parties[97] and to provide such persons with necessary treatment.[98] The Court's reasoning therefore generates the powers to incapacitate and rehabilitate, but derives them from custodianship. Additionally, the approach advanced here arguably resolves the principal disagreement between *Comstock*'s majority and dissent. Whereas the majority justified section 4248 by taking several steps away from Congress's enumerated powers,[99] Justice Thomas rejected section 4248 because he insisted that every federal statute be directly related to — no more than one step away from — an enumerated power.[100] The suggested approach charts a third course: it achieves the majority's outcome by invoking the government's authority to incapacitate and rehabilitate prisoners, which is, per the dissent's requirements, directly related to the enumerated powers justifying the prisoners' original detention.

F. Separation of Powers

Removal Power. — The Supreme Court's separation-of-powers precedents have upheld the constitutionality of "independent agencies" whose officers are protected from removal except for cause.[1] These decisions have remained controversial,[2] however, to those who believe that the power to remove officers at will is essential to the President's vested control over the government's executive functions[3] and his constitutional duty to "take Care that the Laws be faithfully executed."[4] Last Term, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[5] the Supreme Court held that inferior officers must be removable at will if their agency head is herself removable only for cause: "two levels of protection from removal" violate the Constitution's separation of powers.[6] The particular statute that the Court invalidated, however, also granted extensive oversight powers to the Securities and Exchange Commission to overrule and curtail the powers of the officials on the Public Company Accounting Oversight Board. Because these comprehensive oversight provisions allowed the Com-

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97 *See* United States v. Volungus, 595 F.3d 1, 8 (1st Cir. 2010); RESTATEMENT (SECOND) OF TORTS § 319 (1965).

98 *See Volungus*, 595 F.3d at 8; RESTATEMENT (SECOND) OF TORTS § 314A(4) (1965).

99 *Comstock*, 130 S. Ct. at 1961–65.

100 *Id.* at 1975–77 (Thomas, J., dissenting).

1 *See, e.g.*, Morrison v. Olson, 487 U.S. 654 (1988); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

2 *See, e.g.*, *Morrison*, 487 U.S. at 698 (Scalia, J., dissenting); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 598 (1994) ("If the President is to have effective control of his constitutionally granted powers, he must be able to remove those who he believes will not follow his administrative agenda and philosophy.").

3 U.S. CONST. art. II, § 1, cl. 1.

4 *Id.* art. II, § 3.

5 130 S. Ct. 3138 (2010).

6 *Id.* at 3164.

mission to ensure faithful execution of the laws, the Court should have upheld the statute, and indeed could have done so while retaining the benefits of its formalist opinion that emphasized the importance of presidential authority.

Following several high-profile accounting scandals,[7] Congress passed the Sarbanes-Oxley Act of 2002,[8] which, among other things, created the Public Company Accounting Oversight Board.[9] The Board was empowered to enact auditing standards, inspect and investigate public accounting firms, enforce auditors' compliance with professional standards and the law, and set its own budget.[10] The five members of the Board were appointed by the Securities and Exchange Commission.[11] Each Board member served a five-year term and was removable by the Commission for good cause.[12] The Commission enjoyed far-reaching oversight powers with respect to the Board: each rule the Board proposed had to receive prior approval from the Commission in order to take effect;[13] the Commission was free to "abrogat[e], delet[e], or add[] to portions of the rules of the Board";[14] the Commission could stay, review, enhance, modify, or cancel any sanction the Board imposed;[15] and the Commission could relieve the Board of all enforcement powers and (after on-the-record findings, notice, and a hearing) could limit the Board's functions and operations.[16]

In 2004, the Board audited Beckstead & Watts, a small Nevada accounting firm, and found several deficiencies.[17] Beckstead & Watts and the Free Enterprise Fund, a nonprofit organization dedicated to promoting "economic growth, lower taxes, and limited government" and of which Beckstead & Watts was a member, brought a facial challenge to the Board's constitutionality.[18] First, they alleged that the

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[7] *See, e.g.*, William W. Bratton, *Enron and the Dark Side of Shareholder Value*, 76 TUL. L. REV. 1275, 1340–41 (2002) ("Enron undoubtedly . . . was the biggest audit failure [in American history]."); Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 2–3 (2002) ("Worldcom . . . disclosed in the summer of 2002 that it had created billions in earnings by capitalizing expenses as needed.").

