

THE COLLATERAL FALLOUT FROM THE QUEST FOR A UNITARY EXECUTIVE

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INTRODUCTION

To bolster a strong “Unitary Executive,”¹ the Roberts Court has held that Congress can neither shield a single head of an administrative agency² nor an inferior officer in an independent agency from removal at will.³ With respect to appointments, the Roberts Court has held that adjudicative officers in many executive agencies must now be appointed either by the President or a superior officer under the President’s supervision.⁴ As a result, dissenting Justices and academics have accused the Roberts Court of expanding Article II beyond both the constitutional text—which seemingly grants Congress the

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1. The unitary executive theory stresses the President’s power under Article II to closely supervise subordinates within the executive branch, thereby circumscribing Congress’s power to structure administrative agencies as it deems appropriate. *See generally* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008). There are different versions of the unitary executive theory. For a helpful synopsis, see Ilan Wurman, *The Removal Power: A Critical Guide*, 2019–2020 *CATO SUP. CT. REV.* 157, 158 (2020).

2. *See* *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020).

3. *See* *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010).

4. *See* *Lucia v. Sec. & Exch. Comm’n*, 138 S. Ct. 2044 (2018).

discretion to structure administrative agencies as it deems fit⁵—and historical precedents.⁶

Less well noted, these rulings have in addition destabilized other legal doctrines. This Essay focuses on one of several doctrinal reverberations.⁷ In deciding how to remedy the appointments and removal violations, the Court has adopted cures for the perceived defects by rewriting statutes in increasingly freewheeling ways.⁸ As a consequence, the Court's adventurism in selecting remedies for perceived separation of powers flaws has itself arguably resulted in separation of powers violations.⁹

I. THE ROBERTS COURT'S PUSH TOWARD GREATER PRESIDENTIAL POWER

In resolving litigants' challenges to agency structure, the Supreme Court has recently stressed the unique role of the President under Article II to closely supervise the unelected government officials who do the government's work.¹⁰ The Court explained in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*¹¹ that

5. See, e.g., *Free Enterprise Fund*, 561 U.S. at 514–32 (Breyer, J., dissenting); *Seila L.*, 140 S. Ct. at 1224–34 (Kagan, J., concurring in part and dissenting in part).

6. Indeed, at the founding, Congress delegated substantial financial authority to individuals insulated from presidential supervision. See, e.g., Christine K. Chabot, *Is the Federal Reserve Constitutional?: An Originalist Argument for Independent Agencies*, 96 NOTRE DAME L. REV. 1 (2019); Jed H. Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. 753 (2023); Harold J. Krent, *Limits on the Unitary Executive: The Special Case of the Adjudicative Function*, 46 VT. L. REV. 86 (2021). Moreover, for a historical discussion of the limited understanding of the reasons for which the President could remove an officer for cause, see Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 27–51 (2021).

7. For another example, the Court in *Axon Enterprise, Inc. v. Federal Trade Commission*, 143 S. Ct. 890 (2023), authorized judicial review of challenges to an agency's structure after the agency initiated an enforcement action but before the action had run its course. Courts previously rejected such challenges under a variety of rationales. See, e.g., *Fed. Trade Comm'n v. Standard Oil Co.*, 449 U.S. 232 (1980) (precluding review of challenge to agency's authority under finality doctrine); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) (precluding review under exhaustion doctrine); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994) (formalizing the doctrine of implicit preclusion). Presumably, the increasing interest in and number of structural challenges to agencies helped persuade the Court to alter course.

8. See, e.g., *United States v. Arthrex*, 141 S. Ct. 1970 (2021); *Free Enter. Fund*, 561 U.S. at 514–32 (Breyer, J., dissenting); *Lucia*, 138 S. Ct. at 2055.

9. Other Roberts Court decisions have severely curtailed administrative agencies' power to implement their statutory authority. See, e.g., *West Virginia v. Env't Prot. Agency*, 142 S. Ct. 2587 (2022) (limiting scope of the Environmental Protection Agency's (EPA) ability to regulate carbon emissions); *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021) (per curiam) (blocking COVID-19-related Centers for Disease Control and Prevention (CDC) eviction moratorium); *Nat'l Fed'n of Indep. Bus. v. Dep't of Lab.*, 142 S. Ct. 661 (2022) (per curiam) (blocking Occupational Safety and Health Administration (OSHA) COVID-19 vaccine-or-test mandate for large employers); *Biden v. Missouri*, 143 S. Ct. 2355 (2023) (setting aside the Biden administration's plan to forgive a substantial amount of student debt).

10. See *supra* notes 2–3 and accompanying text.

11. 561 U.S. 477 (2010).

[t]he diffusion of power carries with it a diffusion of accountability. The people do not vote for the “Officers of the United States.” They instead look to the President to guide the “assistants or deputies . . . subject to his superintendence.” Without a clear and effective chain of command, the public cannot “determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.”¹²

The Court subsequently elaborated in *Seila Law LLC v. Consumer Financial Protection Bureau*¹³ that “[u]nder our Constitution, the ‘executive power’—all of it—is ‘vested in a President’ who must ‘take Care that the Laws be faithfully executed.’”¹⁴ Accordingly, the Court has been skeptical both of any congressional effort to immunize executive branch officials from the President’s plenary removal authority and any congressional delegation of authority to officials not appointed by the President.¹⁵ The Court’s insistence on a “unitary executive” in turn has encouraged litigants to mount constitutional challenges against decisions of agency officials who are not closely supervised by the President.¹⁶

II. THE COURT’S REMEDIAL QUANDARY

Once the Supreme Court identifies a separation of powers defect in the congressional structure, it has several options. First, as it did in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,¹⁷ when declaring the Bankruptcy Reform Act of 1978¹⁸ (the “Bankruptcy Act”) unconstitutional,¹⁹ the Court can grant Congress a chance to consider the issue anew and make a determination whether and, if so, how to recraft the legislative scheme.²⁰ In *Northern Pipeline*, a combination of provisions offended the Constitution—the congressional delegation of significant authority to bankruptcy judges and the separate congressional determination that the bankruptcy judges not be protected by Article III tenure.²¹ The Court

12. *Id.* at 497–98 (first quoting U.S. CONST. art. II, § 2, cl. 2; then quoting THE FEDERALIST NO. 72, at 487 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); and then quoting THE FEDERALIST NO. 72, *supra*, at 476).

