FREE ENTERPRISE FUND, BOUNDARY-ENFORCING DECISIONS, AND THE UNITARY EXECUTIVE BRANCH THEORY OF GOVERNMENT ADMINISTRATION

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The Court's 5-4 decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*[1] presents the most expansive vision of presidential power over the structure of administrative agencies in perhaps ninety years. In holding that the design of the relationship between the president, the Securities and Exchange Commission (SEC), and the Public Company Accounting Oversight Board (the Board) violated the president's Article II powers, the Court found, for the first time, that the design of an administrative agency was unconstitutional even though Congress had not taken one of three steps: inserting itself directly into the removal process; inserting itself directly into the appointments process; or inserting itself into the substance of agency policymaking by retaining a congressional veto power over the agency's actions.[2] In all prior decisions in which the Court had held the design of an agency to be unconstitutional, at least one of these three forms of congressional grabs at greater control had been involved.[3] Yet, in an expression of

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

2. *Id.* at 3147.

3. *See. e.g.,* Bowsher v. Synar, 478 U.S. 714, 733–34 (1986) (holding that Congress may not hold the power of removal of the comptroller general); Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 959 (1983) (ruling that legislative vetoes of administrative decisions are unconstitutional).

the "unitary executive branch" vision of presidential powers under Article II, the Court held that the Board's design was unconstitutional, not because it left Congress too much control over the Board, but because it left *the president* too little.[4]

I. THE IDIOSYNCRATIC NATURE OF THE CASE

Despite the extent to which the Court's rhetoric and outcome endorsed an exceptionally robust view of presidential power over administrative governance, the implications of *Free Enterprise Fund* for the more general struggle between Congress and the president over administration remain obscure because the case presented such an idiosyncratic context. The Court had never seen an administrative agency structure like the one at issue; the structure was obscure enough that I do not believe any major administrative law scholarship had noticed or addressed this peculiar structure before. In the Sarbanes-Oxley Act of 2002 (SOX), Congress had created a new entity—the Public Company Accounting Oversight Board—to regulate accounting firms that audit public companies.[5] Rather than creating a new, freestanding agency, Congress decided to put this new board inside the SEC. The SEC was given a vast array of powers over the Board, including control of the Board's budget, the power to appoint its heads, the power to decide whether to permit Board rules to go into effect, and the power to control all the Board's enforcement and sanctioning decisions.[6] The one power the SEC lacked, however, was to fire Board members at will. Instead, the SEC could fire Board members only for demonstrated "good cause."[7] Thus the idiosyncratic nature of this structure emerged: Congress had insulated the Board from presidential control through two "for cause" removal protections. First, the president could remove SEC commissioners not at will, but only for good cause.[8] Second, the SEC itself could remove

4. *See Free Enter. Fund*, 130 S. Ct. at 3164 ("[T]he Act before us imposes a new type of restriction—two levels of protection from removal for those who nonetheless exercise significant executive power. Congress cannot limit the President's authority in this way.").

5. Public Company Accounting Reform and Investor Protection (Sarbanes-Oxley) Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C.A.).

6. 15 U.S.C.A. §§ 7211(e)(4), 7217 (West 2009).

7. 15 U.S.C.A. § 7211(e)(6) (West 2009).

8. *See* Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935) (finding that independent agencies are not subject to the president's "illimitable power of removal").

Board members only for good cause.[9] Thus, the Court confronted for the first time an administrative entity *twice* insulated from direct presidential control by good cause removal protections. Although the Court had long held that Congress could prohibit the president from removing agency heads except for good cause, the Court had never seen, much less been asked to assess, agency heads doubly insulated in this way.

Moreover, as the case was litigated, it confirmed the idiosyncratic nature of this dual for-cause removal structure. Neither the Solicitor General nor the Board was able to document more than a handful of other places in the government where officials with major policymaking responsibility, like Board members, were doubly protected through for-cause removal provisions.[10] Hence, it seems likely that the Court, relying on the government's own representations about the essential uniqueness of the Board's structure, decided *Free Enterprise Fund* on the understanding (accurate or not) that few other administrative agencies, officials, or actions would be affected by its decision.[11] On the other hand, the dissent marshaled a parade-of-horribles catalogue of officials throughout the government who appear to be doubly insulated from direct presidential removal, and thus are perhaps situated analogously to Board members.[12] The Court majority dismissed many of these examples as far-fetched and effectively rejected some of them out-of-hand.[13] Despite the dissent, then, it still seems likely that the Court believed it was deciding a case with limited practical effect on other agencies.

