

THE PRESUMPTION AGAINST NOVELTY
IN THE ROBERTS COURT'S
SEPARATION-OF-POWERS CASE LAW

On the penultimate day of its October 2019 Term, the Supreme Court decided *Seila Law LLC v. Consumer Financial Protection Bureau*,¹ declaring that the structure of the CFPB unconstitutionally infringed on the President's removal power.² According to the Court, the CFPB's single-member head, insulated by for-cause removal protections, constituted a "novel impediment to the President's oversight of the Executive Branch."³ Dissenting in part, Justice Kagan chastised the majority for "pick[ing] out [an] until-now-irrelevant fact to distinguish the CFPB"⁴ from other agencies, pointedly observing that "if the majority really wants to see something 'novel,' it need only look to its opinion."⁵

In 2017, Professor Leah Litman warned that the Supreme Court was increasingly "promot[ing] the idea that legislative novelty [was] a mark against a law's constitutionality."⁶ This "antinovelty rhetoric" appears in the Court's anticommandeering⁷ and sovereign immunity⁸ cases from the 1990s, and its roots are visible in opinions from the New Deal era⁹ and before.¹⁰ But the Court did not openly cite novelty as a sign that a statute violated the Constitution's separation of powers until 2010.¹¹ Since then, however, and especially since Litman first explored the trend in 2017, the Court has deployed antinovelty language with increasing frequency in cases touching all three branches of the federal government. Antinovelty shaped the Court's conclusion in *Seila Law* that for-cause removal protections are almost always an unconstitutional congressional intrusion on presidential power.¹² Antinovelty

¹ 140 S. Ct. 2183 (2020).

² *See id.* at 2192.

³ *Id.* at 2198.

⁴ *Id.* at 2241 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

⁵ *Id.* (citation omitted) (quoting *id.* at 2191–92 (majority opinion)).

⁶ Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1415 (2017); *see also* Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2113 (2015); Neal K. Katyal, *Rethinking Legal Conservatism*, 36 HARV. J.L. & PUB. POL'Y 949, 951 (2013).

⁷ *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 925 (1997); *see also* Litman, *supra* note 6, at 1416.

⁸ *See, e.g.*, *Alden v. Maine*, 527 U.S. 706, 744 (1999); *see also* Litman, *supra* note 6, at 1410 n.10.

⁹ *See, e.g.*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935) (citing the fact that a law was "without precedent," *id.* at 541, as a ground for concluding that it constituted an "unconstitutional delegation of legislative power," *id.* at 542).

¹⁰ *See, e.g.*, *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 129 (1873) (Swayne, J., dissenting) (criticizing majority for objecting to the Privileges or Immunities Clause's conferral of "novel and large" powers on Congress and consequent narrowing construction of the Clause).

¹¹ *See* *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 496 (2010).

¹² *See* *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2191–92 (2020).

undergirded the Court's holding in *TransUnion LLC v. Ramirez*¹³ that Congress's efforts to confer standing by defining injuries lacking a historical or common law analogue are an unacceptable legislative invasion of Article III.¹⁴ And antinovelty lurked in the background of *West Virginia v. EPA*¹⁵ and *Biden v. Nebraska*,¹⁶ where the Court held that significant assertions of regulatory power should be treated with judicial skepticism absent a clear statement from Congress.¹⁷ These cases suggest that the current Court views antinovelty as more than mere rhetoric. Instead, the Court wields it as a presumption dictating that novel statutes and regulations be treated with heightened judicial scrutiny.

Picking up where Litman left off, this Note traces and critiques the operation of the presumption against novelty in the Roberts Court's recent separation-of-powers cases. As the Court has embraced originalism in high-profile constitutional rights cases, it has purported to apply a different sort of conservatism in the structural separation-of-powers context that this Note, following Professor Cass Sunstein, describes as "Burkean minimalism."¹⁸ The presumption against novelty, which takes stock of the law as it currently exists and puts the brakes on future development, is how the Court claims to implement this commitment to minimalism. In practice, however, the presumption against novelty fails to live up to its promises. First, it aggrandizes the judiciary by giving it the power to make an essentially arbitrary decision about when a regulation or statute is so novel as to cause concern, an objection explored by Litman in 2017 but more salient now given the Court's "increasing reliance" on the presumption.¹⁹ Second, it fails on its own terms by disrupting long-standing assumptions about the appropriate relationship between the three branches. Thus, Justice Kagan's warning in *Seila Law* is worth heeding: the presumption against novelty produces results that are themselves quite novel, and in so doing expands judicial discretion — and judicial power — at the expense of the democratic process.

This Note proceeds in three parts. Part I briefly describes the Court's embrace of originalism in the constitutional-rights context, potential problems with applying originalism to structural separation-of-powers questions, and an alternative form of judicial conservatism — Burkean minimalism — that addresses these problems. Part II frames the presumption against novelty in Burkean terms and traces it through three separation-of-powers doctrines: presidential removals,

¹³ 141 S. Ct. 2190 (2021).

¹⁴ See *id.* at 2204–05.

¹⁵ 142 S. Ct. 2587 (2022).

¹⁶ 143 S. Ct. 2355 (2023).

¹⁷ See *West Virginia v. EPA*, 142 S. Ct. at 2608–09; *Biden v. Nebraska*, 143 S. Ct. at 2375.

¹⁸ See Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 356 (2006); see also Litman, *supra* note 6, at 1473–74.

¹⁹ Litman, *supra* note 6, at 1414; see *id.* at 1481–82.

standing, and major questions. Part III criticizes the presumption on two grounds, updating Litman's aggrandizement argument in light of recent cases and raising a related issue: that the presumption itself leads to novel and unexpected results.

I. ORIGINALISM AND BURKEAN MINIMALISM

As the Supreme Court has grown increasingly conservative, it has aggressively deployed originalist methodology to expand or narrow the scope of various constitutional rights. This Part briefly defines originalism, describes the differences between it and Burkean minimalism, and explains why an originalist Court might gravitate towards the latter when confronting structural separation-of-powers issues.

A. *Originalism Defined*

Since the 1980s, legal conservatives have embraced originalism as part of a broader commitment to historically grounded interpretation, a reaction to the perceived excesses of the Warren and early Burger Courts.²⁰ At the risk of oversimplifying, "originalism" dictates that the Constitution be "interpreted in a way that fits with its *original public meaning*," which includes "not only semantic meaning, but also the shared public context."²¹ An originalist might look to contemporaneous dictionaries, as well as tools like corpus linguistics, to develop a working idea of a provision's semantic meaning.²² She then might consider "the publicly accessible context" of that provision's enactment — "those features of the context of framing and ratification that were accessible to the public at the time each portion of the constitutional text was framed and ratified"²³ — recognizing that language is imprecise and can often tell an incomplete story when read in a vacuum. The proper way to apply this methodology,²⁴ and the question of whether judges can even apply it objectively,²⁵ remains a matter of debate. For present purposes, the key takeaway is that originalism ties the Constitution's meaning to

²⁰ See Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215, 250 (2019).

²¹ CASS R. SUNSTEIN, HOW TO INTERPRET THE CONSTITUTION 30 (2023). There are multiple schools of originalist thought, including "semantic originalism," which eschews shared public context and focuses solely on a legal text's historical meaning, *id.* at 24, and "original intentions originalism," which asks what the Framers intended the Constitution to mean, *id.* at 26–28. "Original public meaning originalism," however, is the "preferred current form of originalism," *id.* at 30, and the form this Note takes as representative of originalist methodology as a whole. It is worth noting that one could apply a version of originalism to statutes, as Justice Alito did in his dissent in *Bostock v. Clayton County*, 140 S. Ct. 1731, 1769 (2020) (Alito, J., dissenting).

²² Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 282–83 (2017).

²³ *Id.* at 291.

²⁴ See J. Joel Alicea, *Liberalism and Disagreement in American Constitutional Theory*, 107 VA. L. REV. 1711, 1717 (2021) (describing competing approaches and their implications).

