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AGENCY SELF-FUNDING IN THE ANTINOVELTY AGE

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INTRODUCTION

The Fifth Circuit Court of Appeals grabbed the headlines[1] when it held that the Consumer Financial Protection Bureau's (CFPB) funding structure violates the Constitution[2]—specifically, "the separation of powers embodied in the Appropriations Clause."[3] The case, *Community Financial Services Association of America v. CFPB (CFSA)*, is the first of its kind.[4] It is the first time a court has deemed the CFPB's funding structure unconstitutional.[5] In fact, by one account, it is the first time ever that any court has held that congressional action (by passing the CFPB's organic statute, in this case) has violated the Appropriations Clause.[6]

The CFPB's funding structure is notable because the agency does not receive its funding from the congressional appropriations process like most agencies do.[7] Rather, the CFPB is self-funding.[8] But

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1. *See, e.g.*, Stacy Cowley, *Appeals Court Finds Consumer Bureau's Funding Unconstitutional*, N.Y. TIMES (Oct. 20, 2022), https://www.nytimes.com/2022/10/20/business/consumer-bureau-funding-unconstitutional.html [https://perma.cc/F8ER-SNKP].

2. *See* Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB (*CFSA*), 51 F.4th 616, 638-42 (5th Cir. 2022).

3. *Id.* at 640; *see also id.* at 642 ("The Bureau's funding apparatus cannot be reconciled with the Appropriations Clause and the clause's underpinning, the constitutional separation of powers."). *See generally* U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law[.]").

4. *See CFSA*, 51 F.4th at 641.

5. *See, e.g.*, *id.* ("[E]very court to consider [the CFPB's] funding structure has deemed it constitutionally sound.... But carefully considering those decisions, we must respectfully disagree with their conclusion." (footnote omitted)). The Second Circuit and D.C. Circuit are the only other federal courts of appeal to decide this issue, both deeming the CFPB's funding structure constitutional. *See* CFPB v. Law Offs. of Crystal Moroney, P.C., 63 F.4th 174, 181-83 (2d Cir. 2023); PHH Corp. v. CFPB, 881 F.3d 75, 95-96 (D.C. Cir. 2018). For a collection of district court cases upholding the CFPB's funding structure, see *CFSA*, 51 F.4th at 641 n.15.

6. *See* Petition for A Writ of Certiorari at 2, CFPB v. Comm. Fin. Servs. Ass'n of Am., Ltd., 2022 WL 16951308, at *5 (U.S.) ("No other court has ever held that Congress violated the Appropriations Clause by passing a statute authorizing spending.").

7. *E.g.*, *CFSA*, 51 F.4th at 638 ("While the great majority of executive agencies rely on annual appropriations for funding, the Bureau does not."); *see also* 12 U.S.C. § 5497(a).

8. *See* 12 U.S.C. § 5497(a). The CFPB receives its funding from the Federal Reserve System. *See id. See generally* Charles Kruly, *Self-Funding and Agency Independence*, 81 GEO. WASH. L. REV. 1733 (2013). Distinguish "self-funded" agencies—i.e., agencies that (1) receive funding from non-congressional sources and (2) may use said funds without further congressional approval—from agencies that have the power to levy fines to fund their operations but may only use those funds in an amount Congress authorizes. *See id.* at 1735 n.6 (contrasting

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it is not the only agency Congress has chosen to exempt from the normal appropriations process.[9] Congress has done the same with the Federal Reserve,[10] Office of the Comptroller of the Currency (OCC),[11] Federal Deposit Insurance Corporation (FDIC),[12] National Credit Union Administration (NCUA),[13] Federal Housing Finance Agency (FHFA),[14] Public Company Accounting Oversight Board (PCAOB),[15] Farm Credit Administration (FCA),[16] and Office of Financial Research (OFR),[17] among others.[18] By not having to go through the appropriations process to get their funding, these agencies can largely go about their business without needing to bend to partisan, political pressures from Congress.[19]

The natural follow-up question to this information: What does the Fifth Circuit's decision mean for the constitutionality of these other self-funded agencies' structures? Academics have expressed concerns over the potential broad reach of the *CFSA* opinion to apply to (and strike down) appropriations-exempt agencies beyond the CFPB.[20] But this is not just an academic exercise. Other self-funded agencies themselves have the exact same worry, as the Inspector General for the FDIC expressed in an internal memorandum.[21]

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the CFPB and the Federal Communications Commission as respective examples of each).

9. *See id.* at 1735-36.

10. *See* 12 U.S.C. §§ 248(s)(3), 248(a).

11. *Id.* § 16.

12. *See id.* §§ 1815, 1820.

13. *Id.* § 1755.

14. *Id.* § 4516.

15. 15 U.S.C. § 7219.

16. 12 U.S.C. § 2250.

17. *Id.* § 5345.

18. For example, Federal Prison Industries, Inc., and the Bureau of Engraving and Printing are also self-funded. *See* Eric Pearson, *A Brief Essay on the Constitutionality of the Consumer Financial Protection Bureau*, 47 CREIGHTON L. REV. 99, 109 n.64 (2013).

19. *See, e.g.*, Kruly, *supra* note 8.

20. *See, e.g.*, *Peter Conti-Brown on the Legal and Regulatory Issues Facing the Fed and Financial Markets*, MERCATUS CTR. AT GEO. MASON UNIV. (Feb. 27, 2023), https://www.mercatus.org/macro-musings/peter-conti-brown-legal-and-regulatory-issues-facing-fed-and-financial-markets [https://perma.cc/9TD7-GWDR] [hereinafter *Peter Conti-Brown*] ("[I]f the CFPB's budgetary autonomy falls, then the Fed's should fall immediately thereafter and that would be catastrophic."); Adam J. Levitin, *Those Seeking to Bring Down the CFPB Should Be Careful What They Wish For*, AM. BANKER (Oct. 28, 2022, 10:38 AM), https://www.americanbanker.com/opinion/those-seeking-to-bring-down-the-cfpb-should-be-careful-what-they-wish-for [https://perma.cc/MLX7-8F2G].

21. *See* Tyler Smith, *Top Management and Performance Challenges Facing the Federal*

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The stakes are only getting higher. The Supreme Court granted certiorari in the *CFSA* case.[22] Post-certiorari grant, the debate rages on between the circuit courts.[23] The Second Circuit, confronting the same challenge to the CFPB's funding structure, explicitly "declin[ed] to follow the Fifth Circuit's decision."[24] The Supreme Court has since heard argument in *CFSA*,[25] and an opinion is soon to come. All self-funded agencies are waiting with bated breath.[26]

This Article examines the Fifth Circuit's *CFSA* decision and the potential for its rationale to reach other self-funded agencies.[27] Most importantly, though, this Article unpacks the lurking—and animating—element of the *CFSA* opinion: antinovelty.[28] For those unfamiliar, antinovelty is the idea that a statute is more likely to be unconstitutional (as violative of federalism or the separation of powers, for example) if there is a lack of history of Congress passing similar statutes.[29] (The premise itself is dubious, but that is an issue for another day.[30]) In the agency structure context, specifically, the

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Deposit Insurance Corporation, FED. DEPOSIT INS. CORP. OFF. OF INSPECTOR GEN. 39 (Feb. 16, 2023), https://www.fdicoig.gov/sites/default/files/reports/2023-02/TMPC%20Final%202-16-23_0.pdf [https://perma.cc/75QS-SRX5] ("There is a risk that the Fifth Circuit's ruling could also be applied to the FDIC.").

22. *See* CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd., No. 143 S. Ct. 978, 978 (U.S. 2023).

23. *E.g.*, CFPB v. Law Offs. of Crystal Moroney, P.C., 63 F.4th 174, 181-83 (2d Cir. 2023).

24. *Id.*

25. *See Consumer Financial Protection Bureau v. Community Financial Services Association of America, Limited*, SCOTUSBLOG, https://www.scotusblog.com/case-files/cases/consumer-financial-protection-bureau-v-community-financial-services-association-of-america-limited/ [https://perma.cc/96Q6-8KUU].

26. *See, e.g.*, Sam Sutton, *The FDIC Is also Sweating the CFPB's Supreme Court Case*, POLITICO (Feb. 28, 2023, 8:00 AM), https://www.politico.com/newsletters/morning-money/2023/02/28/the-fdic-is-also-sweating-the-cfpbs-supreme-court-case-00084688 [https://perma.cc/BF5D-YPZV].

27. *See infra* Parts I-II.

28. *See infra* Part III; *see also* Ian Millhiser, *The Supreme Court Will Decide if a Whole Federal Agency Is Unconstitutional*, VOX (Feb. 27, 2023, 9:32 AM), https://www.vox.com/politics/2023/2/27/23613506/supreme-court-federal-agency-unconstitutional-cfpb-consumer-protection [https://perma.cc/Y7FR-2NPK] (noticing antinovelty's prominence in the *CFSA* opinion).

29. *See* Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1410-11 (2017).

30. Professor Leah Litman convincingly debunks the anitnovelty principle in her aptly titled article. *See id.* at 1407-08, 1491. It is well worth a read in full, but here is a high-level summary of her argument:

> The idea that legislative novelty is a sign that a statute is unconstitutional primarily rests on the mistaken Madisonian premise that Congress reliably exercises the full scope of its constitutional powers and that prior Congresses'

Supreme Court has said that novelty (that is, novelty in an agency's organic statute) is "[p]erhaps the most telling indication of [a] severe constitutional problem" with an agency's structure.[31]

This Article demonstrates that *CFSA*'s introduction of antinovelty into the self-funding space, including its particular antinovelty approach, poses an existential threat to any and all agency self-funding. On its face, this may seem like something that will only worry the more functionalist or more liberal crowd—likely because so much of the recent discussion surrounding agency self-funding has revolved around the polarizing CFPB.[32] But even those who might want the CFPB struck down and those who subscribe to the antinovelty rationale as a general matter (between those two camps there is surely significant overlap) may not wish to call into question the constitutionality of all self-funding. The CFPB has long caught conservative ire, to be sure, but Republicans have staunchly defended the budgetary autonomy of agencies like the OCC and the FHFA.[33] For every congressional conservative ready to hold up the CFPB's consumer protection mission if it lost its insulation from the appropriations process, one would imagine there exists a congressional progressive willing to do the same with the missions of the OCC and FHFA. Antinovelty's malleable methodology makes it such that no self-funded agency will be safe from the rationale's wrath.[34] It may start with the CFPB, but it will get to your favorite agency soon

> failure to enact a statute shows that prior Congresses assumed that the statute was unconstitutional. But there are myriad reasons why Congress does not enact statutes: enacting federal laws is difficult—in part because of constitutional requirements—and Congress legislates in response to existing conditions, which change over time. There are also many reasons why Congress may not innovate and why Congress may not have enacted every constitutionally permissible means of regulation.

Id. at 1407-08; *accord* Mistretta v. United States, 488 U.S. 361, 385 (1989) ("Our constitutional principles of separated powers are not violated ... by mere anomaly or innovation.").

31. Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2201 (2020) (alteration in original) (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 505 (2010)).

32. *See, e.g.*, Kruly, *supra* note 8, at 1735 ("[The CFPB] brought to the forefront the subject of agency self-funding, a topic previously relegated to passing scholarly references rather than front-page news." (footnotes omitted)).

33. *See* Arthur E. Wilmarth, Jr., *The Financial Services Industry's Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31 REV. BANKING & FIN. L. 881, 914-19, 953-56 (2012).

34. *See infra* Part III.

enough. This unworkability is dangerous and leads to the inescapable conclusion that the Supreme Court must expel the rationale from the agency self-funding context when it decides this case.