[8] Pub L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 5, 11, 12, 15, 18, 28, 29, and 49 U.S.C.).

[9] 15 U.S.C. § 7211(a) (2006).

[10] *Id.* § 7211(c).

[11] *Id.* § 7211(e).

[12] *Id.* §§ 7211(e), 7217(d)(3).

[13] *Id.* § 7217(b)(2).

[14] *Id.* § 7217(b)(5).

[15] *Id.* § 7217(c)(2)–(3).

[16] *Id.* § 7217(d)(1)–(2).

[17] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., No. 06-0217, 2007 WL 891675, at *2 (D.D.C. Mar. 21, 2007).

[18] *Id.* (internal quotation marks omitted).

Board's structure violated the Appointments Clause[19] on either of two alternative grounds: if the Board's members were *principal* officers, then the Constitution requires that the President directly appoint them;[20] if they were *inferior* officers, then the Commission could not appoint them because the Commission was not a "Department" and the five Commissioners were not its "Head" within the meaning of the Appointments Clause.[21] Second, the plaintiffs argued that Sarbanes-Oxley violated separation of powers by impeding the President's executive authority with two layers of for-cause removal protections.[22] The trial court granted the Board's motion for summary judgment, holding that although the Free Enterprise Fund had standing, the structure of the Board violated neither the Appointments Clause nor separation of powers.[23]

The District of Columbia Circuit affirmed.[24] Writing for the court, Judge Rogers held that the Sarbanes-Oxley Act did not violate the Appointments Clause because the Board's members were inferior officers[25] and the Commissioners as a group constituted a Department Head.[26] Judge Rogers also concluded that the statute's tenure protection for Board members did not violate the separation of powers because two layers of for-cause removal limitations "preserve[] sufficient Executive influence over the Board through the Commission so as not to render the President unable to perform his constitutional duties."[27] Judge Kavanaugh dissented. He argued that the Board's members were principal, not inferior, officers,[28] and thus their appointment by the Commission rather than by the President violated the Appointments Clause.[29] Moreover, he contended, the two layers of for-cause

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[19] U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

[20] *See* Brief for Petitioners at 45–56, *Free Enter. Fund*, 130 S. Ct. 3138 (No. 08-861), 2009 WL 2247130, at *45–46.

[21] *See id.* at 56–62.

[22] *See id.* at 29–30. In the district court, the plaintiffs also asserted that Sarbanes-Oxley violated nondelegation principles, *see Free Enter. Fund*, 2007 WL 891675, at *1, but they abandoned that argument on appeal, *see* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 670 n.2 (D.C. Cir. 2008).

[23] *Free Enter. Fund*, 2007 WL 891675, at *3–5.

[24] *See Free Enter. Fund*, 537 F.3d at 685.

[25] *Id.* at 676.

[26] *Id.* at 676–78.

[27] *Id.* at 683.

[28] *Id.* at 709 (Kavanaugh, J., dissenting).

[29] *Id.* at 712.

protections effectively stripped the President of any removal authority and therefore violated the separation of powers.[30]

The Supreme Court reversed in part.[31] After establishing that the district court properly found jurisdiction,[32] Chief Justice Roberts,[33] writing for the Court, held that the double-layering of for-cause removal limits was unconstitutional.[34] Chief Justice Roberts acknowledged that the Court had permitted Congress to impose for-cause limitations on the President's removal power,[35] but he noted that none of the Court's precedents addressed the permissibility of more than one level of for-cause tenure protection.[36] This "novel structure," he argued, made the President "powerless to intervene" in the event that he and the Commission disagreed about whether good cause existed for removing a Board member.[37] Moreover, the additional insulation from presidential control diffused the Board's political accountability, bringing the executive branch nearer to "slip[ping] from the Executive's control, and thus from that of the people."[38] To reinforce these points, Chief Justice Roberts noted that the for-cause standard for the Board was "unusually high," requiring willful violations of securities laws or abuse of authority before the Commission could remove a Board member.[39] Although the Commission enjoyed significant oversight authority over the Board, the majority held that the Commission's "[b]road power over Board functions is not equivalent to the power to remove Board members"[40] because the Board can undertake investigations and enforcement actions without Commission preapproval.[41]

