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The Remedies for Constitutional Flaws Have Major Flaws

Richard J. Pierce, Jr.¹

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 reach out to detect and to 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.²

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*,³ the Court held that Congress cannot limit the power of the president to remove an officer to circumstances in which the president states a cause for removal and also limit the power of the officer to remove an inferior officer to circumstances in which the officer states a cause for removal.⁴ To reach and address that issue in, however, the majority had to make up a non-existent provision of a statute.

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² E.g., *West Virginia v. EPA*, 142 S.Ct. 2587, 1606-07 (2022); *Seila Law v Consumer Financial Protection Board*, 140 S. Ct. 2183, 2195-97 (2020); *Free Enterprise Fund v. Public Company Accounting and Oversight Board*, 561 U.S. 477, 489-91 (2010). See generally, Kristin Hickman & Richard Pierce, *Administrative Law Treatise* chapters 17 and 18 (6th ed. 2019).

³ 561 U.S. 477.

⁴ *Id.* at 484.

The Sarbanes Oxley Act created a new agency called the Public Company Accounting and Oversight Board (PCAOB) to regulate the 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 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.⁵ 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.⁶

There is no statutory “for cause” limit on the power of the SEC to remove members of the SEC⁷, 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. Since 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.⁸

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.⁹ He argued that the necessary and proper clause in article I confers on Congress discretion to create a wide variety of agency structures.¹⁰ 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 clause and the take care clause would make it impossible for the complicated structure of government that Congress created to function.¹¹ In a lengthy appendix, Justice Breyer identified tens of 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.¹²

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.

In part I, I describe the four lines of cases in which the Court has used its interpretations of the

⁵ Id. at 484-87.

⁶ Id. at 508-10.

⁷ Id. at 545-49 (dissenting opinion of Justice Breyer).

⁸ Id. at 487.

⁹ Id. at 515-20 (dissenting opinion of Justice Breyer).

¹⁰ Id.

¹¹ Id. at 520-48.

¹² Id. at 549-88.

constitution to determine the permissible structure of government and the permissible allocation of power among units of government. In part II, I describe 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. In part III, I predict 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: (1) opinions in which the Court has interpreted the due process clause to require a degree of insulation between the administrative law judges (ALJs) who make adjudicative decisions in agencies 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; (2) 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; (3) 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; and (4) opinions in which the Court has limited the circumstances in which Congress can limit the president's removal power by interpreting and enforcing the vesting clause and the take care clause 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.¹³ The Court has long held that due process includes the right to a neutral decisionmaker.¹⁴ During the 1930s, there were many complaints that the agency hearing examiners, who are now called administrative law judges (ALJs), were systematically biased in favor of the agencies where they presided.¹⁵ Studies supported those complaints.¹⁶ After over a decade of debate, Congress responded to those complaints and studies by enacting the Administrative Procedure Act of 1946 (APA).¹⁷

The APA responded to the complaints and findings of bias in several ways. First, it created a structural framework in which the agency personnel who investigate alleged wrongdoing or play a role in initiating an enforcement proceeding or in representing the government in such a proceeding can play no role in supervising an ALJ.¹⁸ The investigative and enforcement personnel

¹³ E.g., *Londoner v. Denver*, 210 U.S. 373 (1908). See generally & Pierce, *supra* note 2, at §7.3 (6th ed. 2019).

¹⁴ E.g., *Tumey v. Ohio*, 273 U.S. 510 (1927). See generally Hickman & Pierce, *supra* note 2, at §7.7.

¹⁵ *Ramspeck v. Fed. Trial Examiners Conf.*, 345 U.S. 128, 131 (1953).

¹⁶ *Id.* at 131-132.

¹⁷ See George Shepherd, *Fierce Compromise; The Administrative Procedure Act Emerges from New Deal Politics*, 90 *Nw. L. Rev.* 1557, 1560 (1996).

