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First Take

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THE “PRINCIPAL” REASON WHY THE PCAOB IS UNCONSTITUTIONAL

The Constitution creates very few federal offices. It creates the House and Senate,¹ the Speaker of the House² and the President pro tempore of the Senate,³ the President,⁴ the Vice President,⁵ and the Supreme Court⁶--and that is it. The Constitution clearly contemplates that there will be other federal “Officers,” who the President must commission⁷ and who Congress may impeach and remove,⁸ but the document does not itself create those positions. Instead, it provides general authorization to Congress (in conjunction with the President's presentment power⁹ and the Vice President's modest voting authority¹⁰) to “make all Laws which shall be necessary and proper for carrying into Execution” the enumerated powers of national institutions,¹¹ which plainly includes the authority to create federal positions.

The Constitution specifies, in quite gruesome detail, how Congress, the President, and the Vice President are to be selected for *74 office. Indeed, judging by the number of provisions devoted to the subject,¹² it is clearly the central concern of the document. With respect to appointment, however, the Constitution only directs that the officers of Congress other than the Vice President shall be chosen by each branch of Congress,¹³ that the States get to choose the officers of the militia,¹⁴ and that the President

shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.¹⁵

Under this clause, non-inferior, or **principal**, officers *must* be appointed by the President with the advice and consent of the Senate; whereas inferior officers *may* be appointed by the President, the courts of law, or heads of departments without Senate confirmation if Congress so specifies. And if someone within the federal government does not fall anywhere within the class of persons described in this clause, presumably that person's appointment can be fixed by Congress in any manner that is “necessary and proper for carrying into Execution” federal powers.

The members of the Public Company Accounting Oversight Board (“**PCAOB**”) are, as Professor Strauss points out in his characteristically elegant introduction to this symposium,¹⁶ conceded by all parties in this case to be “Officers of the United States” under the Appointments Clause. It is true that Congress has specifically declared in the Sarbanes-Oxley Act that the **PCAOB** “shall not be an agency or establishment of the United States Government” and “[n]o member or person employed by, or agent for, the Board shall be deemed to be an officer or employee of or agent for the Federal Government by **reason** of such service,”¹⁷ but Congress is not a party to this case. And as a matter of substance, Congress's declaration is about as

interesting and profound as would be a similar legislative declaration that, for example, FBI agents are not government officials *75 for purposes of the Fourth Amendment.¹⁸ The members of the **PCAOB**, with power to regulate the entire corporate audit process, undeniably exercise “significant authority pursuant to the laws of the United States,”¹⁹ and that makes them officers for Appointments Clause purposes.

The **PCAOB** members are appointed by the Securities and Exchange Commission.²⁰ If the **PCAOB** members are **principal** officers, their appointments are flagrantly **unconstitutional**. If they are inferior officers, their appointments are permissible if (1) the SEC counts as a “Department[]” under the Appointments Clause and (2) the five members of the SEC can collectively qualify as a “Head[]” of a department. The petitioners in *Free Enterprise Fund v. PCAOB*²¹ insist that the **PCAOB** members are **principal** officers because at least some of their functions are not supervised by any executive officer and the scope of their duties are sufficiently broad to foreclose classification as inferior officers. They also maintain that, even if the **PCAOB** members are inferior officers, an independent agency such as the SEC cannot be a “Department[]” and a collective body (as opposed to a unitary Chairperson of an agency) cannot be a departmental “Head[].”

It is clear (at least to me) that the members of the **PCAOB** are **principal** officers who must be appointed by the President with the advice and consent of the Senate. This is true for three independent **reasons**: (1) the members of the **PCAOB** are not fully subject to the control and supervision of other officers; (2) the scope and nature of their duties, independent of the degree of supervision to which they are subject, make them **principal** officers; and (3) the members of the **PCAOB** are “Heads of Departments” under the Appointments Clause and are therefore necessarily **principal** officers. The third argument was not advanced by the Free Enterprise Fund--and indeed contradicts its position that a “Department[]” under the Appointments Clause must be a Cabinet-like entity--but it may well be the strongest argument against the current structure of the **PCAOB**.

