THE REMEDIES FOR CONSTITUTIONAL FLAWS HAVE MAJOR FLAWS

RICHARD J. PIERCE, JR.*

PREAMBLE

In this essay, Professor Pierce describes the many ways in which the conservative majority of the Supreme Court has attempted to use its unique approach to interpretation of the Constitution to restructure the government and to reallocate power among the branches of government. He then describes the problems that the Court has encountered in its efforts to choose remedies for the constitutional flaws that it detects.

Increasingly, the Court must choose between remedies that are ineffective and remedies that make it impossible for the government to function. Pierce predicts that the problems that the Court has experienced to date will increase and will become even more intractable if it continues to apply its present approach to interpretation of the Constitution.

Pierce argues that the choice of remedy problems will diminish significantly if the Court adopts an approach to interpretation of the Constitution that is less rigid. The Court should accord Congress the deference it deserves in recognition of the challenges that it faces in its efforts to create a government that is true to our constitutional values and that is capable of performing the critical functions of government.

INTRODUCTION

In recent years, the Supreme Court has issued many opinions in which it has detected constitutional flaws in the structure of government and the allocation of power among units of government. The cases invariably divide the Justices between the conservatives, who see a wide variety of constitutional flaws in the structure and power of the administrative state, and the liberals, who see no such flaws. The conservative majority has made it clear that it is prepared to detect and

remedy every conceivable constitutional flaw. It has created special highly permissive versions of the doctrines of standing, ripeness, finality, and exhaustion that allow it to address the flaws that it perceives in circumstances in which it does not permit any other type of challenge to an agency action.[1]

In one of its earliest steps in this quixotic quest, the majority held that the Vesting and Take Care Clauses of Article II prohibit Congress from creating two or more layers of insulation between the President and any inferior officer of the United States. In its 2010 opinion in *Free Enterprise Fund v. PCAOB,*[2] the Court held that Congress cannot limit the power of the President to remove a principal officer to circumstances in which the President states a cause for removal while simultaneously limiting the power of the principal officer to remove an inferior officer to circumstances in which the principal officer states a cause for removal.[3] To reach and address that issue, however, the majority had to make up a non-existent provision of a statute.

The Sarbannes Oxley Act created a new agency called the Public Company Accounting Oversight Board (PCAOB) to regulate the

---

Lyle T. Alverson Professor of Law, George Washington University.

1. *See e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2606–07 (2022) (finding standing for state petitioners to challenge the Obama administration's Clean Power Plan, despite the Plan being stayed and later abandoned before oral arguments); Seila Law v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2195–97 (2020) (applying lenient traceability and ripeness standards to hold that petitioner had standing and that unconstitutionality claim was ripe even though the challenged provision had not been used); Free Enter. Fund v. Pub. Co. Acct. and Oversight Bd., 561 U.S. 477, 489–91 (2010) (interpreting statutory provision broadly to find that district court properly had jurisdiction and that petitioners were not required to incur sanctions to challenge statute). *See generally* KRISTIN HICKMAN & RICHARD PIERCE, ADMINISTRATIVE LAW TREATISE chs. 17–18 (6th ed. 2019).

2. 561 U.S. 477.

3. *Id.* at 484, 513. The Constitution does not use the term "principal officer." It confers on the President the power to appoint "officers" through the process of nomination by the President followed by confirmation by the Senate. *See* U.S. CONST. art. II, § 2, cl. 2. It then identifies a subcategory of officers called "inferior officers." It provides that Congress can confer the power to appoint inferior officers on the President acting alone, the head of a department, or a court of law. *See id.*
To avoid confusion, courts and scholars often use the term "principal officer" to refer to officers who can only be appointed through the process of nomination by the President followed by confirmation by Congress and to distinguish those officers from the "inferior officers" who can be appointed by the President acting alone, the head of a department, or a court of law if Congress authorizes one of those methods of appointment. *E.g.*, Morrison v. Olson, 487 U.S. 654, 670–71 (1988) (identifying two classes of appointed officers); Edmond v. United States, 520 U.S. 651, 659–60 (1997) (distinguishing the manner of appointment for principal officers from that of inferior officers); United States v. Arthrex, Inc., 141 S. Ct. 1970, 1978 (2021) (affirming that Congress may vest the appointment of inferior officers only in the President alone, the courts of law, or heads of departments). This essay uses the term "principal officer" consistent with these scholars and courts.

practices of corporate accountants. The members of the PCAOB can be removed by the Securities and Exchange Commission (SEC) only for cause. The majority concluded that the members of the SEC are principal officers, the members of the PCAOB are inferior officers, and the "for cause" limit on the power of the SEC to remove the members of the PCAOB, when combined with the "for cause" limit on the President's power to remove the members of the SEC, violates the Vesting and Take Care Clauses of Article II.[4] The Court remedied that structural flaw by holding unconstitutional the statutory "for cause" limit on the SEC's power to remove members of the PCAOB.[5]

There is no statutory "for cause" limit on the power of the SEC to remove members of the SEC,[6] however, so there was only one layer of insulation between the President and the members of the PCAOB. It follows that the "for cause" limit on the power of the SEC to remove members of the PCAOB was entirely consistent with the new rule of constitutional law that the majority announced. The majority explained the difference between the facts that were the basis for its decision and the actual facts of the case by referring to the litigating positions of the parties. Because the parties had litigated the case on the assumption that there was a statutory limit on the President's power to remove a member of the SEC, the majority accepted that assumption for purposes of deciding the case.[7]

In a dissenting opinion, Justice Breyer quoted the framers of the Constitution and prior opinions of the Court to support his argument that the overriding purpose of the Constitution was to create a workable government.[8] He argued that the Necessary and Proper Clause in Article I confers on Congress discretion to create a wide variety of agency structures.[9] He predicted that the rigid formalistic structure of government that the majority was trying to create through interpretation of the ambiguous language of the Vesting and Take Care Clauses would make it impossible for the complicated structure of government that Congress created to function.[10] In a lengthy appendix,

4. *Free Enterprise Fund*, 561 U.S. at 484, 510–14.

5. *Id.* at 508–10.

6. *See id.* at 545–49 (Breyer, J., dissenting) (noting that the federal statute establishing the SEC is "silent" on the question of removal).

7. *Id.* at 487.

8. *See id.* at 515–20 (Breyer, J., dissenting) (concluding that no constitutional text, history, or precedent provided a clear answer as to whether Congress could limit the President's removal power in this context).

9. *Id.* at 515.

10. *See* Free Enter. Fund v. Pub. Co. Acct. and Oversight Bd., 561 U.S. 477, 520–49 (2010)

Justice Breyer identified thousands of inferior officer positions that would be unconstitutional if the Court were to apply the new principle of constitutional law it announced across the government.[11]

Thirteen years later, Justice Breyer's prediction seems prescient. Many of the Court's attempts to identify a remedy for a perceived constitutional flaw have forced the Court to choose between creating conditions in which government cannot function and implementing a remedy that is ineffective. The problems that the Court is experiencing in its efforts to choose appropriate remedies for constitutional flaws in agency structures and powers are a product of a combination of four lines of opinions that illustrate the ways in which the Court has limited the structure of government and the allocation of power among units of government, combined with the practical limits of our political system.

Part I describes the four lines of cases in which the Court has used its interpretations of the Constitution to determine the permissible structure of government and the permissible allocation of power among units of government. Part II describes the cases that illustrate the problems that the Court is experiencing in the process of choosing remedies for the constitutional flaws that the Court detects. Part III predicts that the Court will experience even more serious problems in its efforts to choose remedies for constitutional flaws if it continues to adhere to its current methods of identifying constitutional flaws. In Part IV, I suggest ways in which the Court can change its methods of identifying constitutional flaws that will allow the politically accountable branches of government the flexibility needed to create a government that can function in ways that are consistent with the Constitution.