²⁵ See Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421, 1463 (2021).

how it was understood when the provision in question was ratified — something the Court has recently and repeatedly emphasized in several landmark cases interpreting the scope of various constitutional rights.²⁶ A corollary to this point is that if the current doctrine does *not* reflect the ratification-era public understanding, the originalist judge is faced with the task of pushing the law back toward its historical meaning,²⁷ subject only to the constraints of *stare decisis*.²⁸

B. Separation-of-Powers Problems with Originalism

Even setting aside the significant methodological problems originalism poses in the separation-of-powers context,²⁹ applying it to void well-established institutional arrangements between the three branches risks undermining the Court’s legitimacy. Originalism claims superiority over

²⁶ See, e.g., *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111 (2022) (setting forth a Second Amendment test that asks whether the amendment’s “plain text covers an individual’s conduct,” *id.* at 2126, at which point the government must “justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation,” *id.* at 2130, defined with reference to either 1791 (when the Second Amendment was ratified) or 1868 (when the Fourteenth Amendment was ratified), *id.* at 2132, 2135–36); *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973), on originalist grounds); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2429 (2022) (discussing the original meaning of the Establishment Clause).

²⁷ This might include striking down even long-standing laws that do not accord with ratification-era meaning, like the century-old firearm law at issue in *Bruen*. See 142 S. Ct. at 2156.

²⁸ See generally Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017).

²⁹ The Constitution contains no “Separation of Powers Clause” that might provide textual insight into the appropriate relationship between the three branches of the federal government, so immediately, the originalist lacks an obvious source of semantic meaning for a constitutional separation-of-powers principle. John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1959 (2011). True, some originalists have argued that the Constitution should be read with reference to unwritten background principles in existence at the Founding, like natural law, which might provide an originalist (but nontextual) basis for a constitutional separation-of-powers principle. Cf., e.g., Jud Campbell, *Natural Rights, Positive Rights, and the Right to Keep and Bear Arms*, 83 LAW & CONTEMP. PROBS. 31, 34–39 (2020) (making this claim about the right to bear arms). But even if one views separation of powers through such a lens, the historical record does not support the notion of judicially enforceable separation-of-powers doctrines, because as Professors Andrea Katz and Noah Rosenblum explain, “early American government was characterized by cooperation and mutual accommodation by the President and Congress.” Andrea Scoseria Katz & Noah A. Rosenblum, *Removal Rehashed*, 136 HARV. L. REV. F. 404, 414 (2023). “This early ‘political constitutionalism,’” they contend, “was consistent with a Madisonian understanding of checks and balances. . . . The Court was not in the business of ruling Congress out of checks on the presidency; instead, party and federalism absorbed these conflicts. The judicialization of the separation of powers is a modern invention.” *Id.* For an example of the methodological difficulties posed by separation-of-powers originalism, consider *Myers v. United States*, 272 U.S. 52 (1926), which concluded, after a lengthy analysis of the First Congress’s so-called “Decision of 1789,” that the President enjoys a plenary removal power even though the Constitution lacks a removals clause. See *id.* at 163–64. In reaching this conclusion, the *Myers* Court ignored that the debates in the First Congress “did not establish a legal precedent that prohibited future Congresses from reaching a different interpretation” of the removal power, and instead “reflected . . . representative institutions, through negotiation and statecraft, constituting the separation of powers by statute.” Nikolas Bowie & Daphna Renan, *The Separation-of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2046 (2022). This result was itself unprecedented — and thus not in accordance with original understandings. See *id.* at 2028.

other methods through its reliance on objective historical source material, which its proponents say cabins “freewheeling judicial policymaking”³⁰ by tying a legal text’s meaning to a single moment in time — the moment when the American people, or their elected officials, ratified or enacted the text in question.³¹ In other words, originalism purports to reduce the likelihood that the will of unelected judges is substituted for the will of the ratifying public or its elected representatives.³²

But by definition, originalism calls for a reevaluation of precedents that are at odds with a legal text’s original meaning, including precedents on which Congress or the Executive may have relied when making policy decisions. If the Court overrules past cases to invalidate a statute or administrative action on separation-of-powers grounds, it has effectively pulled the rug out from under the political branches. One could argue, of course, that the Court aggrandizes itself at the other branches’ expense whenever it exercises the power of judicial review.³³ But the danger of self-aggrandizement is more salient in the separation-of-powers context because the Court, in determining the appropriate balance of power between the three branches, leaves the Legislature and the Executive no way to respond when the Court has transcended its own power.³⁴ So applying originalism to upend settled divisions of authority between the three branches risks creating a crisis of judicial legitimacy: the perception that the Court is overstepping its proper role, engaging in the sort of policymaking an originalist would claim to abhor.

C. *Burkean Minimalism*

Perhaps because of this legitimacy concern, the Roberts Court has eschewed originalism in the separation-of-powers context.³⁵ Instead, as Part II of this Note explains, the Court has claimed to embrace a different type of conservatism resembling “Burkean minimalism.”

Viewing civil society as “fragile,” Anglo-Irish statesman Edmund Burke “abhorred the idea that fundamental and far-reaching reform should be undertaken in order to rebuild society among ideal lines dictated by abstract theory.”³⁶ Instead, he “believed people should rely on

³⁰ *Dobbs*, 142 S. Ct. at 2248.

³¹ See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 854 (1989).

³² See Diarmuid F. O’Scannlain, Lecture, *Politicians in Robes: The Separation of Powers and the Problem of Judicial Legislation*, 101 VA. L. REV. ONLINE 31, 33 (2015).

³³ See Eric J. Segall, *Aggressive Judicial Review, Political Ideology, and the Rule of Law*, 79 STUDIA IURIDICA 68, 75 (2019).

³⁴ See J. Harvie Wilkinson III, *The Role of Reason in the Rule of Law*, 56 U. CHI. L. REV. 779, 783 (1989) (arguing that “any governmental body that defines the powers of other governmental bodies must possess some fixed idea of the limits of its own,” lest the “democratic balance [be] distorted”).

³⁵ Cf. Litman, *supra* note 6, at 1450 (describing how the Court’s separation-of-powers decisions deploy reasoning that “most contemporary proponents of originalism [would] reject”).

³⁶ Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 647 (1994) (quoting Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1047 (1990)).

the prescriptive wisdom inherent in . . . existing institutions,” seeing the “past [as possessing] an authority of its own.”³⁷ Thus, in *Reflections on the Revolution in France*, Burke defended the English common law as a “collected reason of ages” that preserved “the whole chain of continuity of the commonwealth” and linked “one generation . . . with the other.”³⁸ This view is reflected throughout his corpus of work.³⁹

Though the Supreme Court has rarely cited Burke directly,⁴⁰ its interpretive methodology on occasion tracks Burkean values.⁴¹ When the Court is confronted with principles, like the separation of powers, that lack a strong textual basis and have instead been hashed out in the hurly-burly of the political process over time, Burkean philosophy has particular force.⁴² This mode of interpretation has been termed “Burkean minimalism,” or the belief that legal principles “must be built incrementally and by analogy, with close reference to long-standing practices.”⁴³ Justice Frankfurter is generally — with the notable exception of *Brown v. Board of Education*⁴⁴ — associated with Burkean minimalism.⁴⁵ Concurring in *Youngstown Sheet & Tube Co. v. Sawyer*,⁴⁶ he explained that “[d]eeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they [can] give meaning to the words of a text or supply them.”⁴⁷ To Justice Frankfurter and other Burkean minimalists, the Constitution and statutes passed pursuant to it provide a “framework for government,” and “the way [that] framework has consistently operated fairly establishes that it has operated according to its true nature.”⁴⁸

Here, it is worth pausing to reflect on the differences between Burkean minimalism and originalism. Originalism dictates that the law means “what it meant at the time that it was ratified” and requires judges to interpret the law in a manner that respects that meaning, even if it means overturning past precedent to get there.⁴⁹ Burkean minimalism dictates that the law accumulates its meaning over time, and

³⁷ *Id.* at 648.

³⁸ EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 81 (Frank M. Turner ed., Yale Univ. Press 2003) (1790).

³⁹ See Young, *supra* note 36, at 648–50.

⁴⁰ *But see, e.g.*, Cook v. Gralike, 531 U.S. 510, 522 n.16 (2001).