In *Free Enterprise Fund*, the Court thus had something of a free pass in invalidating the Board's structure: it could hold this peculiar

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9. 15 U.S.C.A. § 7211(e)(6) (West 2009).

10. *See* Brief of Respondent at 43, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010) (No. 08-861) (noting examples in the Postal Service, Foreign Service Labor Relations Board, and Social Security Administration).

11. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3159 (2010) (remarking that "the Sarbanes-Oxley Act is highly unusual in committing substantial executive authority to officers protected by two layers of for-cause removal").

12. *Id*. at 3179 (Breyer, J., dissenting) ("I still see no way to avoid sweeping hundreds, perhaps thousands of high level government officials within the scope of the Court's holding, putting their job security and their administrative actions and decisions constitutionally at risk. To make even a conservative estimate, one would have to begin by listing federal departments, offices, bureaus and other agencies whose heads are by statute removable only 'for cause.' I have found 48 such agencies.").

13. *See id.* at 3160 (majority opinion) ("[T]he dissent fails to support its premonitions of doom; none of the positions it identifies are similarly situated to the Board.").

design to be an unconstitutional limitation on the president's Article II powers without putting much else about the structure of administrative government up for grabs. Indeed, the immediate stakes were even lower, for the Court concluded that it could sever the constitutionally offensive provision—the provision that barred the SEC from firing Board members except for good cause—and then permit the SOX Act to remain in effect and fully operative.[14] Thus, the case gave the Court an opportunity to strike a blow for a general principle that, at some point, presidential control over the agencies can become so attenuated as to violate Article II. And yet the Court could do so in a context that had no practical effect on SOX itself, and perhaps minimal effect, if any, on any other agency. *Free Enterprise Fund* provided the Court a rare opportunity for a seemingly "free declaration" of abstract principle.

II. TWO WAYS OF READING *FREE ENTERPRISE FUND*

Given the idiosyncratic context of the case, then, what does the Court's decision portend for many still-unresolved questions about the relationship between the president, Congress, and control of the administrative state? That depends on which of two kinds of decisions *Free Enterprise Fund* turns out to be. One possibility is that it is a substantively transformative decision, in which the forceful rhetoric and analysis concerning presidential Article II powers presages further decisions that shift the balance of the constitutional principles that structure control over administration of the laws toward the president. The other possibility is that *Free Enterprise Fund* represents what I have previously called a "boundary-enforcing decision."[15] Such

14. *Id.* at 3145.

15. *See* Richard H. Pildes, Foreword, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 59–76 (2004) (suggesting that vague constitutional constraints imposed by the Supreme Court restrain extreme practices and can lead political actors to give those norms more determinate content in practice). *See also* Richard H. Pildes, *Caperton and The Supreme Court's Boundary-Enforcing Role*, BALKINIZATION (June 8, 2009, 12:05 PM), http://balkin.blogspot.com/2009/06/caperton-and-supreme-courts-boundary.html ("[T]here are boundaries on the conduct of public institutions and actors – . . . some lines cannot be crossed, even if it is legally impossible to define those lines with clarity."); Richard H. Pildes, Caperton *and Boundary-Enforcing Justices Part II: How Vague Law Can Create Stable Outcomes*, BALKINIZATION (June 26, 2009, 2:15 PM), http://balkin.blogspot.com/2009/06/caperton-and-boundary-enforcing.html ("Vague Supreme Court law can nonetheless lead to stable legal/policy outcomes."); Richard H. Pildes, *Boundary-Enforcing Supreme Court Decisions Part III*: *How Do We Recognize a Boundary-Enforcing Decision, Why We Often Don't*, BALKINIZATION (June 28, 2009, 10:49 AM), http://balkin.blogspot.com/2009/06/boundary-

decisions establish outer-bound limits on the organization of public power in exceptional or extreme contexts—they establish that certain structures or actions have gone "too far"—but those boundaries remain vague and the Court does not relentlessly pursue the logic of those limiting principles all the way to their ultimate conclusion.