I. THE FOUR LINES OF CASES THAT LIMIT THE STRUCTURES AND POWERS OF GOVERNMENT

The Court has issued four lines of opinions that apply provisions of the Constitution to limit the permissible structure of government and the permissible allocation of power among units of government. They are: (A) opinions in which the Court has interpreted the Due Process Clause[12] to require a degree of insulation between the administrative

(describing the majority's rule, if applied broadly, as a "serious threat" to the proper functioning of workable government).

11. *Id.* at 549–88.

12. *See* U.S. CONST. amend. XIV, § 1.

law judges (ALJs) who make agency adjudicative decisions and the political appointees who head the agencies where they preside to minimize the risk that the ALJs will behave in a manner that reflects systemic bias in favor of the views of the agency head; (B) opinions in which the Court has limited the power of Congress to delegate power to agencies by interpreting and enforcing the clause in Article I that vests the legislative power in Congress[13]; (C) opinions in which the Court has limited the power of Congress to confer the power to appoint agency officials by interpreting and applying the Appointments Clause in Article II[14]; and (D) opinions in which the Court has curtailed the circumstances in which Congress can limit the President's removal power by interpreting and enforcing the Vesting Clause[15] and the Take Care Clause[16] in Article II.

A. Due Process Cases

The Court has long held that due process applies to the many agency adjudications in which an agency may deprive an individual of liberty or property[17] and that due process includes the right to a neutral decisionmaker.[18] During the 1930s, many complaints arose that agency hearing examiners (now called ALJs), were systematically biased in favor of the agencies where they presided.[19] Studies supported those complaints.[20] After over a decade of debate, Congress responded to those complaints and studies by enacting the Administrative Procedure Act of 1946 (APA).[21]

---

13. *See* U.S. CONST. art. I, § 1.

14. *See* U.S. CONST. art. II, § 2, cl. 2.

15. U.S. CONST. art. II, § 1, cl. 1.

16. U.S. CONST. art. II, § 3.

17. *See e.g.*, Londoner v. City & Cnty. of Denver, 210 U.S. 373, 380–86 (1908) (holding that city board's denial of a hearing to challenge board's tax assessment violated appellees' due process rights). *See generally* HICKMAN & PIERCE, *supra* note 1, § 7.3.

18. *See, e.g.*, Tumey v. Ohio, 273 U.S. 510, 532–35 (1927) (finding due process violation where sentencing judge had a direct pecuniary interest in the prosecution and official motive to convict). *See generally* HICKMAN & PIERCE, *supra* note 1, § 7.7.

19. *See, e.g.*, Ramspeck v. Fed. Trial Examiners Conf., 345 U.S. 128, 131 (1953) ("Many complaints were voiced against the actions of the hearing examiners, it being charged that they were mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations.").

20. *See id.* at 131–32 (describing studies commissioned by the Roosevelt administration to examine the decisional processes of administrative agencies). The Attorney General's Committee on Administrative Procedure ultimately recommended in its 1941 report that hearing examiners be made partially independent of the agency for which they were employed. *Id.*

21. 5 U.S.C. §§ 551–559. *See also* George Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. L. REV. 1557, 1560 (1996) (recounting the historic development of the APA and political context of its passage).

The APA responded to the complaints and findings of bias in several ways. First, it created a structural framework in which the agency personnel can play no role in supervising an ALJ if such personnel investigate alleged wrongdoing or play a role in initiating an enforcement proceeding or in representing the government.[22] The investigative and enforcement personnel are also prohibited from communicating with an ALJ off the record.[23] Second, to protect ALJs from the risk that agency officials might try to influence them to make rulings that favor the agency and disadvantage the private party, the APA prohibits the agency from playing any role in determining the salary of an ALJ[24] and requires the agency to assign cases to ALJs on a rotation basis.[25] Finally, the most important safeguard of the decisional independence of ALJs is the APA's limit on the power of an agency to remove or otherwise discipline an ALJ by requiring the agency to state a cause for the action.[26]

Congress recognized that agency heads nominated by the President and confirmed by the Senate must be able to determine the policy content of the decisions that agencies make in adjudications. It insured that such agency heads had complete control over the policies that were reflected in the decisions the agency made in adjudications by conferring on the agency head the power to substitute a final decision of the agency itself for the initial decision of the ALJ.[27]

In 1950, the Supreme Court issued an opinion in which it praised the APA and strongly suggested that the statutory limit on the removal

22. *See* 5 U.S.C. § 554(d)(2) ("The employee who presides at the reception of evidence pursuant to section 556 of this title [governing hearings] shall make the recommended decision or initial decision required by section 557 of this title[.] . . . [S]uch an employee may not . . . be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.").

23. *See id.* § 554(d)(1) ("The employee who presides at the reception of evidence pursuant to section 556 of this title . . . may not . . . consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate[.]").

24. *See id.* § 5372 (designating responsibility for determining the level of pay for administrative law judges to the Office of Personnel Management).

25. *See id.* § 3105 ("Administrative law judges shall be assigned to cases in rotation so far as practicable[.]").

26. *See id.* § 7521(a) ("An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board.").

27. *See id.* § 557(b) ("When the [ALJ] makes an initial decision, that decision becomes the decision of the agency without further proceedings unless there is an appeal to, or review in motion of, the agency within time provided by the rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.").

power in the APA was required by due process.[28] The Court backed away from that suggestion in a later case,[29] but it has continued to recognize the importance of a neutral decision maker in its opinions that interpret and apply the Due Process Clause.[30] Thus, for instance, in 1975, the Court upheld as consistent with due process a state agency administrative adjudication procedure that was structured the way that the APA structures federal agency adjudications.[31] In dicta, the Court described and praised the APA's method of simultaneously assuring that the person who presides in an agency adjudication is not biased in favor of the agency and that the policy content of the decision reflects the views of the head of the agency.[32]

B. Legislative Power Cases

The Court sometimes limits the power of agencies by interpreting and enforcing the Vesting Clause in Article I, which vests the legislative power in Congress. For over a century, the Court has interpreted this clause to limit the power of Congress to delegate some decision-making power to agencies and to limit the power of agencies to make decisions.[33] Those opinions announced the non-delegation doctrine. Except for two opinions that the Court issued in 1935, however, the references to the non-delegation doctrine were dicta in opinions that upheld broad congressional delegations of power to agencies.[34] In two 1935 opinions, the Court held that two provisions of the National Industrial Recovery Act were unconstitutional because they violated the non-delegation doctrine.[35]

---

28. *See* Wong Yang Sung v. McGrath, 339 U.S. 33, 38–46, 52–53 (1950) (requiring that deportation proceedings conform to the procedural safeguards of the APA to ensure "independence" and give "assurances of neutrality" envisioned by Congress), *superseded by* Ardestani v. INS, 502 U.S. 129 (1991).

29. *See* Marcello v. Bonds, 349 U.S. 302, 305–11 (1955) (finding that Congress, through the 1952 Immigration Act, intentionally supplanted the APA's application to deportation proceedings and permitted the INS to exercise control over adjudicative officers in such proceedings without violating due process).

30. *See e.g.*, Ward v. Vill. of Monroeville, 409 U.S. 57, 60–62 (1972) (holding that village mayor could not preside as a judge over local traffic offenses because of the temptation to act impartially to inflate village finances).

31. *See* Withrow v. Larkin, 421 U.S. 35, 51–55 (1975) (concluding that although state licensing board permitted its members to exercise both investigative and adjudicatory functions, there were sufficient safeguards in place to ensure due process).

32. *Id.* at 47–52.

33. *See e.g.*, Marshall Field & Co. v. Clark, 143 U.S. 649, 692–94 (1892) (upholding the constitutionality of Congress's delegation of discretionary power to the President, and subsequently to an administrative board created by the executive).

34. *See* HICKMAN & PIERCE, *supra* note 1, § 2.6.