⁴¹ See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 890–94 (1996); see also Thomas W. Merrill, *Bork v. Burke*, 19 HARV. J.L. & PUB. POL’Y 509, 518–19 (1996) (describing aspects of Burkeanism in the Court’s dormant commerce clause jurisprudence); Young, *supra* note 36, at 715–24 (describing Burkean impulses in Rehnquist Court opinions).

⁴² See Adrian Vermeule, Essay, *Common Law Constitutionalism and the Limits of Reason*, 107 COLUM. L. REV. 1482, 1516 (2007).

⁴³ Sunstein, *supra* note 18, at 356.

⁴⁴ 347 U.S. 483 (1954).

⁴⁵ See Sunstein, *supra* note 18, at 356 n.14, 383.

⁴⁶ 343 U.S. 579 (1952).

⁴⁷ *Id.* at 610 (Frankfurter, J., concurring).

⁴⁸ *Id.*

⁴⁹ *Cf.* Sunstein, *supra* note 18, at 357.

instructs that the law should be interpreted in a manner that respects the “acts and judgments of diverse people at diverse moments in history.”⁵⁰ Such an approach might manifest in one of two related ways. First, it might provide — contrary to originalism — that the Court ought not to make avulsive changes to existing doctrine and instead work hard to preserve existing precedents. Second, it might justify legal rules that ensure the *other branches* operate incrementally and in accordance with their own past practices, rules that an originalist, assuming such practices did not accord with original meaning, would reject.

For a judge with conservative commitments, Burkean minimalism addresses the legitimacy problem originalism poses for separation-of-powers cases. Instead of looking to *original* meaning, the Burkean minimalist can consider a separation-of-powers question through the lens of *liquidated* meaning, analyzing the way the three branches have hashed out a workable understanding of a question over time.⁵¹ This sort of analysis avoids “disrupt[ing] established practices”⁵² — and the appearance that the Court is changing the rules under which Congress and the Executive operate — thus preserving the judiciary’s legitimacy as a distinct branch with limited authority.

II. THE PRESUMPTION AGAINST NOVELTY AND THE SEPARATION OF POWERS

Whereas the Court has embraced originalism in major cases involving constitutional rights, its approach to separation-of-powers issues has been different. Here, the Court has increasingly invoked a “presumption that novel statutes are unconstitutional”⁵³ and that novel regulations exceed an agency’s statutory authority.⁵⁴ This Part considers the role that this presumption against novelty plays in three separation-of-powers doctrines — presidential removals, standing, and major questions — where the Court has preserved the holdings of past cases and attempted to slow down future legal development. This Part argues that if one takes the Court’s descriptions of novelty at face value, the

⁵⁰ *Id.* at 359.

⁵¹ James Madison endorsed this sort of approach in an 1819 letter, where he wrote that it “was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms and phrases necessarily used in such a charter . . . and that it might require a regular course of practice to liquidate and settle the meaning of some of them.” Letter from James Madison to Spencer Roane (Sept. 2, 1819), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 143, 145 (Phila., J.B. Lippincott & Co. 1867); see also THE FEDERALIST NO. 37, at 225 (James Madison) (Clinton Rossiter ed., 2003). For a scholarly exploration of liquidation’s relationship to constitutional values, see generally William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 13–21 (2019).

⁵² Sunstein, *supra* note 18, at 358–59.

⁵³ Litman, *supra* note 6, at 1455; see also Katyal & Schmidt, *supra* note 6, at 2139–49; Katyal, *supra* note 6, at 951–52.

⁵⁴ See Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1070–71 (2023).

presumption appears more Burkean than originalist, in that the Court, when applying it: (1) claims to rely on precedent over original understandings; and (2) purports to be committed to incremental legal change. In this way, the Court endeavors to use the presumption to rein in the perceived excesses of the political branches without falling prey to the pitfalls of separation-of-powers originalism.

A. *The Presidential Removal Power*

For decades, the Court has struggled to reconcile novel attempts to confer tenure protections on executive officers with the general principle, first set forth in *Myers v. United States*,⁵⁵ that the President possesses a plenary power to remove his subordinates.⁵⁶ In 2010, the Court deployed the presumption against novelty in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*⁵⁷ to declare that the structure of the Public Company Accounting Oversight Board (PCAOB) violated the President's removal power.⁵⁸ A decade later in *Seila Law*, the Court applied the presumption even more aggressively to strike down the tenure protections conferred on the head of the CFPB.⁵⁹

In *Free Enterprise*, the Court invalidated the structure of the PCAOB, which constituted a board of inferior officers with tenure protections who were removable only by the tenure-protected SEC, as contravening Article II.⁶⁰ In so doing, the Court quoted a discussion from then-Judge Kavanaugh's dissent in the D.C. Circuit's opinion below, which opined that "the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity."⁶¹ As Litman and Professor Daniel Deacon note, this language has since become the "standard formulation" of the presumption against novelty.⁶²

Seila Law went a step further than *Free Enterprise* because the agency structure at issue was less unusual: rather than involving two layers of removal protections, *Seila Law* hinged on the CFPB, an agency

⁵⁵ 272 U.S. 52 (1926).

⁵⁶ *See id.* at 176.

⁵⁷ 561 U.S. 477 (2010).

⁵⁸ *Id.* at 514.

⁵⁹ *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2211 (2020).

⁶⁰ *See Free Enterprise*, 561 U.S. at 486, 496.

⁶¹ *Id.* at 505 (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)). The *Free Enterprise* Court used this language to rebut the government's argument that because the PCAOB's structure accorded with the "past practice of Congress," it was constitutional. *Id.* In other words, the government invoked Burkeanism as a shield to argue that the PCAOB's structure was more likely to be constitutional because it had historical precedent supporting it. The Court, after rejecting the "handful of isolated [examples]" the government offered as inapposite, *id.*, flipped the script and deployed Burkeanism as a "sword" to suggest that a lack of historical precedent was a sign of unconstitutionality, *see id.*; Litman, *supra* note 6, at 1478. As Litman explains, this "sword . . . Burkeanism" is the engine that drives the presumption against novelty's operation. *See id.* (citing Sunstein, *supra* note 18, at 374–76).

⁶² Deacon & Litman, *supra* note 54, at 1070; *see also* Litman, *supra* note 6, at 1418, 1454.

with a single head insulated by one layer of tenure protection that, besides its unitary leadership, was not particularly different from the multimember FTC and SEC.⁶³ Nevertheless, the Court began its analysis with the antinovelty language from *Free Enterprise*, stating that “‘the most telling indication of [a] severe constitutional problem’ with an executive entity ‘is [a] lack of historical precedent’ to support it.”⁶⁴ The Court then rejected four proposed analogues to the CFPB⁶⁵ before concluding that it was “incompatible with our constitutional structure”⁶⁶ because it “contravened th[e] carefully calibrated [separation of powers] by vesting significant governmental power in the hands of a single individual accountable to no one.”⁶⁷

A close reading of the antinovelty language in *Seila Law* reveals Burkean impulses.⁶⁸ To begin with, the Court emphasized that the CFPB’s structure had “no foothold in . . . tradition,” since only four agencies had ever been led by single members with removal protections and all but one of those agencies were “modern and contested.”⁶⁹ Moreover, the Court did not seriously engage with an originalist analysis of Article II. *Myers*, the foundational case in this area, had attempted such an analysis and concluded that the Framers intended the President to be able to remove subordinates at will.⁷⁰ But *Myers* was subsequently narrowed by *Humphrey’s Executor v. United States*,⁷¹ which upheld tenure protections on the FTC and generally endorsed Congress’s power to craft independent agencies,⁷² an approach the Court retained in *Morrison v. Olson*.⁷³ Instead of re-engaging in this debate, *Seila Law* took *Myers* at face value and attempted to square it with *Humphrey’s Executor* and *Morrison*,⁷⁴ which is a paradigmatically Burkean move. By contrast, Justice Thomas criticized the majority for its failure to overrule cases that he perceived ignored the original meaning of Article II.⁷⁵

In addition, and relatedly, *Seila Law* claimed to leave open a pathway to gradual innovation by preserving the core holdings of *Humphrey’s Executor* (allowing removal protections for “multimember

⁶³ See *Seila L.*, 140 S. Ct. at 2232–33 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

⁶⁴ *Id.* at 2201 (majority opinion) (alteration in original) (quoting *Free Enterprise*, 561 U.S. at 505).