13. 140 S. Ct. 2183 (2020).

14. *Id.* at 2191 (first quoting U.S. CONST. art. II, § 1, cl. 1; then quoting *id.* § 3).

15. See *infra* Part III. The Court in *Lucia* redrew the line between an inferior officer and employee and in *Arthrex* between an inferior and superior officer. See *Lucia v. Sec. & Exch. Comm’n*, 138 S. Ct. 2044, 2049 (2018); *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1987 (2021).

16. See, e.g., *Jarkesy v. Sec. & Exch. Comm’n*, 34 F.4th 446 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023) (mem.); *McIntosh v. Dep’t of Def.*, 53 F.4th 630 (Fed. Cir. 2022); *Axon Enter. v. Fed. Trade Comm’n*, 986 F.3d 1173 (9th Cir. 2021); *Calcutt v. Fed. Deposit Ins. Corp.*, 37 F.4th 293 (6th Cir. 2022); *Wirtgen Am., Inc. v. United States*, 443 F. Supp. 3d 198 (D.D.C. 2020).

17. 458 U.S. 50 (1982).

18. Pub. L. No. 95-598, 22 Stat. 2549 (codified as amended in scattered sections of the U.S.C.).

19. Given the reliance concerns at stake in structuring transactions in the shadow of the bankruptcy laws, the Court did not make its ruling retroactive. See *Northern Pipeline*, 458 U.S. at 88.

20. *Id.*

21. *Id.* at 61.

could have saved the Bankruptcy Act by directing that all bankruptcy judges be appointed in conformance with Article III, or it could have pared back the duties that the bankruptcy judges were to perform. The Court, however, declined to pursue either option, explaining that, “[w]e think that it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Art. III in the way that will best effectuate the legislative purpose.”²² That approach permits the contemporary Congress to weigh all the policy concerns—including assessing how the bankruptcy system has fared with the passage of time—before resolving on a new structure. The Court’s approach in *Northern Pipeline* dovetails with the Court’s traditional conservative judicial approach, deferring to the contemporary Congress to fashion the relevant policy. The Court stated in *Virginia v. American Booksellers Ass’n*²³ that “we will not rewrite a . . . law to conform it to constitutional requirements”²⁴ and in *Blount v. Rizzi*²⁵ that “it is for Congress not this Court to rewrite the statute.”²⁶ Finally, the Court in *Ayotte v. Planned Parenthood of Northern New England*²⁷ similarly wrote that “mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from ‘rewrit[ing] . . . law to conform it to constitutional requirements.’”²⁸

III. THE REMEDIAL CONUNDRUM IN APPOINTMENT AND REMOVAL CASES

More recently, however, the Court has adopted a remedial approach somewhat akin to severability²⁹ analysis, placing itself in the enacting Congress’s shoes and determining how Congress would have wanted to remedy the defect had it known that a combination of provisions led to the finding of partial unconstitutionality.³⁰ In the severability context, the Court asks whether the enacting Congress would have wished the statute to remain

22. *Id.* at 88 n.40.

23. 484 U.S. 383 (1988).

24. *Id.* at 397.

25. 400 U.S. 410 (1971).

26. *Id.* at 419.

27. 546 U.S. 320 (2006).

28. *Id.* at 329 (alteration in original) (quoting *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 397 (1988)).

29. For a general discussion of severability, see Brian Charles Lea, *Situational Severability*, 103 VA. L. REV. 735, 743–44 (2017).

30. If Congress has not enacted a severability clause, the Court asks whether Congress would have wanted the enactment to remain even if the offending portion is excised. *See, e.g., Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987) (holding the legislative veto to be severable from the remainder of the statute after finding it unconstitutional). The Supreme Court’s language is controversial, because some members of the Court and academics believe that the Constitution displaces the void provision, so there is no technical excision needed. *See generally* John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 GEO. WASH. L. REV. 56 (2014). Nevertheless, the difference is immaterial given this Essay’s focus on the Court’s need to select which statutory provisions remain after a finding of unconstitutionality. Regardless of whether one views the Court as deciding how much of a statute to sever, or which provisions are displaced by a constitutional provision, the Court still needs to determine which statutory provisions remain operative. *See generally* William Baude, *Severability First Principles*, 109 VA. L. REV. 1 (2023).

after an offending provision is invalidated.³¹ If a severability clause or fallback provision³² exists, the Court can (1) follow congressional instructions to excise the offending part of the statute, (2) invalidate the entire statute, or (3) adopt the fallback.³³ However, when no such guidance exists and a combination of provisions produces the constitutional infirmity, the Court must rely on the legislature's underlying policy to recraft a statute in a way that avoids the constitutional infirmity, while preserving as much of the legislative policy as possible.³⁴

For example, in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,³⁵ the Court concluded that Congress could not insulate inferior officers on the Public Company Accounting Oversight Board (PCAOB) from at-will removal by superior officers unless the latter were subject to at-will removal themselves.³⁶ In other words, the Court held that two layers of insulation from the President's removal authority violated Article II. The Court then confronted the remedial question of whether to excise the protection from at-will removal or alter the duties of the PCAOB.³⁷ The Court explained:

It is true that the language providing for good-cause removal is only one of a number of statutory provisions that, working together, produce a constitutional violation. In theory, perhaps, the Court might blue-pencil a sufficient number of the Board's responsibilities so that its members would no longer be "Officers of the United States." Or we could restrict the Board's enforcement powers, so that it would be a purely recommendatory panel. Or the Board members could in the future be made removable by the President, for good cause or at will. But such editorial freedom—far more extensive than our holding today—belongs to the Legislature, not the Judiciary. Congress of course remains free to pursue any of these options going forward.³⁸

In exercising its remedial authority, the Court inquired as to which route most closely implemented the will of the enacting legislature.³⁹ The Court concluded that the enacting Congress would have wished to sever the PCAOB members' protection from at-will dismissal.⁴⁰ The Court could have saved the statute by holding alternatively that the Securities and Exchange Commission (SEC) members themselves could have been removed at will, which might in fact have accorded with legislative intent given that the Securities Exchange Act of 1934⁴¹ does not expressly limit the SEC

31. *See, e.g., Alaska Airlines*, 480 U.S. at 686; *Regan v. Time*, 468 U.S. 641, 653 (1984).