Chief Justice Roberts minimized the impact of the holding by emphasizing the uniqueness of the Board's structure[42] and by narrowing the decision's applicability.[43] He noted that the decision applied only to dual for-cause removal protections for Officers of the United States,

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30 *Id.* at 697–701.

31 *Free Enter. Fund*, 130 S. Ct. at 3164.

32 *Id.* at 3151.

33 Chief Justice Roberts was joined by Justices Scalia, Kennedy, Thomas, and Alito.

34 *Free Enter. Fund*, 130 S. Ct. at 3155.

35 *See id.* at 3152–53 (examining Morrison v. Olson, 487 U.S. 654 (1988); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935); United States v. Perkins, 116 U.S. 483 (1886)).

36 *See id.* at 3153.

37 *Id.* at 3154.

38 *Id.* at 3156.

39 *Id.* at 3158.

40 *Id.*

41 *Id.* at 3159.

42 *See id.* at 3154 (describing the Board's two layers of for-cause tenure as "novel"); *id.* at 3157 ("unusual"); *id.* at 3159 ("highly unusual").

43 *See id.* at 3160 ("[N]one of the positions [the dissent] identifies are similarly situated to the Board.").

"who exercis[e] significant authority pursuant to the laws,"[44] and therefore that the holding did not necessarily apply to the civil service system within independent agencies, administrative law judges, or the military.[45] The Court found that the unconstitutional removal limitation was severable from the rest of the Sarbanes-Oxley Act, and therefore the Board's existence was permissible and its members would simply be removable by the Commission for any or no cause.[46]

As a result of this holding, the Court affirmed the D.C. Circuit's decision that the statute did not violate the Appointments Clause.[47] After the Court invalidated the Board's for-cause tenure protection, Board members were rendered removable at will. The Court determined that this fact clearly establishes that Board members are "inferior officers" and thus may be appointed by a Department Head.[48] The Court held that the Commission was a "Department" and the Commissioners were collectively its "Head," therefore permitting the Commission to appoint members of the Board.[49]

Justice Breyer dissented[50] and read his dissent from the bench.[51] Although he agreed with the majority that Board members were inferior officers, he argued that the dual removal limitations did not violate the Constitution's separation of powers.[52] Justice Breyer wrote that for constitutional issues such as the removal power on which the text is silent and the history contested,[53] the Court must focus on "how a particular provision, taken in context, is likely to function."[54] He argued that the Framers intended the Constitution to be interpreted functionally and that "a functional approach permits Congress and the President the flexibility needed to adapt statutory law to changing circumstances."[55] In practice, Justice Breyer wrote, political factors are more important in determining the extent of a President's control over executive officials than is the existence of removal limitations.[56] Jus-

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[44] *Id.* at 3160 (alteration in original) (quoting Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam)) (internal quotation mark omitted).

[45] *See id.*

[46] *Id.* at 3161–62.

[47] *Id.* at 3164.

[48] *See id.* at 3162.

[49] *See id.* at 3162–64.

[50] Justices Stevens, Ginsburg, and Sotomayor joined Justice Breyer's dissent.

[51] *See* Floyd Norris & Adam Liptak, *Court Backs Accounting Regulator*, N.Y. TIMES, June 29, 2010, at B1. Recently, an average of four dissents have been read from the Supreme Court bench each year. Lani Guinier, *The Supreme Court, 2007 Term — Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 15 (2008).

[52] *See Free Enter. Fund*, 130 S. Ct. at 3164 (Breyer, J., dissenting).

