
ESSAY

PHH CORPORATION v. CONSUMER FINANCIAL PROTECTION BUREAU: FINANCIAL FAIRNESS AND ADMINISTRATIVE ANXIETY

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INTRODUCTION

With its en banc decision in *PHH Corp. v. Consumer Financial Protection Bureau*,¹ the D.C. Circuit has resolved—for now and over several dissents—that the Consumer Financial Protection Bureau (CFPB) has a constitutional structure. Judge Tatel’s concurring opinion notably ends by invoking Justice Holmes’s famous *Lochner* dissent, asserting that the Constitution “does not enact Mr. Herbert Spencer’s Social Statics.”² This citation to the dissent in a prominent “anticanon”³ case might seem to be a mere stylistic flourish, but this Essay argues that the allusion is in fact quite appropriate. Two of the dissents in *PHH* proclaim that the CFPB’s structure undermines “liberty.”⁴

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¹ 881 F.3d 75 (D.C. Cir. 2018) (en banc).

² *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting); *PHH Corp.*, 881 F.3d at 113 (Tatel, J., concurring). See also Daniel A. Crane, Comment, *A Poor Relation? Regulatory Takings After Dolan v. City of Tigard*, 63 U. CHI. L. REV. 199, 204 n.29 (1996) (“Holmes’s famous statement . . . is cited as a general indictment of any judicial effort to enshrine laissez-faire, antiregulatory sentiment in any substantive provision of the Constitution.”).

³ See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 386 (2011) (defining the “anticanon” as “the set of legal materials so wrongly decided that their errors . . . we would not willingly let die”).

⁴ See *PHH Corp.*, 881 F.3d at 166 (Kavanaugh, J., dissenting) (“The CFPB’s concentration of enormous power in a single unaccountable, unchecked Director poses . . . a far greater threat to individual liberty, than a multi-member independent agency does.”); *id.* at 200 (Randolph, J., dissenting) (“I entirely agree with Judge Kavanaugh’s dissenting opinion.”); see also *PHH Corp. v.*

This liberty is presumably the liberty of contract, as in *Lochner*, but this time, involving consumer contracts, rather than employment contracts. Administrative law scholars will surely continue to write about the specific question of executive removal powers.⁵ But the analysis is incomplete without recognizing that the *PHH* dissenters continue a longstanding judicial and congressional unease with federal regulation of consumer finance.

The CFPB was created in the wake of the 2008 financial crisis by the Dodd-Frank Wall Street Reform and Consumer Protection Act.⁶ Amid a fragmented financial landscape and economic recession, Congress created the CFPB to administer “fair, transparent, and competitive” markets for consumer financial products.⁷ It was established as a single-director independent agency housed in the Federal Reserve⁸ and not subject to Congressional appropriations.⁹ And it exercises enforcement and rulemaking jurisdiction over numerous federal statutes, including the Dodd-Frank Act’s prohibition of “unfair, deceptive, or abusive acts and practices.”¹⁰

In addition to reviewing the *PHH* opinions, this Essay reexamines seminal efforts by the CFPB’s predecessor and partner agency—the Federal Trade Commission (FTC)—to enforce consumer financial protection law and particularly the preexisting prohibition on unfair practices. In particular, we examine the FTC’s Credit Practices Rule¹¹ and litigation attacking the rule.¹² While many things have changed over the last forty years, the anxieties over and polarized opinions regarding federal intervention into consumer financial arrangements have not.

Thus, this Essay attempts to persuade scholars not to limit their analysis of the disputes over the legitimacy of the CFPB to trans-substantive constitutional and administrative law principles. Rather, commentators should pay attention to the substantive debates about consumer protection

Consumer Fin. Prot. Bureau, 839 F.3d 1, 8 (D.C. Cir. 2016) (describing the CFPB as an agency that lacks a liberty-protecting “critical check . . . , yet wields vast power over the U.S. economy”), *rev’d en banc*, 881 F.3d 75 (D.C. Cir. 2018).

