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On Candor, Free Enterprise Fund, and the Theory of the Unitary Executive

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INTRODUCTION

I cannot think of William & Mary Law School without thinking of my friend, Charles Koch. Twice I joined William & Mary Law School, and each time no one did more to welcome me than Charles—and Denise. Throughout my years at William & Mary, I valued no one's counsel—and friendship—more than that of Charles. Twice I left William & Mary Law School, and each time I left I broke Charles's heart. It breaks my heart to participate in this conference in honor of Charles. I can feel his absence and greatly mourn his passing.

Yet I can see Charles smiling, as I often did when we would chat early each morning, and I can still hear him chiding me for my occasional naiveté and idealism. I can see Charles laughing at the prospect of my discussing administrative law, which of course was his field of expertise, not mine. I am sure that he would have been quick to tell you that I know nothing about administrative law, and he would be right. Charles never hesitated to tell you what he thought; he was completely, thoroughly candid. I respected Charles for more reasons than I can say, but perhaps none more so than that you could always count on Charles to be candid, to tell you exactly what he thought. Charles believed that good judges—and scholars—should call it as they saw it, that they should be direct and forthright. He stood by independent agencies because he believed in transparency and in experts who had the integrity, experience, and knowledge to make decisions based on the facts and the merits. He believed that the best scholars speak truth to power, as he did throughout his career, and that judges should have the courage of their convictions as well as the courage to be fully candid about their reasoning and the grounds for their decisions. There was no bullshit in Charles's world, especially about administrative law.

I never talked to Charles about the Roberts Court's 2010 decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[1] but I do know what he would have demanded from the Supreme Court: candor. It is not the only thing he would have demanded, but I think that this quality, which was one of Charles's defining

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[1] 130 S. Ct. 3138 (2010).

attributes, provides an ideal measure by which to assess what the Court did in the case.[2] Since the decision came down, scholars have been divided over the importance of the case, and its importance turns on whether the Court was candid.[3]

Because *Free Enterprise Fund* is a case at the intersection of the fields of administrative and constitutional law, it is familiar to scholars in both fields. We know that many scholars and other Court observers eagerly awaited the decision because it had the potential to buttress the theory of the unitary executive—the notion that the President should have complete control over the exercise of all executive power and thus be able to remove any officials performing executive functions.[4] Buttressing this theory would have serious ramifications for the viability of independent agencies because the theory, in its most robust form, construes the Constitution as vesting in the President the authority to remove the heads of such agencies and thus effectively nullify their independence.[5] So, one obvious question has been whether this decision changed constitutional law in any (significant) way. The answer depends on whether we read the case broadly or narrowly, and how broadly we read the case depends on whether we agree with the majority or the dissent on the significance of the case. The majority maintained that its decision was unremarkable,[6] while the dissent regarded the majority's decision as radical—indeed, perhaps signaling, or laying the groundwork for, the end of independent agencies.[7] It is hard to imagine how both of these could be correct. If the dissent is right that the case should be read broadly as signaling the likely end of independent agencies,[8] then the majority's claim would not only be wrong but also disingenuous. If, however, the case has no discernible effect on constitutional law as it stands, then the dissent could be said to have been calling wolf.

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[2] *See* Charles H. Koch, Jr., *The Devolution of Implementing Policymaking in Network Governments*, 57 EMORY L.J. 167, 179, 185–86 (2007) (highlighting the transparency of the U.S. government's hierarchical system and the notice and comment process for regulatory decision-making); *see also* Charles H. Koch, Jr., *Discovery in Rulemaking*, 1977 DUKE L.J. 295, 308–10 ("Off the record candor . . . serves little purpose in policymaking."). *See generally* Charles H. Koch, Jr., *Collaborative Governance: Lessons for Europe from U.S. Electricity Restructuring*, 61 ADMIN. L. REV. 71 (2009) (recommending that Europe adopt a collaborative governance approach to electricity restructuring in order to mimic the transparency and inclusiveness of the U.S. system); Charles H. Koch, Jr. & Barry R. Rubin, *A Proposal for a Comprehensive Restructuring of the Public Information System*, 1979 DUKE L.J. 1 (advocating a restructuring of the public information system that would encourage accountability, openness, and maximum diffusion of information to the public).

[3] *See infra* Part II.

[4] *See* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 3–4 (2008) (explaining the theory of the unitary executive).