[53] *Id.* at 3166.

[54] *Id.* at 3167 (citing Morrison v. Olson, 487 U.S. 654, 689–90 (1988); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 854 (1986); Crowell v. Benson, 285 U.S. 22, 53 (1932)).

[55] *Id.* at 3168.

[56] *See id.* at 3170.

tice Breyer doubted the likelihood of the majority's hypothetical scenarios in which the second layer of for-cause protection hindered the President more than one such layer would on its own.[57] Moreover, he argued, the statute's broad grant of power to the Commission to oversee the Board should render the statute constitutional.[58]

Justice Breyer wrote that Congress and the President had good reason for wanting to insulate the Board, a financial regulator, from political influence.[59] He noted that the Board had adjudicative functions,[60] and that the Court's precedents support allowing removal limitations for officials with adjudicative responsibilities.[61] He also pointed out that Congress had not aggrandized its power in this case.[62]

Moreover, the majority's holding was not a bright-line rule and would be very difficult to administer, Justice Breyer wrote, because the opinion suggested it might not apply to inferior officers with adjudicative functions, or to less stringent removal limitations, or to the civil service.[63] Emphasizing the breadth of the category of "inferior officer" — from district court clerks to Article I judges to U.S. Attorneys — Justice Breyer catalogued 573 officials at forty-eight agencies whose for-cause tenure protections were put in doubt by the majority's holding.[64] Finally, Justice Breyer criticized the majority for assuming without deciding that the Commissioners themselves are not removable except for good cause because the statute is silent on the question.[65]

Although Justice Breyer framed this separation-of-powers case as yet another battleground between formalism and functionalism[66] — and he convincingly articulated why a functionalist would find Sarbanes-Oxley permissible — even a committed formalist on the Court should have found the Board's structure constitutionally unobjection-

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[57] *See id.* at 3172. The majority argued that, "[w]ithout the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee, the President is no longer the judge of the Board's conduct," *id.* at 3154 (majority opinion), and that "the Commission can shield its decision from Presidential review by finding that good cause is absent — a finding that, given the Commission's own protected tenure, the President cannot easily overturn," *id.* at 3154 n.2.

[58] *See id.* at 3173 (Breyer, J., dissenting).

[59] *See id.* at 3174.

[60] *See id.* at 3173.

[61] *See id.* at 3175.

[62] *See id.* at 3176 ("Congress here has 'drawn' no power to itself to remove the Board members.").

[63] *See id.* at 3177–79.

[64] *See id.* at 3179–80, apps. A–B, at 3184–3213.

[65] *See id.* at 3182–83.

[66] *See* Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions — A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 512–13 (1987) ("The Supreme Court has vacillated over the years between using a formalistic approach to separation-of-powers issues . . . and a functional approach . . . ." *Id.* at 489.).

able.[67] Rather than adopting a rule that two layers of for-cause removal protection are impermissible, a better formalist decision would have focused its rule on the most salient and broadly applicable element in this case: whether the Commission's broad and pervasive oversight authority over the Board gave the Commission the power to review and overturn every significant decision the Board could make.

Formalists prefer bright-line rules over murky standards to strictly police the boundaries of power for each branch of government.[68] Moreover, they determine which powers belong to each branch based on an abstract conception of form rather than a close examination of the substance of a particular case.[69] Therefore, while functionalists undertake case-by-case analysis to determine whether the Executive's power has been infringed, formalists take into account only whichever elements they are willing to incorporate into a bright-line rule — and the more elements they consider, the less rule-like their rule becomes. A good formalist judge, then, must identify the most important factors and incorporate only those into her rule. In *Free Enterprise Fund*, two key facts pointed in opposite directions: the dual for-cause removal provisions reduced the Commission's control over Board members,[70] while the extensive oversight powers granted to the Commission gave the Commission vast control over the Board's actions. In this case, then, a formalist could have adopted either of two bright-line rules: separation of powers is not violated if (1) no more than one layer of for-cause limitations insulates an Officer of the United States from

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[67] Chief Justice Roberts's opinion was not purely formalist. By offering hypothetical situations in which the President might be hindered in his control over the Board, for example, he provided a somewhat functionalist argument for his position. *See Free Enter. Fund*, 130 S. Ct. at 3154. But even then, the Court formalistically neglected to consider the likelihood and significance of these situations. *See id.* at 3171–72 (Breyer, J., dissenting).