32. *See, e.g., Bowsher v. Synar*, 478 U.S. 714, 718 (1986).

33. *See, e.g., Barr v. Am. Ass'n of Pol. Consultants*, 140 S. Ct. 2335 (2020).

34. *See supra* note 30 and accompanying text.

35. 561 U.S. 477 (2010).

36. *Id.* at 484.

37. *See id.* at 508–10.

38. *Id.* at 509–10.

39. *See id.*

40. *See id.*

41. 15 U.S.C. §§ 78a–78qq.

Commissioners' removal.⁴² Ultimately, however, the Court was on solid ground in holding that, if Congress had to choose between protecting the independence of the SEC as opposed to that of the PCAOB, it would have opted for SEC independence.⁴³ The Court eschewed the approach in *Northern Pipeline* that would have permitted the contemporary Congress to determine a solution. The Court's decision to select the remedy, though pragmatic, seems to depart from the judiciary's traditional role.

The Court's decision shortly thereafter in *Lucia v. Securities & Exchange Commission* illustrates the complicated remedial options flowing from the appointment and removal cases.⁴⁴ In *Lucia*, seventy years after Congress's enactment of the Administrative Procedure Act⁴⁵ (APA), the Court for the first time held that Congress, through the APA, had vested administrative law judges (ALJs) with such significant responsibility that they should be considered inferior officers under the Appointments Clause (as opposed to employees),⁴⁶ who therefore must be appointed either by the President or, if Congress so determines, by the head of a department.⁴⁷ Most agencies had delegated the responsibility to appoint ALJs to staff, and ALJs were typically selected from a short list of qualified candidates vetted by the U.S. Office of Personnel Management (OPM).⁴⁸ Therefore, agencies made such appointments outside the Appointments Clause.

The Court did not explicitly address the remedial question, except to guarantee the litigant a new hearing before an appropriately appointed ALJ, other than the one who heard his case originally.⁴⁹ The Court apparently assumed that, to avoid any Appointments Clause issues, agency heads would rubber stamp appointment of previously appointed ALJs.⁵⁰ The Court further noted that the SEC had already reappointed its former ALJs while the

42. In *Free Enterprise Fund*, the Court assumed that SEC Commissioners were protected from at-will removal given that Congress had enacted the Securities Exchange Act after *Myers v. United States*, 272 U.S. 52 (1926), but before *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). See *Free Enter. Fund*, 561 U.S. at 487. The dissent questioned the majority's assumption. See *id.* at 545–46 (Breyer, J., dissenting).

43. In *Intercollegiate Broadcast System, Inc. v. Copyright Royalty Board*, 684 F.3d 1332 (D.C. Cir. 2012), a webcaster challenged a royalty awarded by the Copyright Royalty Board, comprised of judges appointed by the Librarian of Congress for six-year terms and protected from at-will removal. The court stated that “[t]o remedy the violation, we follow the Supreme Court’s approach in [*Free Enterprise Fund*] by invalidating and severing the restrictions on the Librarian of Congress’s ability to remove the [judges].” *Id.* at 1334. The court did not consider that Congress might have preferred to have the Librarian of Congress review the judges’ determinations before the royalties became final—a solution analogous to what the Supreme Court later adopted in *Arthrex*. See *infra* notes 73–87 and accompanying text.

44. 138 S. Ct. 2044 (2018).

45. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

46. U.S. CONST. art. II, § 2, cl. 2.

47. *Lucia*, 138 S. Ct. at 2049.

48. See, e.g., *Qualification Standard for Administrative Law Judge Positions*, OFF. PERS. MGMT., <https://www.opm.gov/policy-data-oversight/classification-qualifications/general-schedule-qualification-standards/specialty-areas/administrative-law-judge-positions/> [<https://perma.cc/QN84-VKH5>] (last visited Oct. 6, 2023).

49. See *Lucia*, 138 S. Ct. at 2055.

50. *Id.*

case was pending before the Supreme Court.⁵¹ Thus, the Court at least implicitly viewed agency appointment of ALJs as the appropriate remedy.

But, had the Court followed its path in *Free Enterprise Fund*, it would have asked what the *enacting* Congress would have wanted some seventy years earlier. To be sure, Congress in the APA directed that ALJs be hired by the agency: “Each agency shall appoint as many administrative law judges as are necessary.”⁵² For years, agency subordinate officials hired ALJs on the merits after getting the green light from the OPM.⁵³ It is not clear, however, whether the enacting Congress would have wanted ALJs to be appointed by a department head as opposed to the President had it known that ALJs were to be categorized as inferior officers. Presidential appointment may well have permitted more ALJ independence in judging than agency-head appointment did, given the risk of agency influence over and discipline of ALJs in cases in which the agency itself is an interested party.⁵⁴ Congress enacted the APA in large part to avoid the risk of bias in adjudication of claims against the agency.⁵⁵ To that end, Congress provided in the APA that, in conducting a hearing, an ALJ cannot be subject to the direction of an employee or agency official who performs investigative or prosecutorial functions.⁵⁶ Moreover, Congress provided that, when the case is sub judice, an ALJ cannot engage in conversations with the parties or agency officials concerning the case without disclosing such contacts.⁵⁷ And Congress directed that ALJs, unlike other agency officials, not be subject to performance appraisals.⁵⁸ The Supreme Court explained that Congress adopted these protections for ALJ independence due to “[c]oncern over administrative impartiality and [in] response to growing discontent [that] was reflected in Congress as early as 1929 Fears and dissatisfactions increased as tribunals grew in number and jurisdiction”⁵⁹ Thus, Congress in 1946 might have opted for presidential appointment which, although not insulating ALJs from politics, would at least have maintained some distance between the ALJ and the agency itself, limiting the concern that agencies would pressure ALJs to side with the agency head that appointed them.⁶⁰

51. *See id.* at 2055 n.6.