A. Decision of Broad Principle with Significant Doctrinal Effect

The most conventional way to read a Supreme Court decision is through the rational elaboration of its internal legal logic. That approach is the bread-and-butter of doctrinal legal scholarship; it assumes that future courts in subsequent cases will apply the immanent legal logic of a decision in a consistent way and will follow the relevant legal principles to their logical limit. If the principle on which a decision rests logically points to decisions that will unsettle a good deal of existing practices and institutional arrangements, reading a decision in this conventional way assumes that the Court will therefore invalidate those structures and arrangements when the Court confronts them in future cases. *Free Enterprise Fund* reflects a robust principle of presidential entitlement to control administrative government. Thus, if the Court's decision is approached in purely doctrinal terms, the question is what the decision will mean for a range of specific issues that all implicate the "unitary executive branch" vision or theory of the president's powers under Article II of the Constitution.

As David Barron has helpfully defined the nature of the dispute concerning the unitary executive branch theory of Article II:

> There are agencies, and there is a White House. Are they to be one and the same—a monolith in which the agencies do the bidding of the President? Or are they to be separate—a federal executive of functional specialization that permits norms of expertise, professionalism, and the rule of law to operate within agencies free from the influence of presidential policy preferences?[16]

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enforcing-supreme-court.html (asserting that boundary-enforcing decisions occur reasonably frequently, and not always in closely divided cases).

16. David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095, 1099 (2008).

The unitary executive branch conception of the administrative state implicates a variety of specific issues. For example, when Congress delegates discretionary decisionmaking power to an administrator, is that decision ultimately one the president must, by virtue of Article II, have the power to make? Peter Strauss has incisively captured this point by asking whether the president is the ultimate "regulatory decider," so that all discretionary decisions of the agencies are ultimately his to make.[17] Or is the president instead a more limited overseer of the regulatory state, one who has various tools to oversee regulation and regulators, but one whom Congress can preclude from being a decisionmaker should Congress want to rely instead on the technical expertise or other skills of administrative officials? Similarly, can the president issue directives to the heads of the agencies, including the independent agencies, and order them to take, or refrain from taking, particular discretionary actions?

Pushed to the furthest limit, the unitary executive branch view asserts that independent agencies are inherently unconstitutional and that the Supreme Court in *Humphrey's Executor*[18] erred by permitting independent agencies to exist. According to the unitary executive branch view, the president must be able to control all the discretion that Congress has delegated to administrators; thus, the president must have the power to fire any federal administrator who refuses to follow the president's policy preferences in areas in which the administrator is exercising discretion (even on the unitary executive branch view, the president cannot order an administrative official to take an action that would violate the law). Moreover, there are also softer forms of potential legal rules that partly reflect the spirit of the

17. *See* Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 696 (2007) ("When Congress confers authority on the Environmental Protection Agency("EPA") to regulate various forms of pollution . . . is it in the law's contemplation giving the President the authority to decide these matters, or only to oversee the agencies' decision processes?"). For other important commentary on these issues, *see* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 492–515 (2003); Christopher C. DeMuth & Douglas H. Ginsburg, Commentary, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1082–83 (1986); Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 987–88 (1997); Alan B. Morrison, Commentary, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1059 (1986); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 967–68 (1997).

18. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 631–32 (1935) (holding that the President's unlimited removal power extends solely to "purely executive officers" and independent agency officials may only be removed as specified by Congress).

unitary executive branch view without going this far in endorsing it: Justice Elena Kagan, as an academic, argued that statutes should generally be read to give the president the power to control the discretion of administrators, unless a statute expressly delegates decisionmaking power to the administrator.[19]

The unitary executive branch vision of Article II has always been based more on an interpretation of the Constitution's original conception of the Presidency, and on the practices of presidents through the years,[20] than on anything in the Supreme Court's case law. Indeed, the only case that strongly supports this vision is *Myers v. United States*,[21] written, perhaps not surprisingly, by former President Taft. And surely it is no accident that Chief Justice Roberts' opinion in *Free Enterprise Fund* refers to *Myers* as a "landmark case."[22] Chief Justice Roberts's characterization is particularly noteworthy because, since the 1930s, the Court has confined *Myers* to a narrow realm and has cabined it in even more since the late 1980s.[23] Thus, it is also not surprising that the bulk of the Court's justification in *Free Enterprise Fund* for its expansive conception of the president's Article II powers comes not from the case law, but from early constitutional debates in Congress, Madison's letters, the Federalist Papers, and similar non-judicial historical sources.[24] These have always been the fields on which the unitary executive branch view has blossomed.