⁶⁵ See *id.* at 2201–02.

⁶⁶ *Id.* at 2202.

⁶⁷ *Id.* at 2203.

⁶⁸ *Free Enterprise* does, too. See, e.g., 561 U.S. at 483 (“The parties do not ask us to reexamine any of [our] precedents, and we do not do so.”).

⁶⁹ *Seila L.*, 140 S. Ct. at 2202.

⁷⁰ See generally *Myers v. United States*, 272 U.S. 52 (1926).

⁷¹ 295 U.S. 602 (1935).

⁷² *Id.* at 629, 632.

⁷³ 487 U.S. 654 (1988); see *id.* at 696–97.

⁷⁴ *Seila L.*, 140 S. Ct. at 2198–200.

⁷⁵ *Id.* at 2211–19 (Thomas, J., concurring in part and dissenting in part).

expert agencies that do not wield substantial executive power”) and *Morrison* (permitting the same for “inferior officers with limited duties and no policymaking or administrative authority”).⁷⁶ While it is true after *Seila Law* that if an agency’s structure does not allow for plenary removal and lacks precedent, it is likely unconstitutional,⁷⁷ it is also true that the assumption of unconstitutionality can be rebutted on a showing that the agency fits within one of the exceptions the Court had previously allowed.⁷⁸ On the Court’s account, then, *Seila Law*’s use of the presumption preserved existing law while limiting (but not extinguishing) Congress’s ability to experiment with new agency structures.

B. Article III Standing

The presumption against novelty is also at work in the Court’s standing rulings. In an effort to discern whether matters before the federal judiciary are sufficiently adversarial to constitute a “case” or “controversy” as required by Article III, the Court has crafted an array of requirements to bring suit in federal court.⁷⁹ In *Lujan v. Defenders of Wildlife*,⁸⁰ the Court made clear that one such requirement was that the plaintiff suffered an injury “in fact” (as opposed to a mere statutory violation, or an injury “in law”) that was “concrete” and “particularized.”⁸¹ But Justice Kennedy’s brief partial concurrence noted that Congress had the power to define such injuries and link them to a class of plaintiffs empowered to bring suit.⁸² His concurrence begged the question, however, of how far Congress’s power to confer standing for novel types of harm went, especially when the harms were “intangible” and thus questionably concrete.

After a period of indecisiveness,⁸³ the Court recently and enthusiastically applied the presumption against novelty in *TransUnion LLC v. Ramirez* to sharply limit the class of individuals Congress can empower to bring suit. *TransUnion* arose after the plaintiff realized that his credit report falsely showed that he was listed on a terrorist database.⁸⁴ He brought a class action against TransUnion under the Fair Credit Reporting Act⁸⁵ (FCRA).⁸⁶ Writing for the Court, Justice Kavanaugh concluded that most of the class lacked standing after fashioning a test for “concreteness” that was deeply skeptical of nontraditional types of

⁷⁶ *Id.* at 2199–2200 (majority opinion).

⁷⁷ See Sasha W. Boutlier, Note, *Simplistic Structure and History in Seila Law*, 96 N.Y.U. L. REV. 1582, 1596 (2021).

⁷⁸ See *Seila L.*, 140 S. Ct. at 2201.

⁷⁹ See generally *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–61 (1992).

⁸⁰ 504 U.S. 555.

⁸¹ *Id.* at 560.

⁸² *Id.* at 580 (Kennedy, J., concurring in part and concurring in the judgment).

⁸³ See, e.g., *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340–41 (2016).

⁸⁴ *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2201 (2021).

⁸⁵ 15 U.S.C. §§ 1681–1681X.

⁸⁶ *TransUnion*, 141 S. Ct. at 2202.

harm and required plaintiffs to “identif[y] a close historical or common-law analogue for their asserted injury.”⁸⁷ Under this test, only the 1,853 class members whose reports had been *disseminated* had suffered a concrete harm, since their injury was analogous to the “tort of defamation.”⁸⁸ The Court’s holding was clear: suits based on mere statutory violations presumptively violate Article III unless the plaintiff (or Congress, in writing the statute) can show that the injury has a historical or common law analogue.

Like the Court’s removal cases, *TransUnion* traffics in Burkean rhetoric. For starters, it goes to great lengths to preserve precedents in tension with its historical-analogical rule. So-called informational injuries,⁸⁹ for example, have no readily apparent common law analogue, but under the pre-*TransUnion* precedent *FEC v. Akins*,⁹⁰ they satisfy Article III.⁹¹ In *TransUnion*, the Solicitor General had argued that the plaintiffs had suffered an informational injury because TransUnion had sent them certain statutorily mandated disclosures in the wrong format.⁹² But the Court distinguished *Akins* on its facts (rather than overruling it) and concluded that the Court’s informational-injury case law was about a failure to receive information *at all* rather than in the wrong format.⁹³ Additionally, *TransUnion* makes little effort to engage with an originalist analysis of Article III; rather, it was Justice Thomas’s dissent that extensively probed Founding-era litigation practices.⁹⁴ Instead, *TransUnion* — like *Free Enterprise* and *Seila Law* — recapitulates the holdings of past precedents and attempts to square its rule with them.

TransUnion also preserves a modicum of congressional power to experiment with defining new statutory injuries, since the Court clarified that Congress need not identify an “exact duplicate in American history and tradition” to confer standing.⁹⁵ Dean Erwin Chemerinsky offers an example: “Environmental harms are seen as injuries in ways that they

⁸⁷ *Id.* at 2204. Two years after *TransUnion*, the Court expressly incorporated the formulation of the presumption from *Free Enterprise* into the standing inquiry. See *United States v. Texas*, 143 S. Ct. 1964, 1970 (2023) (opining that a “telling indication of the severe constitutional problem” with a litigant’s aggressive standing theory “[wa]s the lack of historical precedent’ supporting it” (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010))).

⁸⁸ *TransUnion*, 141 S. Ct. at 2209.

⁸⁹ Informational injuries are injuries arising from the plaintiff’s “failure[] to receive statutorily required information.” Thomas E. Nielsen, *Recent Case: Laufer v. Naranda Hotels, LLC*, HARV. L. REV. BLOG (Mar. 8, 2023), https://harvardlawreview.org/blog/2023/03/recent-case-_laufer-v-naranda-hotels-llc [<https://perma.cc/T48J-YKSH>]; see also Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 614 (1999).

⁹⁰ 524 U.S. 11 (1998).

⁹¹ *Id.* at 24–26.

⁹² *TransUnion*, 141 S. Ct. at 2214.

⁹³ *Id.*

⁹⁴ See *id.* at 2217–18 (Thomas, J., dissenting).

⁹⁵ *Id.* at 2204 (majority opinion).

were not a century ago, let alone at common law.”⁹⁶ But Congress could “analogize environmental harms to the common law of nuisance protected under property law,” thus conferring standing in a manner that potentially satisfies *TransUnion*’s requirements.⁹⁷ Such a statute would be literally novel, but only gradually expand the concept of “concreteness” and thus avoid constitutional concern.

C. The Major Questions Doctrine

Finally, the presumption against novelty is “now firmly part of the major questions doctrine.”⁹⁸ Concerns over broad delegations of policymaking authority to agencies have marked the Court’s administrative law opinions since it last enforced the legislative nondelegation doctrine in 1935.⁹⁹ Given the administrability problems with revitalizing a robust nondelegation doctrine,¹⁰⁰ the Court has more recently relied on statutory narrowing devices to police expansive assertions of regulatory power.¹⁰¹ The major questions doctrine can be viewed as the latest iteration of this trend,¹⁰² and since 2022, the Court has deployed it in two cases — *West Virginia v. EPA* and *Biden v. Nebraska* — to invalidate high-profile regulations. As *West Virginia* explained, the doctrine provides that agency assertions of “highly consequential power” require clear congressional authorization.¹⁰³ And as Deacon and Litman observe, the Court has heavily relied on the novelty of the agency’s position in determining whether an action is sufficiently “major” to trigger the doctrine’s clear statement requirement.¹⁰⁴

West Virginia centered on section 111(d) of the Clean Air Act¹⁰⁵ (CAA), which empowers EPA, subject to certain conditions, to issue performance standards for existing stationary sources based on the “best

⁹⁶ Erwin Chemerinsky, *What’s Standing After TransUnion LLC v. Ramirez*, 96 N.Y.U. L. REV. ONLINE 269, 287 (2021).