52. 5 U.S.C. § 3105.

53. *See Qualification Standard for Administrative Law Judge Positions*, *supra* note 48.

54. The Court has held that the default position for all officers of the United States is for the President to make such appointments in the absence of a congressional directive to the contrary. *See, e.g.*, *United States v. Arthrex*, 141 S. Ct. 1970, 1979 (2021); *Edmond v. United States*, 520 U.S. 651, 660 (1997).

55. *See Lucia*, 138 S. Ct. at 2060 (Thomas, J., concurring).

56. 5 U.S.C. § 554(d).

57. *Id.* § 554(d)(1).

58. *Id.* § 4301(2)(D)–(3) (noting that ALJs are not included as “employees” subject to performance appraisals).

59. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 37–38 (1950).

60. Indeed, after *Lucia*, a number of Senators concerned about ALJ independence, proposed to pass a law guaranteeing that ALJs could continue to be hired based on merit. *See, e.g.*, *Collins, Cantwell Introduce Bipartisan Bill Protecting Independence of Administrative Law Judges*, SUSAN COLLINS (Aug. 1, 2019), <https://www.collins.senate.gov/>

After concluding that separate statutory provisions cannot exist simultaneously, textualist courts face a considerable remedial challenge.⁶¹ The Court cannot rely on specific language, but rather on a more general understanding of what the legislature was trying to accomplish.⁶² Moreover, the passage of time complicates the counterfactual question. Should one impute to the 1946 Congress that passed the APA the knowledge that Congress would create more agencies in the intervening years, the type of issues that subsequent Congresses would delegate to ALJs to adjudicate such as the Investment Advisers Act of 1940⁶³ at stake in *Lucia*,⁶⁴ the role that Congress assigned to the OPM in the appointments process, and so on? Thus, if the Court follows the remedial path it set out in *Free Enterprise Fund*, it not only must ascertain the underlying intent of a Congress from generations past, but would also have to determine whether to factor in subsequent congressional actions bearing on the earlier congressional choice. Although the Court ducked the remedial issue in *Lucia*, that case illustrates the problematic nature of determining what the enacting Congress would have wanted had it known of the partial constitutional invalidity.

If the enacting legislature includes a severability or fallback provision, no problem arises because those provisions are law. But, it is deeply problematic for courts to place themselves in Congress's shoes to determine which of two statutory provisions to choose in order to salvage as much of the underlying policy as possible. Certainly, the contemporary Congress can always respond after the fact, as the Court noted in *Free Enterprise Fund*,⁶⁵ but should a court close its eyes to the social and political judgments of the past seventy years in considering what the enacting Congress would have wanted? And, when should the Court instead adopt the perspective of what it presumes the contemporary Congress would prefer given current social and political realities? Further, when should it instead decline to intervene at all and allow the contemporary Congress to decide how to remedy the defect, despite the inefficiency? The Court's decisions finding certain appointment and removal provisions unconstitutional have sparked a doctrinal dilemma: how should a court determine which statutory provision is displaced by the Constitution—the provision creating the agency structure or the provisions delegating various responsibilities to the agency?

Consider as well the Supreme Court's decision in *Bowsher v. Synar*.⁶⁶ The Court ultimately concluded that Congress's ability to initiate removal of the

newsroom/collins-cantwell-introduce-bipartisan-bill-protecting-independence-administrative-law [https://perma.cc/D5KL-NGWE].

61. See, e.g., *Barr v. Am. Assoc. of Pol. Consultants*, 140 S. Ct. 2335, 2349 (2020) (Kavanaugh, J., dissenting) (noting that “courts today zero in on the precise statutory text”).

62. Some textualists will not consider Congress's subjective intent, whereas others will only consider it as a last resort. Compare Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547–48 (1983), with Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 360–62 (2005) (stating that assessing subjective intent is unavoidable in severability cases).

63. 15 U.S.C. §§ 80b-1 to -21.

64. *Lucia v. Sec. & Exch. Comm'n*, 138 S. Ct. 2044, 2049 (2018).

65. See *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 509–10 (2010).

66. 478 U.S. 714 (1986).

U.S. Comptroller General was incompatible with the budget cutting duties prescribed under the Gramm-Rudman-Hollings Act.⁶⁷ As a remedy, the Court adopted the fallback provision in that act and accordingly honored congressional intent.⁶⁸

But, had there been no fallback provision, the Court would have had to determine which statutory provision(s) to displace: the congressional removal provision enacted in 1921 or the more recent Gramm-Rudman-Hollings Act provisions empowering the Comptroller General to exercise executive-type authority. The Court noted that the enacting Congress believed that the Comptroller General “should be brought under the sole control of Congress, so that Congress at any moment . . . could remove him without the long, tedious process of a trial by impeachment.”⁶⁹ Thus, from the perspective of the 1921 Congress, retaining the removal provision likely would have been preferred. However, Justice John Paul Stevens noted in concurrence that the Comptroller General’s role had changed with the generations—although Congress at the outset intended that the Comptroller General act as its auditor, over time it had vested the Comptroller General with more executive responsibilities.⁷⁰ If the Court in *Bowsher* had to decide which provisions of the Constitution should be displaced, it would have had to choose between the original congressional power to initiate removal and the more recent duties, including the budget-cutting functions challenged in the case.⁷¹ In dissent, Justice Harry A. Blackmun thought it clear that the duties prescribed under the Gramm-Rudman-Hollings Act were more important, particularly because the formal right to initiate removal was not a surefire way to assure subservience.⁷² He stated that “[i]n my view, the only sensible way to choose between two conjunctively unconstitutional statutory provisions is to determine which provision can be invalidated with the least disruption of congressional objectives.”⁷³ When a combination of statutory provisions creates the constitutional problem—particularly when enacted at different times—the Court’s dilemma is acute. Particularly in appointment and removal cases, the Congress that enacted the agency structure may not have envisioned the duties that succeeding Congresses would delegate to the

67. Pub. L. No. 99-177, 99 Stat. 1038 (1985) (codified as amended in scattered sections of 2, 33, and 42 U.S.C.); see *Bowsher*, 478 U.S. at 726.