35. Panama Refin. Co. v. Ryan, 293 U.S. 388, 414–21, 431–33 (1935); A.L.A. Schechter

Since 1935, the Court has upheld scores of statutes that delegate extraordinarily broad power to agencies. Decision making standards like "just," "reasonable" and "public interest" dominate the U.S. Code. Thus, for instance, "just" appears 2457 times, "reasonable" appears 9189 times, and "public interest" appears 2715 times.[36]

Five Justices have expressed an interest in adopting and applying a far more demanding version of the non-delegation doctrine. In 2019, three Justices urged the Court to begin enforcing the non-delegation doctrine more aggressively.[37] Two other Justices have announced their openness to such a movement.[38] The Court has not applied the non-delegation doctrine to any statute since 1935, but it began applying the closely related "major questions" doctrine in 2000,[39] and it greatly strengthened that doctrine during its 2021-2022 Term.

In its 2021 opinion in *National Federation of Independent Business v. OSHA*[40] and its 2022 opinion in *West Virginia v. EPA*,[41] the Court applied the major questions doctrine to hold unlawful agency actions that were within the scope of the broad authority that Congress had conferred on the agencies in statutes that were enacted over fifty years

---

Poultry Corp. v. United States, 295 U.S. 495, 529–30, 537–42 (1935).

36. The Natural Gas Act is a good example of a statute with an extraordinarily broad standard. It authorizes an agency to determine whether the rate that an interstate gas pipeline charges is "unjust, unreasonable, unduly discriminatory, or preferential." 15 U.S.C. § 717d. The Court has interpreted and applied the statute in hundreds of cases. The Court has rejected all constitutional challenges to the statute and has even required the agency to extend the scope of the statute to cover sales by gas producers. *See* Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672, 685 (1954) ("Protection of consumers against exploitation at the hands of natural-gas companies was the primary aim of the Natural Gas Act. . . . [W]e refuse to [weaken these protections] by a strained interpretation of the existing statutory language."). The Court has interpreted the statute to confer an extraordinarily broad range of discretion on the agency. It has held that the agency can use any ratemaking methodology that it chooses as long as the "end result" does not violate the constitutional prohibition on taking property without providing just compensation. Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591, 600–05 (1944). It has also held that any end result is permissible as long as it falls within a wide "zone of reasonableness." In re Permian Basin Area Rate Cases, 390 U.S. 747, 769–70 (1968).

37. *See* Gundy v. United States, 139 S. Ct. 2116, 2135–37 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.) (identifying historic "guiding principles" for when Congress should be permitted to delegate its powers to the executive branch).

38. *See id.* at 2130–31 (Alito, J., concurring) ("If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort."); Paul v. United States, 140 S. Ct. 342 (2019) (separate op. of Kavanaugh, J.) (agreeing with the Court's holding, but suggesting that reconsideration of the non-delegation doctrine may be warranted in future cases).

39. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–61 (2000) (announcing and applying the major questions doctrine).

40. 142 S. Ct. 661 (2021).

41. 142 S. Ct. 2587 (2022).

ago. The Court held that the agency actions were unlawful because the agencies took unprecedented actions that had significant economic and political effects based on power that Congress delegated to the agencies in old, broadly worded statutes. The Court concluded that the agencies could take actions of that type only if Congress had given clear authorization.[42] In concurring opinions, several Justices noted the close relationship between the major question doctrine and the non-delegation doctrine.[43]

C. Appointments Clause Cases

The Court sometimes holds agency actions unlawful because they were taken by unconstitutionally appointed officials.[44] The Appointments Clause in Article II separates officers of the United States into two categories—inferior officers and what are often referred to as principal officers.[45] Congress can authorize the appointment of inferior officers in any of three ways—by the President, by the head of an agency, or by a court of law. The Court has interpreted the term "inferior officer" to include anyone who exercises any significant power on behalf of the United States, including bringing an enforcement action in a court, issuing a rule, or adjudicating a regulatory dispute.[46]

To be an inferior officer, the officer must be inferior to one or more principal officers. The Court has never announced exclusive criteria that describe the required relationship in detail, but it is has held that an officer can be an inferior officer if the officer's decisions are reviewable by a principal officer, the officer can be removed by a principal officer, and the officer is subject to supervision in other ways by a principal officer.[47] A principal officer can only be appointed through the process of nomination by the President and confirmation by the

42. *See OSHA*, 142 S. Ct. at 664–67 (holding that OSHA's 2021 proposed vaccine mandate represented an impermissible expansion of the agency's regulatory authority without clear congressional authorization); *West Virginia*, 142 S. Ct. at 2614–16 (concluding that the EPA's proposed Affordable Clean Energy Rule was of such significance that it could only be implemented by the agency if "acting pursuant to a clear delegation" from Congress).

43. *West Virginia*, 142 S. Ct. at 2616–26 (Gorsuch, J., concurring, joined by Alito, J.); *OSHA*, 142 S. Ct. at 667–70 (Gorsuch, J., concurring, joined by Thomas, J., and Alito, J.).

44. *See, e.g.*, Lucia v. SEC, 138 S. Ct. 2044, 2045 (2018). *See generally* HICKMAN & PIERCE, *supra* note 1, §2.4.

45. *See supra* note 3.

46. *E.g.*, *Lucia*, 138 S.Ct. at 2052–53; *See generally* HICKMAN & PIERCE, *supra* note 1, at §2.4.

47. Edmond v. United States, 520 U.S. 651, 661–66 (1997).

Senate.[48]

D. Executive Power Cases

The Court sometimes holds agency actions unlawful because they were taken by officials who are not subject to the power of the President or a principal officer to remove the officer at will.[49] Article II vests the executive power in the President and provides that the President shall take care that the laws be faithfully executed.[50] The Court has interpreted those clauses to limit the power of Congress to curtail the President's ability to remove an officer by conditioning that power on a finding of cause to remove that officer.

For example, the Court has upheld statutory limits on the power to remove members of a multi-member agency that performs quasi-legislative and quasi-judicial functions at will,[51] but it has held that Congress cannot limit the President's power to remove any single agency head[52] or to provide two layers of for cause removal by both limiting the President's power to remove a member of a multi-member agency and limiting the power of the agency to remove an inferior officer.[53]

The Court has experienced a wide variety of problems in its efforts to identify effective and workable remedies for the constitutional flaws that it has detected, as the next Part illustrates.

II. CASES THAT ILLUSTRATE THE CHOICE OF REMEDY PROBLEM

Four cases illustrate some of the problems that the Court is experiencing in its efforts to identify appropriate remedies for these four types of constitutional flaws.

A. Problems With Remedies for Violations of the Prohibition on Delegating Legislative Power

The first set of problems is illustrated by the Court's 2022 opinion in *NFIB v. OSHA*.[54] The majority did not believe that the broadly worded

48. *See supra* note 3.
49. *See, e.g.*, Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2197 (2020).
50. U.S. CONST. art. II, §§ 1–3.
51. Humphrey's Ex'r v. United States, 295 U.S. 602, 628–31 (1935). *See generally* HICKMAN & PIERCE, supra note 1, §2.5.1.
52. Collins v. Yellen, 141 S.Ct. 1761, 1783–84 (2021).
53. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 514 (2010).
54. Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661 (2022) (per curiam).

statute relied upon by the Occupational Safety & Health Administration (OSHA) was adequate to support the mandate that all employers either require their employees to be vaccinated against Covid or to be tested regularly for Covid, even though the statutory language was broad enough to support that action.[55] The majority could not implement the traditional remedy for a violation of the Vesting Clause in Article I. As a practical matter, the Court could not hold the statute unconstitutional because it violates the non-delegation doctrine.