[68] *See* William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21, 22 (1998) ("Formalism might be associated with bright-line rules that seek to place determinate, readily enforceable limits on public actors."); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988) ("At the heart of the word 'formalism,' in many of its numerous uses, lies the concept of decisionmaking according to *rule*.").

[69] *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 625 (1984) ("Courts have been able to reconcile the reality of modern administrative government and the strict separation-of-powers model . . . only by blind feats of definition . . . ."); Steven L. Winter, *John Roberts's Formalist Nightmare*, 63 U. MIAMI L. REV. 549, 554 (2009) ("What unifies these different meanings [of formalism] is the metaphor of form and substance. The basic idea in each case is that the conceptual operation involves the external form of the relevant performance without attention to the substantive dimensions that give it meaning.").

[70] This comment assumes for the purposes of argument that a second level of for-cause removal protection attenuates the President's control over the Board, although Justice Breyer offered some convincing reasons to doubt this assumption. *See Free Enter. Fund*, 130 S. Ct. at 3170–72 (Breyer, J., dissenting).

removal, or (2) a Department Head has the authority to review every significant policy decision[71] made by an inferior officer.

Due to precedent, both of these possible rules necessarily include a functionalist element: whether the official in question has the authority to make "significant" decisions, thus qualifying her as an "Officer of the United States."[72] After resolving this threshold question, both rules are clear and formalist: (1) one layer of removal protection is permissible but two layers are not, or (2) *every* significant decision must be reviewable by an officer who is insulated from the President by no more than one level of for-cause removal protection. Although the second rule requires one to decide what constitutes a "significant decision" — an admittedly functionalist endeavor — this same issue also burdens the first rule, because under the majority's holding, two layers of removal protection are permissible for government agents who cannot make significant policy decisions. Unlike Chief Justice Rehnquist's highly functional test in *Morrison v. Olson*,[73] the second rule would not create yet another vague balancing test, but rather would restrict its functionalism to an analysis that is identical to the preexisting problem of defining Officers of the United States.

By choosing not to incorporate such an oversight rule into its holding, the Court lost sight of the constitutional principles that its rule was intended to uphold. Chief Justice Roberts relied heavily on the Take Care Clause in reaching his conclusion that the dual for-cause removal provisions were unconstitutional.[74] But if the lodestar for this case is the President's duty to take care that the laws be faithfully executed, then the more salient fact should have been the extent of the Commission's oversight powers to overrule the Board, revoke its authority, and independently perform any significant decisionmaking the Board was empowered to do.[75] The Court's desire to preserve the

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[71] *See* Buckley v. Valeo, 424 U.S. 1, 126, 141 (1976) (per curiam) (defining an Officer of the United States — principal or inferior — as one who exercises "significant authority pursuant to the laws," *id.* at 126, or who "perform[s] . . . a significant governmental duty exercised pursuant to a public law," *id.* at 141).

[72] *See id.*

[73] 487 U.S. 654, 691 (1988) ("[T]he real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty . . . .").

[74] *See, e.g.*, *Free Enter. Fund*, 130 S. Ct. at 3147 ("The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them."). *But see* Evan H. Caminker, Printz*, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 225 n.82 ("The predominant (and better) view is that the Take Care Clause does not grant any power but rather imposes a duty, prohibiting the President from ignoring or otherwise subverting statutory directives.").

[75] Judge Rogers described the Commission's power over the Board as "explicit and comprehensive. Indeed, it is extraordinary." Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 669 (D.C. Cir. 2008) (citation omitted).

