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## NOTE

### THE SEC IS NOT AN INDEPENDENT AGENCY

During his 2008 presidential campaign, Senator John McCain boldly claimed: “The chairman of the [Securities and Exchange Commission] serves at the appointment of the president . . . . If I were president today, I would fire him.”<sup>1</sup> The statement soon became an embarrassment after commentators pointed out that the President cannot “fire” a commissioner of the Securities and Exchange Commission (SEC or Commission) at will,<sup>2</sup> based on the understanding long held by legislators, courts, academics, and other authorities that the SEC is an independent agency.<sup>3</sup> In the face of this criticism, the McCain campaign quickly backed away from the statement.<sup>4</sup>

But two years later, the Supreme Court faced the same question and four Justices were not so easily persuaded. Dissenting in *Free Enterprise Fund v. Public Company Accounting Oversight Board*,<sup>5</sup> Justice Breyer wrote: “It is certainly not obvious that the SEC Commissioners enjoy [removal] protection.”<sup>6</sup> He explained that “the statute that established the Commission . . . *is silent* on the question,”<sup>7</sup> and that, in light of the statute’s history, Congress may not have intended to make the SEC independent.<sup>8</sup> Despite Justice Breyer’s concerns, the majority opinion sidestepped this question, allowing the parties to stipulate that SEC commissioners had removal protection and “decid[ing] the case

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<sup>1</sup> Catherine Dodge & Kim Chipman, *McCain Says He Would Fire SEC’s Cox if President*, BLOOMBERG (Sept. 18, 2008, 8:41 PM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a5ZRYnyfrosQ> (quoting Sen. John McCain) (internal quotation marks omitted).

<sup>2</sup> See, e.g., Alex Koppelman, *McCain Caught Overpromising on SEC Chairman*, SALON (Sept. 18, 2008, 3:20 PM), [http://www.salon.com/2008/09/18/mccain\\_cox](http://www.salon.com/2008/09/18/mccain_cox).

<sup>3</sup> See, e.g., 44 U.S.C. § 3502(5) (2006 & Supp. IV 2010) (classifying the SEC as independent agency for purposes of the Paperwork Reduction Act); *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988) (accepting “that it is commonly understood that the President may remove a commissioner [of the SEC] only for ‘inefficiency, neglect of duty or malfeasance in office’”); Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111 app. at 1285 (2000) (listing the SEC as an independent agency); Andrew Downey Orrick, *Organization, Procedures and Practices of the Securities and Exchange Commission*, 28 GEO. WASH. L. REV. 50, 52 (1959) (“The Commission is an independent regulatory agency . . .”).

<sup>4</sup> See Jennifer Parker, *McCain Flub? Republican Says He’d Fire SEC Chair as President*, ABC NEWS (Sept. 18, 2008, 1:47 PM), <http://abcnews.go.com/blogs/politics/2008/09/mccain-blasts-0-2> (noting that the campaign argued that Senator McCain had meant only that there was a “customary expectation” that SEC commissioners would resign if requested).

<sup>5</sup> 130 S. Ct. 3138 (2010).

<sup>6</sup> *Id.* at 3182 (Breyer, J., dissenting).

<sup>7</sup> *Id.* at 3182–83.

<sup>8</sup> *Id.* at 3183.

with that understanding.”<sup>9</sup> Thus, the Court did not squarely decide whether SEC commissioners are removable by the President at will, or only for cause.<sup>10</sup>

This Note argues that if the President were to remove an SEC commissioner without cause, a reviewing court would uphold the removal. Part I describes the unique historical period in which the SEC was created: during the nine years between the landmark decisions in *Myers v. United States*<sup>11</sup> and *Humphrey's Executor v. United States*,<sup>12</sup> when it was assumed that all executive appointees were terminable at will. Part II considers the text of the statute that created the SEC. To interpret the statute's silence, it turns to a long-standing rule of construction providing that the President has the power to remove officers he or she appoints unless Congress explicitly provides otherwise. Part II also considers the legislative and executive understandings of the statute when it was enacted. Finally, Part III canvasses alternative approaches to interpreting the statute. In particular, it considers rules based on the agency's structural features, on the totality of the circumstances, on the postenactment history of the statute, and on the history and tradition surrounding the agency. Because these approaches produce ambiguous results, rest on questionable legal grounds, and risk undermining important balances struck by the enacting legislature, Part III concludes that they are not suitable techniques for determining the SEC's independence.<sup>13</sup> Therefore, this Note concludes that the SEC is not an independent agency, and closes with a brief look at this argument's potentially significant implications for the SEC and for other agencies similarly lacking explicit statutory for-cause removal protection.

## I. HISTORICAL CONTEXT

Before examining the SEC's enabling statute, it is important to understand the context in which the SEC was created. First, this Part

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<sup>9</sup> *Id.* at 3148–49 (majority opinion).

<sup>10</sup> For purposes of this Note, the term “for cause” refers to any sort of removal protection, as distinguished from “at will” removal by the President. In reality, different statutes specify different standards for removing independent officers; the Court decided *Free Enterprise Fund* under the assumption that SEC commissioners are removable only “under the *Humphrey's Executor* standard of ‘inefficiency, neglect of duty, or malfeasance in office.’” *Id.* at 3148 (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 620 (1935)). Courts have never established exactly what “inefficiency, neglect of duty, or malfeasance in office” means, and some scholars have concluded that these terms could even encompass failure to obey a President's orders. See, e.g., Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 86–87.

<sup>11</sup> 272 U.S. 52 (1926).

<sup>12</sup> 295 U.S. 602.

<sup>13</sup> Unless otherwise specified, this Note uses the term “independent” to describe agencies whose officers are not removable at will by the President.

sketches the Supreme Court's landmark decisions in *Myers*, which appeared to hold that Congress could not limit the President's removal power,<sup>14</sup> and *Humphrey's Executor*, which held that Congress could limit the President's power to remove all but "purely executive" officers.<sup>15</sup> This Part then turns to the creation of the SEC, which occurred between these two decisions, and therefore during a time when most observers believed that Congress could not constitutionally prevent the President from removing an appointee.

#### A. From *Myers* to *Humphrey's Executor*

Although lawmakers have debated the constitutionality of limiting the President's removal power since the First Congress,<sup>16</sup> the Supreme Court did not squarely rule on the issue until *Myers*, in 1926. In *Myers*, the Court struck down a statute that prevented the President from removing a postmaster of the first class without "the advice and consent of the Senate."<sup>17</sup> The Court held that the Constitution required the President to have "unrestricted power . . . to remove his appointees" as part of the "general grant to him of the executive power" and "his own constitutional duty of seeing that the laws be faithfully executed."<sup>18</sup> The Court was not shy in declaring the breadth of this power, holding that it would extend even to "members of executive tribunals" or other officials exercising "quasi-judicial" power.<sup>19</sup> *Myers* thus gave the President exclusive power, rooted in the Constitution, to remove appointees.

This holding did not stand for long. In 1933, President Franklin Roosevelt removed a Hoover-appointed Federal Trade Commission (FTC) commissioner, William Humphrey, essentially without cause.<sup>20</sup> Although the statute stated that the President could remove FTC commissioners for "inefficiency, neglect of duty, or malfeasance in office,"<sup>21</sup> Roosevelt declined to give any of these reasons, relying on *Myers* for the idea that Congress could not limit his power to remove

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<sup>14</sup> 272 U.S. at 176.