I. THE *CFSA* CASE—DOWN GOES THE CFPB

The Fifth Circuit held that the CFPB's funding structure violates "the Appropriations Clause and the clause's underpinning, the constitutional separation of powers."[35] In reaching its decision, the panel homed in on three specific features of the CFPB's structure.[36]

The first feature was the "perpetual self-directed, double-insulated" nature of the CFPB's funding mechanism.[37] Working backwards, the "double-insulation" comes from the fact that the CFPB receives its funding from the Federal Reserve System.[38] The CFPB's budgetary independence from the congressional appropriations process is insulation layer one; the Federal Reserve's own budgetary independence is insulation layer two.[39] Through this "unprecedented" double insulation, the panel explained, Congress surrendered both its *"direct"* and *"indirect control"* over the CFPB's budget.[40]

The funding is "self-directed" because the CFPB Director is the one who determines the number "reasonably necessary" for the Bureau to carry out its functions (within a statutory limit) and requests that amount from the Federal Reserve.[41]

The "perpetual" issue comes from the fact that the funds the CFPB acquires from the Federal Reserve remain "permanently available" to the CFPB until it spends them, meaning the CFPB "may 'roll over' the self-determined funds it draws *ad infinitum*" (as contrasted to the Federal Reserve which must remit any of its

35. Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB (*CFSA*), 51 F.4th 616, 642 (5th Cir. 2022).

36. *See id.* at 631, 641-42.

37. *Id.* at 641.

38. *Id.* at 638-39.

39. *Id.* The Federal Reserve receives its funding from assessments it levies on banks and on interest earned on the securities it owns. *Id.* at 638 n.13 (citing 12 U.S.C. § 243).

40. *Id.* at 638-39.

41. *See id.* at 638, 641 (citing 12 U.S.C. § 5497(a)). Additionally, the account that houses the funds the Bureau receives from the Federal Reserve is "under the control of the Director." *Id.* at 639 (citing 12 U.S.C. § 5497(c)(1)).

surplus funds back to the Treasury).[42] Further aggravating the "perpetual" issue for the panel was the CFPB's "express exemption from congressional review of its funding."[43] For one, the CFPB's enabling statute explicitly states that the CFPB's funds are not "Government funds or appropriated monies."[44] Additionally, the statute states that the funds are "not ... subject to review" by the congressional appropriations committees.[45] All this raises accountability concerns, offensive to separation of powers principles.[46]

The panel then turned to two other structural features that "exacerbate[d] the constitutional problem [ ] arising from the [CFPB's] budgetary independence."[47] One is the CFPB's "plenary regulatory authority."[48] The other is the fact that the CFPB is led by a single agency head removable at-will by the President.[49] Having an agency

42. *See id.* at 639.

43. *See id.*

44. *Id.* (quoting 12 U.S.C. § 5497(c)(2)); 12 U.S.C. § 5497(c)(2) ("Funds obtained by or transferred to the Bureau Fund shall not be construed to be Government funds or appropriated monies.").

45. *CFSA*, 51 F.4th at 639 (quoting 12 U.S.C. § 5497(a)(2)(C)); 12 U.S.C. § 5497(a)(2)(C) ("[F]unds derived from the Federal Reserve System ... shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate.").

46. *See CFSA*, 51 F.4th at 639-40 ("The Bureau's perpetual insulation from Congress's appropriations power, including the express exemption from congressional review of its funding, renders the Bureau no longer dependent and, as a result, no longer accountable to Congress and, ultimately, to the people." (internal quotation marks omitted)).

47. *Id.* at 640 (quoting CFPB v. All Am. Check Cashing, Inc., 33 F.4th 218, 234 (5th Cir. 2022) (Jones, J., concurring)).

48. *Id.* at 641-42 (quoting Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2202 (2020)); *see id.* at 640 ("The constitutional problem is more acute because of the Bureau's capacious portfolio of authority.").

49. *See id.* at 640. Those familiar with the CFBP's seemingly perpetual slog through the court system can see the irony in the *CFSA* panel's reliance on this fact. Originally, the President could only remove the CFPB Director for good cause. *See* 12 U.S.C. §§ 5491(c)(3) (allowing the President to remove the Director from office only for "inefficiency, neglect of duty, or malfeasance in office"). In *Seila Law v. CFPB*, however, the Supreme Court struck down the removal protection as violative of the separation of powers (for taking too much power away from the President) in part because of the CFPB's budgetary independence. *See* 140 S. Ct. 2183, 2204, 2223 (2020) ("The CFPB's receipt of funds outside the appropriations process further aggravates the agency's threat to Presidential control.... This financial freedom makes it even more likely that the agency will slip from the Executive's control, and thus from that of the people." (internal quotation marks omitted)). But now, that budgetary independence violated the separation of powers in part because of the CFPB Director's amenability to presidential control through at-will removal. *See CFSA*, 51 F.4th at 640, 642. If the good-cause removal limitation was still there, would there be enough separation from the president for the budgetary independence to comport with the separation of powers?

with this budgetary autonomy headed by a Director with no removal protection "is *the epitome* of the unification of the purse and the sword in the executive."[50] Such unification runs afoul of Framing-era understanding of the separation of powers.[51]

No single structural component of the CFPB alone evidences unconstitutionality—rather, it is only when the three features the panel highlighted are "[t]aken together" that the CFPB's funding mechanism amounts to a separation of powers violation.[52]

Without the budgetary independence, might the extra insulation from presidential removal have survived the Article II challenge? *Cf.* Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1115 (2021) ("[I]n *Seila*, appropriations were treated as a sideshow.... [T]he Court only mentioned the impact of the CFPB's budgetary independence on the President. It never considered whether making the CFPB Director removable at will—and thus giving the President broad control over an agency that operates independent of Congress's budgetary constraints—would raise separation of powers concerns of its own.").

50. *CFSA*, 51 F.4th at 640.

51. *See id.* ("[U]nification of the purse and the sword in the executive [is] an abomination the Framers warned would destroy that division of powers on which political liberty is founded." (internal quotation marks omitted)).

52. *See id.* at 641-42 ("Taken together, the Bureau's express insulation from congressional budgetary review, single Director answerable to the President, and plenary regulatory authority combine to render the Bureau an innovation with no foothold in history or tradition.... The Bureau's funding apparatus cannot be reconciled with the Appropriations Clause and the clause's underpinning, the constitutional separation of powers." (internal quotation marks omitted)). Admittedly, dissecting the opinion is challenging, *see, e.g.*, Millhiser, *supra* note 28 (describing the opinion, accurately, as "difficult to parse"), but there is a part of the opinion that sounds as if the panel is reaching a different decision that *does* turn on a single fact. At one point, the panel seems to suggest that Congress, in enacting the CFPB's organic statute, explicitly violated *the text* of the Appropriations Clause—as opposed to contravening the *spirit of* the Appropriations Clause by violating the Constitutional separation of powers. The panel wrote that "[a] law alone does not suffice" to satisfy the Appropriations Clause's text, rather, "an *appropriation* is required." *CFSA*, 51 F.4th at 640. (That begs the question of what it takes for something to be an "appropriation" in the constitutional sense, but that is beyond the scope of this Article.) Any confusion stemming from this statement seems attributable more to rhetorical flourish than anything else. If the Fifth Circuit meant precisely what it said there, then all self-funded agencies would be unconstitutional on that fact alone. There would be no reason for the panel to have made the effort it did to distinguish the CFPB from other self-funded agencies. *See CFSA*, 51 F.4th at 641-62 (explaining how "[e]ven among self-funded agencies, the [CFPB] is unique"). Nor, for that matter, would there have been any reason to consider the CFPB's regulatory authority nor its single-director structure (nor any other fact besides the fact that it receives funding from the Federal Reserve and not from normal appropriations). *See id.* at 639-40. Based on that (and on most of the opinion's characterizations of the constitutional issue), this Article treats the sole constitutional violation here as one of the separation of powers (as realized in the Appropriations Clause). *See id.* at 623 ("Congress's decision [to structure the CFPB how it did] violates the Constitution's structural separation of powers."); *id.* at 640 ("Congress ran afoul of the separation of powers embodied in the Appropriations Clause."); *see also id.* at 637

Notably, though, the panel left open the question of precisely where the self-funding separation-of-powers line lies.[53]

Significant for present purposes, these three features set the CFPB apart from the other self-funded agencies.[54] According to the panel, the CFPB's perpetual double-insulation from appropriations "goes a significant step further" than the budgetary independence other self-funded agencies possess.[55] And no other appropriations-exempt agency can exercise regulatory and enforcement authority throughout the economy "remotely comparable" to that of the CFPB.[56] These elements, along with the CFPB's single Director removable at-will, combine to make the CFPB "unique" among self-funded agencies and "an innovation with no foothold in history or tradition."[57]

These distinctions carried the day in the Fifth Circuit, but the panel's review of the non-CFPB self-funded agencies' structures was nothing more than cursory.[58] The next Part takes a deeper dive into the enabling statutes of other appropriations-exempt agencies to see how their structures score against the *CFSA* panel's rubric.

II. THE *CFSA* RATIONALE BEYOND THE CFPB

The *CFSA* panel invoked the CFPB's (1) perpetual double-insulation from the appropriations process, (2) broad regulatory authority, and (3) single Director removable at will to distinguish it

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(discussing the Appropriations Clause's "role as a bulwark of the Constitution's separation of powers" (internal quotation marks omitted)). This is in line with how other courts have construed *CFSA*'s constitutional holding. *See* CFPB v. Law Offs. of Crystal Moroney, P.C., 63 F.4th 174, 181-82 (2d Cir. 2023); CFPB v. CashCall, Inc., 2023 WL 2009938, at *2 (C.D. Cal. Feb. 10, 2023).

53. *See CFSA*, 51 F.4th at 639 ("*Wherever the line between a constitutionally and unconstitutionally funded agency may be*, this unprecedented arrangement crosses it." (emphasis added)).

54. *See id.* at 641-42.

55. *Id.* at 641.

56. *Id.*

57. *Id.* at 641-42 ("Even among self-funded agencies, the Bureau is unique.... [T]he Bureau's express insulation from congressional budgetary review, single Director answerable to the President, and plenary regulatory authority combine to render the Bureau an innovation with no foothold in history or tradition." (internal quotation marks omitted)).

58. To support the factual propositions distinguishing the CFPB from other agencies (other than the Federal Reserve), the panel cited one law review note and one concurrence from another Fifth Circuit case. *See id.* at 641.

from other agencies possessing budgetary autonomy. One could (and the Second Circuit did) resist the persuasiveness of these considerations in a separation of powers analysis,[59] but taking the Fifth Circuit's rationale on its face and methodically unpacking it is necessary because the Supreme Court could canonize it when it decides this case. For that reason, this Part talks the Fifth Circuit talk and addresses each distinction in turn.

A. "Perpetual Self-Directed, Double-Insulated" Funding

Quite the mouthful, this element splits up into three distinct analyses: perpetual insulation (including exemption from congressional review), budget "self-direct[ion]," and double-layered insulation.

The perpetual prong itself contains multitudes. The first aspect, which the *CFSA* panel's explicit contrast between the CFPB and Federal Reserve reveals, is that there is a separation of powers problem when a self-funded agency's organic statute allows the agency to keep surplus funds in an appropriations-insulated location.[60] In other words, the issue would arise when an agency keeps its surplus funds on its own books or on another self-funded agency's books (like how the CFPB keeps its excess funds in the Federal Reserve).[61] Admittedly, it is challenging to pinpoint precisely what triggers this problem,[62] but it seems that no other self-funded agency's statute creates it. The Federal Reserve, FCA, NCUA, OCC, and OFR all house their excess funds in the Treasury.[63] The FDIC remits excess funds to regulated entities, which seems to be a functional equivalent for separation of powers

59. *See* CFPB v. Law Offs. of Crystal Moroney, P.C., 63 F.4th 174, 181-83 (2d Cir. 2023) ("[W]e respectfully decline to follow the Fifth Circuit's decision in *CFSA*.").

60. *See CFSA*, 51 F.4th at 639 ("[T]he Federal Reserve at least remains tethered to the Treasury by the requirement that it remit funds above a statutory limit, [but] Congress cut that tether for the [CFPB].... *[C]ontra* the Federal Reserve, the [CFPB] may 'roll over' the self-determined funds it draws *ad infinitum*." (internal citations omitted)).