⁹⁷ *Id.* at 288 n.111.

⁹⁸ Deacon & Litman, *supra* note 54, at 1070.

⁹⁹ See *Pan. Refin. Co. v. Ryan*, 293 U.S. 388, 433 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935).

¹⁰⁰ See John F. Manning, *Lessons from a Nondelegation Canon*, 83 NOTRE DAME L. REV. 1541, 1551 (2008).

¹⁰¹ See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316–17 (2000); Manning, *supra* note 100, at 1541–42.

¹⁰² See Cass R. Sunstein, *There Are Two “Major Questions” Doctrines*, 73 ADMIN. L. REV. 475, 493–94 (2021).

¹⁰³ *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

¹⁰⁴ See Deacon & Litman, *supra* note 54, at 1071. This approach mirrors that taken in two emergency docket cases from 2021–2022. See *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam); *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 142 S. Ct. 661, 665 (2022) (per curiam). Of note, while neither *West Virginia v. EPA* nor *Biden v. Nebraska* directly quoted *Free Enterprise*’s formulation of the presumption against novelty, *National Federation of Independent Business* did. See 142 S. Ct. at 666 (citing the “lack of historical precedent” for agency’s vaccine mandate as a “telling” sign of its invalidity (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010))).

¹⁰⁵ 42 U.S.C. §§ 7401–7671q.

system of emission reduction” (BSER).¹⁰⁶ After congressional efforts to enact a national cap-and-trade program for CO₂ emissions failed,¹⁰⁷ the Obama Administration EPA used section 111(d) to create such a program by regulation.¹⁰⁸ This program, the Clean Power Plan (CPP), was premised on an unusual interpretive gloss on the statutory term “system”: the CPP characterized each of the United States’s three energy grids as a separate system, such that the BSER could be achieved by a single power plant shifting its power generation to a cleaner source in the same grid (a technique known as generation shifting).¹⁰⁹ Under the CPP, such a plant could reduce its own operations, switch to cleaner generation, or purchase credits from cleaner sources within the same grid, allowing it to emit more.¹¹⁰ Critically, EPA had previously interpreted “system” as limited to inside-the-fenceline measures geared at making existing plants “operate more cleanly,”¹¹¹ rather than forcing a shift to alternative generation methods.

The *West Virginia* Court invalidated the CPP as exceeding EPA’s statutory authority after applying the major questions doctrine and finding the requisite clear statement lacking. In determining that *West Virginia* was “a major questions case,” the Court repeatedly invoked the CPP’s novelty, explaining that: (1) “[p]rior to 2015, EPA had always set emissions limits under [s]ection 111” based on measures applicable to existing sources;¹¹² and (2) the CPP’s departure from past practice gave the agency “unprecedented power over American industry.”¹¹³ These features of the CPP, the Court reasoned, amounted to a “major policy” change, something “separation of powers principles and a practical understanding of legislative intent” suggested Congress, not EPA, should effectuate.¹¹⁴ In light of the CPP’s novelty, the Court imposed a high

¹⁰⁶ *West Virginia v. EPA*, 142 S. Ct. at 2601.

¹⁰⁷ See Daniel J. Weiss, *Anatomy of a Senate Climate Bill Death*, CTR. FOR AM. PROGRESS (Oct. 12, 2010), <https://www.americanprogress.org/article/anatomy-of-a-senate-climate-bill-death> [<https://perma.cc/DG7N-FVHU>].

¹⁰⁸ *West Virginia v. EPA*, 142 S. Ct. at 2603 (quoting 42 U.S.C. § 7411(a)(1)).

¹⁰⁹ See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64661, 64665 (Oct. 23, 2015).

¹¹⁰ See *id.* at 64667, 64709.

¹¹¹ *West Virginia v. EPA*, 142 S. Ct. at 2610.

¹¹² *Id.*

¹¹³ *Id.* at 2612 (quoting *Indus. Union Dep’t, AFL-CIO v. Am. Petrol. Inst. (Benzene)*, 448 U.S. 607, 645 (1980) (plurality opinion)).

¹¹⁴ *Id.* at 2609. The *West Virginia v. EPA* majority, without much explanation, stated that it would violate the separation of powers to allow EPA to work a “radical or fundamental change” to the CAA’s statutory scheme without congressional approval. *Id.* (quoting *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994)). But under the surface may have been a concern that if Congress did in fact delegate sweeping power in the phrase “best system,” that delegation would be constitutionally problematic. Justice Gorsuch made this point explicitly in his concurrence, arguing that the CAA had to be read narrowly to avoid a nondelegation issue. See *id.* at 2618–19 (Gorsuch, J., concurring). While acknowledging the *West Virginia v. EPA* majority opinion’s ambiguity on this point,

burden on EPA: it needed to show a clear statement from Congress authorizing its approach so as to avoid trammeling on the legislature's authority.¹¹⁵ Such a framework, the Court argued, was necessary to avoid the separation-of-powers problem that would arise if an agency wielded the authority to define "major" policies in lieu of Congress.¹¹⁶

In justifying its application of the presumption against novelty to trigger the major questions doctrine, the *West Virginia* Court invoked Burkean minimalist rhetoric, quoting Justice Frankfurter for the proposition that "just as established [regulatory] practice may shed light on the extent of power conveyed . . . , so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred."¹¹⁷ And indeed, *West Virginia* seems somewhat Burkean. First, it relies on past practice — the fact that EPA had never enacted a section 111(d) regulation premised on generation shifting before — rather than the original meaning of the CAA or the Constitution's delegation of "[a]ll legislative Powers herein granted"¹¹⁸ to Congress.¹¹⁹ And notwithstanding the dissent's argument that *West Virginia* "announce[d] the arrival of the 'major questions doctrine,'"¹²⁰ the majority took pains to try and ground its analysis in prior case law.¹²¹

numerous commentators have assumed that the major questions doctrine as set forth in *West Virginia v. EPA* is implicitly grounded in constitutional nondelegation concerns. See, e.g., Thomas B. Griffith & Haley N. Proctor, *Deference, Delegation, and Divination: Justice Breyer and the Future of the Major Questions Doctrine*, 132 YALE L.J.F. 693, 702–03 (2022); cf. Marla D. Tortorice, *Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power*, 67 BUFF. L. REV. 1075, 1078 (2019).

¹¹⁵ See *West Virginia v. EPA*, 142 S. Ct. at 2609.

¹¹⁶ See *id.* In *Biden v. Nebraska*, 143 S. Ct. 2355 (2023), the Court applied basically the same analysis to conclude that President Biden's student loan forgiveness program exceeded the Department of Education's statutory authority. See *id.* at 2375. *Biden v. Nebraska* centered on the HEROES Act, *id.* at 2363–64, which empowers the Secretary of Education to "waive or modify" statutory or regulatory provisions relating to federal student loans, 20 U.S.C. § 1098bb(a)(1). During the COVID-19 pandemic, the Department of Education invoked the Act to purport to waive up to \$20,000 in federal student loan debt for borrowers who met certain income requirements. *Biden v. Nebraska*, 143 S. Ct. at 2364, 2369. In deciding that the major questions doctrine applied, the Court again highlighted the novelty of the forgiveness plan. Previous "'modifications' . . . under the Act," the Court explained, "implemented only minor changes, most of which were procedural." *Id.* at 2369. And prior "invocation[s] of the waiver power" involved particular legal requirements, whereas this one did not. *Id.* at 2370. The plan thus raised similar "separation of powers concerns" as *West Virginia v. EPA*, triggering the major questions doctrine. *Id.* at 2375.