The statute relied upon by the agency was over fifty years old, and the Court had held that it complied with the non-delegation doctrine over forty years earlier.[56] As a practical matter, the Court could not overrule a precedent and hold that a fifty-year-old statute that agencies and courts had applied in thousands of cases was unconstitutional when it was enacted. Moreover, none of the three new standards that the Justices have proposed to replace the permissive "intelligible principle" standard[57] are at all promising, as Kristin Hickman and I have explained in some detail.[58]

The Court invoked the major questions doctrine again in its 2022 opinion in *West Virginia v. EPA*.[59] The Court held that EPA could not take an action that was by far the most promising action to mitigate climate change that the government has attempted to date—requiring owners of coal-fired generating plants to switch to low carbon or carbon free sources.[60] The majority implicitly acknowledged that the broadly worded fifty-year-old statute that the agency relied on authorized the agency to take the action.[61] The Court rejected the validity of the action because it was unprecedented and had significant political and economic effects and it was taken under an old, broadly worded statute that did not clearly authorize the agency to take the action.[62]

---

55. *Id.* at 670–77 (Breyer, J., dissenting).

56. *See* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 645–46 (1980).

57. J.W. Hampton v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body . . . is directed to confirm, such legislative action is not a forbidden delegation of legislative power").

58. Kristin E. Hickman, *Nondelegation as Constitutional Symbolism*, 89 GEO. WASH. L. REV. 1079, 1118 (2021) (criticizing the proposals made in 2019); Richard J. Pierce, Jr., *Political Accountability and Delegated Power*, 36 AM. U. L. REV. 391, 393–403 (1987) (criticizing the proposals made in the early 1980s).

59. 142 S. Ct. 2587, 2610 (2022).

60. *Id.* at 2616.

61. *Id.* at 2608 (stating that while the statute "confers authority upon [the] administrative agency," the Court must also consider "whether Congress in fact meant to confer the power the agency has asserted").

62. *Id.* at 2608–13.

This problem plagues any attempt by the Court to limit the range of actions that agencies can take by adopting aggressive interpretations of the Vesting Clause in Article I. There are hundreds of statutes that are worded more broadly than the statutes that the agencies relied on in the vaccine mandate and climate change cases.[63] Most of those statutes were enacted between thirty and eighty years ago. Courts, including the Supreme Court, have applied those statutes in tens of thousands of cases. The Court would look foolish if it issued hundreds of opinions in which it held unconstitutional a high proportion of the statutes that Congress has enacted and that the Court has applied for nearly a century.

The Court attempted to avoid this problem by adopting an aggressive version of the major questions doctrine. This new remedy raises another serious problem, however. The Court justifies its remedy as a means of ensuring that Congress does its job of addressing any major new problem that confronts the nation by enacting a statute that specifies with particularity the actions that the executive branch can take to address the problem.[64] In today's extremely polarized political conditions, it is unrealistic to expect Congress to act in that manner, however. The inability of Congress to enact or amend regulatory statutes is well-documented.[65] As I have explained at length, legislative impotence will continue unless and until we replace party-based primaries with open primaries.[66]

It is easy to predict the unfortunate results of the Court's use of the major questions doctrine to enforce the Vesting Clause in Article I. As evidenced by recent phenomena like the Covid pandemic and the ongoing issue of climate change, the nation will confront a variety of serious new problems in the future. When the executive branch attempts to respond to those problems by acting based on old, broadly worded statutes, the Court will hold those actions invalid through application of the major questions doctrine. The polarized and paralyzed Congress will be unable to address the problems by enacting

63. *See* discussion *supra* note 36. An example of a much more broadly worded statute than those addressed by the Court during its 2021-2022 Term is The Natural Gas Act. Congress incorporated the "just and reasonable" standard in that statute in many other statutes. *See, e.g.*, The Federal Power Act, 16 U.S.C. § 824d.

64. 142 S. Ct at 2614-15.

65. Richard J. Pierce, Jr., *Delegation, Time, and Congressional Capacity: A Response to Adler & Walker*, 105 IOWA L. REV. ONLINE 1, 6–12 (2020).

66. Richard J. Pierce, Jr., *The Combination of Chevron and Political Polarity Has Awful Effects*, 70 DUKE L.J. ONLINE 91, 107–08 (2021).

legislation that authorizes the executive to act with the particularity that the Court demands. As a result, the major new problems will not be addressed at all.

B. Problems With Remedies for Violations of the Executive Power

The second set of problems is illustrated by the Court's 2021 opinion in *Collins v. Yellen*.[67] The Court held that the statutory for cause limit on the President's power to remove the head of the Federal Housing Finance Agency violates the Vesting and Take Care Clauses in Article II.[68] The Court then remanded the case to the circuit court with instructions to decide whether to provide the petitioner a remedy for this violation of the Constitution.[69]

The Court's instructions to the lower court allow it to provide a remedy only in the highly unlikely event that the court concludes that the President would have removed the agency head for taking an action that injured the petitioner if he had known that he had the power to remove the agency head without stating a cause for removal at the time the agency took the action.[70] Justice Gorsuch identified an obvious problem with this approach to the remedy issue.[71] No one has any incentive to challenge the constitutionality of a characteristic of an agency's structure if they know that they are not likely to obtain any remedy if they prevail.[72]

C. Conflicts Between the Executive Power and Due Process

The third set of problems is illustrated by the Ninth Circuit's opinion in *Axon Enterprise v. FTC*.[73] These problems are a function of the inherent conflict between the Court's attempts to implement the Due Process Clause by assuring that agencies are structured in a way that provides a neutral decision maker in agency adjudications and the Court's attempts to enforce the Take Care Clause and the Vesting Clause of Article II.

In *Axon*, the FTC had threatened to initiate administrative

67. 141 S. Ct. 1761 (2021).

68. *See id.* at 1781–87 (holding that the Housing and Economic Recovery Act's provision that "[t]he Director shall be appointed for a term of 5 years, unless removed before the end of such term for cause by the President" violated Article II of the Constitution).

69. *Id.* at 1787–89.

70. *Id.*

71. *Id.* at 1796–99 (Gorsuch, J., dissenting).

72. *Id.*

73. 986 F.3d 1173 (9th Cir. 2021).

proceedings before an ALJ to resolve the FTC's allegation that Axon had committed antitrust violations.[74] The petitioner argued that the FTC has a fatal constitutional flaw because Congress limited the agency's power to remove an ALJ by requiring the agency to state a cause for removal.[75]

The petitioner in *Axon* relied on the Supreme Court's 2010 opinion holding that it is unconstitutional for Congress to provide two or more layers of insulation between the President and an inferior officer by limiting the power of the President to remove an agency head to situations in which the President states a cause for removal and by limiting the power of the agency to remove the inferior officer to situations in which the agency states a cause for removal.[76] The for cause limit on the power of the FTC to remove an ALJ violates that prohibition on two or more layers of insulation of an inferior officer from the President's removal power. The Supreme Court held that ALJs are inferior officers in 2018.[77] There are three layers of insulation between the President and an ALJ at FTC. The President can only remove a member of the FTC for cause,[78] the FTC can only remove an ALJ for cause,[79] and the President can only remove a member of the Merit System Protection Board (MSPB) for cause.[80] The MSPB has the exclusive power to determine whether an agency has cause to remove an ALJ.[81]

The remedy for this constitutional flaw is obvious. The Court should hold that the provision of the APA that limits an agency's power to remove an ALJ is unconstitutional. The problem with that remedy is equally obvious. Congress limited the power of agency heads to remove ALJs to assure parties to agency adjudications that their cases would be heard by neutral decision makers rather than by decision makers who are biased in favor of the agency.[82] If the Court holds that the

74. *Id.* at 1177.
75. *Id.* at 1180–81.
76. Free Enter. Fund v. Pub. Co. Acct. and Oversight Bd., 561 U.S. 477, 484 (2010).
77. Lucia v. SEC, 138 S. Ct. 2044, 2049 (2018).
78. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 631–32 (1935).
79. *See* 5 U.S.C. § 7521.
80. *Id.*
81. *Id.*
82. 5 U.S.C. §§ 551–559. *See also* George Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. L. REV. 1557, 1560 (1996) (recounting the historic development of the APA and political context of its passage); Ramspeck v. Fed. Trial Examiners Conf., 345 U.S. 128, 131 (1953) ("Many complaints were voiced against the actions of the hearing examiners, it being charged that they were mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations.").

statutory for cause limit on an agency's power to remove an ALJ is unconstitutional, we are likely to return to the conditions of the 1930s in which ALJs exhibited systemic bias in favor of agencies, thereby compromising the neutral decision maker requirement of due process.