61. *See id.*

62. *Cf. Peter Conti-Brown*, *supra* note 20 ("[T]he Fifth Circuit's attempt to distinguish the Fed from the CFPB is incoherent.").

63. *See CFSA*, 51 F.4th at 639 (Federal Reserve); 12 U.S.C. § 2250(b)(1) (FCA); *id.* § 1755(d) (NCUA); *id.* § 16 (OCC); *id.* § 5345(a)(1)-(2) (OFR).

purposes.[64] The FHFA does both.[65] The funds the PCAOB collects from assessing monetary penalties, beyond that used to cover its own expenses, go toward a merit scholarship program, which also seems like it does not generate the same separation of powers issue the CFPB's arrangement does.[66] So, this aspect of the distinction holds up.

The second aspect of this distinction—the exemption from congressional review aspect—does not fare as well. The language in the CFPB's statute that its funds "shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate"[67] technically goes unmatched,[68] but the PCAOB's statute does contain a seemingly analogous admonition that "[n]othing ... shall be construed to render" the PCAOB "subject to procedures in Congress to authorize or appropriate public funds."[69] However, the CFPB is decidedly not the only self-funded agency whose statute specifies that its funds are not "Government funds [n]or appropriated monies."[70] Only the NCUA's organic statute lacks such language.[71] The Federal Reserve, OCC, FHFA, FCA, FDIC, OFR, and PCAOB, on the other hand, all bankroll themselves with

64. *See id.* § 1817(e)(1)-(2).

65. *See* 12 U.S.C. § 4516(a)(3), (e). Pursuant to these subsections, the Director is to use excess funds to maintain "a working capital fund," *id.*, which appears to be part of the FHFA's "Fund Balance with Treasury," *see* FED. HOUSING FIN. AGENCY, FY 2023 PERFORMANCE AND ACCOUNTABILITY REPORT 93 (Note 2) (2023), https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/FHFA-2023-PAR.pdf [https://perma.cc/T7YX-LHF6], which, one would imagine, is housed in the Treasury. If the excess funds are beyond "the amount the Director deems necessary to maintain a working capital fund," "the Director shall remit to each regulated entity any [such] amount." 12 U.S.C. § 4516(e).

66. *See* 15 U.S.C. § 7219(c).

67. 12 U.S.C. § 5497(a)(2)(C).

68. *See id.* § 243 (Federal Reserve); *id.* § 16 (OCC); *id.* § 1811, et seq. (FDIC); *id.* § 1755 (NCUA); *id.* § 4516 (FHFA); 15 U.S.C. § 7219 (PCAOB); 12 U.S.C. § 2250 (FCA); *id.* § 5345 (OFR).

69. 15 U.S.C. § 7219(j).

70. 12 U.S.C. § 5497(c)(2); *see supra* note 44 and accompanying text.

71. *See* 12 U.S.C. § 1755.

statutorily-blessed "[n]ongovernment funds"[72] and/or "[un]appropriated monies,"[73] just like the CFPB.

The "self-directed" prong does little screening. Excepting those of the PCAOB and OFR, all self-funded agency heads direct the amount of funding their agency receives all by themselves. For example, the NCUA funds its operations by levying fees on federal credit unions.[74] By statute, the agency's head, the NCUA Board, determines the amount those credit unions must pay.[75] The Federal Reserve, OCC, FDIC, FCA, and FHFA all similarly determine their own budgets.[76] The PCAOB's deviation from this is slight; its Board still determines the agency's budget, but the Board's determination must be approved by the Securities and Exchange Commission (SEC) (a sort of supervised self-direction).[77] The OFR deviates completely; its organic statute vests the responsibility to establish its assessment schedule not in the OFR's Director, but in the Secretary of the Treasury.[78]

The CFPB's double insulation from the appropriations process is unique. No other self-funded agency receives its funding from another self-funded agency year on year. The OCC, FHFA, FDIC, NCUA, PCAOB, and OFR finance their operations primarily through assessments and fees levied on regulated entities;[79] the

72. *Id.* § 2250(b)(2) ("Nongovernment funds[:] The funds contained in the [FCA's] Expense Account shall not be construed to be Federal Government funds or appropriated moneys."); *see id.* § 1467(i)(2) (FDIC's funds "not ... Government or public funds"); *id.* § 5345(b)(2) (OFR's funds not "Government funds"); *id.* § 4516(f)(2) (FHFA's funds not "Government or public funds"); *id.* § 16 (OCC's funds not "Government funds"); *id.* § 244 (Federal Reserve's funds not "Government funds"); 15 U.S.C. § 7219(c)(1) (PCAOB's funds not "public monies of the United States").

73. 12 U.S.C. § 16 ("[The OCC's] funds shall not be construed to be ... appropriated monies."); *see id.* § 5345(b)(2) (OFR's funds not "appropriated moneys"); *id.* § 244 (Federal Reserve's funds not "appropriated moneys"); *id.* § 2250(b)(2) (FCA's funds not "appropriated moneys"); *id.* § 4516(f)(2) (FHFA's funds not "appropriated money").

74. *See id.* § 1755.

75. *See id.* § 1755(a)-(b) ("In accordance with rules prescribed by the Board, each Federal credit union shall pay to the Administration an annual operating fee.... *The fee assessed under this section shall be determined according to a schedule, or schedules, or other method determined by the Board* to be appropriate." (emphasis added)).

76. *See id.* § 244 (Federal Reserve); *id.* § 16 (OCC); *id.* § 1817(b)(2)(a) (FDIC); *id.* § 2250(a)(1) (FCA); *id.* § 4516(a) (FHFA).

77. *See* 15 U.S.C. § 7219(b)—(d)(1).

78. *See* 12 U.S.C. § 5345(d). Additionally, the statute requires the Financial Supervisory Oversight Council approve that schedule. *See id.*

79. *See About Us*, OFF. OF THE COMPTROLLER OF THE CURRENCY, https://www.occ.treas.gov/

FCA funds its operations by selling debt securities;[80] and the Federal Reserve receives funding both from earnings made on securities it owns and through levying assessments[81]—all paltry single insulation. The only two agencies that move anywhere closer toward the CFPB's double insulation are the PCAOB and the OFR. Again, the PCAOB must receive budgetary approval from the SEC,[82] a distinct independent agency (though not budgetarily so).[83] A definite stretch, one could argue that this is a sort of double insulation that "carries with it a diffusion of [budgetary] accountability" that strains the separation of powers.[84] But, again, that is a stretch.

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about/index-about.html [https://perma.cc/SDF6-72GW] (OCC); FHFA Announces $545 Million for Affordable Housing Programs, FED. HOUSING FIN. AGENCY, https://www.fhfa.gov/Media/PublicAffairs/Pages/FHFA-Announces-545-Million-for-Affordable-Housing-Programs.aspx [https://perma.cc/XU7S-R6WT] (FHFA); *What We Do*, FED. DEPOSIT INS. CORP., https://www.fdic.gov/about/what-we-do [https://perma.cc/U2VY-C52H] (FDIC); *NCUA Money Watch*, NAT'L ASSN OF FED.-INSURED CREDIT UNIONS, https://www.nafcu.org/ncua [https://perma.cc/52XB-2R7C] (NCUA); *Accounting Support Fee*, PUB. CO. ACCT. OVERSIGHT BD., https://pcaobus.org/about/accounting-support-fee [https://perma.cc/89MT-48A9] (PCAOB); *Budget*, OFF. OF FIN. RSCH., https://www.financialresearch.gov/strategy-budget/ [https://perma.cc/9FCY-46U9] (OFR).

80. *See Our Structure*, FARM CREDIT, https://farmcredit.com/our-structure [https://perma.cc/XP5F-4GYX].

81. *See* Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB (*CFSA*), 51 F.4th 616, 638 n.13 (5th Cir. 2022).

82. *See* 15 U.S.C. § 7219(b) (PCAOB funding).

83. The SEC is independent in the sense that its commissioners are insulated from presidential removal; they are removable only for "inefficiency, neglect of duty, or malfeasance in office." *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 477 (2010) (quoting Humphrey's Executor v. United States, 295 U.S. 602, 620 (1935)). The SEC does not possess budgetary independence; it has the power to levy fees, but it is limited in its use of those funds by what Congress allows via the appropriations process. *See* Kruly, *supra* note 8, at 1737 n.13.

84. *See Free Enter. Fund*, 561 U.S. at 497-98 ("[D]iffusion of power carries with it a diffusion of accountability.... Without a clear and effective chain of command, the public cannot determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall." (internal quotation marks omitted)). In *Free Enterprise*, the PCAOB Board's double insulation from presidential removal (the Board members were removable only for good cause by the SEC, whose commissioners are removable only for good cause by the President) created the "diffusion of accountability" which violated separation of powers. *See id.* Here, the argument would be that there is double insulation because the PCAOB's budget is overseen by a separate agency and ultimately (single) insulated from *two* branches of government—from Congress (due to the PCAOB's exemption from appropriations) and the Executive (because of the SEC Commissioners' removal protection).

The OFR is a more interesting case. For the first two years of its existence, it received funding directly from the Federal Reserve.[85] In other words, it enjoyed the exact same "double insulation from Congress's purse strings" that the CFPB does now.[86] But Congress's cession of both its "direct control" and "indirect control" over the OFR's budget[87] was only on an interim basis; Congress only cedes "direct control"[88] now that the OFR makes up its budget from fees and assessments like the rest.[89] Two years of double insulation is objectively distinguishable from (or, to use the panel's qualifier, is "a significant step" below[90]) the CFPB's ongoing double insulation. So, although the OFR puts up the strongest fight, the panel's double insulation distinction ultimately emerges unscathed.

B. Plenary Regulatory Authority

This element—whether any other self-funded agency possesses "remotely comparable" regulatory authority to that of the CFPB[91]—is objectively difficult to apply. Do not just take the author's word for it—the Supreme Court *itself* recently struggled with contrasting the regulatory reaches of the FHFA and (you guessed it) the CFPB.[92] And it makes sense why it is difficult: How does one

85. *See* 12 U.S.C. § 5345(c).

86. *See CFSA*, 51 F.4th at 639.

87. *See id.* at 638-39 (emphasis omitted).

88. *See id.* at 638.

89. *See* 12 U.S.C. § 5345(c)-(d).

90. *See CFSA*, 51 F.4th at 641.

91. *Id.* at 641 (quoting CFPB v. All Am. Check Cashing, Inc., 33 F.4th 218, 237 (5th Cir. 2022) (Jones, J., concurring)).

92. *See Collins v. Yellen*, 141 S. Ct. 1761, 1784 (2021) ("[T]he CFPB might be thought to wield more power than the FHFA in some respects. But the FHFA might in other respects be considered more powerful than the CFPB."). In fact, the *Collins* opinion lends itself to the argument that courts should not consider an agency's regulatory reach at all in a separation of powers inquiry. In *Collins*, the Supreme Court heard a separation of powers challenge to the FHFA Director's for-cause protection from presidential removal. *Id.* at 1775. To overcome the Court's decision in *Seila Law* (decided the prior term), *amici* sympathetic to the FHFA's (for-)cause attempted to distinguish the FHFA from the CFPB on the ground that the "the FHFA's authority is more limited than that of the CFPB" (and thus the removal restriction was less offensive to the separation of powers). *Id.* at 1784. Rejecting that line of argument, the *Collins* Court explained that "[c]ourts are not well-suited to weigh the relative importance of the regulatory and enforcement authority of disparate agencies, and we do not think that the constitutionality of removal restrictions hinges on such an inquiry." *Id.* at 1785. "Though *Collins* is not precisely on point" because "that case involved an unconstitutional removal

quantify an agency's regulatory authority to begin with? And even if everyone agrees on the metrics, when does an agency's regulatory power becomes so much that it becomes "remotely comparable"[93] to the CFPB's and causes a "constitutional [separation of powers] problem [to grow] more acute?"[94] Because these questions do not lend themselves to objective analysis,[95] this Article will avoid dragging its feet on this element and simply lay out both sides of the argument.[96]

The arguments that the CFPB is more powerful than other self-funded agencies differentiate the CFPB based on its "public-facing regulatory authority"[97] and "broad discretionary authorit[y]."[98] The CFPB's authority is "public-facing" because its statute empowers the agency to regulate "a broad array of individuals and institutions," whereas other self-funded agencies merely regulate a limited group of recurring players (businesses, banks, and other financial institutions).[99] And the CFPB's statute confers "a broad delegation

provision," it would make sense to "read its analysis as instructive for separation-of-powers cases more generally." *CFSA*, 51 F.4th at 642.