*76 I

Start with the problem of control and supervision. As former Administrative Law Professor Scalia²² pointed out in *Edmond v. United States*,²³ if an officer is not controlled and supervised by any other officer, it is difficult to see in what respect that officer is “inferior.”²⁴ Careful study of the original meaning²⁵ of the term “inferior” in the Appointments Clause shows that Professor Scalia was right.

The standard, and therefore presumptive, eighteenth-century meaning of the term “inferior” describes a hierarchical relationship. The leading eighteenth-century dictionary defined “inferiour” as “1. Lower in place. 2. Lower in station or rank of life. 3. Lower in value or excellency. 4. Subordinate.”²⁶ This is consistent with the Latin root “inferus,” which means “below or beneath.”²⁷ Given the prevalence of knowledge of Latin among the educated members of the founding generation,²⁸ a reasonable reader of the Constitution would construe the Appointments Clause to require an inferior officer to be subordinate to some other officer.

This conclusion is reinforced by the Constitution's other explicit and implicit uses of the term “inferior.” The Article III Vesting Clause distinguishes the “supreme Court” from “inferior Courts.”²⁹ Lower federal courts are “inferior” to the Supreme Court because they are subject to the control and supervision of the Supreme Court. If lower courts could decide cases free of Supreme Court supervision, they would be “coordinate” rather than “inferior” courts. Similarly, federal *77 laws are “the supreme Law of the Land,”³⁰ and contrary state laws are thus implicitly “inferior,” because federal law hierarchically prevails over state law in the event of conflict.

In sum, the Constitution repeatedly uses terms like “inferior” and “supreme” to describe hierarchical relationships. In this respect, *Edmond* was right: officers who do not answer to other officers are necessarily **principal** officers.

The SEC has review power over the **PCAOB's** rules and sanctions, but it has no specific statutory power to direct, supervise, or review the **PCAOB's** investigative and enforcement decisions, which are precisely the decisions of the **PCAOB** to which the Free Enterprise Fund has been subjected. The fact that there are other powers of the **PCAOB** that *are* subject to active SEC control is irrelevant. A **principal** officer does not become inferior simply by being given additional authority over which

other officers exercise control. The Attorney General, for example, is clearly a **principal** officer, with considerable authority that is subject to control and direction only by the President. If Congress added to the Attorney General's authority statutory decision-making power over all functions now entrusted to the various Cabinet agencies, but subject to the direct control and supervision of the heads of those agencies, it would not turn the Attorney General into an inferior officer simply because he or she now had considerable authority subject to the control and supervision of other officers. The key consideration in determining **principal** officer status is not the percentage or amount of an officer's authority that is subject to the control or supervision of some other officer but the presence of some significant authority that is not so subject. Therefore, even if many of the functions of the **PCAOB** are subject to the control and supervision of other officers, the **PCAOB** members are still **principal** rather than inferior officers so long as there are significant functions for which no such control or supervision exists--and the **PCAOB's** investigative, examining, and enforcement functions are not controlled and supervised by the SEC.

II

Suppose, however, that one could twist the Sarbanes-Oxley Act to give the SEC control and supervision over even the investigative and enforcement functions of the **PCAOB**, so that there is literally no authority of consequence exercised by the **PCAOB** that is not under *78 the direction of the SEC.³¹ The **PCAOB** members would still be **principal** officers because of the nature and scope of their authority. Answerability to another officer is a *necessary* condition of inferior officer status, but it is not necessarily a *sufficient* condition.

The primary eighteenth-century meaning of “inferior,” both in general and in the specific context of Article II, involves a hierarchical relationship of subordination and control. That is not, however, the only way in which the term “inferior” was used during the founding era--and in particular not the only way in which it was used in connection with governmental authority. In the late eighteenth century, a court whose decisions were not subject to review by any other court could nonetheless sometimes be called an “inferior court” if its jurisdiction or geographic scope was limited in some important respect.³² Indeed, a number of states during the founding era had nonhierarchical court systems in which the label “supreme” did not necessarily connote ultimate decisional authority and the label “inferior” did not necessarily connote decisional subordination but instead described scope of authority.³³ An early draft of Article III proposed creating “one or more supreme tribunals,”³⁴ which makes sense only if “supreme,” and therefore “inferior,” can sometimes have a nonhierarchical meaning.