⁵ See, e.g., Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 18–19 (2017) (discussing *PHH*’s place in the development of executive removal doctrine).

⁶ Pub. L. No. 111-203, 124 Stat. 1376.

⁷ 12 U.S.C. § 5511(a) (2012).

⁸ *Id.* § 5491(a)–(b).

⁹ See *id.* § 5497 (funding the CFPB from the earnings of the Federal Reserve and authorizing additional congressional appropriations only when the Director reports a shortfall).

¹⁰ *Id.* § 5531(b); see also *id.* § 5512 (granting the CFPB broad rulemaking authority “under Federal consumer financial law” alongside rigorous requirements for the rulemaking process); *id.* §§ 5514–16 (granting the CFPB supervisory authority over certain providers of financial products and services); *id.* §§ 5561–67 (establishing the CFPB’s enforcement powers).

¹¹ 16 C.F.R. § 444 (2017).

¹² *E.g.*, *Am. Fin. Servs. Ass’n v. FTC*, 767 F.2d 957 (D.C. Cir. 1985).

underlying the controversy.¹³ Such attention to the substance of the CFPB's mission will be equally important as disputes over the transition in leadership of the agency percolate through the courts.¹⁴ In short, *PHH* should be recognized as much as a referendum on "Consumer Financial Protection" as it is on the "Bureau."

I. PHH v. CFPB

The broad question of the CFPB's legitimacy arose, as such questions often do, in the context of an enforcement action against specific purportedly illegal activities. The CFPB attempted to enforce a statutory prohibition of kickbacks in residential mortgage transactions against a mortgage company that had allegedly created a "tying" arrangement with private mortgage insurers.¹⁵ The seemingly narrow issue of residential mortgage finance regulation generated a much broader attack on the Bureau's constitutionality; in fact, the en banc majority declined to address the specific statutory provision that gave rise to the enforcement action.¹⁶

The en banc majority upheld the CFPB's constitutionality, including the limitation on removal of the Director of the CFPB only for "inefficiency, neglect of duty, or malfeasance."¹⁷ In rejecting attempts to cast the CFPB as illegitimately "novel,"¹⁸ the majority largely analogized to similar language limiting the removal of FTC Commissioners, which the Supreme Court upheld against constitutional challenge in *Humphrey's Executor v. United States*.¹⁹

However, the majority and dissenters disagreed not only on the constitutional conception of executive power, but also on the empirical reality of consumer financial markets and the CFPB's authority. Judge Pillard,

¹³ Cf. Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445, 1450-51 (2016) (arguing for attention to economic power and inequality in constitutional analysis).

¹⁴ The resignation of the CFPB Director in November led to a dispute over who should lead the agency, with opponents challenging President Donald Trump's appointment of Mick Mulvaney to lead the CFPB. See *Lower E. Side People's Fed. Credit Union v. Trump*, No. 17 Civ. 9536 (PGG), 2018 WL 703298 (S.D.N.Y. Feb. 1, 2018) (dismissing for lack of standing lawsuit alleging that appointment of Mick Mulvaney as acting director was illegal); *English v. Trump*, 279 F. Supp. 3d 307, 337 (D.D.C. 2018) (denying preliminary injunction to prevent Mick Mulvaney from serving as acting Director).

¹⁵ See *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 82-83 (D.C. Cir. 2018) (en banc) (discussing the CFPB's attempt to apply the Real Estate Settlement Procedures Act of 1974 (RESPA), 12 U.S.C. §§ 2601-17, to PHH).

¹⁶ *Id.* at 83 (reinstating the panel opinion on the interpretation of RESPA). *But see id.* at 111-13 (Tatel, J., concurring) (arguing that the panel erred in its interpretation of RESPA).

¹⁷ *Id.* at 80 (quoting 12 U.S.C. § 5491(c)(3) (2012)).

¹⁸ *PHH Corp.*, 881 F.3d at 84.