¹¹⁷ *West Virginia v. EPA*, 142 S. Ct. at 2610 (quoting *FTC v. Bunte Bros.*, 312 U.S. 349, 352 (1941)); see also Deacon & Litman, *supra* note 54, at 1083 (describing the *West Virginia v. EPA* Court as "purport[ing] to be adopting a minimalist, non-constitutional approach").

¹¹⁸ U.S. CONST. art. I, § 1.

¹¹⁹ Compare *West Virginia v. EPA*, 142 S. Ct. at 2610 (citing regulatory novelty), with *id.* at 2617–18 (Gorsuch, J., concurring) (discussing original understanding of Legislative Vesting Clause).

¹²⁰ *Id.* at 2633–34 (Kagan, J., dissenting) (citing *id.* at 2607–16 (majority opinion)).

¹²¹ See *id.* at 2609 (majority opinion); see also Deacon & Litman, *supra* note 54, at 1071 (describing *West Virginia v. EPA*'s analytical link to *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), which mentioned the novelty of the agency's regulation as a ground for skepticism).

Second, *West Virginia* seems to contemplate gradual legal development by explicitly declining to “decide whether the statutory phrase ‘system of emission reduction’ [in section 111(d)] refers *exclusively* to measures that improve the pollution performance of individual sources.”¹²² As commentators have noted, this dictum implies that EPA may have the authority under section 111(d) to enact emissions limits that are less transformative but still unlinked to specific source improvements.¹²³ Such an enactment would be novel in a literal sense, but also only marginally different from the sort of regulations EPA had previously enacted under section 111(d). On this account, then, the presumption against novelty operated within the framework of past precedent to constrain EPA to develop policy incrementally.

* * *

In each of the three aforementioned doctrinal areas, the Court has deployed the presumption against novelty to police the actions of Congress and the Executive. In cases where an originalist approach might overrule significant precedents and leave the law in disarray, the Court has sought to avoid the legitimacy crisis such an approach would create by striving to take a more careful path evocative of Burkean minimalism. This path, instead of pushing the law back toward where it was at some singular point in the past, freezes the law as it currently stands and endeavors to ensure that future developments are both incremental and grounded in historical practice.

III. DECONSTRUCTING THE PRESUMPTION: PROBLEMS WITH LEGITIMACY AND HISTORY

Even though the presumption against novelty purports to embrace a Burkean form of legal development, it actually effectuates radical departures from past practice. This Part contends that the Court’s application of the presumption is flawed in two fundamental ways. First, the Court has created the same legitimacy problem posed by separation-of-powers originalism by using the presumption to aggrandize judicial policymaking power at the political branches’ expense. Second, notwithstanding the Court’s Burkean rhetoric, its use of the presumption is not particularly Burkean, since it produces outcomes that have little resemblance to liquidated understandings about the separation of powers.

¹²² *West Virginia v. EPA*, 142 S. Ct. at 2615.

¹²³ See Eric Groten et al., *What Does the Supreme Court’s Recent Decision on Climate Regulation Mean for the Energy Industry?*, VINSON & ELKINS (July 5, 2022), <https://www.velaw.com/insights/what-does-the-supreme-courts-recent-decision-on-climate-regulation-mean-for-the-energy-industry> [https://perma.cc/8Y9D-YD92].

A. Radically Aggrandizing the Judiciary

The Court claims to deploy the presumption against novelty to police the relationship between the three branches of the federal government without radically upending existing law. But as Litman points out, applying it requires the Court to play the role of referee, which entails a great deal of discretion in determining when a policy is sufficiently “new” to provoke constitutional or statutory concern.¹²⁴ The Court has used this discretion to aggressively promote its own policy preferences at the political branches’ expense — a problem that has only intensified as the Court has relied on the presumption with greater regularity. In so doing, the Court has created a separation-of-powers problem that is just as serious, though perhaps more subtle, as that which would arise if the Court leveraged the original understanding of a separation-of-powers concept to invalidate prior cases and political branch actions taken in reliance on those cases.

I. Plenary Removals. — The removal issue reflects a policy tension between two visions of democratic accountability. On one hand, allowing a popularly elected Congress to fashion agency structures as it so chooses (including by providing removal protections) might be said to better respect the will of the people.¹²⁵ On the other hand, the President can also claim strong democratic legitimacy: He usually commands a national majority, which Congress (thanks to Senate malapportionment and the filibuster) might not.¹²⁶ And he represents today’s voters, while the prior Congress that crafted an independent agency with tenure-protected leadership represented voters of the past.¹²⁷ For almost a century following *Humphrey’s Executor*, where the Court read *Myers* narrowly and upheld the FTC’s structure, the political branches negotiated these dueling visions of accountability with minimal judicial intervention.¹²⁸

Seila Law, building on *Free Enterprise*, invoked the presumption against novelty to insert the Court into the debate, “returning to the baseline set almost a century ago in *Myers*”¹²⁹ while preserving *Humphrey’s Executor* and *Morrison* as exceptions, which ostensibly allows Congress some discretion in conferring removal protections.¹³⁰ Notwithstanding the Court’s apparent restraint in preserving past pre-

¹²⁴ See Litman, *supra* note 6, at 1482–83 (noting that “there does not appear to be a way to coherently define novelty,” *id.* at 1482, nor does there “seem to be a good — or at least consistent — way to select a level of generality at which to describe the past practices and a current statute,” *id.* at 1483).

¹²⁵ See Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court’s Political Theory*, 73 HASTINGS L.J. 371, 414 (2022).

¹²⁶ See *id.*

¹²⁷ Cf. *id.*

¹²⁸ See *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2233, 2236–37 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

¹²⁹ *The Supreme Court, 2022 Term — Leading Cases*, 137 HARV. L. REV. 290, 345 (2023).

¹³⁰ See *Seila L.*, 140 S. Ct. at 2199.

cedent, this framework reserves to the Court the authority to determine whether an agency structure is allowable under one of the two exceptions, or novel and thus constitutionally suspect.¹³¹ The Court's discretion here is standardless: as Justice Kagan wrote in partial dissent, the fact that the CFPB had a single-member head with tenure protections was an "until-now-irrelevant fact" that the Court highlighted to distinguish the CFPB from the multimember, tenure-protected FTC.¹³² The *Seila Law* framework thus enabled the Court to "arrogate[] power to itself — a body of unelected and tenured officials who are insulated from popular accountability."¹³³ And its "maximalist" recasting of *Myers* as a default rule¹³⁴ allowed the Court to promote its own apparent policy judgment that the unitary Executive's democratic mandate to "take Care that the Laws be faithfully executed"¹³⁵ outweighs the democratically elected Congress's decisions about agency structure.

2. *Standing*. — In his *Lujan* concurrence, Justice Kennedy explicitly recognized Congress's ability to "define injuries and articulate chains of causation" as necessary to enacting new "programs and policies" in response to the complexities of the modern world.¹³⁶ Such authority aligns with the basic premise of the Necessary and Proper Clause, which empowers Congress to "determine the means of implementing federal power," including through citizen-suit provisions.¹³⁷

But *TransUnion* used the presumption against novelty to wrest the power over "programs and policies" back from Congress, requiring any statutorily defined injury to have a historical or common law analogue to be vindicable in court.¹³⁸ True, Congress could expressly link an injury to one remediable at common law in an effort to comply with *TransUnion*'s rule — but the Court would still retain the power to determine whether the injury was sufficiently similar.¹³⁹ Ponder the implications of this approach for a case like *Trafficante v. Metropolitan*

¹³¹ Cf. Emerson, *supra* note 125, at 409 ("[The Supreme Court] has aggrandized itself at the expense of the elected branches, thus disserving the system of separated power it purports to honor.").

¹³² See *Seila L.*, 140 S. Ct. at 2241 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part); cf. Litman, *supra* note 6, at 1483 (explaining that *Free Enterprise* did not consider whether "the relevant tradition" was "single for-cause removal," such that "a double layer of for-cause removal fell outside of the tradition," or whether the relevant tradition was "'insulation' from presidential control such that the statute fell within the historical tradition").