[5] *See id.*

[6] *Free Enter. Fund*, 130 S. Ct. at 3160.

[7] *Id.* at 3164–65, 3179–80 (Breyer, J., dissenting).

[8] *Id.* at 3179–80.

It is possible that both sides were merely speculating on the direction of the law based on their best guesses. Of course, neither the majority nor the dissent phrased what it said along these lines, and it is also possible that one side, or maybe both, was not being candid in its assessment of the likely consequences of the decision. The majority might have known that it was planting the seeds for the destruction of independent agencies, but it clearly did not say so.[9] Likewise, the dissent might have genuinely feared the ramifications of the decision as it described them or might have hoped that it could use hyperbole to increase the pressure on the majority (or some future Court) to stick with what it had said about the ruling as being narrow and having little impact on constitutional law.[10] In any event, it is unlikely for both the majority and the dissent to have been right in their respective characterizations of the decision. While it is possible both the majority and the dissent genuinely believed what they said (and therefore were candid) in the opinions, only one of them will be proven substantively right in the end.

The Justices are not, however, the only people for whom candor—genuinely acknowledging the grounds for their decisions—is important. Scholars, too, need to be careful about not reading too much into opinions because of their own assumptions or biases. The best that we are likely to do is to follow Charles's example by modeling the candor we expect from our courts and in scholarship and explaining the educated guesses we each have made about the relative credibility of the claims made in the case.

This Article has three parts. In Part I, I review the majority and dissenting opinions in *Free Enterprise Fund*, particularly the discussions on the President's removal power. In Part II, I discuss the three ways in which scholars have analyzed the Court's opinion. These include: (1) arguing that the majority subtly but without complete candor laid the foundations for holding unconstitutional any limitations on the President's removal power (a position that would require ending independent agencies); (2) suggesting that the decision was merely pragmatic and not doctrinally significant; and (3) positing that the decision set forth the outer boundaries of organizing power within the context of administrative law. Interestingly, each of these is based on a reading of the Court's decision as imperfect or less than candid, and each provides an imperfect understanding of the case. In the final Part, I suggest a fourth reading of the opinion.[11] On this reading, one has to read the case within the larger context of administrative law, particularly litigation involving the Securities and Exchange Commission (SEC).[12] Fixing the case within this context helps to illuminate several facets of the agency that have not been well understood, or acknowledged, particularly outside of administrative law scholarship. It is partly because of these assumptions that the case took the shape that it did. On this reading, one has to choose whether the majority or the dissent was candid, and I

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[9] *See id.* at 3146–64 (majority opinion).

[10] *See id.* at 3164–84 (Breyer, J., dissenting).

[11] *See infra* Part IV.

[12] *See infra* notes 88–89 and accompanying text.

explain why I choose the majority. I defend its decision as candid on the grounds that: (1) the majority opinion makes more sense in light of the assumptions (or conventional wisdom) about the SEC; (2) the majority put its credibility on the line in the decision; and (3) to radically alter removal law would undermine confidence in the Chief Justice's trustworthiness.[13]

I. THE *FREE ENTERPRISE FUND* DECISION

When *Free Enterprise Fund* came to the Supreme Court in 2009, it was closely watched for at least two reasons. The first was whether the special removal mechanism for members of the Public Company Accounting Oversight Board, which Congress established as a five-member board with powers to oversee, investigate, and discipline accounting firms, was constitutional.[14] The members of the board were removable only "for good cause shown" by the SEC Commissioners,[15] who themselves could only be removed by the President for "inefficiency, neglect of duty, or malfeasance in office."[16] This mechanism was known as a dual for-cause or double-tenure protection standard.[17] If the standard were unconstitutional, it would require striking down a provision of the enabling statute, the Sarbanes-Oxley Act,[18] which was extremely unpopular with many Republican members of Congress who believed that it was not sufficiently politically accountable.[19] The other reason the case drew attention was because the main advocate defending the provision's constitutionality before the Court was then–Solicitor General Elena Kagan, whose nomination to the Supreme Court was pending while the Court decided the case.[20] If the Court agreed with her argument, it would have obviously bolstered her claim that she was qualified to be sitting on the Court. If she lost the case (as she eventually did), it would have arguably lent support to the claims of some that she was either unqualified or held constitutional views that the Court itself rejected.[21]

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[13] *See infra* notes 86–93 and accompanying text.