<sup>15</sup> 295 U.S. at 631–32.

<sup>16</sup> See *Myers*, 272 U.S. at 109. For a thorough description of the famous Decision of 1789, in which the First Congress wrestled with this problem, see *id.* at 111–16. For an alternative view, see Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 25–27 (1994).

<sup>17</sup> *Myers*, 272 U.S. at 107 (quoting Act of July 12, 1876, ch. 179, § 6, 19 Stat. 78, 80).

<sup>18</sup> *Id.* at 134–35.

<sup>19</sup> *Id.* at 135. The Court noted that the Executive could not "properly influence or control" the outcome of a particular case, but could nonetheless "consider the decision after its rendition as a reason for removing the officer." *Id.*

<sup>20</sup> *Humphrey's Ex'r*, 295 U.S. at 618–19.

<sup>21</sup> *Id.* at 620 (quoting Federal Trade Commission Act, Pub. L. No. 63-203, § 1, 38 Stat. 717, 718 (1914) (codified as amended at 15 U.S.C. § 41 (2006))).

commissioners at will.<sup>22</sup> When Humphrey's challenge reached the Supreme Court, the Attorney General offered it to incoming Solicitor General Stanley Reed as his very first case, considering it a "certain victory" for the government.<sup>23</sup>

The Court had other ideas. In a unanimous decision, it held that Congress could limit the grounds on which the President may fire commissioners.<sup>24</sup> The Court drastically reduced the scope of *Myers*, holding it applicable only to "purely executive officers,"<sup>25</sup> such as postmasters. Finding that the FTC "acts in part quasi-legislatively and in part quasi-judicially" and that commissioners "exercise[] no part of the executive power,"<sup>26</sup> the Court upheld the removal protection.<sup>27</sup> While the reasoning of this decision has been widely criticized,<sup>28</sup> it nonetheless laid the foundation for the development of independent agencies and the modern administrative state.<sup>29</sup>

### B. The Creation of the SEC

The Securities Exchange Act of 1934<sup>30</sup> (1934 Act) established the SEC.<sup>31</sup> Originally, the Roosevelt Administration wanted the FTC to enforce the securities laws,<sup>32</sup> and commentators disagree about exactly why a separate commission was created. Some suggest that the SEC was created to appease Wall Street lobbyists, who disliked the FTC and felt that a new, securities-specific agency would be easier to capture.<sup>33</sup> Others believe that the SEC was created to ensure that the laws would be enforced more vigorously and effectively than they would be under the heavily burdened FTC.<sup>34</sup> Both of these explana-

<sup>22</sup> MARIAN C. MCKENNA, FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR 97–98 (2002).

<sup>23</sup> *Id.* at 96 (internal quotation marks omitted).

<sup>24</sup> *Humphrey's Ex'r*, 295 U.S. at 632.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 628.

<sup>27</sup> *Id.* at 632.

<sup>28</sup> See *Morrison v. Olson*, 487 U.S. 654, 724–26 (1988) (Scalia, J., dissenting); see also Miller, *supra* note 10, at 93 ("*Humphrey's Executor*, as commentators have noted, is one of the more egregious opinions to be found on pages of the United States Supreme Court Reports.>").

<sup>29</sup> See Miller, *supra* note 10, at 94 ("*Humphrey's Executor* has long been viewed as the fundamental constitutional charter of the independent regulatory commissions.>").

<sup>30</sup> Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78pp (2006 & Supp. IV 2010)).

<sup>31</sup> *Id.* § 4, 48 Stat. at 885 (codified as amended at 15 U.S.C. § 78d).

<sup>32</sup> See JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET 98 (3d ed. 2003); Henry Laurence, *Spawning the SEC*, 6 IND. J. GLOBAL LEGAL STUD. 647, 658 (1999).

<sup>33</sup> See ANNE M. KHADEMIAN, THE SEC AND CAPITAL MARKET REGULATION 34–35 (1992); Laurence, *supra* note 32, at 658–59.

<sup>34</sup> See 1 THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 1.2[3][B] (6th ed. 2009). The legislative history of the 1934 Act also supports this position. See, e.g., 78 CONG. REC. 8162 (1934) (statement of Sen. Carter Glass) ("[I]t was inconceivable that ei-

tions are probably right: the SEC was likely a compromise that appealed to different factions for different reasons.<sup>35</sup>

Ultimately, the 1934 Act gave the SEC five commissioners, who serve staggered five-year terms.<sup>36</sup> The statute gave the President power to appoint commissioners “by and with the advice and consent of the Senate,” and provided that no more than three commissioners could come from the same political party.<sup>37</sup> Critically, however, the statute said nothing about the removal of commissioners.<sup>38</sup>

As the statute was enacted almost exactly one year before *Humphrey’s Executor*,<sup>39</sup> it is perhaps unsurprising that it had nothing to say about removal. At the time, the *Myers* holding would have controlled, seemingly making it unconstitutional to limit the President’s power to remove an appointee.<sup>40</sup> After *Humphrey’s Executor*, however, the 1934 Act’s silence on this issue was forgotten. As early as 1940, commentators had already put the SEC in the same category as other agencies with removal protection, without considering the 1934 Act’s silence.<sup>41</sup> These post hoc interpretations, not explicitly grounded in the text of the statute or in any obvious principles of law, should not control the analysis today. The rest of this Note aims to demonstrate that a proper interpretation of the 1934 Act leads to the conclusion that the President can remove an SEC commissioner at will.

## II. INTERPRETING THE STATUTE

In light of the Court’s removal jurisprudence, it is almost beyond dispute that Congress has the power to make SEC commissioners removable either at will or only for cause.<sup>42</sup> Thus, the question is

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ther the [FTC] or the Federal Reserve Board could do the work as effectively as could a separate commission appointed for the purpose, in view of the fact that [they] have important and complex duties which . . . now occupy all of their time and their ingenuity.”); see also 4 THE ECONOMIC REGULATION OF BUSINESS AND INDUSTRY 2679 (Bernard Schwartz ed., 1973) (discussing the 1934 Act’s legislative history).

<sup>35</sup> See SELIGMAN, *supra* note 32, at 99–100 (discussing various compromises in the 1934 Act).

<sup>36</sup> Securities Exchange Act of 1934 § 4(a), 48 Stat. at 885 (codified as amended at 15 U.S.C. § 78d(a)).

<sup>37</sup> *Id.*

<sup>38</sup> See *id.*

<sup>39</sup> The statute was enacted on June 6, 1934. *Id.* pmb. The Court decided *Humphrey’s Executor* on May 27, 1935. *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 602 (1935).

<sup>40</sup> See *Myers v. United States*, 272 U.S. 52, 176 (1926); see also *supra* pp. 783–84. As Justice Breyer noted in *Free Enterprise Fund*, Congress did not provide removal protection for any of the agencies it created between *Myers* and *Humphrey’s Executor*, but began doing so immediately after *Humphrey’s Executor* was decided. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3183 (2010) (Breyer, J., dissenting).

<sup>41</sup> See, e.g., FREDERICK F. BLACHLY & MIRIAM E. OATMAN, FEDERAL REGULATORY ACTION AND CONTROL 42 (1940).