68. See *Bowsher*, 478 U.S. at 735.

69. *Id.* at 728 (citation omitted). Further, the Court pointed out that Congress specified in the Reorganization Acts of 1945 and 1949 that the “Comptroller General . . . [is] ‘a part of the legislative branch of the Government.’” *Id.* at 731 (quoting Reorganization Act of 1945, ch. 582, 59 Stat. 613, 616; Reorganization Act of 1949, ch. 226, 63 Stat. 203, 205).

70. See *id.* at 745 (Stevens, J., concurring).

71. Had a Court faced a challenge soon after Congress established the Comptroller General position it would presumably have opted instead to keep the structure of the office intact. But with each subsequent delegation of executive-type duties to the Comptroller General, the case for altering the status of the Comptroller General strengthened. See also *Glidden Co. v. Zdanok*, 370 U.S. 530, 583 (1962) (concluding that Congress would have preferred to keep the agency’s structure intact and therefore excising the problematic duties).

72. See *Bowsher*, 478 U.S. at 786–87 (Blackmun, J., dissenting).

73. *Id.* at 780.

agency. Therefore, the Court not only faces an archival challenge in identifying congressional intent but also must decide which congressional intent to prioritize. At that point, the case strengthens for the Court to allow the *current* Congress to decide how much of the statute should remain.

The Supreme Court, moreover, has not abstained from the “editorial freedom”⁷⁴ decried in *Free Enterprise Fund* when fashioning remedies for subsequent appointments and removal violations. Consider *United States v. Arthrex*.⁷⁵ In *Arthrex*, the Court assessed whether administrative patent judges (APJs) determining patentability on inter partes review should be considered inferior officers, like the ALJs in *Lucia*,⁷⁶ or should instead be considered superior officers as the U.S. Court of Appeals for the Federal Circuit had held below⁷⁷ in light of their ability—unlike ALJs—to issue final decisions on behalf of the U.S. Patent and Trademark Office (PTO). The U.S. Secretary of Commerce appoints APJs.⁷⁸ If the APJs were deemed superior officers, then only appointment by the President would be consistent with the constitutional scheme.⁷⁹ In contrast, if APJs were deemed inferior officers like the ALJs, then appointment by the Secretary of Commerce would suffice.⁸⁰ In light of the final decision-making authority, the Federal Circuit had concluded that APJs were superior officers and determined as a remedy that their protection from plenary removal be excised so that their status would be similar to inferior officers, thus preserving their functions under the statute.⁸¹

The Supreme Court rejected the remedial option selected by the Federal Circuit despite agreeing that inferior officers could not exercise the final decision-making power that the APJs wielded.⁸² The Court instead held that, if APJs’ decisions were made subject to review by the Director of the PTO—who, like the Secretary of Commerce, is a superior officer—then the constitutional defect would be remedied and appointment by the Secretary of Commerce upheld, as “[d]ecisions by APJs must be subject to review by the Director.”⁸³ In other words, the Court altered the statutory scheme to preserve the status of APJs as inferior officers, protecting them from at-will removal. The departure from the statutory text was considerable—the Court inserted a requirement of PTO Director review found nowhere in the statute. The contemporary Congress may have agreed with the Court’s fix, but the Court did not leave it to Congress to make the judgment as it had in *Northern Pipeline*. The Court in *Arthrex* did not merely displace an offending part of

74. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 510 (2010).

75. 141 S. Ct. 1970 (2021).

76. 138 S. Ct. 2044 (2018).

77. *See Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1329 (Fed. Cir. 2019), *vacated and remanded sub nom. United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021).

78. *See id.* at 1325.

79. *See id.* at 1327–28.

80. *See id.* at 1327–29.

81. *See id.* at 1335, 1338. Of course, the Federal Circuit could have determined that the more appropriate remedy was presidential appointment.

82. *See United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1987 (2021).

83. *Id.* at 1986.

the statute, but instead changed the statutory system to preserve its constitutionality.

After redefining which officers are “Superior” and which “Inferior,” the Court in *Arthrex* donned a legislative mantle in choosing a remedy to save the constitutionality of the legislative scheme.⁸⁴ The inescapable conclusion seems to be that the Court was implementing its policy choice, rather than that of the enacting Congress.

Dissenting from the remedial order in *Arthrex*, Justice Gorsuch summarized the options that the Court could have pursued once it determined that the inter partes patent scheme violated the Appointments Clause:

First, one could choose as the Court does and make PTAB [Patent Trial and Appeal Board] decisions subject to review by the Director, who is answerable to the President through a chain of dependence. Separately, one could specify that PTAB panel members should be appointed by the President and confirmed by the Senate and render their decisions directly reviewable by the President. Separately still, one could reassign the power to cancel patents to the Judiciary where it resided for nearly two centuries. Without some direction from Congress, this problem cannot be resolved as a matter of statutory interpretation. All that remains is a policy choice. In circumstances like these, I believe traditional remedial principles should be our guide.⁸⁵

Indeed, Justice Gorsuch relayed that amici had argued that Congress explicitly structured the statute to ensure that APJs “enjoy ‘independence’ from superior executive officers and thus possess more ‘impartiality’ All of which suggests that the majority’s severability analysis defies, rather than implements, legislative intent.”⁸⁶ Instead of attempting to ascertain what a prior Congress would have done, Justice Gorsuch would have allowed the current Congress, with the knowledge gained through oversight of the administrative tribunal, to make the policy call. The Court’s decision in *Arthrex* represents a far cry from the admonition in *Ayotte* that, because the Court’s “institutional competence [is] limited, we restrain ourselves from ‘rewrit[ing] state law to conform it to its constitutional requirements’”⁸⁷ The quest to bolster the unitary executive has resulted not only in an increase in presidential power, but in an increase in judicial power as well.⁸⁸

The Court’s freewheeling remedial efforts are also evident in the removal context. In *Seila Law LLC v. Consumer Financial Protection Bureau*,⁸⁹ the Court held that Congress could not insulate the head of the Consumer

84. *Id.* at 1986–88.