[14] *See* Robert Barnes, *High Court Weighs Constitutionality of Corporate Audit Board*, WASH. POST, Dec. 8, 2009, at A5.

[15] *See infra* notes 22–26 and accompanying text.

[16] Free Enter. Fund v. Pub. Accounting Oversight Bd., 130 S. Ct. 3138, 3148 (quoting Humphrey's Executor v. United States, 295 U.S. 602, 620 (1935)).

[17] *Id.* at 3151–52.

[18] Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C.).

[19] *See, e.g.*, Stephen Labaton, *Committee Allows a Break on Certain Auditing Rules*, N.Y. TIMES, Nov. 5, 2009, at B3.

[20] *See, e.g.*, Floyd Norris & Adam Liptak, *Court Backs Accounting Regulator*, N.Y. TIMES, June 29, 2010, at B1, B4.

[21] *See, e.g.*, Michael Cohn, *Supreme Court Keeps PCAOB in Suspense*, ACCT. TODAY (June 23, 2010), http://www.accountingtoday.com/debits_credits/Supreme-Court-Keeps-PCAOB-Suspense-54734-1.html ("Kagan argued the government's case on behalf of the PCAOB as solicitor general, which would make it awkward for the court to rule against her arguments on the week of her confirmation hearings.").

The Court ruled five to four against the constitutionality of the dual for-cause removal mechanism.[22] In his opinion for the majority, Chief Justice Roberts declared that this mechanism "contravene[d] the Constitution's separation of powers" because it was "contrary to Article II's vesting of the executive power in the President."[23] He explained that, while the Court in previous cases had "upheld limited restrictions on the President's removal power,"[24] those other cases involved mechanisms in which

> only one level of protected tenure separated the President from an officer exercising executive power . . . . The Act before us . . . not only protects Board members from removal except [under a rigorous good cause standard], but [also] withdraws from the President any decision on whether that good cause exists. That decision is vested instead in other tenured officers—the Commissioners—none of whom is subject to the President's direct control.[25]

Thus, the Court concluded, "[t]he President . . . cannot hold the Commission fully accountable for the Board's conduct, to the same extent that he may hold the Commission accountable for everything else that it does."[26]

In the fourth footnote, the Chief Justice explained why a system "[w]ithout a second layer of protection" was constitutionally preferable.[27] Without that second layer, he noted, "the Commission has no excuse for retaining an officer who is not faithfully executing the law."[28] But, inserting that "second layer of protection" from removal ensured 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."[29]

The dissent took issue with the majority's formalism, an approach to separation of powers analysis requiring the Court to strike down any arrangement for distributing power not expressly set forth in the Constitution or clearly supported by the original meaning of the Constitution.[30] The dissent maintained that the majority's formalism

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[22] *Free Enter. Fund*, 130 S. Ct. at 3151.

[23] *Id.* at 3151, 3154.

[24] *Id.* at 3153; *see also* Morrison v. Olson, 487 U.S. 654 (1988); Wiener v. United States, 357 U.S. 349 (1958); Humphrey's Executor v. United States, 295 U.S. 602 (1935).

[25] *Free Enter. Fund*, 130 S. Ct. at 3153.

[26] *Id.* at 3154.

[27] *Id.* at 3154 n.4.

[28] *Id.*

[29] *Id.*

[30] *See generally* Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987) (describing the Court's vacillation between formalist and functionalist approaches to separation of powers questions).

required striking down "hundreds, perhaps thousands"[31] of statutes providing for "their execution or administration through the work of administrators organized within many different kinds of administrative structures, exercising different kinds of administrative authority," for the purpose of achieving "legislatively mandated objectives."[32] The dissent acknowledged that its own approach to the case was functional, an approach in separation of powers cases that emphasizes the practical consequences of the institutional arrangements that the Court is assessing.[33] Thus, the dissent argued that "[t]he functional approach required by our precedents recognizes this administrative complexity and, more importantly, recognizes the various ways . . . in which a removal provision might affect [presidential] power."[34] Whereas formalism rejected practical concerns and historical practices (as well as deference to Congress), Justice Breyer's functional approach recognized that "the Commission's control over the Board's investigatory and legal functions is virtually absolute,"[35] as well as "[t]he Commission's [practical] inability to remove a Board member whose perfectly *reasonable* actions cause the Commission to overrule him with great frequency."[36] The dissent suggested that, "if the President's control over the Commission is sufficient, and the Commission's control over the Board is virtually absolute, then, as a practical matter, the President's control over the Board should prove sufficient as well."[37]