There are many cases like *Axon* that are making their way to the Supreme Court.[83] Eventually, the Court will have to decide whether to enforce the Vesting Clause and the Take Care Clause of Article II by holding that the statutory limit on an agency's power to remove an ALJ is unconstitutional. If the Court takes that action, it will have sacrificed the due process value that is the basis for the limit.

Of course, even if the Supreme Court holds that the statutory limit on the power of an agency to remove an ALJ is unconstitutional and it chooses the obvious remedy of holding that provision of the APA invalid, it will encounter the additional remedial problem that became apparent in *Collins v. Yellin*.[84] The petitioner will obtain no remedy for the violation of its rights because it is impossible for the petitioner to prove that the FTC that upheld the ALJ's decision would have removed the ALJ for making that decision if the FTC had known that it had the power to remove the ALJ without cause at the time that the ALJ made the decision.

D. Problems With Remedies for Violations of the Appointments Clause

The fourth case that illustrates the Court's current problems in choosing remedies for constitutional flaws in agencies is the Supreme Court's 2021 opinion in *United States v. Arthrex*.[85] The Patent and Trademark Appeals Board (PTAB) employs several hundred Administrative Patent Judges (APJs).[86] The America Invents Act confers on each APJ the power to decide that a patent is invalid.[87] The APJs are appointed by the Secretary of Commerce.[88] The statute does not provide any opportunity for review of a decision of an APJ by the Secretary or by the Director of PTAB. It also limits the agency's power to remove an APJ by requiring the Secretary of Commerce to state a

83. *E.g.*, Jarkesy v. SEC, 34 F. 4th 446, 463–465 (5th Cir. 2022) (finding for cause removal protections for SEC ALJs unconstitutional).

84. 141 S. Ct. 1761 (2021).

85. 141 S. Ct. 1970 (2021).

86. *Id.* at 1977.

87. 35 U.S.C. § 6(a)–(b) ("[T]he administrative patent judges shall constitute the Patent Trial and Appeal Board. The Patent Trial and Appeal Board shall . . . conduct inter partes reviews . . . .").

88. 35 U.S.C. § 6(d).

cause for removing an APJ.[89]

The Federal Circuit concluded that APJs are principal officers, rather than inferior officers, because they have the power to make final decisions and they can only be removed for cause.[90] Since APJs are not appointed through the process of nomination by the President and confirmation by the Senate, the APJs were not appointed in the manner required by the Constitution.

The most obvious remedy for that violation of the Appointments Clause would be to hold invalid the provision of the statute that authorizes the Secretary of Commerce to appoint APJs. That remedy would be impossible to implement, however. It would require the President to nominate and the Senate to confirm each of the hundreds of APJs. As Anne Joseph O'Connell has documented, the extreme political polarization that afflicts the nation has made it impossible for the President and Congress to use that process to appoint the 1242 officers that now must be appointed in that manner.[91] Obviously, the political branches could not appoint hundreds of *additional* officers through use of that process.

The Federal Circuit adopted the remedy of invalidating the statutory provision that limits the power of the Secretary to remove APJs, thereby giving the Secretary of Commerce the power to remove an APJ at will.[92] In the view of the Federal Circuit, that would convert the APJs from principal officers to inferior officers, thereby legitimating their appointment by the Secretary of Commerce.[93]

The Supreme Court agreed with the Federal Circuit that the APJs are principal officers who can only be appointed through the process of nomination and confirmation.[94] It did not even mention the obvious remedy of holding invalid the statutory provision that authorizes the Secretary to appoint APJs. That remedy would be impossible to implement.

The petitioner argued that the appropriate remedy would be to invalidate the entire statute. The Court rejected that remedy because it would interfere with the obvious desire of Congress to encourage

89. 35 U.S.C. § 3c.

90. Arthex, Inc. v. Smith & Nephew, Inc., 941 F. 3d 1320, 1327 (Fed. Cir. 2019) (rehearing en banc denied in Arthex, Inc. v. Smith & Nephew, Inc., 953 F.3d 760 (2020)).

91. Anne Joseph O'Connell, *Acting*, 120 COL. L. REV. 613, 716 (2020).

92. *Arthex*, 941 F. 3d at 1335-39.

93. *Id.*

94. United States v. Arthex, 141 S.Ct. 1970, 1985-86 (2021).

investment in new technology by making it easier to challenge the validity of the patents that often discourage investment in new technology.[95]

The Court also rejected the remedy that the Federal Circuit chose. It did not state reasons for that decision, but it is fair to infer that it disliked the adverse effects of the remedy on the due process values that are furthered by limiting an agency's power to remove an adjudicative officer and it considered the Federal Circuit's choice of remedies insufficient to cure the constitutional flaw in the statute.

The Supreme Court chose the unprecedented remedy of adding a provision to the statute that authorizes the Director of PTAB to review the decisions of APJs.[96] Notably, the Court did not choose the remedy that it chose in similar circumstances in its 1976 opinion in *Buckley v. Valeo*.[97] In that opinion, the Court recognized that it lacked the power to add a provision to a statute. It gave Congress a period of thirty days in which to choose and implement a remedy for the structural flaw that the Court detected through the process of amending the statute.[98] Congress then saved the statute by amending it in ways that eliminated the flaws that the Court detected.[99]

The *Arthrex* Court gave no reason for its unprecedented decision to exercise legislative power that is clearly vested in Congress. It is fair to draw the inference that the Court was aware of the new phenomenon of legislative impotence and did not want to create a situation in which the entire statute became invalid due to congressional inaction.

I can confirm the accuracy of the Court's belief that Congress was incapable of amending the America Invents Act in any way that would remedy the constitutional flaw that the Court detected. I was one of the many administrative law and constitutional law scholars who went to Capitol Hill after the Federal Circuit decision in an effort to persuade Congress to amend the statute in ways that would remedy the constitutional flaw.[100] We described many ways in which Congress could

95. *Id*. at 1986-88.

96. *Id.*

97. 424 U.S. 1, 142-43 (1976).

98. *Id.*

99. *See generally* Act of May 11, 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976) (amending the Federal Election Campaign Act of 1971 to require presidential nomination and Senate confirmation of FEC members).

100. *See* Pierce, Richard J. Jr., "Comments of Richard J. Pierce, Jr. on Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication Docket Number OMB-2019-006" (2020). *GW LAW Faculty Publications & Other Works.* 1480,

accomplish that relatively simple task.[101] We then observed what has become the norm. Congress was unable to reach agreement with respect to any of the minor amendments to the statute that would render it constitutional.

Increasing political polarity has had massive adverse effects on Congress between 1976 and 2022.[102] It was realistic for the Court to assume that Congress could agree on a cure for the constitutional flaw that the Court detected in the statute that was at issue in 1976 in *Buckley v. Valeo*. At that time, Congress regularly engaged in the bipartisan negotiations and compromises that are essential to the process of enacting or amending a statute.[103]

It was also realistic to assume that Congress could not agree on a cure for the constitutional flaw in the statute that was at issue in 2022 in *Arthrex*. The unprecedented remedy that the Court chose in *Arthrex* is an understandable reaction to the phenomenon of legislative impotence. The Court assumed that Congress could not cure the constitutional flaw in the statute, so the Court performed that legislative task for Congress.