For the **reasons** given above, and some additional **reasons** given below, it is not plausible to think that either Article II or Article III adopted this authority-based understanding of inferiority wholesale.³⁵ The textual and structural evidence for a hierarchical understanding of inferiority in the Constitution is quite potent. But that does not mean that the authority-based alternative understanding must disappear quietly into the night. One way to accommodate both understandings is to treat them as independently sufficient alternative routes to inferiority: an officer who is not subordinate can never be inferior, but an officer who is subordinate (and is therefore presumptively “inferior” in the primary sense) could nonetheless be **principal** because of the nature of his or her duties. For example, the *79 Solicitor General is hierarchically subordinate to the Attorney General, who is “the head of the Department of Justice”³⁶ and can displace or direct the Solicitor General in the representation of the United States.³⁷ But given the Solicitor General's pervasive role in the conduct of litigation on behalf of the United States, it seems quite sensible to conclude that he or she is a **principal** officer notwithstanding the hierarchical superiority of the Attorney General. The same might be said, for the same **reasons**, of the Deputy Attorneys General.³⁸

If this dual-track vision of inferiority is correct, there is a very strong case that the **PCAOB** members are **principal** officers, given the enormous power with which they are vested. All public auditors must register with and provide information to the **PCAOB**,³⁹ and the **PCAOB** “shall assess and collect a registration fee and an annual fee from each registered public accounting firm, in amounts that are sufficient to recover the costs of processing and reviewing applications and annual reports.”⁴⁰ The **PCAOB** has authority to promulgate rules establishing “such auditing and related attestation standards, such quality control standards, and such ethics standards to be used by registered public accounting firms in the preparation and issuance of audit reports, as required by this Act or the rules of the Commission, or as may be necessary or appropriate in the public interest or for the protection of investors.”⁴¹ The **PCAOB**, in other words, has authority to regulate virtually every aspect of the public

auditing process. The **PCAOB** is further empowered to inspect, investigate, and discipline all registered public accounting firms,⁴² and the power to discipline includes the power to impose substantial civil fines.⁴³ These powers extend to the entirety of the public auditing process, throughout the country and across all businesses. These powers are obviously enough to make the **PCAOB** members “Officers of the United States.” They are also plausibly enough to make them **principal** officers regardless of their relationship to the SEC.

“[P]lausibly enough,” of course, is not the same thing as “enough.” It may be *plausible* to think that an authority-based *80 understanding of inferiority infuses the Appointments Clause, but is it *right* so to think?

One consideration modestly in favor of so thinking is that persons as diverse as Justice Scalia and Justice Souter have both so thought.⁴⁴ As evidence of original meaning, however, this is very thin. I do not see a knock-down argument in either direction on this point. In the end, the balance tips in favor of the dual-track version of inferiority, but in order to make that case, one more set of considerations, which also independently supports another argument for the **unconstitutionality** of the **PCAOB**, must be put into play.

III

If the **PCAOB** members are inferior officers, their appointments by the SEC are proper if the SEC is a “Department[.]” under the Appointments Clause and the SEC commissioners, as a collective body, are the “Head[.]” of that department. Drawing heavily on the majority opinion in *Freytag v. Commissioner*,⁴⁵ which sought to “confin[e] the term ‘Heads of Departments’ in the Appointments Clause to executive divisions like the Cabinet-level departments,”⁴⁶ the Free Enterprise Fund argues vigorously that the SEC is not a constitutional “Department[.]” (a proposition specifically reserved by the Court in *Freytag*⁴⁷) and that a collective group of people cannot be a departmental “Head[.]” I think that they are wrong on both counts but right in their ultimate conclusion. The **PCAOB** is a constitutional “Department[.]” its members are constitutional “Heads of Departments,” and a constitutional department head is necessarily a **principal** officer.