93. *CFSA*, 51 F.4th at 641.

94. *Id.* at 640.

95. *Cf.* Rucho v. Common Cause, 139 S. Ct. 2484, 2500-01 (2019) ("Any judicial decision on what is 'fair' in th[e partisan gerrymandering] context would be an 'unmoored determination' of the sort ... beyond the competence of the federal courts. And it is only after determining how to define fairness that you can even begin to answer the determinative question: 'How much is too much?' At what point does permissible partisanship become unconstitutional? ... Even assuming the court knew which version of fairness to be looking for, there are no discernible and manageable standards for deciding whether there has been a violation.").

96. This avoidance does not jeopardize this Part's "deep dive" status. After all, the *CFSA* opinion gives no argument explaining how the breadth of an agency's regulatory authority practically affects the separation of powers concerns budgetary autonomy implicates to accompany its assertion that more regulatory power makes the separation of powers impact worse. *See CFSA*, 51 F.4th at 640.

97. William Simpson, *Above Reproach: How the Consumer Financial Protection Bureau Escapes Constitutional Checks & Balances*, 36 REV. BANKING & FIN. L. 343, 367 (2016) ("[Other self-funded agencies] lack[ ] the CFPB's public-facing regulatory authority.").

98. Pearson, *supra* note 18, at 109-10 ("[Other] self-funded agencies ..., unlike the CFPB, ... [l]ack[ ] broad discretionary authorities.").

99. *See* Simpson, *supra* note 97, at 368 ("The CFPB stands in sharp contrast to each of these limited institutional jurisdictions [of the other self-funded agencies]. Instead, it wields power over 'any person' who violates its consumer finance rules. The CFPB assumes power from eighteen enumerated consumer financial protection laws to enforce them against a broad array of individuals and institutions." (footnote omitted)); *see also* Pearson, *supra* note 18, at 110 ("The foci of [other self-funded] agencies are comparatively narrow.").

of discretionary policymaking authority" to the agency, but the other appropriations-exempt agencies "engage essentially in tasks of management rather than in policymaking, ... [l]acking broad discretionary authorities."[100]

On the other side of the argument, there is an obvious ace to play in undercutting the contention that the CFPB is stronger than every other self-funded agency: the Federal Reserve. More than just "remotely comparable" to the CFPB, the Federal Reserve is arguably the most powerful agency in the federal government,[101] if not one of the most powerful institutions in the entire country.[102] The assertion that the authority the CFPB can exercise throughout the economy exceeds that of the Federal Reserve is objectively difficult to accept.[103]

There are facts that undercut this contention with respect to other self-funded agencies as well. For example, the Supreme Court specifically laid out two reasons why the FHFA could be seen to possess comparable power to the CFPB, both applicable to other agencies possessing budgetary independence. First, "the CFPB's rulemaking authority is more constricted" because the Financial Stability and Oversight Council can veto the CFPB's final rules.[104] "No board or commission can set aside the FHFA's rules,"[105] nor any other self-funded agencies' rules.[106] And comparable to the CFPB's

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100. *See* Pearson, *supra* note 18, at 106, 110.

101. *See, e.g.*, Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 523 (2000) ("It is difficult to conceive of an administrative agency with more power and more political independence than the Fed."); Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 HARV. L. REV. 1822, 1836 (2012) [hereinafter *Independence, Congressional Weakness*] ("[The Federal Reserve is] arguably the most powerful independent agency.").

102. *See* John O. McGinnis, *Comparing the Court and the Fed: Democratic Dilemmas of Elite Institutions*, 57 WAKE FOREST L. REV. 173, 175 (2022) ("The Supreme Court and the Federal Reserve are the most powerful institutions in the United States.").

103. *See, e.g.*, Lauren Sanders, *Practice Implications of Fifth Circuit Ruling That CFPB Funding Unconstitutional*, NAT'L CONSUMER L. CTR. DIGIT. LIBR. (Oct. 26, 2022), https://library.nclc.org/article/practice-implications-fifth-circuit-ruling-cfpb-funding-unconstitutional [https://perma.cc/J7Z5-ZGVB] ("Most observers would find that the Federal Reserve has a greater impact on the overall economy than the CFPB.").

104. *Collins v. Yellen*, 141 S. Ct. 1761, 1784-85 (2021).

105. *Id.* at 1785.

106. *See* Wilmarth, *supra* note 33, at 910 ("[The] CFPB is the only federal financial regulator whose regulations are subject to override by an appellate body composed of heads

"direct regulatory and enforcement authority over purely private individuals and businesses" is the FHFA's regulatory and enforcement authority over Fannie Mae and Freddie Mac, "FHFA actions with respect to [which] could have an immediate impact on millions of private individuals and the economy at large."[107] Commentators have made analogous arguments respecting the economic impact that the FDIC, NCUA, and OCC can have too.[108] But one could not lodge such an argument for *every* self-funded agency. The OFR, for example, focuses on (as the name would suggest) conducting financial research;[109] it possesses no enforcement authority of its own,[110] and its rulemaking authority is limited to the narrow purpose of collecting data from and standardizing data across other agencies.[111]

C. Single Agency Head Removable At-Will

The first part of this distinction filters out the Federal Reserve, FDIC, NCUA, FCA, and PCAOB, as they are all headed by multi-member boards.[112] Further differentiating them from the CFPB, the members of the Federal Reserve Board of Governors and PCAOB enjoy a layer of "for cause" protection from presidential removal.[113]

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of other agencies.").

107. *Collins*, 141 S. Ct. at 1785.

108. *See* Sanders, *supra* note 103 ("[*CFSA*] makes much of the CFPB's broad authority, but ... [t]he other self-funded federal financial agencies—FHFA, FDIC, NCUA, and the OCC—also have broad regulatory authority over the American economy."); Wilmarth, *supra* note 33, at 904-908 (arguing that the "CFPB's powers are comparable to those of other federal financial regulators").

109. *See About the OFR*, OFF. OF FIN. RSCH., https://www.financialresearch.gov/about [https://perma.cc/RR6M-N7VR].

110. *See* 12 U.S.C. § 5343.

111. *See id.* § 5343(c)(1). *See generally* Simon Johnson, *The Disappointing Office of Financial Research*, N.Y. TIMES: ECONOMIX BLOG (Jan. 30, 2014, 12:01 AM), https://archive.nytimes.com/economix.blogs.nytimes.com/2014/01/30/the-disappointing-office-of-financial-research/?_r=1 [https://perma.cc/4G3B-FLJN].

112. *See* 12 U.S.C. § 241 (Federal Reserve); *id.* § 1812(a)(1) (FDIC); *id.* § 1752(2) (NCUA); *id.* § 2242(a) (FCA); 15 U.S.C. § 7211(e)(1) (PCAOB).

113. Governors of the Federal Reserve Board can be removed by the President only "for cause." 12 U.S.C. § 242. PCAOB members are removable by the Commissioners of the SEC at-will, but the SEC Commissioners are removable by the President only for "inefficiency, neglect of duty, or malfeasance in office." *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 477 (2010) (quoting Humphrey's Executor v. United States, 295 U.S. 602, 620 (1935)).

Neither the statutes of the FDIC nor the NCUA nor the FCA possess any good-cause removal protection language,[114] but this does not necessarily mean that a court would not find that such insulation exists.[115]

The OCC, FHFA, and OFR, on the other hand, all are run by a single agency head.[116] Just like the CFPB Director, the FHFA Director possesses "newfound presidential subservience,"[117] removable at-will as of 2021.[118] The removal status of the Comptroller of the Currency, the OCC's head, is not as clear from a purely legal perspective.[119] But at the very least, as a *practical* matter, the Comptroller is removable at-will by the President.[120] The OFR Director's deal is unclear and unexplored. The OFR's organic statute has no removal language,[121] so, in theory, a court could go either way on the question.[122] At the very least, both the FHFA and OCC represent

114. *See Free Enter. Fund*, 561 U.S. at 518, app. D (Breyer, J., dissenting) (cataloging agencies with no removal provisions in their organic statutes).

115. *See* Kruly, *supra* note 8, at 1747. For example, the SEC's organic statute has no good-cause removal language, but the *Free Enterprise* Court accepted the parties' agreement that SEC Commissioners are insulated from presidential removal. 561 U.S. at 487.

116. *See* 12 U.S.C. § 1(b)(1) (OCC); *id.* § 4512(b)(1) (FHFA); *id.* § 5342(b) (OFR).

117. Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB (*CFSA*), 51 F.4th 616, 640 (5th Cir. 2022).

118. Collins v. Yellen, 141 S. Ct. 1761, 1783 (2021) (striking down the FHFA Director's for-cause removal restriction).

119. The Comptroller is "remov[able] by the President, upon reasons to be communicated by him to the Senate." 12 U.S.C. § 2. Only two federal courts of appeals have had to deal with this language. The D.C. Circuit, sitting *en banc*, split on whether this constitutes insulation from removal. *Compare* PHH Corp. v. CFPB, 881 F.3d 75, 91-92 (D.C. Cir. 2018) ("[T]he Comptroller of the Currency has been removable only if the President sends the Senate 'reasons' for removing him. Whatever the type of reason it requires, the statute without question constrains the presidential removal power." (internal citation omitted)), *with id.* at 177 n.4 (D.C. Cir. 2018) (Kavanaugh, J., dissenting) ("[U]nlike the [CFPB] Director, the Comptroller is not independent. The Comptroller is removable at will by the President. Full stop."). A Sixth Circuit panel, briefly encountering the issue, accepted the parties' agreement that the Comptroller is removable at-will. *See* Calcutt v. FDIC, 37 F.4th 293, 303 (6th Cir. 2022) ("The Comptroller of the Currency's term lasts for five years 'unless sooner removed by the President, upon reasons to be communicated by him to the Senate,' and Calcutt concedes that this provision provides for at-will removal."(quoting 12 U.S.C. § 2)). Neither decision remains standing, however. *See PHH*, 881 F.3d 75, *abrogated by* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2183 (2020); *Calcutt*, 37 F.4th 293, *cert. granted, opinion rev'd*, 598 U.S. 623 (2023).

120. *See, e.g.*, Simpson, *supra* note 97, at 369; Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. 856, 873 (2013).

121. *See* 12 U.S.C. § 5342(b)(1)-(2).

122. *See* Kruly, *supra* note 8, at 1747. There is some authority to support the proposition

the same "unification of the purse and the sword" that the *CFSA* panel found so offensive to the separation of powers.[123]

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This Part demonstrates that on the *CFSA* opinion's terms, the CFPB is distinguishable from every other self-funded agency. No agency ticks all the boxes the panel drew. For example, the FHFA wields (Supreme Court-confirmed) "comparable"[124] regulatory authority, unifies purse and sword, and "rings up '[un]appropriated monies,'"[125] but it falls at the double-insulation hurdle.[126] The OFR comes closest on double insulation and is run by a single agency head, but it misses the mark on self-direction and regulatory authority.[127] The Federal Reserve (at least) is comparable to the CFPB on the regulatory prong and self-directs its budget of "[non]Government funds," but it only enjoys single-layer insulation from the

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that the OFR Director enjoys insulation from removal. Congressional hearing records provide support. *See The Annual Report of the Financial Stability Oversight Council: Hearing Before the Comm. on Fin. Servs.*, 113th Cong. (2013) (Statement of Jeb Hensarling) ("[T]he Financial Research Office [does not] answer[ ] to anyone. A single director who cannot be removed by the President at will heads [the OFR]."). As does a 2017 Treasury report suggesting the following reforms to the OFR:

> Treasury recommends that Congress reform the [OFR's] structure.... Treasury recommends that the OFR become a functional part of Treasury, with its Director appointed by the Secretary, without a fixed term and *subject to removal at will*, and that the budget of OFR come under the control of the Treasury appropriation and budget process.