¹³³ Emerson, *supra* note 125, at 414–15.

¹³⁴ Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83, 85 (2021).

¹³⁵ U.S. CONST. art. II, § 3.

¹³⁶ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in the judgment).

¹³⁷ *The Supreme Court, 2015 Term — Leading Cases*, 130 HARV. L. REV. 307, 444 n.73 (2016) (citing John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 4 (2014)).

¹³⁸ See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021).

¹³⁹ See Chemerinsky, *supra* note 96, at 290 ("It is troubling for the Court to pick and choose among rights created by Congress based on the justices' subjective preferences about what they care about.").

Life Insurance Co.,¹⁴⁰ where a group of tenants brought suit based on a statute granting a right of action to “person[s] aggrieved” by discriminatory housing practices.¹⁴¹ One might argue that a stigmatic or dignitary injury of the sort contemplated by the *Trafficante* statute is analogous to the tort of intentional infliction of emotional distress (IIED).¹⁴² But one could just as easily argue that IIED imposes high barriers to recovery, making it an ill-suited analogue.¹⁴³ If *Trafficante* were litigated today, either position would have a colorable chance of success. Indeed, the only reason the *TransUnion* Court found that certain of the class plaintiffs’ injuries were not sufficiently linked to a common law harm was because they lacked a single feature — publication — that the other claims had.¹⁴⁴ As the dissenters in *TransUnion* observed, the Court’s relegating to itself the discretion to select a proper analogue privileges its own policy preferences at the expense of Congress’s.¹⁴⁵

3. *Major Questions.* — Despite nominally shifting power from agencies to the legislature, the major questions doctrine requires Congress to try and “foresee and spell out every possible form of regulation that would be perceived as ‘major’ at some point in the future.”¹⁴⁶ This sort of *ex ante* prediction is difficult if not impossible.¹⁴⁷ The Court’s application of the doctrine thus operates as a statute-narrowing device, “severely restricting agencies from adopting regulations pursuant to generally worded congressional statutes,” which in turn discourages regulation and facilitates deregulation.¹⁴⁸

Since the “novelty of an agency’s regulatory approach” triggers the major questions doctrine’s clear statement requirement,¹⁴⁹ the Court deploys the presumption against novelty within the major questions analysis to impose narrow statutory interpretations based on its own conception of what constitutes an unprecedented assertion of regulatory authority. As Justice Kagan observed in dissent in *West Virginia*, it is not immediately clear why the statutory term “system” in the CAA could not bear the CPP’s outside-the-fence approach, especially since other

¹⁴⁰ 409 U.S. 205 (1972).

¹⁴¹ *Id.* at 208.

¹⁴² Indeed, *TransUnion* expressly contemplated this analogue without taking a position on its viability. See 141 S. Ct. at 2211 n.7.

¹⁴³ The Eleventh Circuit invoked a similar argument to reject a proposed analogy, under *TransUnion*, to IIED, made by a plaintiff alleging “frustration and humiliation” suffered as a result of being unable to access information on a hotel website. *Laufer v. Arpan LLC*, 29 F.4th 1268, 1272 (11th Cir. 2022). The court reasoned that IIED requires “extreme and outrageous” conduct. *Id.* at 1273.

¹⁴⁴ See *TransUnion*, 141 S. Ct. at 2208–09.

¹⁴⁵ See *id.* at 2224 (Thomas, J., dissenting) (“Weighing the harms caused by specific facts and choosing remedies seems to me like a much better fit for legislatures and juries than for this Court.”); *id.* at 2225 (Kagan, J., dissenting) (“The Court here transforms standing law from a doctrine of judicial modesty into a tool of judicial aggrandizement.”).

¹⁴⁶ Deacon & Litman, *supra* note 54, at 1084.

¹⁴⁷ See *id.*

¹⁴⁸ *Id.* at 1086.

¹⁴⁹ *Id.* at 1070.

provisions of the CAA used the same sort of language to describe cap-and-trade programs.¹⁵⁰ The fact that the Court exercised its discretion to come out the other way illustrates the obvious point that the presumption against novelty hobbles administrative agencies. But this sort of discretion has the subtle effect of disabling Congress, too: the presumption “limits Congress’s ability to rely on broad delegations . . . in the circumstances where [it] may be most likely to do so — namely, to respond to changing circumstances or unforeseen developments using agencies’ superior expertise and flexibility.”¹⁵¹ Consequently, the manner in which the Court uses the presumption in its major questions analysis “may not be particularly minimalist,” instead working to embed the Court’s own policy preference of deregulation.¹⁵²

*B. Disrupting Long-Standing Assumptions
About the Separation of Powers*

In addition to aggressively aggrandizing judicial power, the presumption against novelty produces results that are unmoored from the liquidated meaning of the separation of powers,¹⁵³ disrupting long-standing assumptions about the proper relationship between the federal government’s three branches. In this way, the presumption, despite trafficking in Burkean rhetoric, is strikingly un-Burkean in practice.

i. Plenary Removals. — At first blush, *Seila Law*’s default rule foreclosing Congress from meddling with the presidential removal power seems Burkean enough. The case grounds the rule in the century-old *Myers* opinion, which itself evaluated sources from the Founding era onward to conclude that Congress’s long-standing acquiescence to a plenary removal power rendered it judicially enforceable.¹⁵⁴ But this view has two problems. First, it presumes that the *Myers* rule is an accurate account of historical practice. In fact, *Myers* glossed over inconvenient facts suggesting at least some degree of presidential acquiescence to congressional intrusions on the removal power during the nineteenth century.¹⁵⁵ Second, *Seila Law* disregards the manner in which the law developed after *Myers*. In *Humphrey’s Executor*, decided only nine years later, the Court broadly empowered Congress to create

¹⁵⁰ *West Virginia v. EPA*, 142 S. Ct. 2587, 2630, 2639 (2022) (Kagan, J., dissenting).

¹⁵¹ Deacon & Litman, *supra* note 54, at 1086.

¹⁵² *Id.* at 1084; *see also id.* at 1088 (“The major questions doctrine . . . seems to embed de-regulatory preferences in the Court’s methods of statutory interpretation.”); Tortorice, *supra* note 114, at 1130.

¹⁵³ *See supra* note 51 and accompanying text.

¹⁵⁴ *See* Bowie & Renan, *supra* note 29, at 2071. *See generally* *Myers v. United States*, 272 U.S. 52 (1926); Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175 (2021); Boutillier, *supra* note 77.

¹⁵⁵ *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 479 (2012). Chief Justice Taft’s dismissive treatment of this era was motivated in part by a racially inflected view of Reconstruction as a period of “radical innovation” led by “congressional extremists whose partisanship blinded them.” Bowie & Renan, *supra* note 29, at 2076 (quoting *Myers*, 272 U.S. at 167–68).

independent agencies with tenure protections, so long as such agencies did not exercise “purely executive” functions.¹⁵⁶ And in *Morrison*, the Court, though declining to follow certain aspects of *Humphrey’s Executor*, preserved its permissive approach to removal protections.¹⁵⁷ Ignoring the thrust of both cases, the *Seila Law* Court recast *Humphrey’s Executor* and *Morrison* as narrow, fact-bound exceptions.¹⁵⁸

For the Burkean minimalist, then, *Seila Law* alters the relationship between Congress and the Executive in a manner unsupported by past practice. Adopting *Myers* as a default rule reflects, at best, a “contested” reading of Article II with ambiguous historical support.¹⁵⁹ And the Court’s recasting of *Humphrey’s Executor* and *Morrison* jettisons its long-standing, flexible approach to removals to radically redefine the dynamic negotiated by Congress and the Executive over time.