In response to the dissent's assertion that "hundreds, perhaps thousands of high level government officials" clearly fell "within the scope of the Court's holding,"[38] Chief Justice Roberts observed that "[t]he parties have identified only a handful of isolated positions [in the government] in which inferior officers might be protected by two levels of good-cause tenure."[39] But none, not even "'civil service tenure-protected employees in independent agencies' or administrative law judges,"[40] are "similarly situated to the Board."[41] Moreover, the Court held that "the Board members have been validly appointed,"[42] because Commission "constitutes a 'Departmen[t]' for the purposes of the Appointments Clause,"[43] and "under *Edmond* the Board members are inferior officers whose appointment Congress may permissibly vest in a 'Hea[d] of Departmen[t].'"[44] The dissent did not disagree.[45]

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[31] *Free Enter. Fund*, 130 S. Ct. at 3179 (Breyer, J., dissenting).
[32] *Id.* at 3169.
[33] *Id.* at 3167–69.
[34] *Id.* at 3169.
[35] *Id.* at 3173.
[36] *Id.*
[37] *Id.*
[38] *Id.* at 3179.
[39] *Id.* at 3159 (majority opinion).
[40] *Id.* at 3160 n.10.
[41] *Id.* at 3160.
[42] *Id.* at 3164.
[43] *Id.* at 3163.
[44] *Id.* at 3162 (citing Edmond v. United States, 520 U.S. 651 (1997)).
[45] *Id.* at 3175–76 (Breyer, J., dissenting).

II. READING *FREE ENTERPRISE* CANDIDLY

Generally, scholars have analyzed *Free Enterprise Fund* in three ways. First, some scholars believe the case is a wolf in sheep's clothing. For example, Neomi Rao argues that

> [d]espite claims to minimalism by the Court, *Free Enterprise Fund* logically implicates the constitutionality of agency independence. The breadth of the proof and the narrowness of the remedy [of allowing the Board to remain intact] are not well suited to the unusual and limited question about the constitutionality of the Board's two levels of tenure protection.[46]

She believes that the argument set forth in the fourth footnote[47] implicitly accepts a robust conception of the unitary theory of the executive.[48] She believes the argument is grounded on the principles that the President must oversee executive branch officials; that such oversight requires that the President have the power of removal over such officials; and that Congress does not have the right to diminish or modify that power.[49] Hence, Rao believes, the fourth footnote logically implies—indeed, requires—holding independent agencies unconstitutional.[50]

Second, some scholars believe the opinion should be construed narrowly as unremarkable. For example, Henry Monaghan suggests that the Court's ruling is a pragmatic disposition of the case.[51] He notes that there was no statutory basis for the double layer of protection of the board members, but rather all the parties had merely agreed to stipulate that board members had such protection (as well as the independence of the SEC commissioners themselves).[52] Monaghan says

> [c]onsidering the apparent gravity of the constitutional issue before the Court, surely something more seemed called for, given the traditional doctrine that courts generally refuse to be bound by stipulations of law. Especially so, when the result is to bring to the front an "important" and difficult constitutional issue. Something more could have been said. Pragmatism may have triumphed yet again. While the Court technically awarded the President a victory, it seems to have no practical significance, at least not yet.[53]

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[46] Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in* Free Enterprise Fund v. PCAOB, 79 FORDHAM L. REV. 2541, 2559 (2011).

[47] *Free Enter. Fund*, 130 S. Ct. at 3154 n.4 (majority opinion).

[48] *See* Rao, *supra* note 46, at 2557–58.

[49] *Id.* at 2554–57.

[50] *Id.* at 2570.

[51] Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 703–04 (2012).

[52] *Id.* at 701–02.

[53] *Id.* at 703–04 (citation omitted).