¶ 155-022 Treasury Department Releases First Report On Regulatory Reform., Fed. Bank. L. Rep. P 155-022 (emphasis added). Ostensibly, the fact that the Treasury sought this reform means the OFR's organic statute confers removal protection. There has been no change to the OFR's statute in the interim, so one could assume that that removal protection (if it existed to begin with) remains. What the precise removal limitation would be is unclear. But if the removal protection does exist, it could be unconstitutional (perhaps depending on if the OFR head is a principal or inferior officer) under "[a] straightforward application" of the Supreme Court's reasoning in *Collins* and *Seila Law*. *See Collins*, 141 S. Ct. at 1783-84; *id.* at 1787 ("[T]he Constitution prohibits even 'modest restrictions' on the President's power to remove the head of an agency with a single top officer." (quoting *Seila Law*, 140 S. Ct. at 2205)).

123. *See* Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB (*CFSA*), 51 F.4th 616, 640 (5th Cir. 2022).

124. *Id.* at 641 (quoting CFPB v. All Am. Check Cashing, Inc., 33 F.4th 218, 237 (5th Cir. 2022) (Jones, J., concurring)).

125. *Id.* at 639 (alteration in original) (quoting 12 U.S.C. § 5497(c)(2)).

126. *See supra* notes 72-73, 79, 104-107, 117-118, 122 and accompanying text.

127. *See supra* notes 72-73, 78, 85-90, 109-111 and accompanying text.

appropriations process and has a multi-member board removable only for good cause.[128] Each self-funded agency toes the separation of powers line in one way or another, but none reaches the Fifth Circuit's (explicit) threshold.

This suggests a holding solely limited to the CFPB, a realization that naturally conjures thoughts of "a ticket good for one day only."[129] Such a narrow, fact-bound decision lends itself to "find[ing] application just once"—here, to strike down the CFPB—"before passing quietly into desuetude."[130] Solicitor General Elizabeth Prelogar, defending the CFPB before the Supreme Court, echoed this sentiment at oral argument, urging the Court reject the challengers' (and the Fifth Circuit's) attempt "to gerrymander a rule to fit the CFPB alone."[131] Put coarsely, a "gerrymander[ed]" "rule" like this looks like a hit-and-run on the CFPB. Such a decision will naturally be "viewed with derision,"[132] and at worst, it potentially raises suspicions of "result-oriented judging."[133] This is all before one considers the antinovelty of it all, which adds additional layers to the suspicion that comes with the Fifth Circuit's CFPB-only rationale.

III. WHY DOES THIS MATTER?—ANTINOVELTY MEETS AGENCY SELF-FUNDING

Antinovelty's presence in *CFSA* is plain to see: language like "anomalous," "unprecedented," "unique," and (of course) "novel"

128. *See supra* notes 72-73, 76, 101-103, 112-113 and accompanying text.

129. Richard M. Re, *On "A Ticket Good for One Day Only,"* 16 GREEN BAG 2d 155, 155 (2013).

130. *Id.* at 161-62.

131. Transcript of Oral Argument at 5, CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd., (No. 22-448).

132. Re, *supra* note 129, at 155 ("[T]he idea of a one-day-only precedent is almost always viewed with derision. A legal principle, if sound, is expected to survive the day it was decided and to last far into the future—perhaps even forever.").

133. *See* Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637, 650 (2001) (discussing the "classic" one-day-ticket case, *Bush v. Gore*, and arguing that its "'good for this train, and this train only' offer" reveals "a cynical vessel used to engage in result-oriented judging by decree"); *see also* Mark Joseph Stern, *The Trumpiest Federal Appeals Court Did Something Truly Beyond the Pale*, SLATE (Oct. 20, 2022, 4:56 PM), https://slate.com/news-and-politics/2022/10/trumpiest-federal-appeals-court-kills-cfpb-fifth-circuit.html [https://perma.cc/A9MM-WF4V] (criticizing *CFSA* as a political judgment).

litters the opinion.[134] *CFSA* is no outlier in this respect; it merely represents another data point in an ongoing swell of federal courts invoking the rationale.[135] But *CFSA* did break new ground by being the first court to endorse antinovelty in a challenge to an agency's budgetary independence.[136]

But there is a problem. Antinovelty is fundamentally flawed (and beyond just the dubious nature of its "something is new so it must be unconstitutional" argument[137]). Antinovelty possesses an inherent level of generality problem. Professor Leah Litman explains:

> Whether a statute is "novel" turns on whether it is similar to previous ones. Accordingly, properly identifying the scope of that past practice is an important part of determining whether the antinovelty principle even applies, that is, determining whether a statute is new. But historical traditions—specifically, whether current statutes are similar to preexisting ones—can be defined at different levels of generality. And there does not 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.[138]

This flaw makes antinovelty a malleable, dangerous rationale and a tool ready-made for judicial abuse.[139] Because there is no principled way to pick a level of generality in an antinovelty analysis, a court has virtually unbounded discretion to determine how closely it wishes to trace a statute to see if it fits into the relevant historical tradition (which the court *also* has virtually unbounded discretion to define); thus, the court has virtually unbounded discretion in deciding the merits of the constitutional question itself.[140]

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134. *See* Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB (*CFSA*), 51 F.4th 616, 638-39, 641 (5th Cir. 2022); Millhiser, *supra* note 28 ("[The *CFSA* decision] claims that th[e CFPB's] funding structure is 'unique,' and places a great deal of weight on that claim in declaring the CFPB's funding mechanism unconstitutional.").

135. *See* Litman, *supra* note 29, at 1411 ("The use of antinovelty rhetoric is now commonly employed by the federal courts.").

136. *See supra* notes 5-6 and accompanying text.

137. *See supra* note 29 and accompanying text.

138. Litman, *supra* note 29, at 1482-83 (footnote omitted).

139. *See* City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1491-92 (2022) (Thomas, J., dissenting) (arguing that "malleable" standards are "'vehicl[es] for the implementation of individual judges' policy preferences'" and are "danger[ous]" (quoting Tennessee v. Lane, 541 U.S. 509, 556 (2004) (Scalia, J., dissenting))); *infra* Parts III A-B.

140. *See* Litman, *supra* note 29, at 1483 (explaining that the determination of how specific

An additional way to conceptualize antinovelty's level of generality problem is to think about the different definitions that exist for the word "novel." Something can be "novel" if it is "different from anything ... before"—that is, if it is unique.[141] But something could also be "novel" if it is merely "unusual"—that is, if it is different from what the relevant typical, traditional practice has been.[142] The latter understanding is broader: several things could *all* be novel if they *all* deviate from the usual practice. (One could argue that the existence of these multiple, kindred things demonstrates credence for those things such that they might not be "novel," but there is no guarantee that that argument would succeed.[143]) The only difference between these two understandings is the level of generality, because, really, both understandings qualify as "novel" because they differ from the usual practice. Something unique is novel because it deviates from the usual practice when one examines that thing,

a level of generality to use in characterizing a statute and the relevant past practice "involves a fair amount of choice" and "can change the outcome of a case"); Lackland H. Bloom, Jr., *"Lawyers' Work": Does the Court Have A Legitimacy Crisis?*, 52 ST. MARY'S L.J. 285, 315 (2021) ("Reliance on tradition and history is ... a slippery methodology easily subject to manipulation.... There is ... a question as to the level of abstraction at which a tradition should be defined, which in a particular case may be outcome determinative.").

141. *Novel*, COLLINS DICTIONARY, https://www.collinsdictionary.com/us/dictionary/english/novel [https://perma.cc/QHW7-MZSD] ("different from anything that has been done, experienced, or made before"); *see also, e.g.*, *Novel*, WEBSTER'S THIRD NEW INT'L DICTIONARY (2002) ("not resembling something formerly known; having no precedent"); *Novel*, CAMBRIDGE DICTIONARY https://dictionary.cambridge.org/us/dictionary/english/novel [https://perma.cc/ SG4H-3HK7] ("not like anything seen before"); *Novel*, DICTIONARY.COM, https://www.dictionary.com/browse/novel [https://perma.cc/TR5M-RXJ5] ("different from anything seen or known before"); WIKTIONARY, https://en.wiktionary.org/wiki/novel#Adjective [https://perma.cc/AL69-797X] ("having no precedent").

142. *Novel*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2022), https://www.ahdictionary.com/word/search.html?q=novel [https://perma.cc/ZJF4-N4C7] ("[s]trikingly new, unusual, or different"); *Novel*, OXFORD ENGLISH DICTIONARY (2023), https://www.oed.com/search/dictionary/?scope=Entries&q=novel [https://perma.cc/K4XT-DZ K5] ("interestingly new or unusual"); *Novel*, WEBSTER'S 1828 AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE, https://webstersdictionary1828.com/Dictionary/novel [https://perma.cc/F2JT-WYEZ] ("hence, unusual"); *see also, e.g.*, *Novel*, DICTIONARY.COM, https://www.dictionary.com/browse/novel [https://perma.cc/TR5M-RXJ5] ("of a new and unusual kind"); *Novel*, WIKTIONARY, https://en.wiktionary.org/wiki/novel#Adjective [https://perma.cc/AL69-797X] ("not of the typical or ordinary type").

143. *See* Litman, *supra* note 29, at 1482-85; Bloom, *supra* note 140, at 315 ("It may be difficult to establish a particular practice or tradition. There may be room for a choice between competing traditions.").

the practice, or both at a low level of generality.[144] Examining the thing at a low level of generality may be the only reason that thing appears to be unique in the first place.[145] Many similar things will all be novel because they all deviate from the usual practice when one appraises those things, the relevant practice, or both at a higher levels of generality.[146] This linguistic journey mirrors the legal one this section will take.

When it comes to agency self-funding, antinovelty gives a court carte blanche. Looking at statutes and agency structures at a low level of generality, a court could use antinovelty to pick off any self-funded agency a court wanted, on a rationale good-for-that-one-agency-only.[147] The *CFSA* case exemplifies this. Conversely, if a court looked at the relevant statute and tradition at high levels of generality, it could use the antinovelty rationale to strike down *all* self-funded agencies.[148] Given antinovelty's pliable methodology, a court deploying the rationale is at liberty to select whichever extreme it wants.[149] And in addition to opportunity, there is motive. Scholars have linked the antinovelty rationale and the agenda of rolling back federal governmental (in particular, *administrative*) authority.[150] Gutting an agency's independence by removing its budgetary buffer from political pressures would undoubtedly further this agenda. The following discussion foreshadows how antinovelty in the agency self-funding space might play out in practice.

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144. *See* Litman, *supra* note 29, at 1483.
145. *See id.*; *infra* Part III.A.
146. *See infra* Part III.B.
147. *See infra* Part III.A.
148. *See infra* Part III.B.
149. *See* Litman, *supra* note 29, at 1483; *supra* note 140 and accompanying text.
150. *See* Litman, *supra* note 29, at 1424-26 ("[A]re courts deploying antinovelty rhetoric in service of a conclusion that they have already reached? ... The Court's antinovelty rhetoric is probably more related to an agenda of scaling back the federal government's authority.... [S]cholars have observed a ... trend in recent administrative law cases—a libertarian-infused skepticism of federal administrative regulation that rejects the twentieth-century expansion of the administrative state. Here ... antinovelty rhetoric is a way to challenge federal regulation because it raises questions about the proper authority of the administrative state, which expanded significantly in the 1930s. So antinovelty rhetoric might be a way to retreat from the kind of federal social and economic regulation that became common after the 1930s by only sanctioning already-enacted statutes and regulations." (footnotes omitted)).