Given the robust conception of the president's Article II powers to control the administrative state reflected in *Free Enterprise Fund*, future courts could seize upon the principles and language of the decision to support application of the unitary executive branch view

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19. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2251 (2001) (suggesting that Congress has the ability to restrict the President's power over administrative functions and personnel, but typically leaves "more power in presidential hands than generally is recognized.").

20. S*ee generally* STEPHEN CALABRESI AND CHRISTOPHER YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008) (cataloguing the assertions by presidents of their right to remove from office at will any official exercising executive power throughout American history).

21. Myers v. United States, 272 U.S. 52, 176 (1926) (holding that Congress had unconstitutionally interfered with the President's removal power).

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

23. *See* Morrison v. Olson, 487 U.S. 654, 686 (1988) (asserting that *Myers* only dealt with situations where Congress was assuming the power of removal).

24. *See* Free Enter. Fund, 130 S. Ct. at 3151–52, 3156–57 (stating that the Framers believed the removal power to belong inherently to the executive and that this power was necessary to maintain the balance between the branches of government).

beyond the peculiar context of dual for-cause removal structures. That Chief Justice Roberts self-consciously planted the seeds for further extensions of that view is quite likely. The unitary executive branch view was created (critics would say) or recovered (supporters would say) during the early years of the Reagan presidency as an administration that saw itself with a deregulatory mandate sought to bend what it perceived as recalcitrant bureaucracies to the new president's policy agenda.[25] Chief Justice Roberts and Justice Alito worked at high levels in the executive branch during those years; there is no reason to think they are not as sympathetic to the unitary executive branch view as the other elite Reagan administration lawyers who advanced that view during those same years.[26] Indeed, Justice Alito gave speeches endorsing the unitary executive branch position before he was appointed to the Court.[27]

Free Enterprise Fund presented Chief Justice Roberts and Justice Alito with their first opportunity on the Court to endorse the understanding of Article II that underwrites the unitary executive branch view. That they took the opportunity to do so comes as no surprise. Moreover, based on her scholarship and work in the White House, Justice Kagan is more likely to give this view a sympathetic ear than Justice Stevens, at least in the context of some related issues.[28] That is not to say that *Free Enterprise Fund*'s reasoning will be taken to its most extreme potential limit; the Court, for example, seems unlikely to revisit the question of the constitutionality of administrative agencies given how much water has flowed under that bridge. But in areas in which the doctrine is still indeterminate, or the legal questions presented novel (such as some of the questions noted above), *Free Enterprise Fund* could logically be read, as matter of internal doctrinal development, to support the president over Congress in future constitutional conflicts concerning control of the administrative state.

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25. *See* Amanda Hollis-Brusky, *Building the Unitary Executive from the Inside-Out (1981-1988) and the Outside-In (1989-2008)* (unpublished draft) (paper delivered at Western Political Science Association Annual Meetings, April 2, 2010) (detailing the history of the internal executive branch development of this position).

26. *Id.*

27. *See, e.g.*, Jess Bravin, *Judge Alito's View Of the Presidency: Expansive Powers*, WALL ST. J., Jan. 5, 2006, at A1 (quoting Alito as saying: "The president has not just some executive powers, but the executive power—the whole thing.").

28. *See* Elena Kagan, supra note 19, *Presidential Administration*, 114 HARV. L. REV. at 2251.

B. A Boundary-Enforcing Decision of Limited Effect

It is also possible that *Free Enterprise Fund* is instead a more limited "boundary-enforcing decision" confined to the peculiar and limited context of dual for-cause removal structures. Boundary-enforcing decisions are a major but unappreciated feature of Supreme Court constitutional decisionmaking. These decisions typically arise in contexts in which the Court perceives powerful competing constitutional values and principles to be at stake, and in which the Court believes the relevant public or private actors have pushed one set of those competing principles to an extreme extent. In these decisions, the Court seeks to restore that balance by invalidating the action that has taken one side of these competing principles to a (perceived) extreme.[29]

Boundary-enforcing decisions of this sort are primarily expressive in character. That is, the Court's decision is designed to express the view that one set of constitutional values cannot be ignored altogether. Such decisions reflect the view that both sides of the constitutional tension must be given their due. Characteristically, decisions of this sort end up with doctrine expressed in terms of vague principles rather than bright-line rules that define clear, necessary, and sufficient criteria of their application. Boundary-enforcing decisions draw a line in the sand; they indicate there is some limit, which courts will enforce, to particular constitutional principles. But it is also characteristic of these decisions that the Court does not develop the full logical implications of the decision. Doing so would be inconsistent with the *raison d'etre* of the boundary-enforcing decision: the point is to assert that some balance must be maintained, not to endorse one side of that balance wholeheartedly and for all it is worth.