Richard Pildes suggests a third reading of the case.[54] He views *Free Enterprise Fund* as an idiosyncratic case that produced an opinion that could be read as either a "decision of broad principle with significant doctrinal effect,"[55] or as a "more limited 'boundary-enforcing decision' confined to the peculiar and limited context of dual for-cause removal structures."[56] *Free Enterprise Fund* is, in other words, similar to the Court's ruling in *United States v. Lopez*,[57] in which it defined the legal framework (including the outer limits) governing congressional exercises of the power to regulate interstate commerce.[58] Pildes explains the support for each of these constructions of the case.[59] He suggests that a broad reading could be explained by the fact that Chief Justice Roberts and Justice Alito worked in the Reagan administration and thus were adherents to the unitary theory of the executive.[60] In support of the narrow reading, he points to Justice Kennedy as the swing vote, which he would have cast to prevent Congress from overreaching, i.e., to define the outer boundaries of how far Congress could stretch the independence of administrative officials.[61]

Interestingly, one thing that connects these three different readings of *Free Enterprise Fund* is that each supposes that the Court was not candid. Each assumes that something more was (at least possibly) happening in the case than the Justices acknowledged. While it is too soon to tell the validity of these (or any other) readings, because they each depend on what the Court does in the future, we do know that the majority and the dissent cannot both be right with the former maintaining its decision was unremarkable and the latter that it was radical. As the next Part suggests, the extent to which one or the other is proven right over time will also establish which of these was more candid, perhaps not perfectly so, but at least more than most commentators allow.

III. READING *FREE ENTERPRISE* MORE CANDIDLY

Long before *Free Enterprise Fund*, scholars and judges have debated the importance of candor in judicial decisionmaking. One popular position has been to favor nearly absolute candor from the Supreme Court.[62] Those who favor this position insist, inter alia, that the Justices should acknowledge the major justifications for their decisions; the likely or expected impact of their decisions on the Court's own precedent;

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[54] *See* Richard H. Pildes, Free Enterprise Fund*, Boundary-Enforcing Decisions, and the Unitary Executive Branch Theory of Government Administration*, 6 DUKE J. CONST. L. & PUB. POL'Y 1 (2012).

[55] *Id.* at 5.

[56] *Id.* at 9.

[57] 514 U.S. 549 (1995).

[58] *See generally id.*

[59] Pildes, *supra* note 54, at 9–13.

[60] *Id.* at 8.

[61] *Id.* at 12–13.

[62] *See, e.g.*, Prof. Gillian E. Metzger, *Remarks of Gillian E. Metzger*, 64 N.Y.U. ANN. SURV. AM. L. 459, 459 (2009).

and, where necessary, their attitudes or intentions with respect to changing the law.[63] Further, those favoring this nearly absolute candor in judicial decisionmaking would no doubt find *Free Enterprise Fund* wanting. I expect that they would have wanted the Court to have candidly acknowledged whether they adhere to the theory of the unitary executive and which precedents pertaining to presidential removal power, if any, they think were wrongly decided and need to be discarded,[64] including *Morrison v. Olson*,[65] which the Court did not even cite.

The problem with the insistence on nearly absolute candor is that it does not square with a positive account of how the Court, as a collegial institution, actually performs in constitutional decisionmaking. In fact, the Court has never been perfectly candid in its decisions. Nor could it ever fully disclose all the justifications and ramifications of its decision. Perfect or nearly absolute candor is not possible because it would make compromise in decisionmaking practically impossible. Further, Supreme Court Justices may not know, much less be able to achieve perfect consensus on, all the issues arising in, and all the ramifications of, a particular decision. Moreover, virtually absolute candor is an ideal, which is impossible to follow when a court is attempting to decide cases, or issues, incrementally. The point of incremental decisionmaking is that it consists of decisions made one issue at a time, preferably as narrowly as possible, in order to leave ample room for other constitutional actors, as well as lower courts, to develop the law over time based on their experience, the issues that come before them, and shifts in the composition of the Court itself. Incremental decisionmaking tends to be bottom-up, i.e., it tends to provide for other constitutional actors, including lower courts, the opportunity to develop the law based on experience. The point of incremental decisionmaking is not to overreach or overdecide questions of constitutional law.[66] It is, as Henry Monaghan suggested in his critique of *Free Enterprise Fund*,[67] to adhere to the avoidance canon, which calls upon the Court to avoid deciding questions of constitutional law for as long as possible.[68] Incremental decisionmaking is, in other words, antithetical to judicial imperialism or the Court's assuming as much power as it can to decide and to direct the other branches as much it can.

It is, however, a crude, simplistic conception of candor that requires perfect or nearly absolute acknowledgment of all the major justifications and ramifications of a judicial decision.[69] I am not sure that anyone in the real world actually demands candor to such an extent, particularly from a nine-member Court. If they did, the best for which

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[63] *See id.*

[64] *See id.* ("[C]andor is particularly important in regard to precedent, because another important constraint in the area of constitutional adjudication is the need to take seriously decisions that courts, both yours and others, have previously issued.").