Take the last proposition first. The Appointments Clause does not explicitly state that “Heads of Departments” are **principal** officers. But structurally, the conclusion is hard to avoid. The Appointments Clause sets forth a default rule of presidential nomination and senatorial confirmation for all “Officers of the United States, whose Appointments are not herein otherwise provided for” and then allows Congress to “vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” There is nothing logically impossible about *81 vesting the appointment of inferior officers in other inferior officers, but it certainly looks odd given the phrasing of the Appointments Clause. “[T]he fact that the Appointments Clause singles out two classes of officers (other than the President) as permissible appointing authorities certainly suggests that these officers do not themselves fall into the class of inferior officers who may be appointed without Senate confirmation.”⁴⁸ This conclusion is reinforced, if not utterly confirmed, by the Opinions Clause, which authorizes the President to “require the Opinion, in writing, of the **principal** Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices ...”⁴⁹ The Opinions Clause plainly contemplates that the “Heads of Departments” will be “**principal** Officer[s].” The final nail is provided by the linguistic meaning of “head” in the context of the Appointments Clause. Samuel Johnson’s dictionary defined “head” as “Chief; **principal** person; one to whom the rest are subordinate; leader; commander.”⁵⁰ The head of a federal department is a **principal** officer.

As for the second proposition, the **PCAOB** is a constitutional “Department [.]” A “department,” according to Samuel Johnson, is a “separate allotment; province or business assigned to a particular person.”⁵¹ Noah Webster’s dictionary carried through this meaning of “department” into 1828, defining a department as a “separate allotment or part of business; a distinct province, in which a class of duties are allotted to a particular person.”⁵² Justice Scalia invoked Webster in his concurring opinion (joined by three other Justices) in *Freytag*, in which he noted that “the Founders ... chose the word ‘Department[t],’ ... not to connote size or function (much less Cabinet status), but separate organization.”⁵³ An executive department, accordingly, is any unit that has a significant degree of organizational identity and responsibility. Anyone at the apex of such an organization is a head of a department and therefore a **principal** officer who must be appointed by the President with the advice and consent of the Senate.

Nothing in the eighteenth-century definition of a “department” makes reference to a hierarchical relationship between a department and other institutions. In other words, whether an organizational unit *82 is a “department” *does not* depend on whether or not it is part of, or answerable to, another department. A federal entity can be a constitutional “department” even if it is part of a larger organizational unit—just as an entity can be an “agency” under the Administrative Procedure Act “whether or not it is within or subject to review by another agency.”⁵⁴

By the same token, not every identifiable executive unit (e.g., the Freedom of Information Act compliance unit within an agency general counsel's office) is a “department” whose “head” is a **principal** officer. An entity must have a certain degree and kind of identity and authority in order to qualify as a constitutional “department” and thus require its head to be appointed by the President with the Senate's advice and consent. It is a necessary but not sufficient condition for departmental status that a governmental unit have a recognizable identity as a distinct organization. Units with such organizational identity and decisional autonomy are clearly departments. Units with organizational identity, without decisional autonomy, but with powers that cannot be dismissed as lesser or lower are departments as well.

I would state the ultimate test for departmental status as follows: a unit of the federal executive is a constitutional “Department[.]” under the Appointments Clause if it has sufficient organizational identity and decisional authority to be a constitutional “Department[.]” under the Appointments Clause.

If that sounds absurdly circular to you, then you are half-right: it is circular, but not absurdly so. A great many crucial questions in structural constitutionalism ultimately come down to “I know it when I see it.” Consider the definition of an “Officer.” When *Buckley* says that an officer is someone who exercises “significant authority pursuant to the laws of the United States” (as opposed to insignificant authority pursuant to the laws of the United States), is it saying anything other than that an officer is a federal official who is important enough to be an officer? And isn't that obviously the right answer? In 2007, the Office of Legal Counsel (“OLC”) tried to provide a more precise definition of “Officer,”⁵⁵ but I doubt whether it advanced the ball very far. The OLC memo concluded that “a position, however labeled, is in fact a federal office if (1) it is invested by legal authority with a portion of the sovereign powers of the federal Government, and *83 (2) it is ‘continuing.’”⁵⁶ Delegated sovereign power is legally-binding power “to administer, execute, or interpret the law”⁵⁷ or to perform certain other functions traditionally associated with the executive arm of the national government such as military affairs and the conduct of diplomacy.⁵⁸ The requirement that a position be “continuing” was no doubt included to account for *Auffmordt v. Hedden*, which held that a merchant appraiser hired by the Customs Service was not an officer.⁵⁹ Additionally, many special agents, envoys, and *qui tam* litigants have existed through the years, and it would be awkward for the Justice Department to declare these entities **unconstitutional** en masse. But the OLC memorandum makes very clear that “continuing” does not mean “permanent”: “a temporary position may also be ‘continuing,’ if it is not personal, ‘transient,’ or ‘incidental.’”⁶⁰ When all is said and done, after forty pages, the OLC's definition does not-- nor could it plausibly--differ markedly from the definition of an officer as someone important enough to be an officer.