<sup>42</sup> In *Morrison v. Olson*, 487 U.S. 654, 691 (1988), the Court held that removal restrictions are constitutional so long as they do not “impede the President’s ability to perform his constitutional

whether Congress has done either — a question of statutory interpretation.<sup>43</sup> This Part examines the text of the statute using traditional tools of statutory interpretation, beginning with the statutory text, then turning to relevant canons of construction, and finally considering the legislative history.

### A. *The Statutory Text*

As noted above, the statute is simply silent on the removal issue.<sup>44</sup> The statute does specify that “[e]ach commissioner shall hold office for a term of five years,”<sup>45</sup> but such fixed-term provisions generally do not confer a *right* to serve for the entire duration of the term; instead, they create only an *upper limit* on the number of years an officer may serve.<sup>46</sup> Thus, the plain text does not clearly answer the question, at least not without reference to some rule of statutory construction.

### B. *The Presumption of At-Will Removal*

Canons of construction can serve several useful purposes in statutory interpretation.<sup>47</sup> First, canons reflect the rules against which Congress legislates; by examining the contemporary canons in effect when a statute was enacted, a court can better understand how the legislature would have expected its language to be interpreted. Second, canons represent commonsense ideas about how people use and understand language. Third, canons often represent “default rules” about how best to decide cases in the absence of clear guidance from the legislature. This section considers a venerable canon that serves all three

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duty.” Given that the SEC has enjoyed de facto independence from executive control for decades, it would be difficult to argue that it is “essential to the President’s proper execution of his Article II powers that [the SEC] be headed up by individuals who [are] removable at will.” *Id.*; see SEC v. Blinder, Robinson & Co., 855 F.2d 677, 682 (10th Cir. 1988) (concluding that removal protection for SEC commissioners is constitutional under *Morrison*).

<sup>43</sup> See Breger & Edles, *supra* note 3, at 1144 n.163 (“After *Morrison*, a threshold question remains whether Congress intended to confer some form of statutory protection on government officials.”).

<sup>44</sup> See 15 U.S.C. § 78d(a) (2006 & Supp. IV 2010).

<sup>45</sup> *Id.*

<sup>46</sup> See *Parsons v. United States*, 167 U.S. 324, 342 (1897); see also *Pievksy v. Ridge*, 98 F.3d 730, 734 (3d Cir. 1996) (“It is a long-standing rule in the federal courts that a fixed term merely provides a time for the term to end.”). These cases did not involve independent agencies, and some courts have suggested, in dicta, that a fixed-term provision along with several other structural factors might allow courts to infer removal protection. See, e.g., *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 826 (D.C. Cir. 1993). Regardless, the cases establish that the fixed term does not, by itself, confer removal protection; at most, a fixed term might be one factor in some extratextual test, based on the agency’s structure, that courts might use to infer removal protection. See *infra* section III.A, pp. 794–95.

<sup>47</sup> See generally Richard A. Posner, *Statutory Interpretation — In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 806–07 (1983). To be sure, the use of canons is controversial, but nevertheless widespread. See *id.* at 805.

functions, providing that when the statute is silent on the removal question, “the power of removal [is] incident to the power of appointment.”<sup>48</sup>

1. *History of the Presumption.* — The first statement of this principle, in *Ex parte Hennen*,<sup>49</sup> predates the 1934 Act by almost one hundred years. The *Hennen* Court found that, even when the Senate plays a role in the appointment process through its advice and consent powers, the incidental power of removal “was vested in the President alone.”<sup>50</sup> The Court relied on the so-called Decision of 1789,<sup>51</sup> in which the First Congress struck out a statutory provision that explicitly granted removal power to the President, so that it would not appear that the President exercised this power only by legislative grace.<sup>52</sup> Ultimately, *Hennen* established a default rule: where the President is given power to appoint an officer, the President presumptively has the power to remove that officer. The Court has repeated this principle several times since *Hennen*,<sup>53</sup> and even the three Justices who would dissent in *Myers* apparently accepted it.<sup>54</sup>

Indeed, by 1903, this principle had become so well established that the Court fashioned it into a clear statement rule. In *Shurtleff v. United States*,<sup>55</sup> the Court considered a statute providing that “general appraisers of merchandise . . . may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office.”<sup>56</sup> Because the statute did not say that the President could remove appraisers *only* for cause, the Court held that it did not prevent the President from removing appraisers *without* cause.<sup>57</sup> The Court specifically noted that the statute did not express a desire to limit the President’s power “in words plain enough to call upon the courts to determine that such intention existed.”<sup>58</sup>

<sup>48</sup> *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839).

<sup>49</sup> 38 U.S. (13 Pet.) 230.

<sup>50</sup> *Id.* at 259.

<sup>51</sup> *See id.*

<sup>52</sup> *See generally* sources cited *supra* note 16. The Decision of 1789 strongly suggests that the Framers believed the President would have the power to remove an officer in the face of statutory silence.

<sup>53</sup> *See, e.g.*, *Shurtleff v. United States*, 189 U.S. 311, 314–15 (1903); *Keim v. United States*, 177 U.S. 290, 293 (1900); *Blake v. United States*, 103 U.S. 227, 231 (1880).

<sup>54</sup> In 1920, after all three *Myers* dissenters (Justices Holmes, McReynolds, and Brandeis) had joined the Court, Justice Brandeis authored a unanimous opinion explaining that “[t]he power to remove is, in the absence of statutory provision to the contrary, an incident of the power to appoint.” *Burnap v. United States*, 252 U.S. 512, 515 (1920).

<sup>55</sup> 189 U.S. 311.

<sup>56</sup> *Id.* at 313 (quoting Customs Administrative Act, ch. 407, § 12, 26 Stat. 131, 136 (1890)).

<sup>57</sup> *Id.* at 318.

<sup>58</sup> *Id.*

Thus, well before 1934, the *Hennen* rule of construction had been transformed into a powerful presumption that could be overcome only by “very clear and explicit language.”<sup>59</sup> This well-established rule reveals that Congress would not have believed that the 1934 Act’s silence would create any ambiguity regarding removal. Rather, Congress likely understood that its silence would unambiguously make SEC commissioners removable at will by the President.

2. *The Presumption’s Continuing Validity.* — The *Hennen* rule of construction explains not only how Congress would have expected its silence to be interpreted in 1934, but also how a court should interpret silent or ambiguous statutes today. The Supreme Court restated the principle most recently in *Free Enterprise Fund*, when it held that striking removal protections in a statute would, by default, leave officers removable at will by the entity that appointed them.<sup>60</sup> Even though the Court largely abandoned the *Shurtleff* clear statement rule in *Humphrey’s Executor*,<sup>61</sup> *Free Enterprise Fund* indicates that the Court still considers the *Hennen* principle a valuable default rule for interpreting ambiguous or silent statutes.