¹⁸ 5 U.S.C. §554(d)(2).

are also prohibited from communicating with an ALJ off the record.¹⁹ 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 ALJ²⁰ and requires the agency to assign cases to ALJs on a rotation basis.²¹ 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.²²

Congress recognized that agency heads nominated by the president and confirmed by the Senate had to be able to determine the policy content of the decisions that agencies make in adjudications. It insured that presidentially appointed 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.²³

In 1950, the Supreme Court issued an opinion in which it praised the APA and strongly suggested that the statutory limit on the removal power in the APA was required by due process.²⁴ The Court backed away from that suggestion in a later case,²⁵ but it has continued to recognize the importance of a neutral decision maker in its opinions that interpret and apply the due process clause.²⁶ 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.²⁷ 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.²⁸

B. Legislative Power Cases

Article I vests the legislative power in Congress. The Court sometimes limits the power of agencies by interpreting and enforcing the vesting clause in article I. For over a century, the Court has interpreted the vesting clause of article I to limit the power of Congress to delegate some decision-making power to agencies and to limit the power of agencies to make decisions.²⁹ 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.³⁰ In two 1935 opinions, the Court held that two provisions of the National Industrial Recovery Act were unconstitutional because they

¹⁹ 5 U.S.C. §554(d).

²⁰ *Id.*

²¹ 5 U.S.C. §3105.

²² 5 U.S.C. §7521.

²³ 5 U.S.C. § 557(b).

²⁴ *Wong Yang Sung v. McGrath*, 339 38-46, 52-53 (1950).

²⁵ *Marcello v. Bonds*, 349 U.S. 302 (1955).

²⁶ *E.g.*, *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

²⁷ *Withrow v. Larkin*, 421 U.S. 35 (1975).

²⁸ *Id.* at 47-52.

²⁹ *E.g.*, *Field v. Clark*, 143 U.S. 649 (1892).

³⁰ See *Hickman & Pierce*, *supra*. note 2, at §2.6.

violated the non-delegation doctrine.³¹

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.

In 2019, three Justices urged the Court to begin to enforce the non-delegation doctrine more aggressively.³² Two other Justices have stated that they are also receptive to such a movement.³³ The Court has not applied the non-delegation doctrine to any statute since 1935, but it began to apply a closely related doctrine, the major questions doctrine, in 2000,³⁴ and it greatly strengthened that doctrine during its 2021-2022 Term.

In its 2021 opinion in *National Federation of Independent Businesses v. OSHA*³⁵ (*NFIB*) and its 2022 opinion in *West Virginia v. EPA*,³⁶ the Court applied the major questions doctrine as the basis 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 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 clearly authorized the actions. In concurring opinions, several Justices noted the close relationship between the major question doctrine and the non-delegation doctrine.³⁷

C. Appointments Clause Cases

The Court sometimes holds agency actions unlawful because they were taken by unconstitutionally appointed officials.³⁸ 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. 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.³⁹

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 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

³¹ *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. U.S.*, 293 U.S. 495 (1935).

³² *Gundy v. U.S.*, 139 S.Ct. 2116, 2335-37 (2019) (dissenting opinion of Justice Gorsuch).

³³ *Id.* at 2130-31 (separate opinion of Justice Alito); *Paul v. U.S.*, 140 S. Ct. 742 (2019) (separate opinion of Justice Kavanaugh).

³⁴ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (announcing and applying the major questions doctrine).

³⁵ 142 S. Ct. 661 (2021).

³⁶ 142 S.Ct. 2587 (2022).

³⁷ 142 S.Ct. at 2616-26; 142 S.Ct. at 667-70.

³⁸ E.g., *Lucia v. SEC*, 138 S.Ct. 2044 (2018). See generally *Hickman & Pierce*, supra note 2, at §2.4.

³⁹ *Id.*

supervision in other ways by a principal officer.⁴⁰ A principal officer can only be appointed through the process of nomination by the president and confirmation by the Senate.

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. Article II vests the executive power in the president and provides that the president shall take care that the laws be faithfully executed. The Court has interpreted those clauses to limit the power of Congress to limit the power of the president to remove an officer by conditioning that power on a finding of cause to remove the officer.