¹⁹ 295 U.S. 602, 619 (1935).

writing for the majority, squarely situated the justification of the CFPB's creation and independence within the 2008 financial crisis and "regulators [that] were overly responsive to the industry they purported to police."²⁰ She further pointed to the distinct historical context in which the CFPB was established to combat PHH's arguments about the novelty of the agency's structure and its purported infringement on liberty.²¹

In contrast, dissenting Judge Henderson characterized the CFPB as one of "a warren of administrative agencies . . . 'poking into every nook and cranny of daily life.'"²² She noted that the Dodd-Frank Act "transferred to the CFPB the authority to enforce eighteen existing laws previously administered by seven different federal agencies" as well as the authority to prevent unfair, deceptive, and abusive acts and practices, which Judge Henderson described as "expansive *new* powers" with "malleable statutory definitions."²³ Most strikingly, Judge Henderson questioned the legitimacy of any agency that "uniformly crusades for one segment of the populace [i.e., consumers] against others."²⁴ Judge Kavanaugh likewise remarked that the CFPB's authority is "massive in scope"—that it "cover[s] everything from home finance to student loans to credit cards to banking practices."²⁵ He went on to expound on a generalized "liberty" interest,²⁶ which in this context can only mean the liberty to offer and accept consumer contracts and engage in related practices, regardless of whether they may be considered unfair by some.²⁷

²⁰ *PHH Corp.*, 881 F.3d at 77.

²¹ *See id.* at 103 ("Our political representatives sometimes confront new problems calling for tailored solutions. The 2008 financial crisis, which Congress partially attributed to a colossal failure of consumer protection, was surely such a situation."). This framing was noted by contemporary commentators. *See* Jack Lienke (@jacklienke), TWITTER (Feb. 2, 2018, 10:58 AM), <https://twitter.com/jacklienke/status/959501385590067200> [<https://perma.cc/M9LD-EANB>] (contrasting the majority's narrative built around the financial crisis with Judge Kavanaugh's dissent based on broad conceptions of liberty and executive power).

²² *PHH Corp.*, 881 F.3d at 137 (Henderson, J., dissenting) (quoting *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting)).

²³ *Id.* at 145, 148.

²⁴ *Id.* at 149. With palpable disapproval, Judge Henderson also reviewed an earlier proposal for the CFPB, describing a vision for an agency that "could take 'quick action' to solve the problems regularly generated by a financial services industry bent on 'increas[ing] profits.' . . . The agency, in short, was to 'side' with consumers against the industry." *Id.* at 145 (quoting Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY (Summer 2007)).

²⁵ *Id.* at 165, 166 (Kavanaugh, J., dissenting); *see also id.* at 166, 171 (characterizing the CFPB as "concentrat[ing] . . . enormous power" and "wield[ing] broad authority").

²⁶ *Id.* at 166-67.

²⁷ Judge Kavanaugh's dissent offered no explanation for how the CFPB would infringe upon a person's individual liberty other than that the agency might "enforce[e] a law against you or . . . issu[e] a rule that affects your liberty or property . . ." *Id.* at 183.

The dissenters saw liberty (of contract) as threatened by the purportedly “unaccountable” and “immense power” of the Director.²⁸ They identify the absence of either presidential control or co-equal agency leaders (as in *Humphrey’s Executor*) as driving such lack of accountability. According to Judge Kavanaugh, the absence of the “traditional safeguard” of a multimember leadership structure “threatens the individual liberty protected by the Constitution’s separation of powers.”²⁹ Regardless of whether a majority bloc on a multimember board can act as tyrannically as a single director, the dissenters’ primary concern in safeguarding separation of powers appears to be the particular individual liberty at issue: the liberty to contract for financial goods.

II. HISTORICAL ECHOES FROM THE FTC

The dissenters’ anxieties are not original—consumer-facing financial regulation has frequently engendered judicial and congressional skepticism.