The one exception to the Supreme Court’s adherence to this rule is found in *Wiener v. United States*,<sup>62</sup> where the Court held that the President could not remove a member of the War Claims Commission (WCC) even though the WCC’s enabling statute was silent about removal.<sup>63</sup> The Court looked at the legislative history of the statute and found that Congress had explicitly rejected a proposal by the House that would have given the WCC’s duties — adjudicating war claims by Americans against Japan — to an agency under the President’s control,<sup>64</sup> preferring instead to create a quasi-judicial body to “adjudicate [the claims] according to law.”<sup>65</sup> Additionally, the statute insulated the WCC from external control, specifying that no agency or court could review the WCC’s actions.<sup>66</sup> Concluding that the statute and legislative history clearly indicated that Congress did not want the executive branch to have any control over the WCC, the Court held that “*a fortiori* must it be inferred that Congress did not wish to have hang over the Commission the Damocles’ sword of removal by the President

<sup>59</sup> *Id.* at 315.

<sup>60</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3161 (2010) (“Under the traditional default rule, removal is incident to the power of appointment.”).

<sup>61</sup> *Humphrey’s Executor* did not overrule *Shurtleff*, but essentially limited it to its facts, especially the fact that the statute in *Shurtleff* did not provide a term of office for general appraisers. See *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 621–23 (1935).

<sup>62</sup> 357 U.S. 349 (1958).

<sup>63</sup> *Id.* at 356.

<sup>64</sup> See *id.* at 354–55.

<sup>65</sup> *Id.* at 355 (internal quotation marks omitted).

<sup>66</sup> See *id.* at 354–55.

[without cause].”<sup>67</sup> Without mentioning *Hennen* or *Shurtleff*, the Court concluded that *Humphrey’s Executor* “preclude[d]” giving the President power to remove commissioners at will.<sup>68</sup>

The *Wiener* Court did not need to rely on the *Hennen* default rule because, under its interpretation of the text and history, the statute was clear. The Court recognized that Congress could not have intended to make WCC commissioners removable at will, because that would give the President exactly the sort of control that Congress had rejected in creating the WCC.<sup>69</sup> To the extent the Court fashioned a new default rule, it relied on the “intrinsic judicial character” of the WCC’s task, considering executive control incompatible with the WCC’s purely judicial function.<sup>70</sup>

Therefore, *Wiener* does not diminish *Hennen’s* applicability to the 1934 Act. Nothing in the 1934 Act evinces such a clear intent to insulate the SEC from external control that “*a fortiori* must it be inferred”<sup>71</sup> that Congress intended to grant removal protection to SEC commissioners; indeed, Congress explicitly provided for mechanisms by which other branches could influence and control the SEC.<sup>72</sup> Additionally, the SEC’s functions are not purely judicial. Although the SEC can and does adjudicate claims, it also performs legislative and executive functions by promulgating rules and bringing enforcement actions.<sup>73</sup> There is no reason to think that Congress would not want the President to control such an agency: the Environmental Protection Agency, for example, has a similar range of powers,<sup>74</sup> but its Administrator is removable at will by the President.<sup>75</sup>

The Supreme Court’s decision in *Morrison v. Olson*<sup>76</sup> further confirms that *Hennen*, not *Wiener*, is the appropriate guide for interpreting the 1934 Act. In *Morrison*, the Court abandoned the distinction between purely executive, quasi-judicial, and quasi-legislative powers,<sup>77</sup> replacing it with a functional rule allowing Congress to grant

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<sup>67</sup> *Id.* at 356.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 355–56.

<sup>70</sup> *Id.* at 355.

<sup>71</sup> *Id.* at 356.

<sup>72</sup> See, e.g., Orrick, *supra* note 3, at 52 (“[T]he absolute independence of the Commission is limited by explicit responsibilities running to both the Executive Branch and to the Congress, and both these branches possess specific powers relating to its operations.”).

<sup>73</sup> See M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1384 (2004).

<sup>74</sup> See *id.* at 1388.

<sup>75</sup> See, e.g., Richard J. Pierce, Jr., *The Inherent Limits on Judicial Control of Agency Discretion: The D.C. Circuit and the Nondelegation Doctrine*, 52 ADMIN. L. REV. 63, 94 (2000) (“The EPA Administrator . . . serves at the pleasure of the President.”).

<sup>76</sup> 487 U.S. 654 (1988).

<sup>77</sup> See *id.* at 689–91.

removal protection so long as it does not “impede the President’s ability to perform his constitutional duty.”<sup>78</sup> The Court specifically noted the difficulty of drawing principled distinctions between purely executive, quasi-legislative, and quasi-judicial functions,<sup>79</sup> undermining cases like *Wiener* that rely on this distinction, while leaving *Hennen* intact. Moreover, *Morrison* did not provide a new default rule to replace *Hennen*: the *Morrison* rule constrains Congress as it encroaches on the President’s core constitutional functions, but it does not help define the limits of the President’s authority in the face of congressional silence.<sup>80</sup>

Thus, *Hennen* remains the controlling rule for interpreting statutes that are silent on the removal question, and *Wiener* is not to the contrary. A court should therefore apply the *Hennen* principle even if the court does not agree that Congress was necessarily conscious of the canon when it enacted the 1934 Act — at least where nothing in the historical record indicates that Congress expected a different result.

### C. The Legislative and Executive Understanding

In light of the prevailing rules of construction, the proper interpretation of the 1934 Act is clear: SEC commissioners are removable at will.<sup>81</sup> At least some judges, however, might hesitate to rely on a can-

<sup>78</sup> *Id.* at 691.

<sup>79</sup> *See, e.g., id.* at 689 n.28. The dissent also agreed “that the line between ‘purely executive’ functions and ‘quasi-legislative’ or ‘quasi-judicial’ functions is not a clear one or even a rational one.” *Id.* at 725 (Scalia, J., dissenting). The majority did note, however, that attempting to identify the nature of an agency’s functions might help interpret an ambiguous statute. *See id.* at 691 n.30 (majority opinion).

<sup>80</sup> *See id.* at 689–90. Moreover, converting *Morrison* into a rule of interpretation would be contrary to the very functional principles underlying the decision itself. To turn the *Morrison* rule into a statutory presumption would mean that, by default, the President’s power to remove commissioners would end where Congress’s power to insulate them begins; the President could remove most officers only if Congress expressly acted to delegate that power. This approach would be antithetical to the functional ideas embraced in *Morrison*, and more akin to the formalist principle that there be sharp divisions between the three branches. *See, e.g.,* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1942–44 (2011) (comparing formalism and functionalism). By contrast, the *Hennen* rule provides that where Congress has not yet acted (that is, it has remained silent), either branch may exercise power over an agency: the President by removing an officer, and Congress by enacting removal protection. This idea, rejecting a sharp division between the branches in favor of a shared space where either can act, is more in accord with functional principles. *See id.*; *see also* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 667–69 (1984) (describing a functional perspective of separation of powers); *cf.* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (explaining how Congress and the President have shared, overlapping, and interdependent powers).