Similarly, I have spent a great deal of time elsewhere defending the proposition that the nondelegation doctrine, properly understood, requires Congress to make those decisions that are sufficiently important to the statutory scheme in question so that Congress must make them.⁶¹ Some constitutional questions just do not lend themselves to bright-line definitions but require all-things-considered judgments. The question whether a federal entity is a “Department[.]” is just such a question.

Fortunately, the **PCAOB** presents a relatively easy case for departmental status. The **PCAOB's** organizational identity is established by its authority to appear in court with its own counsel,⁶² to conduct operations in any State,⁶³ to appoint employees,⁶⁴ to enter into contracts,⁶⁵ and (perhaps most tellingly) “to allocate, assess, and collect accounting support fees established pursuant to section 109, for the Board, and other fees and charges imposed under this title.”⁶⁶ The **PCAOB's** extensive regulatory powers have been described *84 elsewhere.⁶⁷ While there is no definitive way to determine whether an entity is identifiable and important enough to be a “Department[.]”, there is a pretty good case for the **PCAOB**.

The head of **PCAOB** must therefore be a **principal** officer appointed by the President with the advice and consent of the Senate. For present purposes, it does not matter whether that head must be (as Free Enterprise Fund claims) the Chairperson of the **PCAOB** or whether the **PCAOB** as a collective entity could serve that role.⁶⁸ In either case, the present structure of the **PCAOB** is **unconstitutional**.

What to make of the fact that five Justices of the Supreme Court took a very different view of the term “Department[]” in *Freytag*? If one is looking for right answers to constitutional questions rather than predictions of court outcomes--nothing at all.

Footnotes

a1 Professor of Law, Boston University School of Law. This Essay draws upon and extends an argument made in an amicus brief, co-authored with Steven G. Calabresi and Christopher S. Yoo, filed in the Supreme Court in support of the petitioners in *Free Enterprise Fund v. Public Company Accounting Oversight Board*. I am grateful to participants at a workshop at Boston University School of Law for comments and to the Abraham & Lillian Benton Fund for support.

1 U.S. CONST. art. I, § 1.

2 *Id.* art. I, § 2, cl. 5.

3 *Id.* art. I, § 3, cl. 5.

4 *Id.* art. II, § 1, cl. 1.

5 *Id.* art. II, § 1, cl. 3.

6 *Id.* art. III, § 1.

7 *Id.* art. II, § 3.








8 *Id.* art. II, § 4.





9 *Id.* art. I, § 7, cls. 2-3.






10 *Id.* art. I, § 3, cl. 4 (“The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.”).

11 *Id.* art. I, § 3, cl. 18. One must refer to the power of “national institutions” rather than “the national government” because the Constitution vests no power at all in the national government *simpliciter*. Every grant of power is a grant to a specific actor or institution within the national government.

12 I count at least 22, plus 11 amendments. See GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 126 (5th ed. 2009).

- 13 U.S. CONST. art. I, § 2, cl. 5; *Id.* art. I, § 3, cl. 5. I do not address the thorny question whether congressional officers are “Officers of the United States” under the Appointments Clause or for other purposes.
- 14 *Id.* art. I, § 8, cl. 16.
- 15 *Id.* art. II, § 2, cl. 2.
- 16 Peter L. Strauss, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 62 VAND. L. REV. EN BANC 51, 59 (2009).
- 17  15 U.S.C. § 7211(b) (2006).
- 18 *See*  *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995).
- 19  *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).
- 20  15 U.S.C. § 7211(e)(4). The statute requires the Commission to consult with the Chairman of the Board of Governors of the Federal Reserve System and the Secretary of the Treasury before making any appointments, *id.*, but does not actually require the Commission to do anything specific with the results of that consultation.
- 21  537 F.3d 667 (D.C. Cir. 2008), *cert. granted*, 129 S.Ct. 2378 (2009).
- 22 The title “former Administrative Law Professor” is without question a better credential for reaching a correct answer on a constitutional issue than is the title “Supreme Court Justice.”
- 23  520 U.S. 651 (1997).
- 24 *See*  *Id.* at 662-63.
- 25 I use the term “original meaning” to describe the meaning that a documentary provision would have had to a hypothetical reasonable and fully-informed observer at the time of the provision’s enactment. *See* Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENTARY 47 (2006). The specific thoughts or intentions of concrete historical actors can be relevant to original meaning but are not constitutive--or even necessarily very good evidence--of it.
- 26 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1755).
- 27 THE BARNHART DICTIONARY OF ETYMOLOGY 525 (Robert K. Barnhart ed., 1988).