2. *Standing*. — *TransUnion* upends the previously understood relationship between Congress and the federal judiciary. As Justice Thomas explained in dissent: “The principle that the violation of an individual [statutory] right gives rise to an actionable harm was widespread at the founding.”¹⁶⁰ For instance, the “First Congress enacted a law . . . g[iving] copyright holders the right to sue infringing persons in order to recover statutory damages,” even absent monetary loss.¹⁶¹ In the late-eighteenth and early-nineteenth centuries, if a statute protected rights “held . . . by an individual,” a mere statutory violation (or injury *at law*) was sufficient to invoke the judicial power.¹⁶² Only if a statute set forth a duty “owed broadly to the whole community” was something more — a “concrete interest” — necessary to bring suit.¹⁶³

Critically for the Burkean, the private-public rights distinction persisted into the 1900s: the APA allowed individuals to obtain standing by showing that their individual “statutory interests were at stake,” and Congress had the power to define new private injuries at law,¹⁶⁴ such as the dignitary harm in *Trafficante*. As Sunstein explains, the concept of “injury in fact” arose out of a misinterpretation of the APA in Professor Kenneth Culp Davis’s *Administrative Law Treatise*, which was in turn picked up by the Court in *Association of Data Processing Service*

¹⁵⁶ *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 631–32 (1935).

¹⁵⁷ *Morrison v. Olson*, 487 U.S. 654, 689–93 (1988).

¹⁵⁸ See *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2199–200 (2020).

¹⁵⁹ Cf. Cass R. Sunstein, Reaction, *Originalism v. Burkeanism: A Dialogue over Recess*, 126 HARV. L. REV. F. 126, 127 (2013) (noting that the Burkean would find it “extraordinary . . . that the court [would be] willing to adopt a contested understanding of the text to override very longstanding understandings on the part of the President and the Senate”).

¹⁶⁰ *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2218 (2021) (Thomas, J., dissenting).

¹⁶¹ *Id.* at 2217.

¹⁶² *Id.*

¹⁶³ *Id.* at 2217, 2220.

¹⁶⁴ Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 181–82 (1992).

Organizations, Inc. v. Camp,¹⁶⁵ the opinion that “provides the basic underpinnings for the modern law of standing.”¹⁶⁶ Even so, Justice Kennedy’s formulation of “injury in fact” in *Lujan* conceptualized a role for Congress in defining concrete harms, thus blunting the effect of the Court’s anachronistic conception of “injury.”¹⁶⁷ But coupled with the presumption against novelty, the notion of “injury in fact” metastasized into *TransUnion*, which ignores Congress and instead “look[s] at common law and history to answer a question that did not even exist when that law developed.”¹⁶⁸ Such a rule is antithetical to a Burkean understanding of the relationship between Congress and the courts.

3. *Major Questions.* — The federal government has long operated under the assumption that agencies have authority to adapt to “the demands of changing circumstances.”¹⁶⁹ This latitude manifested in judicial deference to agency interpretations of their statutory authority almost a century ago,¹⁷⁰ famously reformulated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*¹⁷¹ Among the many policy reasons given for deference is that agencies are well suited (both in terms of expertise and efficiency) to respond to matters Congress could not reasonably be expected to anticipate via statute.¹⁷² But *West Virginia* and *Nebraska*, by invoking the presumption against novelty, invert this rationale by presuming that novel readings of old statutes are invalid, a sort of “antideference.”¹⁷³ In so doing, these cases upend almost a century of precedent pointing the other way, suddenly throwing into doubt a myriad of broad delegations Congress made with the assumption that agencies’ responses to new problems would be accorded deference, not antideference.¹⁷⁴ That is impossible to square with tradition.

¹⁶⁵ 397 U.S. 150 (1970).

¹⁶⁶ Sunstein, *supra* note 164, at 185–86.

¹⁶⁷ See Jason R. Smith, *Statutes and Spokeo: The Case of the FDCA*, 87 U. CHI. L. REV. 1695, 1702–03 (2020).

¹⁶⁸ Chemerinsky, *supra* note 96, at 288.

¹⁶⁹ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 157 (2000).

¹⁷⁰ See generally, e.g., *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111 (1944).

¹⁷¹ 467 U.S. 837 (1984).

¹⁷² See Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2102–03 (1990).

¹⁷³ Nathan Richardson, Essay, *Antideference: COVID, Climate, and the Rise of the Major Questions Canon*, 108 VA. L. REV. ONLINE 174, 177 (2022).

¹⁷⁴ See *id.* at 204. Concurrent with the rise of antideference is the Court’s reevaluation of *Chevron* itself. See *Loper Bright Enters. v. Raimondo*, 143 S. Ct. 2429, 2429 (2023) (granting certiorari on whether *Chevron* should be overruled). Louis Capozzi argues that the major questions doctrine has a “longer and more robust history than most have appreciated,” in part because courts have since the late-nineteenth century “employed a general presumption against implied delegations by legislatures.” Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191, 191, 200 (2023). But Capozzi does not contend with the role of novelty in the modern major questions doctrine. The linchpin of his argument is *Interstate Com. Comm’n v. Cincinnati, New Orleans & Tex. Pac. Ry. Co.*, 167 U.S. 479 (1897), where the Court rejected the Interstate Commerce Commission’s (ICC)

CONCLUSION

The Court's removals, standing, and major questions cases reveal that the presumption against novelty is now an outcome-determinative feature of the Court's separation-of-powers doctrines. Recall a key reason a conservative jurist might prefer Burkean minimalism to originalism in separation-of-powers cases: because an aggressive application of the latter risks disrupting traditional understandings about the limits of each branch's power, undermining judicial legitimacy. In applying the presumption against novelty to act as a referee with respect to its coordinate branches, the Court appears to have stumbled into this same legitimacy crisis, forgetting that it, too, is a constitutional branch whose authority must remain constrained in order to respect a traditional separation-of-powers balance. For a Court that has expressed a commitment to judicial restraint¹⁷⁵ and respect for the political process,¹⁷⁶ the presumption is strikingly at odds with the Court's ostensible values — as well as Burkean minimalism itself.

Seven years ago, Litman encouraged the Court to “abandon[]” its “antinovalty rhetoric,” which she argued “serve[d] little purpose” and “prevent[ed] ordinary and legitimate congressional innovation.”¹⁷⁷ Since then, the Court has relied on the presumption against novelty with even greater enthusiasm,¹⁷⁸ which has only intensified the problems with its use. Fortunately, at least in its *Free Enterprise* form, the presumption is a relatively recent addition to the Court's interpretive arsenal, and disavowing it now would have a minimal effect. As the Court refines its separation-of-powers jurisprudence in the years to come, then, it should eschew novelty as an indicator of a separation-of-powers problem; instead, if it is truly committed to Burkean minimalism, it should respect the “working accommodations” of the three branches of government and the manner in which they gradually develop over time.¹⁷⁹

purported authority to set rates for common carriers. *Id.* at 511. There, the Court did not invoke novelty. Instead, the Court distinguished between “legislative” and “administrative or judicial” functions, reasoning that the ICC's exercise of the former required a “clear and direct” statement from Congress. *Id.* at 505. Thus, while the major questions doctrine, described at a high level of generality, may have some long-standing basis in precedent, the presumption against novelty's role in the analysis does not.

¹⁷⁵ See, e.g., *Egbert v. Boule*, 142 S. Ct. 1793, 1798 (2022) (declining to extend *Bivens* if “there is any reason to think that Congress might be better equipped to create a damages remedy”).

¹⁷⁶ See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2239 (2022) (“[U]nder the Constitution, courts cannot ‘substitute their social and economic beliefs for the judgment of legislative bodies.’” (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 729–30 (1963))).

¹⁷⁷ Litman, *supra* note 6, at 1491.

¹⁷⁸ To name one extremely recent example, albeit outside of the federal separation-of-powers context, the Court invoked the presumption in *Trump v. Anderson*, 144 S. Ct. 662 (2024), opining that “a lack of historical precedent” for “state enforcement of Section 3 [of the Fourteenth Amendment] against federal officeholders or candidates” evinced a “severe constitutional problem” with such enforcement. *Id.* at 669 (quoting *United States v. Texas*, 143 S. Ct. 1964, 1970 (2023)).

¹⁷⁹ Sunstein, *supra* note 159, at 128; see also *Clinton v. City of New York*, 524 U.S. 417, 473 (1998) (Breyer, J., dissenting) (“[W]e are to interpret nonliteral separation-of-powers principles in light of the need for ‘workable government.’”).