The FTC’s very first appearance at the Supreme Court involved a “tying” arrangement, like PHH’s arrangement with mortgage insurers.³⁰ Over a dissent from Justice Brandeis, the Supreme Court refused to hold that these arrangements, which affected commercial purchasers, were unfair methods of competition because there were inadequate allegations of injury to competitors or of monopolistic practices.³¹ The Court urged that the FTC Act not “fetter free and fair competition.”³² Although in subsequent cases the FTC was sometimes able to address deceptive and unfair treatment of consumers, its efforts that survived judicial scrutiny were generally framed in terms of harm to competitors, as opposed to harm to consumers.³³ Ultimately, Congress expanded the FTC’s authority to address “unfair and deceptive acts or practices in commerce” (UDAP), although this authority did not reach banks (and, later, depository institutions were also exempted more generally).³⁴

²⁸ *Id.* at 137, 139 (Henderson, J., dissenting).

²⁹ *Id.* at 183 (Kavanaugh, J., dissenting).

³⁰ *FTC v. Gratz*, 253 U.S. 421, 424 (1920) (describing an arrangement in which purchasers of cotton ties were required to also purchase a certain amount of bagging from the company).

³¹ *Id.* at 428.

³² *Id.*

³³ Compare *FTC v. R.F. Keppel & Bro.*, 291 U.S. 304, 314 (1934) (finding a sales practice unfair due to its effect on competitors), with *FTC v. Raladam Co.*, 283 U.S. 643, 654 (1931) (rejecting an FTC cease and desist order against deceptive medical advertising because it purportedly lacked an effect on competitors).

³⁴ Wheeler-Lea Amendment, Pub. L. No. 75-447, § 3, 52 Stat. 111, 111–114 (1938) (codified at 15 U.S.C. § 45(a)).

Controversy over the FTC's regulation of consumer-facing practices continued throughout the consumer rights revolution of the 1960s and 70s.³⁵ The FTC began to assert authority to issue legislative rules defining UDAP, including a regulation on finance companies.³⁶ Congress reacted by imposing further procedural requirements for FTC rulemaking.³⁷ By the 1980s, these procedural changes were accompanied by a substantive shift in the FTC's unfairness doctrine, reflecting greater attention to consumer choice.³⁸

When the FTC next promulgated a UDAP rule regarding consumer finance—the Credit Practices Rule³⁹—it abided by these new procedural and substantive constraints. Finance companies nonetheless promptly challenged two provisions of the rule.⁴⁰ First, the Rule regulated nonpossessory, nonpurchase security interests, so that creditors could no longer threaten to remove appliances and household goods to incentivize payment of an unrelated debt.⁴¹ Second, the Rule limited the wage assignments that creditors could require as a condition of a debt.⁴² The D.C. Circuit upheld the rule, but a dissenting judge expressed many of the same concerns about consumer-protective financial regulation as the *PHH* dissenters.

35 See Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 167-68 (2011) (describing criticism of the FTC during this period). This era also saw the adoption of the Uniform Commercial Code, with its recognition of the “unconscionability” defense to sales contracts. See also Anne Fleming, *The Rise and Fall of Unconscionability as the “Law of the Poor,”* 102 GEO. L.J. 1383, 1389 (2014) (distinguishing the “consumers rights movement,” reflecting statutory enactments catalyzed by otherwise limited litigation of common law unconscionability, from the “tenants’ rights revolution,” which was arguably sparked by judicial recognition of an implied warranty of habitability).

36 See, e.g., Preservation of Consumers’ Claims and Defenses, Unfair or Deceptive Acts or Practices, 16 C.F.R. § 433.2 (2017). This rule is commonly known as the Holder in Due Course Rule. Because it was finalized shortly after the adoption of the more rigorous procedures discussed below, the Federal Register notice asserts compliance with those procedures. 40 Fed. Reg. 53,506 (Nov. 18, 1975). See also Jeffrey S. Lubbers, *It’s Time to Remove the “Mossified” Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979, 1985-87 (2015) (cataloguing currently operative FTC rules promulgated in this period).