President's control over the bureaucracy[76] by robustly enforcing separation of powers would have been better served by deciding the constitutionality of Sarbanes-Oxley based on the extent of oversight authority granted to the Commission.[77] Firing an officer based on a disagreement over policy views is a very blunt instrument of control that Presidents and their department heads are reluctant to use.[78] In many situations, it is easier to overrule an officer than to fire her, such as when the problem from the President's point of view is that the officer is "sitting still" rather than taking action.[79] Moreover, a President's informal powers of persuasion over inferior officers — often more useful than formal authority in achieving the President's goals — are enhanced by "formal authority to intervene in many matters of concern" to such officers.[80] By refocusing the doctrinal debate on oversight provisions, the Court would have made more headway in protecting presidential authority — even if the structure of the Board in this case had been upheld — because it would not have needed to make its holding so narrow as to constrain it to the facts of this case. Legislators drafting new administrative structures might err on the side of extensive administrative oversight to avoid being struck down in court, especially because oversight is rarely politically unpalatable.[81]

Instead, Chief Justice Roberts's opinion suggested that this oversight authority was irrelevant to the disposition of this case.[82] The majority claimed that even if the Court took the Commission's oversight powers into account, the Board nonetheless possessed an impermissible amount of independent discretion — but the majority's analy-

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[76] *See Free Enter. Fund*, 130 S. Ct. at 3155–56 ("[W]here, in all this, is the role for *oversight* by an elected President? The Constitution requires that a President chosen by the entire Nation *oversee* the execution of the laws." (emphases added)).

[77] *Cf.* Rachel E. Barkow, Insulating Agencies 36 (Aug. 17, 2010) (unpublished manuscript) (on file with the Harvard Law School Library), *available at* http://works.bepress.com/context/rachel_barkow/article/1000/type/native/viewcontent ("If [an] executive agency has the authority to veto or dictate the insulated agency's policies, the other design features of the insulated agency are meaningless because the insulated agency answers to a political entity that shares none of its insulating features." (footnote omitted)).

[78] *See, e.g.*, Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 957 (1980) ("[R]emoval is a doomsday machine; it can be both an overwhelming and an inadequate device for controlling or formulating policy.").

[79] RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS 36–37 (1990).

[80] *Id.* at 30.

[81] Although both at-will employment and for-cause removal protections plus oversight may increase presidential control over the bureaucracy, legislators might prefer the latter because disagreements within the bureaucracy (for example, between the Board and the Commission) would require formal review rather than informal pressure, thus increasing transparency.

[82] *See Free Enter. Fund*, 130 S. Ct. at 3158 ("Broad power over Board functions is not equivalent to the power to remove Board members.").

sis was neither comprehensive nor essential to its holding.[83] The Court should have first examined whether the Commission could directly review all of the Board's significant actions.[84] Only if it answered this question in the negative should the Court have held that the double layer of for-cause protection was impermissible.

It is difficult to reconcile the majority's refusal to credit the Commission's comprehensive oversight powers with the Court's presumably broader goal of preserving the President's executive authority to take care that the laws be faithfully executed.[85] At-will removal power is of course relevant to this goal, but a rule against dual for-cause tenure protections does not apply broadly[86] — the majority itself argued that this structure is exceedingly rare — so this rule was not chosen because it was particularly useful beyond this case. The Court also cannot have chosen to focus on removal provisions while minimizing the importance of oversight authority based on a belief that its rule would be more administrable or predictable. Both the majority's rule and this comment's proposed rule require an assess-

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[83] Chief Justice Roberts wrote that "[*e*]*ven if* Commission power over Board activities could substitute for authority over its members, [the Court] would still reject respondents' premise that the Commission's power in this regard is plenary." *Id.* at 3159 (emphasis added). His argument was that allowing the Commission to make rules, conduct its own investigations, and remove authority from the Board would be "a poor means of micromanaging the Board's affairs," and that "the Act nowhere gives the Commission effective power to start, stop, or alter individual Board investigations." *Id.*

[84] Although "[the Supreme Court's] cases have not set forth an exclusive criterion for [defining] inferior officers," *id.* at 3178 (Breyer, J., dissenting) (second alteration in original) (quoting Edmond v. United States, 520 U.S. 651, 661 (1997)) (internal quotation marks omitted), the Board's unreviewed powers almost certainly do not rise to the level of significance, limited as they are to initiating and terminating its own (reviewable) investigations.