It is notable, however, that the Court has chosen an inconsistent reaction to legislative impotence in its major questions cases. In the context of an unexpected major problem like the Covid pandemic or climate change, the Court indulges the unsupportable assumption that Congress can respond to the problem by enacting a statute that clearly authorizes an agency to respond effectively and with particularity. Since legislative impotence makes that assumed response unrealistic, the country is left with no institution that can address an unprecedented new problem effectively, even when an agency has the authority to address the problem effectively by acting under an old, broadly worded statute.

The many problems with the remedy that the Court chose in

---

at 19, available at https://scholarship.law.gwu.edu/faculty_publications/1480 ("There was broad agreement among the members and the witnesses that the result of the *Arthrex* decision was unacceptable because it created a situation in which the Director of PTAB could tell an APJ that he must decide a case in a particular way or risk removal by the Director.").

101. For example, Professor John Duffy suggested that Congress confer the power to review APJ decisions on the Director (a principal officer), confer review power on a multi-member board comprising principal officers, or require presidential nomination and Senate confirmation of APJs. *Id.*

102. *Cf. supra* note 66 and accompanying text.

103. Dancey, L., & Sheagley, G., *Partisanship and Perceptions of Party-Line Voting in Congress*, 71(1), POLITICAL RSCH. Q., 32–45 (2018).

Arthrex became far more apparent when the agency and the Federal Circuit attempted to implement the remedy.[104] The position of Director of PTAB was vacant, as was the position of Deputy Director, the only other principal officer in PTAB.[105]

The decision on remand was made by the Commissioner. The Commissioner is not a principal officer, but an an inferior officer.[106] Moreover, he was not even Acting Director or Acting Deputy Director.[107] Under the Vacancies Act, only someone who has been nominated by the President and confirmed by the Senate for some other position can be appointed unilaterally to fill a vacancy as an "acting" officer.[108] The Commissioner was not even eligible to be Acting Director or Acting Deputy Director.

The Commissioner denied Arthrex's petition for reconsideration of the decision of the APJ based solely on an internal agency rule that had been issued when the agency had a Director.[109] That rule provided that the duties of the Director and the Deputy Director are delegated to the Commissioner when both the office of Director and the office of Deputy Director are vacant.

The Federal Circuit held[110] that the Commissioner had the power to review the decision of the APJ based on an 1898 precedent[111] in which the Supreme Court held that an inferior officer can perform the duties of an officer on a temporary basis under authority previously delegated by the principal officer. The court held that the Commissioner was only temporarily performing the duties of the Director and the Deputy Director even though those offices had been vacant for almost a year and there was no limit on the period in which the Commissioner would be required to perform those duties.[112]

The court held that the fact that the Commissioner was not appointed as Acting Director or Deputy Director under the Vacancies Act was irrelevant because that statute has no application to people who are performing the duties of an officer under delegated

104. *See* Arthrex v. Nephew & Son, 35 F. 4th 1328, 1332—33 (Fed. Cir. 2022) (discussing the problems that arose from the original decision by the Court).
105. *Id.* at 1332.
106. *Id.* at 1333.
107. *Id*. at 1336-38.
108. Federal Vacancies Reform Act, 5 U.S.C. §§3345 *et seq.* (1998).
109. *Arthex,* 35 F. 4th at 1333.
110. *Id.* at 1334.
111. *See* U.S. v. Eaton, 169 U.S. 331 (1898).
112. *Arthex*, 35 F. 4th at 1337-38.

authority.[113] The court recognized that its holding created a situation in which the Vacancies Act has a "vanishingly small" scope.[114] The court pointed out that a contrary holding would have disastrous "real world" effects, however, including calling into question the validity of 668,000 patents.[115]

Thus, the unprecedented remedy that the Supreme Court chose for an arguable violation of the Appointments Clause in *Arthrex* was not only inconsistent with the remedies that the Court chose for a violation of the Appointments Clause in *Buckley v. Valeo* and for the arguable violations of the Vesting Clause in Article I in *NFIB* and *West Virginia*. It was also an exercise in futility.

The result of the Courts' decision to confer the power to review an inferior officers' decision on a principal officer was to give that constitutionally required power to another inferior officer. It is hard to understand how allowing another inferior officer to review the decision of an inferior officer cures the arguable constitutional defect in the statute.

The remedy that the Court chose in *Arthrex* makes no sense, but it is likely to be the only remedy that is available in most of the cases in which the Court holds that an inferior officer's decisions must be reviewable by a principal officer. As Anne Joseph O'Connell has documented,[116] it has become so difficult to appoint a principal officer through the process of nomination by the President and confirmation by the Senate that a large and rapidly increasing proportion of principal officer positions are occupied by inferior officers who are performing the functions of a principal officer under a delegation of power from a prior Senate-confirmed principal officer who is no longer in office. Many principal officer positions remain vacant for years.[117]

III. THE CHOICE OF REMEDY PROBLEM WILL BECOME WORSE

If the Court continues on its present course, it will encounter problems in choosing a remedy for constitutional flaws that are worse than the problems that it has experienced to date. Two disputes that are on the way to the Supreme Court illustrate the magnitude and severity of the problems that the Court will confront if it continues to apply the

113. *Id*. at 1337-38.
114. *Id.*
115. *Id*.
116. *See generally* O'Connell, *supra*, note 91.
117. *Id.* at 639-40.

approach to interpretation of the Constitution that it has adopted in recent years.

A. The Social Security Administration Problem

The Social Security Administration employs 1500 ALJs who preside in hundreds of thousands of contested disability hearings every year.[118] There are at least two types of disputes about the constitutionality of the Social Security Administration's disability decision making process that are making their way to the Supreme Court. First, some unsuccessful applicants for disability benefits argue that the SSA ALJs are unconstitutional because they can only be removed for cause.[119] Second, some unsuccessful applicants argue that the SSA ALJs were unconstitutionally appointed.[120]

The first dispute raises the combination of remedial problems that are discussed in sections II.A and C. The second dispute raises the remedial problems that are discussed in section II.D, but it raises those problems in a context in which the adverse effects of any choice of remedies are far worse.

SSA ALJs are like APJs. They can only be removed for cause, and their decisions to grant or deny benefits are not reviewable by a principal officer. Their decisions are reviewable only by the Social Security Appeals Council (Council).[121] The Council is composed of SSA employees who might be inferior officers. They cannot be principal officers because they are not nominated by the President and confirmed by the Senate. The Commissioner is a principal officer who is appointed through the process of nomination by the President followed by confirmation by the Senate,[122] but the Commissioner does not have the power to review the decisions of ALJs. SSA ALJs are appointed by the Commissioner.[123]

If the Court uses the reasoning it used in *Arthrex* to characterize

---

118. *Information About SSA's Hearings and Appeals,* SOCIAL SECURITY ADMINISTRATION, https://www.ssa.gov/appeals/about_us.html (last visited Jan. 25, 2023).

119. *See e.g.*, Taffe v. Kijakazi, No. 20-CV-1974-WVG, 2022 U.S. Dist. LEXIS 31749, at *24—25 (S.D. Cal. Feb. 23, 2022).

120. *See e.g.*, Stephanie G. v. Kijakazi, No. 21-1290 (WMW/BRT), 2022 U.S. Dist. LEXIS 149093, at *7-8 (D. Minn. June 21, 2022).

121. *Information About Requesting Review of an Administrative Law Judge's Hearing Decision,* SOCIAL SECURITY ADMINISTRATION, https://www.ssa.gov/appeals/appeals_process.html (last visited Jan. 25, 2023).

122. 42 U.S.C. § 902(a)(1).

