisions such as using credit cards and receiving home equity loans.[200] The CFPB is also moving to regulate debt collection markets, capping the number of times collectors can attempt to make contact and adding regulations

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protection-bureaus-mass-data-collection-program [https://perma.cc/9C26-6PGC].

[194] *See id*.

[195] *See* Zywicki Testimony, *supra* note 189, at 3.

[196] Brad S. Karp, *CFPB and Class Action Arbitration*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (May 28, 2016) https://corpgov.law.harvard.edu/2016/05/28/cfpb-and-class-action-arbitration/ [https://perma.cc/7AYW-F8UL].

[197] *See generally* Eric J. Mogilnicki, *The CFPB's Flawed Case for Banning Class Action Waivers*, LAW360 (Jul. 13, 2016, 4:39 PM), https://www.cov.com//media/files/corporate/publications/2016/07/the_cfpbs_flawed_case_for_banning_class_action_waivers.pdf [https://perma.cc/L95P-MRTN] ("All told, and using only the numbers and estimates supplied by the CFPB, the class actions in the CFPB study provided for a maximum of about $1.5 billion in cash to class members and cash payments of about $1.6 billion to the lawyers.").

[198] *See id*.

[199] *See id*.

[200] *See id*.

to verify the debt they collect.[201] As with any regulation, it may increase costs to consumers if lenders pass down the new compliance costs, or it may curtail costly abuses. Either way, the salient point for our purposes is not simply the merits of the policy, but instead the fact that the CFPB wields an outward-facing regulatory power that touches on more consumers and industries than narrow, fee-supported independent agencies with less regulatory independence.

The most commonly-raised concern about the cost of CFPB policy continues to be its burden on small community banks. The Government Accountability Office (GAO) reports that small bank and industry leaders confirm a drop in mortgage lending due to CFPB rules:

> Since our 2012 report, CFPB issued mortgage-related rules pursuant to Titles X and XIV of the Dodd-Frank Act. . . . Representatives from credit unions, community banks, and industry associations we interviewed said several of these new rules have increased their overall compliance burden—training staff, allocating time for regulatory compliance matters, and updating compliance systems—and in some cases, have begun to affect mortgage lending.[202]

In a predictable tale of bureaucrats frustrating small businesses activities, the GAO also found that the CFPB continues to understate the anticipated cost of its regulations.

> Representatives from community banks, credit unions, and industry associations we interviewed and CFPB stated that the compliance costs incurred by community banks and credit unions to implement the new disclosures included costs to revise and test software and compliance systems and costs to train employees. Representatives from two community

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[201] *See* Jeff Bater, *CFPB Debt Collection Plan Doesn't Spare Banks*, BLOOMBERG BNA (Aug. 8, 2016), http://www.bna.com/cfpb-debt-collection-n73014445984/ [https://perma.cc/BZ9K-PTBR].

[202] U.S. GOV. ACCOUNTABILITY OFFICE, GAO-16-169, IMPACTS ON COMMUNITY BANKS, CREDIT UNIONS AND SYSTEMICALLY IMPORTANT INSTITUTIONS 20 (2015), http://www.gao.gov/assets/680/674459.pdf [https://perma.cc/24NM-YB5Y].

> banks and four credit unions we interviewed stated that they had to work with third-party vendors to update their loan origination and documentation system software. . . . [R]epresentatives from one community bank and one credit union indicated that they had to retain a new vendor to comply with the rules. Representatives from one community bank and one credit union also stated that they have to conduct additional due diligence on their vendors to ensure compliance because they are ultimately held liable if the vendors' systems or disclosures are not compliant with the rule.[203]

One survey conducted by the Mercatus Center at George Mason University found 71 percent of small banks reported that the CFPB was affecting their business activities, with many reporting that it affected their mortgage activities.[204] Community banks with $200 million in assets had little incentive to pay an extra $1 million in annual Dodd-Frank compliance costs.[205] Although the Act exempted banks with less than $10 billion in assets from direct examination by the CFPB, they are still subject to ad hoc reports the CFPB requires "to support its mission."[206] These data points illustrate both the unintended consequences of good intentions and the real risk of handing unchecked authority to a small group of decision makers who are insulated from the consequences of their choices.