37 Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, § 202, 88 Stat. 2183, 2193-95 (1975); Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, §§ 7-12, 15, 21, 94 Stat. 374, 376-80, 388-90, 393-96; see also Lubbers, *supra* note 36, at 1982-84 (listing procedural requirements).

38 See *Int’l Harvester Co.*, 104 FTC 949, 1074 (1984) (“Normally we expect the marketplace to be self-correcting, and we rely on consumer choice—the ability of individual consumers to make their own private purchasing decisions without regulatory intervention—to govern the market.”). This standard was later codified in § 45(n) of the FTC Act. Federal Trade Commission Act Amendments of 1994, Pub. L. No. 103-312, § 9, 108 Stat. 1691, 1695. For a contemporary justification of this shift, see generally Robert B. Reich, *Toward a New Consumer Protection*, 128 U. PA. L. REV. 1 (1979).

39 16 C.F.R. pt. 444 (2017).

40 *Am. Fin. Servs. Ass’n v. FTC*, 767 F.2d 957, 965 (D.C. Cir. 1985).

41 *Id.* at 973-74.

42 *Id.* at 974-75.

Upholding the Credit Practices Rule, then-Chief Judge Wald concluded that the challenged provisions fell within Congress's intentionally broad intent "to allow the Commission to respond to evolving market conditions and practices."⁴³

To dissenting Judge Tamm, however, this exercise of federal regulatory power was an exercise in unconstrained "paternalistic judgment that lenders should not extend credit to low-income consumers."⁴⁴ He swiped at "the benevolent guidance of the federal bureaucracy" that "presumes that consumers are unable . . . to make purchasing decisions for themselves."⁴⁵ Judge Tamm's concerns about undue infringement on free choice and the congressional uncertainty about FTC regulation of unfair practices thus foreshadow the *PHH* dissenters' concerns with regulatory enforcement of fairness standards.

III. FROM THE FTC TO THE CFPB

The FTC's victory at the D.C. Circuit notwithstanding, the Credit Practices Rule was an incomplete solution to the very consumer phenomena it aimed to address. Although prudential regulators like the Federal Reserve Bank eventually applied similar standards to the depository institutions outside the FTC's reach,⁴⁶ the jurisdictional gaps and complexities revealed the difficulty with regulating consumer finance. This fragmented enforcement regime was a core reason that Congress created the Consumer Financial Protection Bureau. Even among legislators who sought greater consumer protections, however, the relationship between the new Bureau and existing agencies was an area of significant debate.⁴⁷

This Essay thus attempts to highlight—without conducting an exhaustive survey—the recurring anxieties, in many quarters, around

⁴³ *Id.* at 969.

⁴⁴ *Id.* at 991 (Tamm, J., dissenting).

⁴⁵ *Id.* at 992.

⁴⁶ *See, e.g.*, Federal Deposit Insurance Corporation, *UNFAIR OR DECEPTIVE ACTS OR PRACTICES BY STATE-CHARTERED BANKS* (MAR. 11, 2004), <https://www.fdic.gov/news/news/financial/2004/fil2604a.html> [<https://perma.cc/B733-B2LC>] (stating that both the Board of Governors of the Federal Reserve System and the Federal Deposit Insurance Corporation will "carry out their responsibility to enforce the prohibitions against unfair or deceptive trade practices found in section 5 of the [FTC Act] as they apply to acts and practices of state-chartered banks").

⁴⁷ *See, e.g.*, Financial Services and Products: The Role of the Federal Trade Commission in Protecting Consumers—Part II Before the Subcomm. on Consumer Protection, Product Safety, and Insurance of the S. Comm. on Commerce, Science, and Transportation, 111th Cong. 22 (2010) (statement of Edmund Mierzwinski, Consumer Program Director, U.S. Public Interest Research Group) (arguing for a strengthened FTC alongside the CFPB).

consumer protection in financial services markets. These anxieties have shaded purportedly neutral discussions of administrative and constitutional law, and further attention to the substantive questions underlying structural disputes would be fruitful.

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