123. *See* 5 U.S.C. § 3105 ("Each [Executive] agency shall appoint as many administrative law judges as are necessary to [conduct hearings and issue decisions.]");

SSA ALJs, it will hold that they are principal officers who were appointed through use of a process that is unconstitutional. It will then have to choose a remedy for that constitutional flaw. The most obvious option is simply to hold that the appointments process is unconstitutional and to force SSA, the President, and Congress to remedy the flaw by using the process of nomination by the President followed by confirmation by the Senate to appoint SSA ALJs. That remedy is impossible to implement, however. Political polarity has created conditions in which the President and Congress are unable to use that process to appoint the existing 1242 principal officers.[124] It is absurd to expect them to be able to use that process to appoint 1500 SSA ALJs.

The second option is to follow the precedent that the Court established in *Buckley v. Valeo*.[125] The Court could give the President and Congress a few months to remedy the constitutional flaw by adding a provision to the statute that authorizes the Commissioner to review the decisions of SSA ALJs. There is a significant risk that the legislative impotence created by political polarity would render it impossible for the President and Congress to agree on a statutory amendment that would cure the constitutional flaw, however. That would leave the SSA with no means through which it could decide the hundreds of thousands of contested disability disputes that come before it each year.[126]

The third option is to follow the precedent that the Court established in *Arthrex*. The Court could eliminate the role of the legislative branch and take the inherently legislative action of amending the statute by adding a provision that authorizes the Commissioner to review the decisions of SSA ALJs. That choice of remedies would be likely to produce the same bizarre result as it has in *Arthrex,* however. If the position of Commissioner is vacant, the review function might have to be performed by an inferior officer to whom the last confirmed Commissioner delegated his duties.

Even if there is a Senate confirmed Commissioner in office, that choice of remedies would create another problem. The heads of regulatory agencies regularly review the modest number of initial decisions that their ALJs make, but it is absurdly unrealistic to expect

124. O'Connell, *supra*, note 91, at 716.

125. 424 U.S. 1, 142-143 (1976).

126. *See Social Security Disabled Worker Applications for Disability Benefits & Benefit Awards*, SOCIAL SECURITY ADMINISTRATION, https://www.ssa.gov/oact/STATS/table6c7.html (last visited Feb. 8, 2023).

the Social Security Commissioner to review the hundreds of thousands of decisions that SSA ALJs make each year. He would have to delegate most of that function to SSA employees who are not even inferior officers. Thus, a Supreme Court opinion in which the Court exercises the legislative power that the Constitution confers on Congress by adding a statutory provision that authorizes the Commissioner to review ALJ decisions would be a transparently ineffective remedy.

B. The Jarkesy *Problems*

The second dispute is illustrated by the Fifth Circuit's opinion in *Jarkesy v. SEC*.[127] The court held that the SEC's use of an ALJ to preside in a securities fraud case was unconstitutional for three reasons. First, it held that the statute that allowed the SEC to choose between bringing a fraud case in federal court or assigning it to an ALJ violates the non-delegation doctrine.[128] Second, it held that SEC ALJs are not sufficiently accountable to the President because they are not subject to at will removal by the SEC.[129] Third, it held that the SEC decision to assign an ALJ to preside deprived the defendant of its Seventh Amendment right to jury trial.[130] The first holding creates the remedial problems described in section II.D. The second holding creates the remedial problems described in section II.C. The third holding creates a new cluster of remedial problems.

The Supreme Court has held that Congress can authorize agencies to decide civil penalty cases without violating the Seventh Amendment if either of two conditions are met.[131] First, the Seventh Amendment only applies to claims that could be resolved under the common law in 1789. It does not apply to claims that are "analogous" to claims that could be resolved under the common law in 1789.[132] Second, even if a class of claims could have been resolved at common law in 1789, Congress can reallocate the resolution of that class of claims to an agency if it concludes that they involve the resolution of public rights disputes. The Court has defined public rights disputes to include "cases in which the claim at issue derives from a federal regulatory scheme, or

127. 34 F. 4th 446 (5th Cir. 2022).
128. *Id*. at 459-463.
129. *Id.* at 463-465.
130. *Id.* at 459-463.
131. Oil States Energy Servs., LLC., v. Greene Energy Grp., LLC., 138 S.Ct. 1365, 1379 (2018); Granfinanciera v. Nordberg, 492 U.S. 33, 41-42 (1989); Atlas Roofing Co. v. OSHRC, 430 U.S. 442, 445 (1977). *See generally* HICKMAN & PIERCE, *supra*, note 1, at §2.8.
132. *Granfinanciera*, 492 U.S. at 52.

in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority."[133]

The Fifth Circuit held that the securities fraud claim that the SEC ALJ adjudicated was not within the scope of the public rights justification for congressional reallocation of the power to resolve a claim that could have been resolved at common law.[134] It also changed the test that the Supreme Court had used to determine whether a claim was within the scope of the Seventh Amendment in an important respect. The Fifth Circuit implicitly recognized the reality that the securities fraud claims that Congress authorized the SEC to resolve are not the same as any claim that could have been resolved at common law in 1789.[135] It held that the Seventh Amendment right to a jury trial applies to the securities fraud claims that Congress authorized the SEC to resolve because they are "akin to" fraud claims that could have been resolved at common law in 1789.[136]

If the Supreme Court agrees with that holding, it will encounter massive problems in its attempts to choose an appropriate remedy for that arguable constitutional flaw. A high proportion of the claims that agencies resolve today are "akin to" claims that could have been resolved at common law in 1789.

We can start with the thousands of claims that agencies are authorized to resolve through application of the ubiquitous "just, reasonable, and not unduly discriminatory" standard. Congress first instructed a federal agency to apply that standard in the Interstate Commerce Act of 1887.[137] Congress has since included it as a decisional standard in many other statutes, such as the Natural Gas Act[138] and the Federal Power Act.[139]

The standard had a rich history before Congress adopted it in 1887. As the Supreme Court recognized in 1884, many states adopted the standard in constitutions and statutes during the 1800s.[140] As the Ohio Supreme Court recognized in 1885, the states borrowed the standard from the common law that U.S., colonial, and British courts had applied

133. Stern v. Marshall, 564 U.S. 462, 490-91 (2011).
134. Jarkesy v. SEC, 34 F. 4th 446, 457 (5th Cir. 2022)
135. *Id.*
136. *Id.*
137. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379, 379.
138. 15 U.S.C. § 717.
139. 16 U.S.C. § 824d.
140. Atchison, Topeka & S.F. F.R. Co. v. Denver & N.O R., 110 U.S. 667, 678-79 (1884).

to innkeepers for centuries.[141]

If the Court upholds the Fifth Circuit's Seventh Amendment holding in *Jarkesy,* it will have to devise some means through which federal courts can accommodate a massive increase in the number of cases in which they provide jury trials. That is an impossible task.

IV. WAYS IN WHICH THE COURT CAN MANAGE THE REMEDY PROBLEMS

If the Court continues its effort to detect and cure every constitutional defect in the structure and distribution of powers in government with the same approach to interpretation of the Constitution that it is has been using, it will continue to encounter intractable problems in its choice of remedies. In many contexts, it will have to choose among (1) remedies that are totally ineffective, for example, replacing review by one inferior officer with review by another inferior officer; (2) remedies that create constitutional flaws that are worse than the flaw being remedied, for example, sacrificing due process values by making ALJs removable at will by agencies; or (3) remedies that make it impossible for government to function, for example, requiring the President and the Senate to nominate and confirm 1500 more principal officers or requiring federal district judges to preside in thousands of additional jury trials.

By adopting a less rigid approach that confers an appropriate degree of deference to Congress, the Court can still continue to pursue its goal of improving the fit between the Constitution and the structure of government. By this point in its search for a government structure that is consistent with its rigid interpretation of the Constitution, the Court should be able to recognize that Congress has an extraordinarily difficult task. The Court must create a structure of government and a distribution of powers that simultaneously furthers the values that are reflected in the Constitution and allows the government to function in a reasonably efficient and effective manner. The Court should take an approach to its restructuring program that is more respectful of the challenges that Congress confronts and more deferential to the ways in which Congress has grappled with those challenges.