[65] 487 U.S. 654 (1988).

[66] Michael Gerhardt, *Silence is Golden*, 64 N.Y.U. ANN. SURV. AM. L. 475, 484 n.30 (2009).

[67] Monaghan, *supra* note 51, at 676–78.

[68] *Id.*

[69] *See generally* Gerhardt, *supra* note 66.

we could probably hope is seriatim opinions similar to the ones that the Justices issued prior to the chief justiceship of John Marshall.[70] As an alternative to this largely archaic, unrealizable ideal of candor, I propose a conception of candor that accords with an accurate or persuasive positive account of the Court. On this view, the candor that counts on a collegial court depends on what the Court is attempting to do in a particular case, i.e., what its objective is. On this view, the Justices should be candid about their objective in a particular case. They should be prepared at least to say how they perceive their role or objective in resolving a particular dispute. Candor about this central aspect of what the Court is doing will help to clarify what else the Justices need to discuss. If, for example, the Court's objective is narrow, such as merely deciding the case or controversy before the Court, then the Justices should say at least as much. While this would include the support for the Court's resolution of the case in light of its objective, it does not necessitate much, if anything, else. There are, of course, other objectives, such as providing guidance to lower courts and/or other constitutional actors, and some of these objectives may be broad, such as redefining the legal framework within a particular area of constitutional law (as in *Lopez*[71]). Whichever of these objectives the Court has will help to shape if not settle the expectations about its decision.

If the Court is engaged in incremental decisionmaking, then its silence can also matter.[72] Incremental decisionmaking is modest in scope; it aims to decide no more than is necessary to dispose of the case before the Court.[73] In such decisionmaking, what the Court does not say—or what it does not do—is at least as telling as what it has said or done. If, for example, I have no intention or agenda to do a particular thing, I might not feel compelled to say that in so many words. Indeed, it could be exhausting for a court to have to roll out, in every case, all the things it has no intention of doing. Consider that a major difficulty with the first reading of *Free Enterprise Fund* as sowing the seeds for the destruction of independent agencies is what the Court fails to do: it does not challenge a single Supreme Court precedent on presidential removal power.[74] Indeed, the Court follows, without any question—and all the parties accept without question—the Court's decision in *Humphrey's Executor*,[75] which is one of the basic precedents upholding the constitutionality of independent agencies.[76] A robust reading of *Free Enterprise Fund* as supporting the theory of the unitary executive cannot be squared with an express affirmation or reliance on one landmark decision supporting the constitutional foundations of independent agencies.

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[70] *See* SCOTT DOUGLAS GERBER, INTRODUCTION TO SERIATIM: THE SUPREME COURT BEFORE JOHN MARSHALL 1–25 (Scott Douglas Gerber ed., 1998).

[71] United States v. Lopez, 514 U.S. 549, 558–59 (1995).

[72] *See* Gerhardt, *supra* note 66.

[73] *Id.* at 478, 491–95; *see also* Tara Smith, *Reckless Caution: The Perils of Judicial Minimalism*, 5 N.Y.U. J.L. & LIBERTY 347, 348–53 (2010).

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

[75] Humphrey's Executor v. United States, 295 U.S. 602 (1935).

[76] *See generally id.*

There is more that the Court's silence in *Free Enterprise Fund* undercuts in construing the decision as laying the foundation for striking down the constitutional foundations of independent agencies. The Court does not follow—and therefore effectively rejects—the opinion below of Judge Brett Kavanaugh,[77] who had endorsed the theory of the unitary executive.[78] The rejection of an invitation to embrace the theory of the unitary executive is not insignificant. Nor is this the first time the Court has rejected such an entreaty. Nearly three decades before, in *Bowsher v. Synar*,[79] the Burger Court declined to follow the reasoning of the lower court opinion in that case,[80] which had distinguished *Humphrey's Executor* and held that it was unconstitutional for Congress to eliminate "all presidential power of removal" over an official performing executive functions.[81] The Burger Court had not adopted this line of reasoning,[82] perhaps because it posed a problem for the complete independence of administrative agencies. The fact that the Roberts Court seemed to be rejecting, at least implicitly, reasoning similar to that which the District Court in *Synar* had followed might not be insignificant, particularly when one considers that then-Judge Scalia (the Court's most ardent formalist) was a member of that special District Court.[83] But, when one considers the Roberts Court's acceptance, without question, of *Humphrey's Executor* and failure, more than once, to follow invitations to strike down independent agencies,[84] it is hard to escape the conclusion that the Court in *Free Enterprise Fund* lacked the agenda that Professor Rao, for example, has suggested that it had.[85]