85. *Id.* at 1990 (Gorsuch, J., dissenting) (citations omitted).

86. *Id.* at 1992.

87. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) (quoting *Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 397 (1988)).

88. Justice Gorsuch lamented that the majority did not “pause to consider whether venturing further down this remedial path today risks undermining the very separation of powers its merits decision purports to vindicate.” *Arthrex*, 141 S. Ct. at 1991 (Gorsuch, J., dissenting).

89. 140 S. Ct. 2183 (2020).

Financial Protection Bureau (CFPB) from the President's at-will removal authority.⁹⁰ Per Chief Justice Roberts, the Court reiterated that, “‘as a general matter,’ the Constitution gives the President ‘the authority to remove those who assist him in carrying out his duties. Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else.’”⁹¹ The Court recognized that Congress had intended to create an “independent agency” to regulate consumer financial products.⁹² Yet, it held that a constitutional flaw existed in the CFPB's structure—unlike those of the Federal Trade Commission (FTC), SEC, Federal Communications Commission (FCC), and other independent regulatory commissions—because a single director need not obtain the agreement of others before approving an enforcement action, proposing a rule, or resolving a case.⁹³ And, unlike members of Congress, a single director is not checked by the need to persuade fellow members of their House, let alone the other House as a whole. The Court noted that with “the sole exception of the Presidency, [the constitutional] structure scrupulously avoids concentrating power in the hands of any single individual.”⁹⁴ Accordingly, the Court stated that “[i]f the Director were removable at will by the President, the constitutional violation would disappear.”⁹⁵

In selecting a remedy, the Court could have left next steps to Congress, cut some of the duties that it had determined were required to be supervised by the President, or struck the protections from at-will removal. The Court opted for striking the provision protecting the director's independence, leaving the agency's statutory duties intact, even while acknowledging the importance Congress ascribed to making the agency independent.⁹⁶ But, the Court could have added directors to the CFPB, a remedy likely more consistent with Congress's intent to ensure independence, the same route Congress had taken in creating the SEC, FTC, FCC and similarly structured independent agencies. That the Court did not seriously consider the option of adding directors⁹⁷ to remedy the defect highlights the power to pick and choose among remedial options. After all, if the principal defect in the administrative scheme was its single head, why not make it plural? Indeed, the Court in *Free Enterprise Fund* implicitly assumed that Congress would have preferred maintaining the independence of the SEC as opposed to that

90. *Id.* at 2211.

91. *Id.* at 2191 (citations omitted) (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 513–514 (2010)).

92. *Id.* at 2193.

93. *See id.* at 2203–04.

94. *Id.* at 2202.

95. *Id.* at 2209.

96. *See id.* at 2211.

97. *Id.* at 2211, 2224 (Thomas, J. dissenting) (suggesting that such an option was open for Congress if it disagreed with the Court's fix). Although adding directors may require more words than excising the protection from at-will removal, the Court in *Arthrex* changed a statute by conferring on the PTO Director a duty not prescribed by Congress. *See United States v. Arthrex*, 141 S. Ct. 1970, 2006 (2021).

of the subordinate officials in the PCAOB.⁹⁸ And, the Court in *Arthrex* similarly assumed that Congress would not have wanted to make the APJs removable at will.⁹⁹ Why would Congress not have therefore cared more about the CFPB's independence than its single-head status? As Justice Thomas noted in his partial dissent, the Court “does not even recognize that it has made a choice between the provisions that cause the constitutional injury.”¹⁰⁰ Accordingly, much as in *Northern Pipeline*, Justice Thomas would have declined to make that choice and instead have denied the CFPB's petition to enforce the civil investigative demand and then awaited Congress's decision as to a statutory fix.¹⁰¹

Justice Gorsuch made similar comments in *Collins v. Yellen*,¹⁰² in which the Court struck down the statutory protection from removal for the head of the Federal Housing Finance Agency (FHFA), again ignoring the possibility of creating a multimember commission instead of eroding the single agency head's independence.¹⁰³ As with the CFPB, Congress plainly acted within its tradition of establishing independent agencies when appropriate to insulate heads of such agencies from partisan pressure.¹⁰⁴ Justice Gorsuch observed that “[t]his Court possesses no authority to substitute its own judgment about which legislative solution Congress might have adopted had it considered a problem never put to it. That is not statutory interpretation; it is statutory reinvention.”¹⁰⁵ And, when there is a significant time lag between a congressional decision structuring an agency and the delegation of enforcement or regulatory authority challenged—as in *Bowsher*—the Court's challenge is even greater.

The problem with the Court's approach to statutes deemed partially unconstitutional, of course, is not unique to the Article II context. For example, the Supreme Court in *United States v. Booker*¹⁰⁶ held that the Federal Sentencing Guidelines could not be mandatory because the required judicial factfinding would violate offenders' Sixth Amendment rights.¹⁰⁷ In crafting a remedy, the Court asked “what ‘Congress would have intended’ in light of the Court's constitutional holding.”¹⁰⁸ The Court's fix to make the guidelines advisory in all cases—even those in which a Sixth Amendment

98. *See supra* note 42 and accompanying text.

99. *Arthrex*, 141 S. Ct. at 1987.