I will describe five illustrations of modest changes in approach that the Court can take that will allow it to continue to improve the fit between the Constitution and the structure and allocation of power of

141. Scofield v. Ry. Co., 43 Ohio St. 571, 619 (1885).

government without creating unacceptable problems in its choice of remedies. They are: (A) reject the Fifth Circuit's holding in *Jarkesy,* (B) change the definition of inferior officer to exclude ALJs that make benefit decisions, (C) change the definition of inferior officer by accepting as adequate a wide range of supervisory relationships between principal officers and inferior officers, (D) uphold the decision of Congress to provide ALJs with protection from agencies that want to induce ALJs to make decisions that are biased in favor of the agency, and (E) change the major questions doctrine in a way that allows the government to respond to an unprecedented major problem by taking an unprecedented major action if the action is within the broad statutory authority of the agency.

A. The Court Should Reject the Fifth Circuit's Holding in Jarkesy

The Supreme Court should start by rejecting the effort by the Fifth Circuit to preclude agencies from adjudicating a wide range of regulatory disputes based on an interpretation of the Seventh Amendment that the Court has repeatedly rejected. If the Court overrules its precedents and holds that the Seventh Amendment applies to all claims that are "akin to" claims that could have been adjudicated at common law in 1789, it will quickly discover that it has created a caseload for the federal courts that is well beyond their capacity to manage.

B. The Court Should Hold That ALJs Who Make Benefit Decisions Are Not Inferior Officers

In its 2018 decision in *Lucia v. SEC*,[142] the Supreme Court held that ALJs at the SEC are inferior officers rather than employees.[143] That holding clearly applies to other ALJs who adjudicate disputes at regulatory agencies. It does not necessarily apply to the 1500 ALJs who adjudicate disability disputes at the SSA or to the hundreds of other administrative judges who adjudicate benefit disputes at other agencies, however.

It would be easy for the Court to distinguish SSA ALJs from SEC ALJs and to hold that SSA ALJs are employees. The tasks performed by the two groups of judges differ in many ways. The Court has often distinguished between benefit decisions and regulatory decisions.[144] It

142. 138 S. Ct. 20144
143. *Id.* at 2057.
144. *E.g.*, Reno v. Catholic Social Services, 509 U.S. 43, 57-58 (1993).

has also distinguished between the adversarial proceedings that agencies use to adjudicate regulatory disputes and the inquisitorial proceedings that agencies use to resolve benefit disputes.[145] Holding that administrative judges who make benefit decisions are employees would greatly reduce the remedial problems that the Court must confront. The Constitution allows Congress near complete discretion with respect to the status and rights of employees and the permissible relationships between employees, agencies, and the President.[146]

C. The Court Should Hold That Inferior Officers Need Only Be Supervised by Principal Officers

The Supreme Court's decisions with respect to the relationship between an officer and a principal officer that makes an officer an inferior officer refer to three criteria: (1) the power to remove the officer, (2) the power to review the decisions made by the officer, and (3) other ways in which the principal officer supervises the officer.[147] The Court has never held that the principal officer must have the power to remove the officer without cause, and it has never held that the principal officer must have all three of those powers over an officer to qualify the officer as an inferior officer.

The Court could significantly reduce the number of officers who are principal officers, and thus must be nominated by the President and confirmed by the Senate, by clarifying the nature of the relationship between a principal officer and an officer that makes the officer an inferior officer. The Court should hold that there must be an adequate supervisory relationship between a principal officer and an inferior officer, but the power to remove the officer with or without stating a cause for removal and the power to review the officer's decisions are only forms of evidence that a court can consider in deciding whether the supervisory relationship is adequate to support a conclusion that the officer is an inferior officer. A court should be empowered to decide that a principal officer has adequate means of supervising on officer to make the officer an inferior officer even if the principal officer does not have the power to remove the officer or to review the officer's decisions in adjudications.

D. The Court Should Uphold the For Cause Limit on the Power to

145. *E.g.*, Carr v. Saul, 141 S.Ct. 1352, 1359 (2019); Sims v. Apfel, 530 U.S. 103, 110-11 (2000).
146. Buckley v. Valeo, 424 U.S. 1, 138-39 (1976).
147. *E.g.*, Edmond v. U.S., 520 U.S. 651, 664-65 (1997).

Remove ALJs

Congress limited the power of an agency to remove an ALJ to reduce the risk that agencies would use the threat of removal as a means of inducing the ALJ to make decisions that are biased in favor of the agency. Congress acted based on firm evidence that ALJs are likely to act in a manner that reflects pro-agency bias in the absence of such a safeguard on their decisional independence.[148] The Supreme Court has repeatedly recognized that the congressional decision to limit the power of agencies to remove ALJs furthers the values on which the Due Process Clause is based.[149]

Congress was aware of the need to ensure that the President could exercise the powers vested in him by Article II and take care that the laws be faithfully executed. It coupled the provisions of the APA that are intended to ensure that ALJs act as neutral decision makers[150] with a provision that authorizes the agency that is headed by a presidential appointee to replace the ALJ's initial decision with its own decision.[151] The Court should respect the decision that Congress made in its effort to further due process values while simultaneously assuring that the President can exercise the powers vested in him and take care that the law be faithfully exercised.

E. The Court Should Not Apply the Major Questions Doctrine to Unprecedented Major Problems

The Court has said that the major questions doctrine applies to unprecedented major exercises of power that are supported only by old, broadly worded statutes.[152] The case in which the Court originally announced and applied the doctrine involved an unprecedented attempt to rely on a broadly worded statute that was nearly a century old, the Food & Drug Act of 1906, to regulate a dangerous substance, cigarettes, that had been in use for over a century.[153] Thus, it was an unprecedented attempt to use an old, broadly worded statute to address

148. *See* sources cited *supra* Part I.A and accompanying text.

149. *E.g.* Wong Yang Sung v. McGrath, 339 U.S. 33, 38-46, 52-53 (1950).

150. *See e..g*, 5 U.S.C. § 556 (stating that adjudications "shall be conducted in an impartial manner").

151. 5 U.S.C. § 557(b).

152. FDA v. Brown & Williamson, 529 U.S. 120, 160 (2000) (superseded by statute as stated in Big Times Vapes, Inc. v. FDA 963 F. 3d 436, 437, n. 2 (5th Cir. 2020)). *See also* West Virginia v. EPA, 142 S. Ct. 2587, 2623 (Gorsuch, J., concurring) ("[A]n agency's attempt to deploy an old statute focused on one problem to solve a new and different problem may also be a warning sign that it is acting without clear congressional authority.").

153. *Brown & Williamson*, 529 U.S. at 131–132.

a hazard that had been well known for decades.

The contexts in which the Court applied the doctrine in its 2021–22 Term differed significantly from the context of the case that gave rise to the doctrine. The Court applied the doctrine to unprecedented major actions that agencies took to address *unprecedented* major new problems—the Covid pandemic and climate change. The major questions doctrine can produce a great deal of harm when it is applied in that context. When it is coupled with the legislative impotence that the Court implicitly recognized with its choice of remedies in *Arthrex*, it can leave the nation powerless to address an unprecedented challenge. The Court can avoid that problem by restoring the major questions doctrine to its original context and holding that an agency can take a major unprecedented action under an old, broadly worded statute if it confronts an unprecedented major new problem.

CONCLUSION

The Supreme Court's efforts to restructure government and to reallocate power among units of government in ways that conform to its interpretation of the Constitution is forcing it to choose between remedies for constitutional flaws that are ineffective and remedies that make it impossible to govern the country. The Court can avoid that problem by using less rigid methods of detecting constitutional flaws that are more respectful of the difficulty of the task that the legislature must undertake in its efforts to create a government that will work.