<sup>81</sup> Where canons of construction make the text of a statute clear, the Supreme Court has suggested that consideration of legislative history is unnecessary, and potentially even inappropriate. *See, e.g.,* *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15, 119 (2001) (noting that consideration of the legislative history was unnecessary after using canons to determine meaning of the text).

on of construction if there were evidence from other sources that either Congress or the President held a different understanding of the statute when it was enacted.<sup>82</sup> Similarly, if there were evidence that legislators would have wanted to grant removal protection to SEC commissioners, but believed that *Myers* prevented them from doing so, a court might choose not to rely on the *Hennen* rule of construction to decide this question. Therefore, this section explores the legislative history of the 1934 Act and materials dealing with the original executive understanding, searching for evidence showing that either branch expected or hoped that SEC commissioners would be independent. Ultimately, the evidence does not suggest that either branch was concerned about commissioners' lack of removal protection. The evidence also indicates that both branches tended to prefer giving the President more rather than less control over the SEC, and therefore does not support an inference that legislators would have granted removal protection if not for *Myers*. Thus, these materials would not lead a court to a result contrary to the one compelled by the *Hennen* rule of construction.<sup>83</sup>

1. *The Legislative History.* — The legislative history of the 1934 Act is voluminous,<sup>84</sup> and it may not be entirely reliable.<sup>85</sup> With those caveats in mind, the legislative history does not demonstrate so much as a hope or a wish that the SEC would be treated as an independent agency, let alone a general understanding or expectation that it would be treated as such.<sup>86</sup> Indeed, the most striking feature of the legislative history is that removal was barely discussed at all.

The central organizational question that occupied Congress was whether the FTC or a new agency would implement the 1934 Act. Ultimately, the House favored the former and the Senate favored the latter.<sup>87</sup> The House plan would have added two new members to the FTC and created a special division within it for administering securi-

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<sup>82</sup> See, e.g., *Braffith v. Virgin Islands*, 26 F.2d 646, 649 (3d Cir. 1928).

<sup>83</sup> See *Circuit City*, 532 U.S. at 114–15, 119 (declining to rely on “sparse” legislative history in the face of conflicting canons of construction, *id.* at 119).

<sup>84</sup> In one compilation of the legislative histories of securities laws, the 1934 Act’s legislative history occupies volumes four through eleven. See 1 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934, at ix–xii (J.S. Ellenberger & Ellen P. Mahar eds., 2001).

<sup>85</sup> Cf. James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 29 & n.1 (1959) (commenting on the difficulty of gathering reliable legislative history for the Securities Act of 1933). For a discussion of the general unreliability of legislative history, see Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1015–19 (1992).

<sup>86</sup> For more on the difficulties presented by hopes and expectations, see RONALD DWORKIN, LAW’S EMPIRE 319–22 (1986).

<sup>87</sup> 4 THE ECONOMIC REGULATION OF BUSINESS AND INDUSTRY, *supra* note 34, at 2679–80.

ties law.<sup>88</sup> At the time, of course, FTC commissioners were widely understood to serve at the President's pleasure,<sup>89</sup> an understanding that President Roosevelt had recently confirmed by firing a commissioner without cause in 1933.<sup>90</sup> Moreover, the House generally supported giving the President power over the agency and opposed provisions that would limit that power. For example, concerned that the FTC could unilaterally change which officers would be assigned to the securities division, the House passed an amendment to ensure that "when the . . . men who administer this act are named and appointed, no one can change them *except the President*."<sup>91</sup>

By contrast, the Senate's plan was to create an agency independent from the FTC to administer the securities laws. When explaining this proposal, Senator Carter Glass made a rare reference to removal power, describing the SEC as "a commission picked for the purpose by the President, to be confirmed for the purpose by the Senate, subject to removal at any time, for reason, by the President."<sup>92</sup> This statement might suggest that Senator Glass believed that the President could not remove commissioners except "for reason," although it is unclear why the Senator used this odd phrasing to describe removal protection.<sup>93</sup> Alternatively, the Senator might have meant to say "for *any* reason," which would explain the choice of phrasing and would create parallelism with the previous clause: "at any time, for any reason." This ambiguous statement appears to be the only reference to removal power in debates over the Senate's plan, but other discussions suggest that the Senate's plan was intended generally to leave the President with a high degree of control over the agency. For example, representatives who preferred the Senate's plan explained that the SEC would not have any ex officio commissioners, in order to leave the President with maximum control over the agency.<sup>94</sup> As Representative Hamilton Fish explained: "The responsibility for this legislation rests with the President and he should have more interest in its proper administration than any other person."<sup>95</sup>

2. *The Executive Understanding.* — The President also plays a substantial role in the legislative process, especially by using the veto

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<sup>88</sup> See H.R. REP. NO. 73-1383, at 16 (1934).

<sup>89</sup> See *supra* pp. 783-84.

<sup>90</sup> See *Humphrey's Ex'r v. United States*, 295 U.S. 602, 618-19 (1935).

<sup>91</sup> 78 CONG. REC. 8111 (1934) (statement of Rep. William Cole) (emphasis added).

<sup>92</sup> *Id.* at 8162 (statement of Sen. Carter Glass).

<sup>93</sup> A Westlaw search revealed no federal statute that used the words "for reason" to confer removal protection.

<sup>94</sup> See 78 CONG. REC. 7946-47 (1934) (statement of Rep. Hamilton Fish).

<sup>95</sup> *Id.* at 7946.

power to shape legislation.<sup>96</sup> President Roosevelt was not shy about using this power to influence policy: he issued an astonishing 635 vetoes during his presidency.<sup>97</sup> Therefore, it is helpful to know not only how the legislature understood the statute it enacted, but also how President Roosevelt understood the statute he signed.<sup>98</sup>

It is difficult to say for certain how President Roosevelt envisioned the SEC. Nonetheless, it is clear that he and his Administration believed Congress could not constitutionally limit the President's removal power, based on their conduct in *Humphrey's Executor*. Specifically, President Roosevelt fired an FTC commissioner without cause, despite explicit statutory removal protection, and his Attorney General considered Humphrey's case to be a sure victory for the government.<sup>99</sup> When the case was decided, it infuriated President Roosevelt, and the decision was one of the key factors that later led to his infamous attempt to pack the Court.<sup>100</sup> More generally, although the New Deal is widely associated with the proliferation of independent agencies, President Roosevelt himself worked unusually hard to consolidate power over the agencies.<sup>101</sup> Thus, the President and his administration likely understood that SEC commissioners would be removable at will, and they almost certainly preferred it that way.

### III. ALTERNATIVE APPROACHES TO INTERPRETING THE STATUTE

The above analysis demonstrates that, interpreted in light of the text, prevailing rules of construction, and legislative history, the 1934 Act made SEC commissioners removable at will. Nonetheless, a court deciding this question might be hesitant to rely on these familiar tools of statutory interpretation, given that Congress's intent likely rested on

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<sup>96</sup> See, e.g., CHARLES M. CAMERON, VETO BARGAINING 20 (2000); Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 AM. U. L. REV. 1, 57–59 (2003).

<sup>97</sup> J. Richard Broughton, *Rethinking the Presidential Veto*, 42 HARV. J. ON LEGIS. 91, 128 (2005) (discussing President Roosevelt's aggressive, policy-based use of the veto, and how he sometimes vetoed bills just to send Congress "a reminder of his strength as President").

<sup>98</sup> See Kathryn Marie Dessayer, Note, *The First Word: The President's Place in "Legislative History"*, 89 MICH. L. REV. 399, 413 (1990).

<sup>99</sup> See *supra* pp. 783–84.

<sup>100</sup> See MCKENNA, *supra* note 22, at 98; William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347, 382.