A. Antinovelty as a Tool to Strike Down Any Self-Funded Agency (and Artificially Narrowing Decisions)

The CFPB's case is a prime example of antinovelty at its lowest level of generality—what this section calls a wholistic antinovelty approach. Under a wholistic approach, a court considers all (or many) elements of a statute (in the CFPB's case, its organic statute) together to determine whether the statute has a historical analogue. The Fifth Circuit did just that, "[t]ak[ing] together" all three relevant elements (along with numerous subelements) of the CFPB and concluding that the elements "combine[d] to render the [CFPB]" novel.[151] Antinovelty includes no limit to prevent a court from considering as many elements of a statute as it wants in making its novelty determination.[152] In other words, a court invoking the rationale is free to apply as low a level of generality as it pleases.[153] The problem is that at the lowest level of generality, everything is novel.[154] If an approach allows a court to reach the same conclusion no matter the facts, as wholistic antinovelty does, that approach is unsound. What's more, the wholistic approach necessarily will cabin a court's reasoning to just that one statute.[155] So in addition to wholistic antinovelty being a tool that allows a court to skip ahead to the end on the constitutional question,[156] it also produces potentially suspicious (and tacit) good-for-one-agency-only holdings.[157]

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151. *See* Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB (*CFSA*), 51 F.4th 616, 641-42 (5th Cir. 2022).

152. *See* Litman, *supra* note 29, at 1482-83.

153. *See id.*; *supra* notes 138-140 and accompanying text.

154. *See* Litman, *supra* note 29, at 1483 ("It is unlikely that any past practice or statute would resemble a new statute at its most specific level of abstraction; otherwise, that exact same statute would already exist."); *infra* note 163-166 and accompanying text.

155. *See infra* notes 168-170 and accompanying text.

156. *See infra* notes 163-167 and accompanying text.

157. *See infra* notes 168-170 and accompanying text; *supra* notes 132-133 and accompanying text. Many view "one-day ticket" decisions like the ones wholistic antinovelty enables as suspicious. *See, e.g.*, Issacharoff, *supra* note 133, at 650 (exhibiting strong suspicion of *Bush v. Gore*'s "'good for this train, and this train only' offer"); Jamie Raskin, *Op-Ed: Bush vs. Gore's Ironic Legal Legacy*, L.A. TIMES (Dec. 13, 2015, 5:00 AM), https://www.latimes.com/opinion/op-ed/la-oe-1213-raskin-bush-v-gore-anniversary-20151213-story.html [https://perma.cc/BLT6-X5PG] ("Everything about th[e] reasoning [in *Bush v. Gore*] was deeply suspicious, but the most baffling aspect was the unusual disclaimer the majority posted at the end of its analysis: 'Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.' In other words: This

By way of background, the wholistic antinovelty argument against the CFPB did not originate at the Fifth Circuit; rather, it has been the common theme of the mainstream constitutional arguments against the CFPB's structure throughout the agency's decade of existence. The prevailing contention has always been that *all* of the CFPB's features, *when considered together*, manifest a novel and thus unconstitutional agency structure.[158] The leading argument has never been that any one feature reveals (novelty and) unconstitutionality on its own.[159] The Fifth Circuit in *CFSA* followed suit with its own wholistic argument.[160] And Justice Alito took a similar tack at oral argument, asking Solicitor General Elizabeth Prelogar (defending the CFPB) to identify an "example of an agency that has *all of* the features that the CFPB has."[161]

Where proving an agency's structure is different from all others' is essentially the finish line in the constitutional inquiry,[162] wholistic, fact-bound arguments like these are a cheat code. As every

decision exists in a vacuum.").

158. *See, e.g.*, Simpson, *supra* note 97, at 377 (arguing that "the CFPB should not withstand scrutiny if courts consider its entire composition *holistically*" because the agency is "*without direct precedent*," possessing "demonstrably *novel and unique*" characteristics (emphasis added)); Pearson, *supra* note 18, at 117-20 (describing the CFPB as "in a *unique* position" compared to other agencies and arguing that the CFPB's "*combination* of powers and immunities repudiate the spirit of separation of powers jurisprudence" (emphasis added)).

159. *See, e.g.*, Simpson, *supra* note 97, at 345 ("[T]he CFPB's unprecedented combination of structural characteristics, rather than any single one of its attributes, renders it incompatible with a constitutional separation of powers."); Pearson, *supra* note 18, at 117-18 ("It is the convergence of [all] the[ ] factors [of the CFPB] rather than any single factor that brings the issue of constitutionality to the fore.").

160. Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB (*CFSA*), 51 F.4th 616, 641-42 (5th Cir. 2022) ("*Taken together*, the Bureau's express insulation from congressional budgetary review, single Director answerable to the President, and plenary regulatory authority *combine* to render the Bureau *'an innovation with no foothold in history or tradition.'*... The Bureau's funding apparatus cannot be reconciled with the Appropriations Clause and the clause's underpinning, the constitutional separation of powers." (emphasis added) (quoting Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2202 (2020)).

161. Transcript of Oral Argument at 31, CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd., (No. 22-448) ("[W]hat is your best historic—your single best example of an agency that has *all of* the features that the CFPB has that are cited by the Respondents, single best example of an agency with *all of* the—with *that combination* of features?" (emphasis added)).

162. *See, e.g.*, Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2201 (2020) (describing novelty as "[p]erhaps the most telling indication of [a] severe constitutional problem" with an agency's structure (alteration in original) (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 505 (2010))); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 506 (2010); Litman, *supra* note 29, at 1418.

first-year law student learns, the more details of a given thing you consider (that is, the lower your level of generality), the easier it becomes to distinguish it from all other things.[163] Agency structures are no different. The more elements of an agency's structure a court takes into account, the less likely it becomes that any other agency will replicate each of those same structural elements.[164] Eventually, if a court considers enough structural elements, an agency's structure becomes unique, as no other agency will be able to match the description.[165] And there is an ostensible real-world reason for this. As a practical matter, it would make no sense for any new agency to ever *perfectly* resemble any existing agency; otherwise, there would be little reason for that new agency to exist.[166] The Fifth Circuit used this cheat code in *CFSA*. By having the inquiry turn on many of the CFPB's features jointly, as opposed to any single feature severally, it was easy for the panel to distinguish the CFPB from all other self-funded agencies.[167] Thus, it was easy for the court to categorize the agency's structure as novel and, under its antinovelty rationale, unconstitutional.

But the wholistic approach has another impact, too. On the working end, it is easier to novelize something because that determination turns on many factors. But because that determination turns on so many factors, that reasoning will be limited to just that one thing on the back end. This is precisely what happened in *CFSA*. The Fifth Circuit's wholistic rationale made it easier to find that the CFPB was novel, but the court necessarily limited its reasoning to just the CFPB.[168] Analytically, both the wholistic approach and the narrow decision were a necessary result of how the Fifth Circuit defined the historical tradition. Because the Fifth Circuit

163. *Cf.* Comperry v. Phelps Dodge Indus., Inc., 928 F.2d 1132 (6th Cir. 1991) ("[I]f enough details were added to any description of a task, the task would become unique.... The more factors that would have to be replicated, the more unlikely a future occurrence would match all of the elements of the description.").

164. *Cf. id.*

165. *Cf. id.*

166. *See* Litman, *supra* note 29, at 1483.

167. *See* Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB (*CFSA*), 51 F.4th 616, 641-42 (5th Cir. 2022) ("[t]ak[ing]" all of the CFPB's features "together" to deem the agency's structure "an innovation" and violative of the separation of powers (third parenthetical quoting Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2202 (2020)).

168. *See supra* Part II.

drew its level of generality line low when defining the relevant tradition (at all other self-funded agencies), it had to distinguish the CFPB from all other self-funded agencies to establish novelty (which it did via its wholistic approach).[169] So, once it established novelty (and unconstitutionality followed), the holding could not possibly implicate other self-funded agencies.[170]

For proof that the wholistic antinovelty approach can be used to strike down *any* self-funded agency structure, look no further than the CFPB itself. The CFPB's structure was not always that which the Fifth Circuit encountered. The Supreme Court forcibly changed it when it decided *Seila Law LLC v. CFPB*.[171] As originally designed, the CFPB's organic statute granted the Director good-cause insulation from presidential removal.[172] In *Seila*, the Court held that this removal protection violated the separation of powers, and the Court severed it from the statute, making the Director removable at-will.[173]

Tracking the evolution of the wholistic antinovelty approach against the CFPB pre- and post-*Seila* reveals just how malleable antinovelty is. Pre-*Seila*, scholars arguing against the agency's constitutionality—including one whose piece the *CFSA* panel cited with approval—relied on that then-existing insulation from presidential removal to argue that the CFPB was "without direct precedent" and thus "should not withstand [constitutional] scrutiny if courts consider its entire composition holistically."[174] The Fifth Circuit, deciding its case post-*Seila*, relied just as strongly on the CFPB director's "newfound" at-will removal as part of a "combin[ation] [that] render[ed] the Bureau 'an innovation with no foothold in

169. *See CFSA*, 51 F.4th at 641-42.
170. *See supra* Part II.
171. *See* 140 S. Ct. 2183, 2192 (2020).
172. *See id.* at 2193.
173. *See id.* at 2192.
174. Simpson, *supra* note 97, at 377; *see id.* at 373 ("[The CFPB']s constitutionality hinges on whether these factors *taken together*—sweeping regulatory power, *insulation from executive oversight*, and exemption from Appropriations Clause supervision—establish an agency free to float unmoored from checks and balances." (emphasis added)); Pearson, *supra* note 18, at 117-18 (including the fact that the CFPB "c[ould] deflect Executive Branch pressure (because its Director c[ould] resist dismissal from office)" as one of the factors that "converge[d]" to "bring[ ] the issue of constitutionality to the fore"). The *CFSA* panel cited Simpson's Note on page 641 of its opinion. *See CFSA*, 51 F.4th at 641.

history or tradition'" and thus violative of the separation of powers.[175] Because the examination was at such a low level of generality—because it turned on so many elements—it made no difference that one of the key structural elements had completely changed.

No matter the intricacies of the organic statute in question, the wholistic antinovelty approach comes up trumps. And it is not very difficult to formulate a unique combination of characteristics for any self-funded agency. Take, as just one example, the OCC. It self-funds.[176] It has a single agency head.[177] Only the FHFA and OFR still match this description (recall that in this universe, the CFPB's self-funding no longer exists).[178] The OCC also has considerable regulatory authority.[179] That knocks out the OFR.[180] The only thing standing between the OCC and uniqueness is the FHFA. One way to distinguish the two is that the OCC head sits on the board of another self-funded agency, the FDIC.[181] The FHFA director does not. Job done. "Taken together," the OCC's self-funding, its single agency head, and its head's partial control over *another* self-funded agency (and its budget) "combine to render the [OCC] an innovation with no foothold in history or tradition."[182]

Take the Federal Reserve as an additional (brief) example. The Federal Reserve self-funds and is headed by a multimember board[183]—a leadership structure that affords additional political independence (from the President) to the independence the agency already enjoys (from Congress) with its budgetary insulation.[184] Four other

175. *CFSA*, 51 F.4th at 642 (quoting *Seila Law*, 140 S. Ct. at 2202).

176. 12 U.S.C. § 16.

177. *Id.*

178. *See supra* note 116 and accompanying text.

179. *See supra* note 108 and accompanying text.

180. *See supra* note 109-111 and accompanying text.

181. *See Board of Directors*, FED. DEPOSIT INS. CORP., https://www.fdic.gov/about/leadership/ [https://perma.cc/E3Z3-RPZ].

182. *See* Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB (*CFSA*), 51 F.4th 616, 641-42 (5th Cir. 2022).

183. 12 U.S.C. § 243.