100. *Seila L.*, 140 S. Ct. at 2224 (Thomas, J., dissenting).

101. *Id.* at 2225.

102. 141 S. Ct. 1761 (2021) (Gorsuch, J., concurring in part).

103. *Id.* at 1797–98.

104. Congress established the agency in an effort to avoid another mortgage crisis after the 2008 collapse. *See* Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (codified as amended at scattered sections of the U.S.C.).

105. *Collins*, 141 S. Ct. at 1797–98 (Gorsuch, J., concurring in part).

106. 543 U.S. 220 (2005).

107. *Id.* at 226–27.

108. *Id.* at 222 (quoting *Denver Area Ed. Telecomm. v. Fed. Comm'n Comm'n*, 518 U.S. 727, 767 (1996)).

claim could not be raised—solved a pragmatic problem,¹⁰⁹ but the Court just as well could have included the jury in the factfinding process that the Federal Sentencing Guidelines required.¹¹⁰ As with *Arthrex* and *Seila Law*, *Booker* manifests the separation of powers problem when courts reimagine what an enacting legislature would have wanted when that legislature could not have foreseen post-enactment developments.¹¹¹ The Court's more recent record in invalidating statutes in appointment and removal cases has brought the legitimacy issue into sharper relief.

The Court's remedial tack is even more surprising given its rejection of an "intentionalist" approach to statutory meaning more generally. Two examples suffice.

Whatever one thinks of the Supreme Court's decision in *Bostock v. Clayton County*,¹¹² it is difficult to label the decision as intentionalist. In considering the meaning of "because of sex" in Title VII of the Civil Rights Act of 1964,¹¹³ the Court recognized that it was unlikely that Congress intended in 1964 for Title VII's prohibition on sex discrimination to include gay and transgender discrimination.¹¹⁴ The Court noted that Congress, on numerous occasions, had considered but not passed proposals to add protections from discrimination based on sexual orientation to Title VII and that, since 1964, Congress had enacted other laws that explicitly mention sexual orientation.¹¹⁵ Nevertheless, the Court held that a plain reading of Title VII's language included a ban on employment discrimination based on an individual's sexual orientation or gender identity.¹¹⁶ The Court reasoned that an employer that fires an individual because the individual is gay or transgender does so because of the individual's "sex."¹¹⁷

109. The Court stated that "two provisions of the Sentencing Reform Act . . . that have the effect of making the Guidelines mandatory must be invalidated in order to allow the statute to operate in a manner consistent with congressional intent." *Id.* at 227.

110. Federal sentencing based on binding guidelines promulgated by the U.S. Sentencing Commission resulted from the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of the U.S.C.). See *Mistretta v. United States*, 488 U.S. 361, 367–68 (1989) (rejecting nondelegation challenge to binding federal sentencing guidelines in 1984 act). The Fifth and Sixth Amendment limitations on judicial factfinding that doomed the Federal Sentencing Guidelines in *Booker* were articulated earlier in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which held that a New Jersey hate-crime statute providing for a sentencing enhancement based on judicial factfinding as opposed to that of the jury was unconstitutional. See also *Blakely v. Washington*, 542 U.S. 296 (2004).

111. For general discussion of the problems inherent in severability analyses, see Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738 (2010); Lea, *supra* note 29.

112. 140 S. Ct. 1731 (2020).

113. 42 U.S.C. §§ 2000e to 2000e-17.

114. *Bostock*, 140 S. Ct. at 1750–52.

115. *Id.* at 1747.

116. *Id.* at 1737. For commentary, see Katherine Carter, *Questioning the Definition of "Sex" in Title VII*: *Bostock v. Clayton County, GA.*, 15 DUKE J. CONST. L. & PUB. POL'Y. SIDEBAR 59 (2020); Kyle C. Velte, *Recovering the Race Analogy in LGBTQ Religious Exemption Cases*, 42 CARDOZO L. REV. 67 (2020).

117. *Id.* at 1741–42.

Again rejecting an intentionalist interpretation, the Roberts Court in *Arlington Central School District Board of Education v. Murphy*¹¹⁸ held that the Individuals with Disabilities Education Act¹¹⁹ (“IDEA”) does not allow courts to award prevailing parties fees incurred by expert consultants during litigation. In that case, parents of a child with disabilities sought \$29,350 in fees for money spent on an educational expert who provided consulting services to the parents throughout their IDEA action.¹²⁰ The statute at issue states that a court “may award reasonable attorneys’ fees as part of the costs” to prevailing parents who bring an action under the act, but does not specifically mention experts’ fees.¹²¹ The Court held that a plain reading of the statutory language only provides clear notice of a requirement to pay attorneys’ fees, not experts’ fees.¹²² The Court also noted that attorneys’ fees are mentioned elsewhere in IDEA, but experts’ fees are not.¹²³ Therefore, the Court held that the statute does not allow courts to award experts’ fees in IDEA actions.¹²⁴

However, the Court also highlighted a statement from the IDEA Conference Committee Report, which stated that “[t]he conferees intend that the term ‘attorneys’ fees as part of the costs’ include reasonable expenses and fees of expert witnesses and the reasonable costs of any test or evaluation which is found to be necessary for the preparation of the . . . case.”¹²⁵ The Court rejected the salience of the discussion in the report: “Whatever weight this legislative history would merit in another context, it is not sufficient here. Putting the legislative history aside, we see virtually no support for respondents’ position.”¹²⁶ Justice Steven G. Breyer in dissent responded, “I can find no good reason for this Court to interpret the language of this statute as meaning the precise opposite of what Congress told us it intended.”¹²⁷ Moreover, the dissent stressed that the act’s language that guarantees “specially designed instruction, at *no cost* to parents” for students with disabilities supported compensation for experts’ fees, particularly given that the statute provides that parents have the right to consult with experts in assessing their children’s disabilities.¹²⁸ Given that underlying purpose, the Court’s opinion seemed to reject intentionalism.¹²⁹

118. 548 U.S. 291 (2006).

119. 20 U.S.C. §§ 1400–1482.