<sup>101</sup> See Angel Manuel Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 ADMIN L.J. AM. U. 461, 484 (1994) ("Roosevelt took a more aggressive approach toward independent agencies than any of his predecessors. . . . He used a variety of tactics to influence the independent agencies, including . . . 'jawboning,' requesting undated letters of resignation from prospective appointees, and . . . employing the removal power." (footnote omitted)); see also Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 616–17 (2010).

a mistaken prediction of how the Supreme Court would rule in removal cases after *Myers*. This Part canvasses four alternative tests that courts might apply to determine whether the President has the power to remove an SEC commissioner. These tests would tend to yield an answer more in line with the expectations of current legislators and scholars, but they lack a sound legal basis, risk undermining or frustrating the expectations of the enacting legislature, and frequently produce only ambiguous results. Thus, none of them provide a basis for rejecting the conclusion that the 1934 Act makes SEC Commissioners removable at will.

#### A. A Structural Test

One alternative way to interpret statutory silence regarding removal is to look at structural features of the agency in question. Independent agencies tend to share a number of distinguishing characteristics that executive agencies lack. The most salient feature, of course, is removal protection,<sup>102</sup> but scholars have identified a number of other common features, including a multimember board, a term of office longer than four years, and a rule that no more than a bare majority of the board can come from the same political party.<sup>103</sup> Thus, faced with statutory silence, a reviewing court might inspect the relevant agency for the presence of these indicia of independence, and infer removal protection for the officers of agencies displaying most or all of these qualities.<sup>104</sup>

This test, however, is not useful for evaluating the SEC's independence. For one thing, scholars have identified these common characteristics by studying "the traditional independent regulatory agencies,"<sup>105</sup> a list that invariably includes the SEC.<sup>106</sup> Since these studies assumed the independence of the SEC, relying on them to test the SEC's independence amounts to begging the question.<sup>107</sup> More broadly, there is no legal basis for converting *indicia* of independence, the presence of which suggests that an agency is independent, into *features* of independence, the presence of which may be inferred from the presence of others. Finally, by assuming that all agencies sharing certain characteristics should also share others, the test might undermine Con-

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<sup>102</sup> See, e.g., Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 16 (2010).

<sup>103</sup> See, e.g., Breger & Edles, *supra* note 3, at 1135, 1137–54 (discussing factors commonly shared by independent agencies); Miller, *supra* note 10, at 51 (same).

<sup>104</sup> The D.C. Circuit has suggested, in dicta, that a court might infer removal protections from this sort of structural analysis. See *Kalaris v. Donovan*, 697 F.2d 376, 395–96 (D.C. Cir. 1983).

<sup>105</sup> Miller, *supra* note 10, at 51.

<sup>106</sup> See, e.g., Breger & Edles, *supra* note 3, at 1137; Miller, *supra* note 10, at 51.

<sup>107</sup> See RUGGERO J. ALDISERT, LOGIC FOR LAWYERS 201–02 (1989).

gress's ability to create new and unique structures to handle specific problems,<sup>108</sup> particularly when the test yields a result contrary to the understanding of the enacting legislature.

*B. A Totality-of-the-Circumstances Test*

Another possible test would ask whether, considering the totality of the circumstances, removal protection *should* be inferred for the officer in question. A reviewing court might cite *Wiener* for this proposition: some commentators have argued that *Wiener* stands for the rule that courts should infer removal protection when independence would be “desirable”<sup>109</sup> or, more narrowly, when “the functions of the agency demand such tenure protection.”<sup>110</sup> Under either of these tests, a court might conclude that it should infer removal protection for SEC commissioners, relying on the widespread belief that the SEC’s independence is highly desirable or even necessary.<sup>111</sup>

To apply either of these tests to the SEC, however, would be to misread *Wiener*. As noted above, *Wiener* evaluated the necessity or desirability of independence solely as one part of its purposivist statutory interpretation. The Court’s conclusion that independence was a desirable or necessary feature of adjudicative bodies like the WCC simply confirmed its interpretation — based on clear indications in the statute and the legislative history — that Congress intended to make the WCC independent.<sup>112</sup> By contrast, the 1934 Act’s text and legislative history do not demonstrate that Congress intended to make the SEC independent. Additionally, it is at least highly doubtful that Congress believed independence to be *necessary* to the SEC’s success, given that it created the Commission despite the widespread belief that Congress could not constitutionally grant independence. For a court to impose removal restrictions on SEC commissioners, in the face of this

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<sup>108</sup> Many commentators have discussed the need for courts to be sensitive to the diversity of unique regulatory structures that Congress has created. See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3168–69 (2010) (Breyer, J., dissenting); Peter L. Strauss, *On the Difficulties of Generalization — PCAOB in the Footsteps of Myers, Humphrey’s Executor, Morrison, and Freytag*, 32 CARDOZO L. REV. 2255, 2282 (2011).

<sup>109</sup> ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 358 (4th ed. 2011).

<sup>110</sup> *The Constitutional Separation of Powers Between the President & Cong.*, 20 Op. O.L.C. 124, 168 n.115 (1996). *But see id.* (noting that this rule “seems questionable”).

<sup>111</sup> See, e.g., Aulana L. Peters, *Independent Agencies: Government’s Scourge or Salvation?*, 1988 DUKE L.J. 286, 291–93; see also *Swan v. Clinton*, 100 F.3d 973, 983 (D.C. Cir. 1996) (“[P]eople will likely have greater confidence in financial institutions if they believe that the regulation of these institutions is immune from political influence.”). *But see id.* at 983 n.6 (“It merits noting, however, that the Comptroller of the Currency, who is responsible for implementing laws relating to the national currency and Federal Reserve notes . . . can be removed by the President [at will].”).

<sup>112</sup> See *Wiener v. United States*, 357 U.S. 349, 354–56 (1958); *supra* pp. 788–89.

understanding, would be to substitute the court's judgment about the desirability of independence for that of the enacting legislature.

Furthermore, it would likely be very difficult for a court to assess whether independence is desirable. On the one hand, many commentators argue that the SEC's independence isolates it from politics, helping it to develop a high level of agency expertise and to maintain a long-term perspective on its activities.<sup>113</sup> On the other hand, many other commentators question these assumptions, noting that independent agencies are not shielded from politics in practice<sup>114</sup> and that there is little evidence that independence helps agencies develop expertise.<sup>115</sup> Additionally, independence allows politically accountable actors to avoid taking responsibility for the SEC's actions<sup>116</sup> and may hamper the SEC's ability to coordinate its activities with other regulatory agencies,<sup>117</sup> such as the Treasury Department. Thus, it is certainly not clear that independence is desirable for the SEC, and the question is probably not suitable for judicial resolution.

Rather than relying on its own assessment of the desirability of independence, however, a reviewing court might rely on the SEC's interpretation of the 1934 Act. In the SEC's Canons of Ethics, the Commission provides that "under the law, this is an independent Agency."<sup>118</sup> There is a considerably stronger argument for granting deference to an agency's interpretation of its enabling statute than to a court's opinion of the desirability of independence.<sup>119</sup> Nonetheless, the SEC's interpretation here is not entitled to deference, because the factors typically offered to support deference are not present. For one thing, an agency's interpretation is not entitled to deference when it contradicts the plain meaning of a statute, as determined according to ordinary rules of statutory interpretation.<sup>120</sup> Additionally, interpretations contained in policy statements and agency manuals are generally

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<sup>113</sup> See, e.g., Bressman & Thompson, *supra* note 101, at 611–14; Peters, *supra* note 111, at 290–93.