To illustrate, here are three brief examples. *United States v. Lopez*[30] is such a decision in the area of Congress's powers under the Commerce Clause. In holding that some outer boundary existed on the power of the national government under the Clause, the Court drew an inherently vague line whose central importance was to

29. For a somewhat similar view of the ambiguous nature of the decision, *see* Paul Clement, *Free Enterprise: Doctrinal Shift or Snoozefest?*, SLATE, June 29, 2010, http://www.slate.com/id/2257937/entry/2258635/.

30. United States v. Lopez, 514 U.S. 549 (1995).

express the principle that Congress's powers were not without limit.[31] At the time, some saw *Lopez* as foreshadowing a revolution in federalism jurisprudence, in which the Court, following *Lopez* to its full limits, would radically cut back on the scope of Congress's powers. But of course, no such revolution transpired. That is because *Lopez* was not a transformative decision; the Court did not develop the legal logic of that decision for all it might have been worth. Instead, *Lopez* has come to stand for the expression of a general principle, which is necessarily somewhat vague in application, that, although the powers of the national government in the modern age of nationally integrated markets are vast, they are not without some limit.

Similarly, *Shaw v. Reno*[32] is a boundary-enforcing decision with respect to the permissible role of race in public policymaking, particularly in the redistricting context. The Court felt the force of two competing constitutional values: the legitimate use of race to foster the values of political inclusion versus the concern to minimize the use of racial classifications. Navigating between these values, the Court held that extreme manipulations of election district designs for racial purposes were unconstitutional[33]—even though it was clear, as the dissenters argued, that there was no precise way to define how much influence of race in district design was "too much."[34] Justice O'Connor believed that the Court's role was to plant a flag to establish that some limits existed—even if those limits could not be defined with precision.[35] As with *Lopez*, some read *Shaw* as the first

31. *Id.* at 556 ("[E]ven these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits.").

32. Shaw v. Reno, 509 U.S. 630 (1993).

33. *See id.* at 657–58 (describing the Court's approach to racial classifications, and holding that a race-based redistricting plan "demands close judicial scrutiny" and may violate the Equal Protection Clause if it is not narrowly tailored to serve a compelling government interest).

34. *See, e.g.*, *id.* at 671 (White, J., dissenting) (commenting on the majority's "imprecise" use of terminology and stressing that a redistricting plan that "segregates [is] functionally indistinguishable from any of the other varieties of gerrymandering"); *id.* at 680 (Souter, J., dissenting) ("Unlike other contexts in which we have addressed the State's conscious use of race, electoral districting calls for decisions that nearly always require some consideration of race for legitimate reasons where there is a racially mixed population." (internal citations omitted)).

35. *See id.* at 657 (majority opinion) ("Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth

step on the way to the Court holding all race-conscious districting unconstitutional.[36] Again, though, the Court did not come close to that result. Instead, *Shaw* expressed the principle that government actors had to respect some outer limit on the role of race in the districting process, but did not lead to a dramatic unwinding of the practice of racial redistricting.

Finally, the Court's due process decision concerning money and judicial elections, *Caperton v. A.T. Massey Coal Co.*,[37] is likely to be a boundary-enforcing decision, rather than one that is followed to the full breadth of its logical potential. *Caperton* presented what the Court called "extreme facts" and "an extraordinary situation."[38] The *Caperton* Court held that, at some point, a party with a direct financial interest in pending litigation can spend so much money trying to elect or defeat a judicial candidate who will participate in that litigation that due process requires that candidate, once on the bench, to recuse himself from adjudicating anything concerning that litigation.[39] *Caperton* is unlikely to lead to an extensive body of due process recusal law. Instead, it draws a line in the sand to express the principle that, at some extreme point, due process can be compromised by massive spending on judicial candidates in the context of pending litigation.

Free Enterprise Fund might similarly be a boundary-enforcing decision of this sort: important for the principle it reflects that some limits exist on the process and form of congressional insulation of agencies, but not a decision that significantly transforms doctrine or practice. The dissenting opinion nicely articulated the competing constitutional principles and values at stake.[40] On the one hand, the

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Amendments embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny.").