- 28 “Latin was an essential part of the education of virtually every schooled person in the founding generation. For this **reason**, and also because that generation was closer to the time when Latin was commonly spoken, the founders' English usage was influenced heavily by the older tongue.” Robert G. Natelson, *Federal Land Retention and the Constitution's Property Clause: The Original Understanding*, 76 U. COLO. L. REV. 327, 334 n.28 (2005).
- 29 U.S. CONST. art. III, § 1; *see also Id.* art. I, § 8, cl. 9 (giving Congress power “to constitute Tribunals inferior to the supreme Court”).
- 30 *Id.* art. VI, cl. 2.
- 31 *See*  *Free Enter. Fund v. PCAOB*, 537 F.3d 667, 675-76 (D.C. Cir. 2008) (attempting precisely such a twist).
- 32 *See* David E. Engdahl, *What's in a Name? The Constitutionality of Multiple “Supreme” Courts*, 66 IND. L.J. 457, 466-72 (1991).
- 33 *See id.* at 468-72.
- 34 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., rev. ed. 1966).
- 35 For general discussion of this point, *see* Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002, 1015-22 (2007).
- 36 28 U.S.C. § 503.
- 37 *Id.* § 518.
- 38 *Id.* § 504
- 39  15 U.S.C. § 7212(a)- (d).
- 40  *Id.* § 7212(f); *see also Id.* § 7219(d)-(g) (describing the Board's authority to impose, allocate, and collect fees).
- 41 *Id.* § 7213(a)(1).
- 42 *Id.* §§ 7214-15.
- 43 *Id.* § 7215(c)(4)(D).

- 44 See   *Edmond v. United States*, 520 U.S. 651, 667 (1997) (Souter, J., concurring in part and concurring in the judgment);
 *Morrison v. Olson*, 487 U.S. 654, 722 (1988) (Scalia, J., dissenting).
- 45  501 U.S. 868 (1991).
- 46  *Id.* at 886.
- 47  *Id.* at 887 n.4.
- 48 Calabresi & Lawson, *supra* note 35, at 1019.
- 49 U.S. CONST. art. II, § 2, cl. 1.
- 50 JOHNSON, *supra* note 26.
- 51 *Id.*
- 52 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 59 (1828).
- 53  501 U.S. at 920 (Scalia, J., concurring in part and concurring in the judgment).
- 54  5 U.S.C. § 551(1).
- 55 See Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. Off. Legal Counsel (Apr. 16, 2007), <http://www.usdoj.gov/olc/2007/appointmentsclausev10.pdf> [hereinafter *Officers of the United States*].
- 56 *Id.* at 1.
- 57 *Id.* at 11.
- 58 *Id.* at 13-14.
- 59 137 U.S. 326-27 (1890).
- 60 *Officers of the United States*, *supra* note 55, at 21.
- 61 See Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 376-78 (2002).

62  15 U.S.C. § 7211(f)(1).

63  *Id.* § 7211(f)(2).

64 *Id.* § 7211(f)(4).

65 *Id.* § 7211(f)(6).

66 *Id.* 7211(f)(5).

67 *See supra* Part II.

68 Cutting in favor of Free Enterprise Fund's position is the Opinions Clause, which clearly contemplates that there will be a single “**principal** Officer” in each department. Cutting against that position is the implausibility of a constitutional rule requiring executive agencies to have only one **principal** officer. Without the cross-reference from the Opinions Clause, it is hard to see why there could not be more than one head of a department if Congress chooses to create that structure. Perhaps one could argue that it could never be “necessary and proper for carrying into Execution” federal powers to have a collective head of an agency, but that is a tough argument to make.

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