<sup>114</sup> See James C. Miller, III, *A Reflection on the Independence of Independent Agencies*, 1988 DUKE L.J. 297, 297–99; Miller, *supra* note 10, at 82–83.

<sup>115</sup> See Miller, *supra* note 10, at 80–81.

<sup>116</sup> See Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197, 202–03 (1982).

<sup>117</sup> See Miller, *supra* note 114, at 297; Peters, *supra* note 111, at 288–89.

<sup>118</sup> 17 C.F.R. § 200.58 (2012).

<sup>119</sup> See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–45 (1984); see also *Kalaris v. Donovan*, 697 F.2d 376, 390–91 (D.C. Cir. 1983) (determining that Congress intended for an agency to decide its own position within the executive branch, and deferring to the agency on that question).

<sup>120</sup> Where the statutory text is clearly resolved by ordinary tools of statutory interpretation — including canons of construction — there is no ambiguity for the agency to resolve. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446–49 (1987).

entitled to reduced deference.<sup>121</sup> It is also doubtful that Congress would ever intend for an agency to decide whether its own commissioners should have removal protection,<sup>122</sup> especially considering that self-interest is so obviously implicated.<sup>123</sup> Finally, a key purpose behind deferring to agency interpretations is to give policymaking power to a political branch, especially to the President.<sup>124</sup> Deferring to the SEC's interpretation here, however, would allow the agency unilaterally to *remove* itself from politics and from the President's control.<sup>125</sup> Thus, because the typical arguments for deferring to an agency's interpretation do not apply, the guideline in the SEC's Canons of Ethics should not affect a reviewing court's statutory interpretation.

### C. A Postenactment-Understanding Test

Although traditional statutory interpretation focuses on the intent of the *enacting* legislature, courts occasionally consider the postenactment history of a statute as well. In *FDA v. Brown & Williamson Tobacco Corp.*,<sup>126</sup> for example, the Court explained that later statutes can help limit the range of possible meanings that could be ascribed to the original statute.<sup>127</sup> A court following this approach might look at the postenactment history of the 1934 Act, searching for language that could limit the range of meanings that can be accorded to the 1934 Act's silence or for indications that Congress has ratified the common understanding of the SEC's independence.

<sup>121</sup> See *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

<sup>122</sup> See *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 178 (2007) (“[T]he ultimate question is whether *Congress* would have intended, and expected, courts to treat an agency’s rule, regulation, application of a statute, or other agency action as within, or outside, its delegation to the agency of ‘gap-filling’ authority.”).

<sup>123</sup> See Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2101 (1990) (arguing that deference is not due when “the agency’s self-interest is conspicuously at stake”). See generally Timothy K. Armstrong, *Chevron Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL’Y 203 (2004) (arguing that “a court confronted with an arguably self-interested agency interpretation of law should evaluate the agency’s interpretation *de novo*,” *id.* at 207). The Supreme Court’s decision in *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2644–45 (2010), arguably supports this position as well, as the Court rejected the NLRB’s self-interested interpretation of its quorum requirement without even addressing *Chevron* or any other framework of deference. See *The Supreme Court, 2009 Term — Leading Cases*, 124 HARV. L. REV. 179, 387–90 (2010).

<sup>124</sup> See *Chevron*, 467 U.S. at 865–66. The Court explained that, “[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices.” *Id.* at 865.

<sup>125</sup> The importance of political accountability has led some commentators to suggest that the amount of deference given to an agency interpretation should vary according to the level of involvement the President had in that interpretation. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2372, 2376–77 (2001). Under this theory, an agency interpretation adverse to the President’s interests should be entitled to little or no deference.

<sup>126</sup> 529 U.S. 120 (2000).

<sup>127</sup> See *id.* at 143; see also *Massachusetts v. EPA*, 549 U.S. 497, 531 (2007).

The Supreme Court has noted, however, that at least in the context of the securities laws, postenactment understandings “deserve little weight in the interpretive process.”<sup>128</sup> Additionally, the postenactment history of the 1934 Act is quite unlike the record the Court faced in *Brown & Williamson*. There, the Court relied on thirty-five years of affirmative actions taken by Congress that were inconsistent with the statutory interpretation urged by the government.<sup>129</sup> By contrast, the only statute that appears inconsistent with the idea that SEC commissioners are removable at will is the Paperwork Reduction Act,<sup>130</sup> where Congress defined the term “independent regulatory agency” as including the SEC.<sup>131</sup> This isolated reference to independence in a statute dealing with internal recordkeeping procedures is not significant enough to overcome the clear result of more traditional techniques of statutory interpretation.<sup>132</sup>

#### D. A History-and-Tradition Test

Finally, a court might infer removal protection from the simple fact that the SEC has traditionally been treated as an independent agency. Particularly in separation-of-powers disputes, the Supreme Court has suggested that it is appropriate to defer to historical practices and traditions.<sup>133</sup> Likewise, the Court has suggested that unprecedented executive actions will be regarded with heightened suspicion.<sup>134</sup> The insight behind this adherence to “historical gloss”<sup>135</sup> in separation-of-powers disputes is the Madisonian idea that each branch will be motivated to challenge any meaningful intrusions on its power.<sup>136</sup> Thus, the absence of any significant executive challenge to the SEC’s presumed independence might be understood as acquiescence in that independence.<sup>137</sup>

<sup>128</sup> Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 187 (1994).

<sup>129</sup> *Brown & Williamson*, 529 U.S. at 155–56.

<sup>130</sup> 44 U.S.C. §§ 3501–3521 (2006 & Supp. IV 2010).

<sup>131</sup> *Id.* § 3502(5) (internal quotation marks omitted).

<sup>132</sup> *Cf. Massachusetts v. EPA*, 549 U.S. at 529–31 (distinguishing *Brown & Williamson* based on the strength of the postenactment record in that case).

<sup>133</sup> See Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 417–24 (2012); Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109, 110–11, 115–16 (1984).

<sup>134</sup> See *Medellín v. Texas*, 552 U.S. 491, 532 (2008) (noting that “the Government has not identified a single instance in which the President has attempted” the action at issue).

<sup>135</sup> Bradley & Morrison, *supra* note 133, at 412.

<sup>136</sup> See *id.* at 438–39.

<sup>137</sup> Indeed, since the Court had to accept the SEC’s independence to reach its holding in *Free Enterprise Fund*, some scholars conclude that the Court has already implicitly relied on this reasoning. See *id.* at 483–84; see also Jack M. Beermann, *An Inductive Understanding of Separation of Powers*, 63 ADMIN. L. REV. 467, 491 (2011). To be sure, *Free Enterprise Fund* did not endorse such an approach; although it may be surprising that the Supreme Court’s conservative Justices

Although recognizing the traditions and conventions of executive control over an agency is a useful way of assessing the actual degree of independence that an agency enjoys in practice,<sup>138</sup> it would be an inappropriate tool for determining whether the President could remove an officer at will.<sup>139</sup> Interpreting the President's failure to challenge the independent status of an agency as acquiescence would create perverse incentives: Presidents attempting to preserve the full extent of their authority would be motivated periodically to discharge commissioners, even if the President was generally satisfied with their performance.<sup>140</sup> Critically, this approach would encourage behavior at odds with the very reasons for creating independent agencies, especially the interests in stability and development of agency expertise.<sup>141</sup>

Moreover, Presidents may fail to challenge self-declared independent agencies for political reasons, even when the Executive believes that the agency is not independent.<sup>142</sup> This political check might be part of an agency's design: Congress might prefer to leave the Executive with the legal power to dismiss a commissioner, while making it politically costly to do so, owing to the agency's reputation for expertise or independence.<sup>143</sup> Compare, for instance, the independence of special prosecutors, appointed throughout the nation's history to investigate wrongdoing by high-level officials, who served under the Attorney General (and therefore the President) but nonetheless enjoyed a high degree of independence, backed only by a powerful political

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would allow parties to create a constitutional defect by stipulation, the issue was neither squarely presented nor decided in the case. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3148–49 (2010).