[85] Why did the Court single-mindedly emphasize the importance of at-will removal of inferior officers? Perhaps because the issue of removal has been contested for much longer than oversight provisions have even existed and has accumulated more doctrinal attention. The debate over the President's removal powers dates back to 1789, when a majority of the House granted the President at-will removal power over the first Cabinet department — although some in the majority believed merely that it was the soundest policy rather than a constitutional mandate. *See* Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 COLUM. L. REV. 353, 360–69 (1927). The Tenure of Office Act of 1867 aroused the country's intense interest in the question of removal by prohibiting removal of any officer appointed by a past President, thus leading to Andrew Johnson's impeachment. *See generally* DAVID O. STEWART, IMPEACHED (2009). The doctrinal debate continued throughout the twentieth century. *See, e.g.*, Morrison v. Olson, 487 U.S. 654 (1988); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935); Myers v. United States, 272 U.S. 52 (1926). By contrast, the issue of bureaucratic autonomy versus oversight in the modern administrative state did not arise until the early twentieth century. *See* DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY 37–39 (2001). Viewed through the prism of this history, the double for-cause removal protections may simply have been more doctrinally salient to the majority in *Free Enterprise Fund*.

[86] *But see Free Enter. Fund*, 130 S. Ct. apps. B–C, at 3192–3214 (Breyer, J., dissenting).

ment of the significance of an officer's authority,[87] and thus this comment's proposal is at least as administrable and predictable.[88] Indeed, considering an official's powers only to the extent that they are not reviewable by a superior would be a more predictable and administrable rule: for example, it is obvious that statutes providing for administrative law judges (some of whom enjoy a second level of for-cause removal protections but whose decisions are reviewed de novo by their agency heads) would be constitutionally permissible.

The Court's opinion in *Free Enterprise Fund* needlessly focused on the Board's removal protections rather than giving doctrinal weight to the plenary oversight authority granted to the Commission. By upholding the statute on the basis of the Commission's powers to review and overturn all of the Board's significant decisions, the Court could have emphasized the importance of presidential power over the executive branch and still provided a formalist rule that was as simple and predictable as a prohibition on double-layered for-cause tenure protections. Such a holding would have helped shift the Court away from its fixation on removal provisions[89] in the domain of separation of powers and toward the administrative oversight powers that have become more varied and pervasive in the last century[90] — thereby offering greater insight for future cases and more accurately reflecting the requirements of the Constitution's Vesting and Take Care Clauses.

G. Takings Clause

Judicial Takings. — The Takings Clause of the Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation."[1] In the nineteenth century, courts wrestled with the question of what uses of property satisfied the clause's "public use" requirement,[2] and in the twentieth century, the Supreme Court confronted the problem of deciding at what point a regulation of the

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[87] *See id.* at 3160 (majority opinion). Under this comment's rule, the only authority a judge would need to consider is the officer's *unreviewable* authority.

[88] *See id.* at 3177–78 (Breyer, J., dissenting).

[89] *See* Barkow, *supra* note 77, at 3 (describing "[t]he obsessive focus on removal as the touchstone of independence" as "curious").

[90] *See, e.g.*, CARPENTER, *supra* note 85, at 37–39; Patricia W. Ingraham, *Political Direction and Policy Change in Three Federal Departments*, *in* THE MANAGERIAL PRESIDENCY 196, 196 (James P. Pfiffner ed., 2d ed. 1999).

[1] U.S. CONST. amend. V. The Fourteenth Amendment incorporates the Takings Clause as a limit on the states. *See* Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 233–35 (1897).

[2] *See* Kelo v. City of New London, 545 U.S. 469, 479–80 (2005) (describing briefly the evolution of the "public use" doctrine); Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 617–18 (1940).