36. *See, e.g.*, A. Leon Higginbotham et al., *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593 (1994) (comparing *Shaw v. Reno* to *Plessy v. Ferguson* and *Dred Scott v. Sandford*).

37. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009).

38. *Id.* at 2265.

39. *Id.* at 2265–67 (holding that "[o]n these extreme facts the probability of actual bias rises to an unconstitutional level," and asserting that, although most issues pertaining to judicial disqualification will be resolved before getting to the level of a constitutional issue, the Constitution will, on rare occasions, require the recusal of a judge).

40. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3165–67 (2010) (Breyer, J., dissenting) (describing the tension between Congress's power to enact statutes that are "'necessary and proper' to the exercise of its specifically enumerated constitutional authority" and constitutional principles—such as the separation of powers—that limit Congress's power to structure the federal government).

Court had long recognized that Congress ought to have a great deal of latitude in designing administrative agencies in response to constantly changing circumstances, as long as Congress did not itself seek to capture control over the agency through inappropriate means.[41] Thus, the Court has long upheld the constitutionality of independent agencies, such as the SEC, in which the head of the agency can be removed by the president only for good cause. On the other hand, as the dissent also acknowledged, Article II of the Constitution vests the president with the executive powers of the government. In order to execute those powers the president must not be too removed from effective control over those who administer the laws.[42]

Justice Kennedy was in the majority in all of the cases I characterize as boundary-enforcing decisions, as he was in *Free Enterprise Fund*. That Justice Kennedy is often the decisive vote in these boundary-enforcing decisions is no accident: central to Justice Kennedy's conception of the role of the Court, like Justice O'Connor's before him, is the view of the Court as a balance wheel in the overall structure of American political institutions. Justice Kennedy sees one of the Court's essential roles to be the insistence that boundaries exist on the conduct of public institutions and actors—that some lines cannot be crossed and that it is the Court's role to police those boundaries even if it is not possible to define those boundaries with sharp legal precision or clarity. Thus, *Free Enterprise Fund* might be a boundary-enforcing decision precisely because Justice Kennedy viewed Congress as simply having taken the legitimate constitutional values of agency independence "too far." The peculiar, idiosyncratic structure of the Board—with the Board twice insulated by for-cause removal protections—might have been thought to tip the balance between the competing constitutional concerns too far in one direction.[43] After all, as the Court pointed out, if Congress

41. *See id.* at 3165–66, 3168 (discussing the "needed flexibility" granted to Congress through the Necessary and Proper Clause and the benefits of a "functional approach [which] permits Congress and the President the flexibility needed to adapt statutory law to changing circumstances").

42. *See id.* at 3165 ("[The structural separation-of-powers principle], along with the instruction in Article II, § 3 that the President 'shall take care that the laws be faithfully executed,' limits Congress's power to structure the Federal Government. Indeed, this Court has held that the separation-of-powers principle guarantees the President the authority to dismiss certain Executive Branch officials at will."(internal citations omitted)).

43. The dissent argued that the Court could have avoided the constitutional question altogether by holding that the statute creating the SEC does not limit the president to removing

can create two layers of independence, what is to stop it from creating five layers?[44] (The answer might be practical, not logical; in over 200 years, Congress has never tried to do so.) Perhaps, for Justice Kennedy, the specter of limitless insulation of agency officials suggested a system out of kilter, one in which it was important for the Court to express the principle that the president's Article II powers must also be given their due. If that view is what accounts for Justice Kennedy's vote, then *Free Enterprise Fund* might define an outer boundary on congressional control over the design of the administrative state without standing for a more expansive endorsement of the unitary executive branch view in general.

Boundary-enforcing decisions come in various forms. At times, Justices explicitly signal, through narrowing concurring opinions, that their agreement with the majority is limited and that the decision at issue should not be assumed to have broad implication. That is what Justices Kennedy and O'Connor did through their concurrences in *Lopez*.[45] But boundary-enforcing decisions do not always come with a narrowing concurrence attached. Neither *Shaw v. Reno* nor *Caperton*