Yet, there is more. *Free Enterprise Fund* is not a purely formalist opinion, for unadulterated formalism would have required striking down any deviation from the theory of the unitary executive, and thus the board itself, as unconstitutional.[86] The Court did not, however, do that.[87] The Court went further to accept several significant assumptions. Perhaps the most important of these is that the parties all agreed that the SEC is

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[77] Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 688 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *aff'd in part, rev'd in part*, 130 S. Ct. 3138 (2010).

[78] *Id.* at 689 ("The Framers established a single President by design: A single head of the Executive Branch enhances efficiency and energy in the administration of the Government. And a single head furthers accountability by making one person responsible for *all* decisions made by and in the Executive Branch. As the Supreme Court has noted, the 'insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known.'" (citation omitted)).

[79] 478 U.S. 714 (1986).

[80] Synar v. United States, 626 F. Supp. 1374 (D.D.C. 1986), *aff'd sub nom.* Bowsher v. Synar, 478 U.S. 714 (1986).

[81] *See id.* at 1393–1401.

[82] *See Bowsher*, 478 U.S. at 719–27.

[83] *See Synar*, 626 F. Supp. at 1393–1401.

[84] *See, e.g.*, Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010).

[85] *See supra* notes 46–50 and accompanying text.

[86] *See generally* Strauss, *supra* note 30 (discussing a formalist approach to separation of powers).

[87] *See Free Enter. Fund*, 130 S. Ct. at 3161.

an independent agency.[88] There is, however, no statute or precedent establishing it as such. Nonetheless, in the literature and popular understanding of administrative law (as well as the stipulations in this case), the SEC is widely considered to be an independent agency.[89] The acceptance of this as a fact is itself significant. At the very least, *Free Enterprise Fund* has become another precedent in a long line of precedents that reinforces the widespread assumption of the SEC's constitutional status as an independent agency. That consequence is hardly consistent with a reading of the decision as undercutting the constitutional foundations of such institutions.

Yet, there is even more. When the majority says that the removal mechanism whose constitutionality it is reviewing is rare, it is placing its credibility on the line.[90] More specifically, the Chief Justice has placed his credibility on the line in making this assertion. If in time he deviates from that assertion or the decision remains no longer unremarkable, as he has suggested, he will be vulnerable to the attack that he was not being candid in the opinion, that in fact he was being disingenuous. For a Chief Justice who is not yet sixty and thus likely to be on the Court for at least a few decades more, it is hard to believe that he would be so cavalier about one of the most important aspects of his legacy. Chief Justice Roberts cast the fifth vote to save the constitutionality of the Affordable Care Act,[91] at least in part because he did not want its overturning to become part of and perhaps overshadow the rest of his legacy.[92] It is not unreasonable, therefore, to assume that in *Free Enterprise Fund* he would have been equally concerned about his legacy. If so, he would not have blithely cast aside the dissent's charge that the decision was a threat to hundreds, if not thousands, of organizational arrangements within the administrative state.

Put slightly differently, the point is that the Chief Justice has more to lose than the dissent. If the dissent were proven wrong, then the administrative state remains largely intact and the Court has continued along its long path of accepting the constitutionality of independent agencies and not endorsing the robust theory of the unitary executive. If the Chief Justice were proven wrong, then his credibility is shot, his legacy has been

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[88] *See id.* at 3148–49.

[89] *See id.*; *see also* MFS Sec. Corp. v. SEC, 380 F.3d 611, 619 (2d Cir. 2004) (citing Blinder, Robinson & Co. v. SEC, 837 F.2d 1099 (D.C. Cir. 1988)); SEC v. Blinder, Robinson & Co., 855 F.2d 677, 681 (10th Cir. 1988). *But see* Note, *The SEC Is Not an Independent Agency*, 126 HARV. L. REV. 781 (2013).

[90] *See Free Enter. Fund*, 130 S. Ct. at 3161.