The CFPB is tasked with making policy determinations that affect millions of people in society that embraces a democratic republican form of government, yet those stakeholders lack any recourse when they suffer the consequences of those decisions. This concern is not as pedantic as common rhetoric about "unelected judges," it is instead a unique risk posed by an agency that operates

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[203] *Id*.

[204] Hester Peirce et al., *How Are Small Banks Faring Under Dodd-Frank?*, MERCATUS CTR. GEO. MASON UNIV. (Feb. 27, 2014), http://mercatus.org/publication/how-are-small-banks-faring-under-dodd-frank [https://perma.cc/5QKT-6YF2].

[205] Tanya D. Marsh & Joseph W. Norman, *The Impact of Dodd Frank on Community Banks*, 6 (Wake Forest Univ. Legal Stud. Paper No. 2302392, 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_ id=2302392 [https://perma.cc/PS9R-6ZU3].

[206] *Id*. at 32.

unmoored from the constraints of any of the three coequal branches of the U.S. federal government. The CFPB's impact on small banks and communities is certainly not dispositive of its legal status. Valid and constitutional agencies make bad decisions every day. These policy concerns are important because they highlight the cost of abandoning the checks and balances of the Madisonian republican project and embracing the autocratic processes of James Landis's wildest dreams.

V. Conclusion

The CFPB is an agency endowed with noble intentions, and beset by fierce criticism. In the wake of the financial crisis, Dodd-Frank drafters sought to insulate the CFPB from industry capture and political pressure. In doing so, they empowered an agency to stand above the checks and balances inherent in a Madisonian system with strong separation of powers. Even in a post-New Deal world with a robust administrative state, the CFPB is without direct precedent.

The CFPB enjoys a broad mandate of public-facing regulatory authority, but despite its ostensible role in the executive branch, the President cannot easily remove its Director. Nor can Congress exercise its Appropriations Clause power to review the CFPB budget; Dodd-Frank explicitly protected that autonomy. Several constitutional challenges are underway in federal courts, but separation of powers challenges only occasionally succeed. In order to overcome skepticism, challengers should demonstrate that specific attributes of the CFPB are demonstrably novel and unique.

In response to constitutional challenge, the CFPB's defenders cite other agencies that they view as analogous in structure. On that basis, the CFPB could likely survive a challenge to any single attribute of its structure. However, the CFPB should not withstand scrutiny if courts consider its entire composition holistically. Comparisons to other agencies break down after considering multiple facets of the CFPB's challenge. For example, the FDIC is self-funded, FTC commissioners can only be removed for cause, and a single director heads the FHFA. But, none of these examples create a precedent for the independent, powerful, perpetual motion machine of the CFPB. The FDIC does not have blanket power to regulate any person dealing with consumer finance, the FTC is run by a bipartisan commission rather than a single entrenched person, and the FHFA does not write its own budget then use those funds to exercise public-facing regulatory authority.

The CFPB accumulates and exercises power without oversight from any branch of government. Congress is forbidden by statute from exercising its public fisc responsibility under the appropriations clause, allowing the CFPB to plunder the Fed for hundreds of millions of dollars annually. The President cannot remove the lone Director except for good cause, insulating the Director from any supervisory incentives or consequences for behavior. Courts must overcome administrative deference in order to exercise judicial review, treating the CFPB as if it were the only entity authorized to enforce consumer protection law.

Insomuch as the drafters of Dodd-Frank sought to create a strong and independent agency, they have succeeded mightily. Insomuch as the framers of the Constitution sought to create a system with separation of powers, checks and balances, and limited government, their vision is threatened.