SEC commissioners only for good cause, but instead permits presidential at-will removal. The statute does not contain any textual provision incorporating a good-cause removal standard. This is perhaps not surprising, since the Act was enacted during the era in which *Myers*, which suggested such provisions were unconstitutional, was the governing law. Nonetheless, based on central features of the SEC's structure, which Congress typically uses for independent agencies, such as the SEC's multi-member structure and fixed terms of office, the courts, including the Supreme Court, have assumed for years that SEC commissioners can only be removed for good cause. Holding that the Act did not in fact so constrain the president would have eliminated the constitutional problem that troubled the Court, but would have destabilized the long-standing understanding that the SEC is an independent agency; as a practical matter, such a holding would have more radical, with more far-reaching, consequences than the Court's holding that the dual for-cause removal structure was unconstitutional. Nonetheless, it is perhaps some signal of the importance to the Court of establishing a boundary principle on the extent to which Congress can insulate administrative officials that the Court bypassed an opportunity to decide the case on a formally narrower statutory, rather than constitutional, ground.

44. *Free Enter. Fund*, 130 S. Ct. at 3154 (majority opinion) ("Indeed, if allowed to stand, this dispersion of responsibility could be multiplied. If Congress can shelter the bureaucracy behind two layers of good-cause tenure, why not a third? At oral argument, the Government was unwilling to concede that even *five* layers between the President and the Board would be too many. The officers of such an agency—safely encased within a Matryoshka doll of tenure protections—would be immune from Presidential oversight, even as they exercised power in the people's name." (internal citation omitted)).

45. *See* United States v. Lopez, 514 U.S. 549, 568 (1995) (Kennedy, J., concurring) ("The history of the judicial struggle to interpret the Commerce Clause during the transition from the economic system the Founders knew to the single, national market still emergent in our own era counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of the national power. That history gives me some pause about today's decision, but I join the Court's opinion with these observations on what I conceive to be its necessary though limited holding.").

v. Massey included such concurrences (and it is too early to be certain that *Caperton* will be applied in as limited a way as I anticipate). Sometimes, Justices will try to engage in boundary-enforcing not by holding the action at issue unconstitutional, but by stating forcefully that there is some line out there whose crossing would create unconstitutional action—even as the Justices uphold the action at issue. This is what Justice Kennedy has attempted to do concerning claims of unconstitutional partisan gerrymandering; his opinions announce that extreme partisan gerrymandering might be unconstitutional in some context, even as he has not yet held any particular gerrymander to violate the Constitution.[46] But boundary-enforcing decisions that actually drop the hammer by holding action unconstitutional, instead of merely threatening to do so in some future case, are likely to be of greater practical effect to both political actors and lower courts.

We can only speculate about what leads a Justice to signal explicitly when a decision should be understood in only limited, boundary-enforcing ways. Certainly the absence of such a signal makes it more likely the lower courts will apply the decision in the more conventional way. Perhaps it depends on how potentially disruptive the Justice fears the decision will be. In the context of *Lopez*, in which the Court held Congress's exercise of Commerce Clause power unconstitutional for the first time since the New Deal,[47] it was easy to anticipate in advance that the decision would spawn enormous uncertainty and concern that the Court was about to limit dramatically long-established congressional powers. Perhaps it depends on how aware a Justice is of the most expansive potential interpretations latent in a particular decision; Justices have varying levels of expertise in different areas of the law. Or, perhaps the answer lies in more mundane matters, such as how much time or interest a Justice has in a particular case.

Moreover, that the five-Justice majority in *Free Enterprise Fund* is internally divided on the meaning and scope of the decision is also

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46. *See* Vieth v. Jubelirer, 541 U.S. 267, 311–14 (2004) (Kennedy, J., concurring) (asserting that under a Fourteenth Amendment standard it is possible that a reapportionment scheme could be found unconstitutional, and contending that "[though] no such standard has emerged in this case [that] should not be taken to prove that none will emerge in the future. Where important rights are involved, the impossibility of full analytical satisfaction is reason to err on the side of caution.").

47. *See Lopez*, 514 U.S. at 551 (holding the Gun-Free School Zones Act of 1990 unconstitutional because it exceeded the scope of the Commerce Clause).

entirely possible. Chief Justice Roberts and Justices Scalia, Thomas, and Alito might hope that the decision becomes a transformative one on the scope of the president's control over the administrative state. Justice Kennedy, none of whose prior opinions suggests he endorses a robust view of the president's Article II powers in this area, might understand the decision as a more limited, boundary-enforcing one made necessary by Congress's creation of a novel structure that pushed the limits of prior constitutional understandings. As with all decisions, which kind of decision *Free Enterprise Fund* turns out to be will not be knowable until the Court chooses to speak on these questions again.