<sup>138</sup> See generally Adrian Vermeule, *Conventions of Agency Independence* (Harvard Pub. Law Working Paper No. 12-32, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2103338](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2103338). Professor Vermeule suggests that courts should consider the conventions of independence when forced to evaluate an agency's actual independence, but not when a convention conflicts with some action taken by the Executive or the legislature. See *id.* at 49 (“[C]onventions may be recognized by courts in the course of interpretation, but may not be . . . directly enforced as freestanding rules that would trump clear statutes or executive action clearly authorized by statute.”).

<sup>139</sup> See *id.* at 43, 49; see also *Free Enter. Fund*, 130 S. Ct. at 3155 (“[T]he separation of powers does not depend on . . . whether ‘the encroached-upon branch approves the encroachment.’” (quoting *New York v. United States*, 505 U.S. 144, 182 (1992))).

<sup>140</sup> Merely asserting the President's nonacquiescence might not be sufficient: acquiescence-based arguments typically turn on the President's acts, not on the President's assertions. See Glennon, *supra* note 133, at 134.

<sup>141</sup> See Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 498 (1979) (“[I]ndependent agencies have been granted protection from presidential involvement in order to ensure . . . development of expertise and stability.”).

<sup>142</sup> Cf. Bradley & Morrison, *supra* note 133, at 444 (noting that Presidents sometimes fail to protect their institutional prerogatives for political reasons).

<sup>143</sup> See Strauss, *supra* note 108, at 2276 (arguing that the enacting Congress might have “understood that . . . presidential interference with [the SEC] would generate enough political heat to dissuade any President from dismissing a commissioner without an articulable, apolitical reason”).

check.<sup>144</sup> Thus, in the infamous “Saturday Night Massacre,” President Nixon successfully removed the prosecutor appointed to investigate the Watergate scandal, Archibald Cox, but only at severe political cost.<sup>145</sup> The removal outraged both Congress and the public, and Nixon was forced to appoint a new prosecutor and eventually to resign,<sup>146</sup> leading observers to conclude “that the system largely functioned as designed and brought the perpetrators to justice.”<sup>147</sup> Indeed, after the impeachment of President Clinton, many scholars argued that the special prosecutor system, with independence protected only by political checks, had worked better than the independent counsel system, with its total insulation from executive control.<sup>148</sup>

The analogy between a special prosecutor and the typical agency commissioner is undoubtedly imperfect. In particular, disrupting the investigation of government scandals and corruption may trigger greater political backlash than would interference in financial rule-making. At the same time, it is difficult to imagine a situation in which independence might seem more valuable than investigating wrongdoing by the most powerful members of the executive branch, or to imagine an officer whose independence had been respected more throughout history than the special prosecutor’s. Yet when the legislature turned this office into a fully independent one, by creating the independent counsel, many observers concluded that the result was disastrous.<sup>149</sup> For a court to do the same, by relying on historical norms to convert traditions of independence into de jure independence, would risk undermining a structure carefully designed by legislators who understood the power of political checks and the dangers of total independence. Instead, courts should rely on traditional techniques of statutory interpretation to protect the important political and structural compromises and design choices that Congress made.<sup>150</sup>

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<sup>144</sup> See Hanly A. Ingram, Note, *United States v. Tucker: Should Independent Counsels Investigate and Prosecute Ordinary Citizens?*, 86 KY. L.J. 741, 742–47 (1998).

<sup>145</sup> See *id.* at 744–46.

<sup>146</sup> See *id.*; see also Cass R. Sunstein, *Bad Incentives and Bad Institutions*, 86 GEO. L.J. 2267, 2281 (1998).

<sup>147</sup> Herbert J. Miller, Jr. & John P. Elwood, *The Independent Counsel Statute: An Idea Whose Time Has Passed*, LAW & CONTEMP. PROBS., Winter 1999, at 111, 112.

<sup>148</sup> See, e.g., Sunstein, *supra* note 146, at 2280–81.

<sup>149</sup> See *id.* at 2283 (“Most people who have explored the subject know[] that the [Independent Counsel] Act is a disastrous failure and that it should be repealed.”).

<sup>150</sup> As an example, Congress might use a politically protected agency to support a two-layer removal protection scheme similar to the one struck down in *Free Enterprise Fund*. The Court likely would have upheld the Public Company Accounting Oversight Board structure if it had found that the President *legally* could remove SEC commissioners at will, even if as a *political* matter, it would be difficult or impossible for the President actually to remove them. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3153–54 (2010).

## CONCLUSION

The widely held assumption that the President cannot remove an SEC commissioner except for good cause is wrong. The text of the 1934 Act is silent on this issue, but an analysis of the prevailing rules of construction demonstrates that SEC commissioners serve at the pleasure of the President, and the legislative history does not suggest that Congress understood the statute differently. Meanwhile, alternative approaches to interpreting the 1934 Act produce ambiguous results, rest on dubious legal grounds, and risk undermining important compromises made by Congress.

The conclusion that SEC commissioners are removable at will has potentially broad implications. For instance, the 2008 election shows that presidential candidates may be willing to make the proper management of the SEC a campaign issue.<sup>151</sup> Such criticism may inspire incumbent Presidents to take a more active role in overseeing the SEC, especially if they can no longer hide behind a popular perception that the SEC is an independent agency.<sup>152</sup> Additionally, cases like *Free Enterprise Fund* show that the independence of the SEC can be implicated indirectly, even without a deliberate challenge by the executive branch.<sup>153</sup> Finally, there are several other agencies that are traditionally considered independent, such as the Federal Communications Commission and the Federal Election Commission, even though they lack explicit statutory removal protection.<sup>154</sup> The analysis in this Note suggests that where the statute is silent on the question, courts, litigants, and government officials should more critically examine traditional assumptions about an agency's independence.

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<sup>151</sup> See *supra* p. 781.

<sup>152</sup> Currently, a sitting President might be unlikely to remove an SEC commissioner, because the SEC's independence allows the President to avoid taking responsibility for the Commission's activities. See Moe, *supra* note 116, at 202–03.

<sup>153</sup> Whether cases like *Free Enterprise Fund* should be decided based on the President's legal power to remove an agency's officers, as opposed to the degree of independence that an agency enjoys in practice, is a separate question beyond the scope of this Note. For more on that question, see generally Vermeule, *supra* note 138.

<sup>154</sup> See *id.* at 8–10.