[91] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

[92] *See, e.g.*, Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBSNEWS (July 1, 2012, 1:29 PM), http://www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law ("Roberts pays attention to media coverage. As Chief Justice, he is keenly aware of his leadership role on the court, and he also is sensitive to how the court is perceived by the public."); *see also* JEFFREY TOOBIN, THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT 286–91 (2012) ("As chief justice, Roberts felt obligated to protect the institutional interests of the Court, not just his own philosophical agenda.").

diminished because of it, and administrative law as all of us (including Charles Koch) have known it has been radically altered.

It is, however, a mistake to think that the former claim must be wrong because otherwise it would have made no sense for the Chief Justice to do what he did in the case, i.e., the Chief Justice must have had some ulterior purpose for going out of his way to address the constitutional issue of removal because there is no actual statute or law that had provided for it. The claim, in other words, might be that the majority deliberately overreached in order to drive a nail into the coffin of independent agencies. The problem is that every Justice agreed that the constitutionality of a double for-cause removal mechanism was an issue in the case because the parties had agreed to stipulate to the nature of the board members' constitutional stature (as inferior officers) and to the means by which they could be removed.[93] It would have been extraordinary for the Court to reject the parties' stipulations.

The final question is whether scholars have been candid in their readings of *Free Enterprise Fund*. Legal scholarship, of course, has quite different objectives than judicial decisionmaking. Scholars are usually pretty good about declaring their objectives, but many, if not most, of these are rather broad. Even the critique of the decision in a particular case might not necessarily be a narrow objective, for the critique might aim, inter alia, to clarify the entire field in which the case has arisen. This is true for much of the criticism of *Free Enterprise Fund*, in which case scholars should be candid in disclosing the assumptions, biases, and values that have driven their critiques of the case.[94] Candor in scholarship, particularly in speaking truth to power as Charles Koch did throughout his career, requires openly addressing the extent to which (and why), for example, we agree, or disagree, with Aziq Huq that constitutional issues relating to the scope of the President's removal power are political questions;[95] that we are formalists or functionalists in analyzing separation of powers issues;[96] whether we think Congress is the most dangerous branch and thus should be tamed by the President and the courts; and that we embrace the theory of the unitary executive. Perhaps most importantly, we should acknowledge or discuss the extent to which we trust (and thus are prepared to defer to) judicial review and the independence of administrative agencies.

CONCLUSION

In a symposium devoted to elucidating the scholarship of the late administrative scholar Charles Koch, we have rightfully considered the significance of his influence, impact, and insights in the field. In closing, I wish to suggest we consider as well the influence and impact of his character. I cannot separate Charles the scholar from

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[93] *Free Enter. Fund*, 130 S. Ct. at 3148–49.

[94] *See supra* Part II.

[95] Aziz Z. Huq, *Removal As a Political Question*, 65 STAN. L. REV. 1 (2013).

[96] *See* Strauss, *supra* note 30.

Charles the family man and friend, and I consider the candor that he embodied and exemplified to be one of his most influential and enduring legacies. The candor that he demanded from agencies, courts, scholars, and ultimately from himself and each of us as scholars requires a level of honesty and integrity that we can only hope to approximate but never cease to hold as an ideal that will make everything we do as scholars, if not as people, more meaningful.

Therefore, I cannot close without candidly acknowledging a debt that I have owed to Charles. In the spring of 1994, my father died. When he died, there were only a couple classes left to teach in my Federal Jurisdiction class, and I still had to finish writing my final, but I could have taught those classes and finished and administered the final and attend his funeral and be with my family. But, it did not matter. Charles stepped up, told me to go, and assured me that he would take care of everything. And he did. He taught the last part of the class, cleaned up my final, and administered it. When I returned weeks later, all of my finals were waiting for me, neatly stacked on my desk, along with a condolence card signed by everyone in the class. Charles never said a word; that was his way. I think I thanked him, but I am not sure I ever thanked him enough. There is, in fact, really no way to properly thank someone for such kindness, and there is, of course, no need to thank a friend for the gift that he gave me. It was the gift of time and the opportunity to begin to achieve some peace at what was then (and still is) among the most difficult crossroads a son ever has to cross. I owe Charles for that. Not a day passes when I do not thank him for that—and for a thousand kindnesses for which I might not have adequately thanked him, but for which, in all candor, both my family and I remain grateful and remember fondly every day.