120. *Arlington Cent. Sch. Dist.*, 548 U.S. at 294, 303–04.

121. 20 U.S.C. § 1415(i)(3)(B).

122. *Arlington Cent. Sch. Dist.*, 548 U.S. at 296–98.

123. *Id.* at 297–98.

124. *Id.* at 304.

125. *Id.* (alteration in original) (quoting H.R. REP. NO. 99-687, at 5 (1986) (Conf. Rep.)).

126. *Id.* at 304.

127. *Id.* at 309 (Breyer, J., dissenting).

128. *Id.* at 313 (emphasis in original); 20 U.S.C. §§ 1401(29), 1415(h)(1).

129. For commentary, see Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2132–33 (2016) (arguing that the text should trump indicia of underlying intent); Rochelle Bobroff, *The Early Roberts Court Attacks Congress’s Power to Protect Civil Rights*, 30 N.C. CENT. L. REV. 231 (2008).

IV. TOWARD A MORE COHERENT REMEDIAL APPROACH

The analyses in cases such as *Bostock* and *Arlington Central School District* should not be that surprising given that the Court describes itself as textualist, not intentionalist.¹³⁰ Yet, in fashioning remedies, the Court has become intentionalist in part and has used tools that it would ordinarily eschew, such as seeking the underlying purpose of a statute. When a combination of statutory provisions produces a constitutional violation as in the appointment and removal cases, the Court has sought to determine the intent of the enacting Congress not based on any text but rather on the general policies undergirding the statute. A textualist Court therefore may be forced to engage in intentionalism when choosing which statutory provision to retain. And, when the Court must decide whether to privilege the intent of the Congress that enacted the agency structure as opposed to a later Congress that created the enforcement or regulatory duties challenged, the Court cannot help but engage in overt policymaking for which there, is as of yet, an undeveloped playbook.

To be sure, perhaps there is little alternative to intentionalism in such contexts—other than to punt the remedy back to Congress as Justices Gorsuch and Thomas have supported recently.¹³¹ In order to avoid the disruption attendant on placing the decision in Congress's hands and awaiting congressional action, the Court must engage in some form of intentionalism or instead justify its remedial efforts on some other basis. The appointment and removal cases reveal the insufficiency of the Roberts Court's remedial approach in determining which of two unconstitutional provisions should be displaced. The Court's approaches in *Northern Pipeline*, *Seila Law*, and *Arthrex* cannot be readily reconciled.

At a minimum, the Court should acknowledge the challenge arising from the need to ascertain appropriate remedies in contexts such as the appointment and removal cases. Perhaps because its statutory fixes are so difficult to defend from a textualist perspective, the Court has been slow to articulate guiding principles to determine when to strike delegated authority, when instead to change agency structure, and when to rewrite a statute as in *Arthrex*. Greater candor about the need to adopt an intentionalist approach (or general equitable principles) when deciding which of two statutory provisions should be displaced when their combination is unconstitutional would represent a first step in shoring the legitimacy of the Court's remedial efforts.

Thereafter, the Court should begin to articulate self-disciplining principles to guide its steps when confronting unconstitutionality that arises from the combination of more than one statutory provision, as in the appointment and

130. Justice Kagan earlier proclaimed, “we are all textualists now.” Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 18, 2015), <https://youtu.be/dpEtszFT0Tg> [<https://perma.cc/3HDV-DXRR>]. More recently, Justice Kagan added that the “Court is textualist only when being so suits it.” *West Virginia v. Env’t Prot. Agency*, 142 S. Ct. 2587, 2641 (2022) (Kagan, J. dissenting).

131. *See supra* notes 83–105 and accompanying text.

removal contexts. For instance, the Court's unstated presumption that Congress would prefer the appointment or removal provision to be altered to conform to constitutional dictate rather than excising the duties delegated to the agency makes sense, as Justice Blackmun noted in his *Bowsher* dissent,¹³² unless the challenged duties reflect a marked departure from the type of duties previously delegated and Congress's prior preference for the agency structure is clear.¹³³

Other guiding principles are possible. For instance, the Court might articulate when, from Congress's perspective, it is more important to remedy an appointments violation for an inferior officer by lodging appointment power in the President as opposed to a head of a department. Presumably, as discussed in the context of *Lucia*,¹³⁴ presidential appointment would further congressional intent if Congress has articulated a need for greater independence for that subordinate official within an agency. More globally, the Court should elaborate when, as in *Northern Pipeline*, to take a minimalist approach and place the remedial issue in Congress's lap, whether due to the issue's importance or the difficulty of ascertaining Congress's preferred solution. Other refinements will need to be made. The difficulties in remedying the flaws in the appointment and removal cases highlight the policy choices intrinsic in choosing the remedy for partially unconstitutional provisions more generally and illustrate the need for greater transparency and coherence.

CONCLUSION

The Court, in bolstering the unitary executive, has faced a myriad of remedial issues. Even some of the Justices most sympathetic to a unitary executive have expressed grave misgivings about the Court's remedial tack permitting the Court to step into the shoes of the legislature to determine legislative policy that it is ill structured to make.¹³⁵ In remedying the legislative choices that it deemed to be at odds with the unitary executive, the Court has aggrandized its own authority.

132. See *Bowsher v. Synar*, 478 U.S. 714, 786–87 (1986) (Blackmun, J., dissenting).

133. Indeed, the Court in *Glidden Co. v. Zdanok*, 370 U.S. 530, 582–83 (1962), declined to alter the status of the U.S. Court of Federal Claims after concluding that some of its congressionally assigned duties were incompatible with the Court's Article III status and that Congress overall intended it to be an Article III court. *Id.* at 582–83.

134. See *supra* notes 52–60 and accompanying text.

135. See, e.g., *United States v. Arthrex*, 141 S. Ct. 1970, 1991 (2021) (Gorsuch, J., dissenting in part); *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2224 (2020) (Thomas, J., dissenting in part); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 309 (2006) (Breyer, J., dissenting).