184. *See, e.g.*, Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2243 (2020) (Kagan, J., dissenting) ("A multimember structure reduces accountability to the President because it's harder for him to oversee, to influence—or to remove, if necessary—a group of five or more commissioners than a single director. Indeed, that is *why* Congress so often resorts to hydra-headed agencies.... [F]or example, Congress constructed the Federal Reserve as it did because it is 'easier to protect a board from political control than to protect a single appointed official.'" (quoting Robert E. Cushman, THE INDEPENDENT REGULATORY COMMISSIONS 153 (1941))).

agencies meet those two requirements,[185] but the Federal Reserve is distinguishable in that it wields the most power and "uniquely occup[ies] a quasi-public role."[186] In other words, a distinctive combination of power, insulation from executive control, and independence from congressional supervision.[187] One can always find a way to say that a self-funded agency's structure is novel and uniquely pushes the separation of powers limits if one cherry-picks enough structural elements.[188]

But there is only room for maneuverability on the front end. On the back end, a wholistic antinovelty rationale will always be limited to the particular facts of the case—for present purposes, a particular agency's structural specifics. That is how the wholistic antinovelty approach necessarily functions.[189] Much like a funnel, once a court establishes wholistic novelty and enters the wide-mouth antinovelty top, the court's opinion is resigned by logical gravity to an exit via the narrow-mouth, "one-day ticket" bottom.

Using the wholistic approach, if a court wants to find that a self-funded agency's structure is novel, it can.[190] No matter the particulars of an agency's structure, a court can always find a "telling indication" of its unconstitutionality.[191] If a decisional tool allows a court to reach a certain outcome irrespective of the facts, then that tool risks jeopardizing the public's trust in an independent judiciary. Public support of the courts is predicated on the belief that courts "attempt[ ] to decide cases in good faith through application of law rather than values, ideology, or policy preferences."[192] But the use of an approach as easy to game as wholistic antinovelty does not lend itself to categorization as a "good faith ... application of law."[193]

185. *See supra* note 112 and accompanying text.

186. *See* Simpson, *supra* note 97, at 367; *supra* notes 145-146, 153-154, 172-176 and accompanying text.

187. *Cf.* Simpson, *supra* note 97, at 373 ("[C]onstitutionality hinges on whether the[following] factors taken together—sweeping regulatory power, insulation from executive oversight, and exemption from Appropriations Clause supervision—establish an agency free to float unmoored from checks and balances.").

188. *See* Litman, *supra* note 29, at 1483; *supra* notes 151-152, 160 and accompanying text.

189. *See supra* notes 163-170 and accompanying text.

190. *See supra* notes 151-152, 163-165 and accompanying text.

191. *See* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2201 (2020); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 506 (2010).

192. Bloom, *supra* note 140, at 317.

193. *Id.*

Rather, such a malleable approach can too easily become a "vehicl[e] for the implementation of individual judges' policy preferences."[194] This worry holds extra weight given that antinovelty rhetoric itself is linked with "an agenda of scaling back the federal government's authority" and a "skepticism of federal administrative regulation that rejects the twentieth-century expansion of the administrative state."[195]

What's more, a court employing a wholistic approach would reach its conclusion in a way that would allow it to wipe its hands clean from any broader implications.[196] In fact, the court would not even need to acknowledge the fact that its rationale was necessarily good-for-one-agency-only. Ostensibly, a court having to admit to its artificial narrowing of a decision operates as a check that will keep a court from issuing too many such decisions. A court not having to admit it, and doing it anyway, potentially poses a risk to judicial legitimacy as well.[197]

B. Antinovelty as a Tool to Strike Down All Self-Funded Agencies

Antinovelty's flaw can also work the other way. Rather than zooming way in to conclude that any single self-funded agency deviates from historical practice, a court could zoom way out and conclude that all self-funded agencies do. Categorizing all budgetary insulation as novel is quite straightforward: all a court must do is define the relevant historical tradition as agencies receiving funding via the congressional appropriations process. This Part contends

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194. City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1491-92 (2022) (Thomas, J., dissenting) (arguing that a "malleable" standard is a "vehicl[e] for the implementation of individual judges' policy preferences" (internal quotation marks omitted)); Tennessee v. Lane, 541 U.S. 509, 556 (2004) (Scalia, J., dissenting) ("[T]ests based on ... malleable standards ... have a way of turning into vehicles for the implementation of individual judges' policy preferences."); *see also* Stern, *supra* note 133 (arguing that *CFSA*, an invocation of wholistic antinovelty, was a political judgment).

195. *See* Litman, *supra* note 29, at 1425-26.

196. *See supra* notes 168-170 and accompanying text.

197. *See* Gillian E. Metzger, *Considering Legitimacy*, 18 GEO. J.L. & PUB. POL'Y 353, 379 (2020) ("Judicial candor is often identified as essential to legitimate judicial decision making."). This is different than a court issuing a narrow opinion but acknowledging the restricted bounds of its ruling. *See* Richard H. Fallon, Jr., Essay, *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265, 2299 (2017).

that there is not only an analytical path to reaching this definition—due to antinovelty's malleable methodology—but a substantive one as well. This Part goes on to explain why the argument to conclusively define the tradition as one layer of budgetary independence (that is, the argument that antinovelty will strike down the CFPB but go no further) is unsound.

CFSA is the catalyst for this Article, so it makes sense to think about this through the lens of that opinion. The most important part of the opinion for present purposes is the first distinction the panel drew: the CFPB's double-insulation from appropriations.[198] In drawing that distinction, the Fifth Circuit drew an antinovelty level-of-generality line at the CFPB's second layer of budgetary independence.[199] In other words, the panel tacitly recognized single-layer budgetary autonomy as the historical tradition.[200] Because the CFPB's double-layer insulation diverged from that, it was novel. But all other self-funded agencies (all possessing mere single-layer insulation) were safe.[201]

Because antinovelty provides no cogent method for selecting a level of generality, another court employing an antinovelty theory could just as easily draw its historical level-of-generality line one layer of insulation higher than the Fifth Circuit did.[202] Such a demarcation would find support both in legal scholarship and in logic. There are over 400 federal agencies, and only eleven or so are self-funded.[203] Looking at it this way, it is not at all difficult to characterize the relevant historical tradition as agencies receiving their funding via the, well, "*traditional* appropriations process,"[204] making all budgetary independence novel.[205] As one scholar has put it, when

198. The first *CFSA* distinction also has the "perpetual" and "self-directed" aspects to it, *see supra* Part II.A, but a future court is free to set its level of generality at a level in which these aspects play no role. *See supra* notes 137-140.

199. Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB (*CFSA*), 51 F.4th 616, 639 (5th Cir. 2022) ("[The CFPB's] double insulation from Congress's purse strings ... is 'unprecedented' across the government." (quoting CFPB v. All Am. Check Cashing, Inc., 33 F.4th 218, 225 (5th Cir. 2022) (Jones, J., concurring))).

200. *See id.*

201. *See id.*

202. *See* Litman, *supra* note 29, at 1483 (discussing the level of generality problem and the "fair amount of choice" courts have in characterizing the relevant historical tradition).

203. *See* Pearson, *supra* note 18, at 109.

204. *See* Kruly, *supra* note 8, at 1736 (emphasis added).

205. *See, e.g.*, Pearson, *supra* note 18, at 109 ("Apart from the CFPB, the list of federal

one considers the big historical picture, "it becomes apparent that [Congress] allowing self-funding *in any measure* is much the exception."[206]

Characterizing funding via the normal appropriations process as the tradition puts all self-funded agencies on the chopping block under an antinovelty theory. The sole fact that an agency is self-funding would be a "telling indication" that the agency's structure is unconstitutional.[207] There is no reason to engage with either of the other *CFSA* distinctions, since those were only important in that case to establish the CFPB's novelty.[208] Under this application of the antinovelty principle, self-funding itself already establishes novelty, so the job is done.

One could push back against this part's argument as a parade of horribles—that it is unlikely that, as this Part contends, the antinovelty rationale logically extends to and invalidates all agency self-funding. Instead, this counterargument would likely go, double-layer budgetary insulation is a clear and principled place to draw a definitive level of generality line. In other words, the CFPB can come down on antinovelty grounds, but the rationale stops there.

This counterargument fails for many reasons. First, it does not respond to the fact that a very straightforward application of the antinovelty principle allows a court to identify agencies receiving funding via the congressional appropriations process as the historical tradition. And if that is the tradition, then all self-funding is novel and constitutionally suspect.

agencies that are supposedly exempt from the appropriations process may be as few as eleven. Considering that there are more than 400 federal agencies, it becomes apparent that *allowing self-funding in any measure is much the exception*." (emphasis added) (footnotes omitted)); Markham S. Chenoweth & Michael P. DeGrandis, *Out of the Separation-of-Powers Frying Pan and into the Nondelegation Fire: How the Court's Decision in Seila Law Makes CFPB's Unlawful Structure Even Worse*, 08/27/20 U. CHI. L. REV. ONLINE 55, 63 (2020) (characterizing the agencies that self-fund as "the Federal Reserve [and] other *rare* agencies" (emphasis added)); *Independence, Congressional Weakness*, *supra* note 101, at 1823 ("A complete exemption from appropriations is rare.").

206. Pearson, *supra* note 18, at 109 (emphasis added).

207. *See* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2201 (2020) (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 505-06 (2010)); *Free Enter. Fund*, 561 U.S. at 505-06 (2010); Litman, *supra* note 29, at 1418.

208. *See* Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB (*CFSA*), 51 F.4th 616, 641-42 (5th Cir. 2022).

Second, it is unclear that the double-layer insulation line is clear. The *CFSA* panel itself was conspicuously unwilling to definitively draw the constitutional line at double insulation.[209] Same goes for scholars. A pair of authors, arguing that the CFPB's "double layer ... insulation from congressional appropriations is ... unique and constitutionally suspect," expressly "saved for another time" the question of "[w]hether the Federal Reserve or other rare agencies funded outside the appropriations process are constitutional."[210] We know all of these "other" agencies are only single insulated. The equivocation of these authors and the *CFSA* panel on this point suggests that the double-insulation line may not be as concrete as some might propose.

Third, and even assuming that the double-layer insulation from appropriations was a clear place to draw the line, it is not clear that that line would be founded on solid legal principles. Appropriations law is a relatively unexplored area of constitutional law, particularly in the separation of powers context.[211] Naturally, constitutional questions about agency self-funding sit in this void, too. As Professor Gillian Metzger explains, courts have had little occasion to consider "what the impact of ... budgetary independence might mean" in the grand separation of powers scheme.[212] So, at the very least, even if there one day will be a principle to justify double-layer insulation as where courts draw the line, that principle does not exist yet.

But there may not be any factual basis on which to ever establish a legal principle that draws the line at double-insulation. The Fifth Circuit's paean to "double-insulation" was surely an effort to call back to the Supreme Court's decision in *Free Enterprise Fund*, where the Court held that double-insulation from presidential removal was unconstitutional.[213] But in the appropriations context,

209. *See id.* at 639 ("*Wherever the line between a constitutionally and unconstitutionally funded agency may be*, this unprecedented arrangement crosses it." (emphasis added)).

210. Chenoweth & DeGrandis, *supra* note 205, at 60, 63.

211. *See* Metzger, *supra* note 49, at 1111-12 ("Appropriations play a surprisingly tangential role in cases addressing the scope of congressional and presidential powers, given how central the congressional—presidential rivalry over spending is in practice to the balance of power between the branches.").

212. *See id.* at 1114.

213. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 497-98 (2010).

double-insulation is "a distinction without a difference."[214] When it comes to removal, a second layer of insulation "makes a difference" because the President has *some control* over removing officers even when there is a layer of insulation (because the President can still remove, it is just more difficult to do so).[215] But a second layer of budgetary insulation makes no difference because Congress has *no control* over an agency's budget when there is insulation.[216] Once Congress exempts an agency from appropriations, the agency is funded from some location over which Congress does not control—whether that location be private sector actors or the (private sector-funded) Federal Reserve.[217]

Bottom line, the introduction of antinovelty into the agency self-funding space opens the path for all self-funded agencies to come down. With "novelty" as the standard, there is no principled way to decide where the dominos stop falling.[218] If the CFPB comes down on an antinovelty rationale, all the other self-funded agencies can as well.[219]

CONCLUSION

Antinovelty is an unmanageable, dangerous rationale.[220] A standard so malleable can easily become nothing more than a "vehicle[ ] for the implementation of individual judges' policy preferences."[221] This is good reason, as some have already argued, for

214. Sanders, *supra* note 103.

215. *See Free Enterprise*, 561 U.S. at 495-96.

216. *See* Kruly, *supra* note 8, at 1736 ("[S]elf-funding, *unlike any other single structural feature of agency independence*, effectively severs an agency from an entire branch of government." (emphasis added)).

217. *See* Sanders, *supra* note 103 ("[The *CFSA*] panel did not explain why th[e CFPB's] funding flow gave Congress any less control than it has over other non-appropriated funding sources.").

218. *See, e.g.*, Litman, *supra* note 29, at 1483; *supra* notes 129, 179 and accompanying text.

219. *See, e.g.*, *supra* notes 192-196 and accompanying text.

220. *See* Litman, *supra* note 29, at 1482; *supra* Part III.

221. *See* City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1491-92 (2022) (Thomas, J., dissenting) (arguing that a "malleable" standard is a "vehicl[e] for the implementation of individual judges' policy preferences" and is "danger[ous]" (internal quotation marks omitted)); Tennessee v. Lane, 541 U.S. 509, 556 (2004) (Scalia, J., dissenting) ("[T]ests based on ... malleable standards ... have a way of turning into vehicles for the implementation of individual judges' policy preferences.").

the Supreme Court to discard the antinovelty theory in all contexts.[222] But the agency self-funding context, ironically enough, is unique. If allowed to fester, antinovelty leads to an outcome that nobody wants. Any and all agency self-funding logically comes down on an antinovelty rationale.[223] But both Republicans and Democrats have faithfully supported giving agencies budgetary autonomy in the past.[224] The Supreme Court has the chance to stop this all at the source by ousting antinovelty from the agency self-funding sphere when it decides the *CFSA* case. It is a chance the Court should take.

The best outcome in *CFSA* for nipping all antinovelty in the agency self-funding space in the bud is entirely unrealistic. The best result, of course, would be for the Supreme Court to explicitly denounce the theory. But that seems unimaginable given how regularly the Court has employed the rhetoric in recent terms.[225] A second-best solution would be for the Court to avoid employing antinovelty rhetoric or otherwise referencing the rationale in its opinion. But that also feels unlikely for the same reason (and because of how big a part it played in the Fifth Circuit's opinion).

Assuming that antinovelty will play an active role in *CFSA*, the ideal result would be for the Supreme Court to reverse the Fifth Circuit. If the CFPB can survive an antinovelty-infused separation of powers challenge, ostensibly, all other self-funded agencies would too.[226] But given the Court's current six-justice conservative

222. *See* Litman, *supra* note 29, at 47.

223. *See supra* Part III.

224. *See* Wilmarth, *supra* note 33, at 914-19, 953-56.

225. *See, e.g.*, Collins v. Yellen, 141 S. Ct. 1761, 1783-84 (2021); Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2201-02 (2020); Litman, *supra* note 29, at 1412-13. In addition to deploying antinovelty to strike down statutes, the Court has also routinely invoked the rhetoric in invalidating agency action. *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2369 (2023) (striking down President Joe Biden's student loan forgiveness plan because the interpretation of the relevant statutes "created a novel and fundamentally different loan forgiveness program"); Nat'l Fed'n of Indep. Bus. v. OSHA, 595 U.S. 109, 119-120 (2022) ("Th[e] 'lack of historical precedent [for OSHA's COVID-19 vaccine mandate],' coupled with the breadth of authority that the Secretary now claims, is a 'telling indication' that the mandate extends beyond the agency's legitimate reach." (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 505 (2010))); Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (holding that the CDC lacked statutory authority to continue an eviction moratorium in part because the agency's "claim of expansive authority under [the relevant statute] [wa]s unprecedented").

226. This naturally follows from the contention that the CFPB's structure strains the separation of powers more than other self-funded agencies' structures do. *See, e.g.*, Cmty. Fin.

supermajority—a contingent that has readily flexed its muscle in recent, high-profile administrative law cases[227]—banking on such a result, all things being equal, feels unwise. That said, Justices Brett Kavanaugh and Amy Coney Barrett, two members of that conservative bloc, indicated at oral argument that they were skeptical of this challenge to the CFPB.[228] So things are very much up for grabs. Still, it makes sense to provide for contingencies.

If the Supreme Court employs antinovelty and does not reverse the Fifth Circuit, there are two possible paths. One is that the Court issues an opinion holding that the funding structure of the CFPB—and *just* the CFPB—is unconstitutional. The other theoretical—though practically unlikely—path is that the Court issues an opinion that holds that the funding structures of *all* self-funded agencies are unconstitutional. Given these two options, the former might seem preferable. But if the goal is to put an end to antinovelty in the agency self-funding space, there likely would be no difference between these two paths. With antinovelty involved, there is no guarantee that a decision only striking down the CFPB would be limited to just the CFPB in the long run.[229] So, the former path, without something more, would just be postponing the inevitable.

Given antinovelty's unworkability, the only way to truly cordon off a CFPB-limited antinovelty-based holding from future, broader use would be for the Court to apply some external limitation. Appropriations law, in its current state, does not provide that limit.[230] Enter the one-day ticket. If the Supreme Court is going to strike down the CFPB and do so on an antinovelty rationale (both within the realm of possibility), the best argument to prevent the rationale from going any further would be to argue the Court explicitly declare that its decision is good-for-the-CFPB-only. It would

Servs. Ass'n of Am., Ltd. v. CFPB (*CFSA*), 51 F.4th 616, 641-42 (5th Cir. 2022) (making this argument); Chenoweth & DeGrandis, *supra* note 205, at 63; Simpson, *supra* note 97, at 377-78; Pearson, *supra* note 18, at 117-22.

227. *See, e.g.*, Biden v. Nebraska, 143 S. Ct. at 2369 (6-3 vote); West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022) (6-3); Nat'l Fed'n of Indep. Bus. v. OSHA 595 U.S. at 109 (6-3); Alabama Ass'n of Realtors, 141 S. Ct. at 2489 (6-3).

228. *See* Amy Howe, *Court Divided Over Funding Mechanism for Consumer Watchdog*, SCOTUSBLOG (Oct. 3, 2023, 5:33 PM), https://www.scotusblog.com/2023/10/court-divided-over-funding-mechanism-for-consumer-watchdog/ [https://perma.cc/MTQ8-S59H].

229. *See supra* Part III.B.

230. *See supra* notes 151-152 and accompanying text.

be an unprincipled move that would leave Court-watchers feeling uneasy,[231] but with antinovelty in the mix, it may be the only way to stop the bleeding.[232]

No doubt, losing the CFPB would be a devastating loss for progressives. And there may be a temptation to lash out at a conservative self-funding favorite in response. After all, the politically motivated nature of the sustained legal challenges against the CFPB is no secret.[233] But if antinovelty gets beyond the CFPB, there is no stopping it. Considering the Supreme Court's current composition, the one-day-ticket path might be the best liberals can muster, particularly if they wish to protect newly emerging conservative self-funding targets like the NCUA.[234]

Whatever one thinks of the desirability of Congress providing the CFPB, or any other agency, budgetary insulation, there can be no debate that these appropriations-exempt agencies do highly important work, work that can impact millions of Americans every day.[235] The budgetary independence serves an important functional purpose, so if any or all these agencies lost that independence—or more extreme, if any or all self-funded agencies were struck down in full—there would be ruinous practical consequences.[236] Maybe the

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231. *See, e.g.*, Re, *supra* note 129, at 155 ("[T]he idea of a one-day-only precedent is almost always viewed with derision. A legal principle, if sound, is expected to survive the day it was decided and to last far into the future—perhaps even forever.").

232. *See supra* Part III.B.

233. *See, e.g.*, Deepak Gupta, *The Consumer Protection Bureau and the Constitution*, 65 ADMIN. L. REV. 945, 956 (2013) ("[I]t apparently took a year before C. Boyden Gray, former White House Counsel to George H.W. Bush and a member of the Board of Directors of the Federalist Society, could locate a plaintiff to bring a case [against the CFPB]." (footnote omitted)); C. Boyden Gray, *Congressional Abdication: Delegation Without Detail and Without Waiver*, 36 HARV. J.L. & PUB. POL'Y 41, 47 (2013) ("Finding private plaintiffs [to challenge the CFPB's constitutionality] has not been easy.").

234. *See* David Baumann, *Conservative Coalition: Abolish NCUA*, CUCOLLABORATE (Aug. 19, 2023), https://www.cucollaborate.com/blogs/conservative-coalition-abolish-ncua [https://perma.cc/L2V6-5SKF] (citing *Mandate for Leadership 2025: The Conservative Promise*, HERITAGE FOUND., https://thf_media.s3.amazonaws.com/project2025/2025_MandateForLeadership_FULL.pdf).

235. *See, e.g.*, Collins v. Yellen, 141 S. Ct. 1761, 1785 (2021) ("FHFA actions ... could have an immediate impact on millions of private individuals and the economy at large."); Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2204 (2020) ("[The CFPB] dictate[s] and enforce[s] policy for a vital segment of the economy affecting millions of Americans.").

236. *See, e.g.*, *Peter Conti-Brown*, *supra* note 20 (explaining that if the Federal Reserve lost its budgetary autonomy, "anyone in the House of Representatives or the US Senate could hold the Fed hostage for any purpose or no purpose every single year"); Wilmarth, *supra* note 33,

Supreme Court eventually decides that all budgetary independence violates the separation of powers. But that is a determination that should be made on the separation of powers merits. To get there on antinovelty grounds would feel cheap and unearned given the rationale's woeful methodological shortcomings (to say nothing of the fact that it would be questionable as a theoretical and doctrinal matter[237]).

CFSA marks an inflection point for agency budgetary insulation in this new age of antinovelty. If, after the Supreme Court decides *CFSA*, antinovelty in the agency self-funding context survives, it is likely that agency self-funding itself will not.

at 953-54 (cataloguing Republican support for the FHFA's budgetary independence to insulate it from political capture and protect it from the "historical[ ] ... impair[ment]" past regulators had suffered because they had to rely on Congress for their funding); Millhiser, *supra* note 28 ("Should the Fifth Circuit's outlier decision stand, consumers would suffer. [Losing the CFPB] would effectively neutralize much of the federal government's ability to fight financial fraud.").

237. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 385 (1989) ("Our constitutional principles of separated powers are not violated ... by mere anomaly or innovation."); Litman, *supra* note 29; *Seila Law*, 140 S. Ct. at 2241-42 (Kagan, J., dissenting) ("[N]ovelty is not the test of constitutionality when it comes to structuring agencies. Congress regulates in that sphere under the Necessary and Proper Clause, not (as the majority seems to think) a Rinse and Repeat Clause. The Framers understood that new times would often require new measures, and exigencies often demand innovation. In line with that belief, the history of the administrative sphere—its rules, its practices, its institutions—is replete with experiment and change.... [T]here is, as the saying goes, 'a first time for everything.' So even if [an agency] differs from its forebears ..., that departure is not itself 'telling' of a 'constitutional problem.' In deciding what [a] moment demand[s], Congress ha[s] no obligation to make a carbon copy of a design from a bygone era." (citations omitted) (first quoting Nat'l Fed. of Ind. Bus. v. Sebelius, 567 U.S. 519, 549 (2012); then quoting *Selia Law*, 140 S. Ct. at 2200-01 (majority opinion)).