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,⁴¹ but it has held that Congress cannot limit the president's power to remove any single agency head⁴² 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.⁴³

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 2021 opinion in *NFIB v. OSHA*.⁴⁴ The majority did not believe that the broadly worded statute that the Occupational Safety & Health Administration (OSHA) relied on 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.⁴⁵ 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 that the agency relied on was over fifty years old, and the Court had held that it complied with the non-delegation doctrine over forty years earlier.⁴⁶ 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 are at all promising, as Kristin Hickman and I have explained in some detail.⁴⁷

⁴⁰ *Edmond v. U.S.*, 520 U.S. 651, 661-66 (1997).

⁴¹ *Humphrey's Executor v. U.S.*, 295 U.S. 602 (1935). See generally Hickman & Pierce, *supra*. note 2, at §2.5.1.

⁴² *Collins v. Yellen*, 141 S.Ct. 1761 (2021).

⁴³ *Free Enterprise Fund v. PCAOB*, 561 U.S. 477.

⁴⁴ 142 S.Ct. 661.

⁴⁵ *Id.* at 670-77 (dissenting opinion of Justice Breyer).

⁴⁶ *Industrial Union Dep't, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980).

⁴⁷ Kristin Hickman, *Nondelegation as Constitutional Symbolism*, 89 *Geo. W. L. Rev.* 1079 (2021) (criticizing the proposals made in 2019); Richard Pierce, *Political Accountability and Delegated Power*, 36 *Am. U. L. Rev.* 391 (1986) (criticizing the proposals made in the early 1980s).

The majority invoked the closely related major questions doctrine instead.

The majority invoked the major questions doctrine again in its 2022 opinion in *West Virginia v. EPA*.⁴⁸ 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. The majority implicitly acknowledged that the broadly worded fifty-year-old statute that the agency relied on authorized the agency to take the action. The Court rejected the validity of the action because it was an unprecedented action that 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.⁴⁹

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. 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. That doctrine empowers the Court to invalidate an agency action if it is unprecedented; it has significant economic or political effects; and it is supported only by an old broadly worded statute.

This new remedy raises another serious problem, however. The Court justifies it 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.⁵⁰ 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.⁵¹ As I have explained at length, legislative impotence will continue unless and until we replace party-based primaries with open primaries.⁵²

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. The nation will confront a variety of serious new problems like the covid pandemic and climate change 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 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

⁴⁸ 142 S.Ct. 2587.

⁴⁹ *Id.* at 2608-13.

⁵⁰ *Id.* at 2614-15.

⁵¹ Richard Pierce, Delegation, Time, and Congressional Capacity, 105 *Iowa L. Rev. Online* 1, 6-12 (2021).

⁵² Richard Pierce, The Combination of Chevron and Political Polarity Is Having Awful Effects, 70 *Duke L. Rev. Online* 91, 105-110 (2021).

The second set of problems is illustrated by the Court's 2021 opinion in *Collins v. Yellen*.⁵³ 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.⁵⁴ 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.⁵⁵

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.⁵⁶ Justice Gorsuch identified an obvious problem with this approach to the remedy issue.⁵⁷ 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.

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*.⁵⁸ They 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. An ALJ concluded that the petitioner had violated the FTC Act, and the FTC upheld that conclusion. 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.

The petitioner in *Axon* relied on the Supreme Court's 2010 opinion in which it held 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 limiting the power of the agency to remove the inferior officer to situations in which the agency states a cause for removal.⁵⁹ 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 2018.⁶⁰ 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 cause⁶¹, the FTC can only remove an ALJ for cause⁶², and the President can only remove a member of the Merit System Protection Board (MSPB) for cause.⁶³ The MSPB has the exclusive power to determine whether an agency has cause to remove an ALJ.⁶⁴

⁵³ 141 S. Ct. 1761 (2021).

⁵⁴ *Id.* at 1783-87.

⁵⁵ *Id.* at 1787-89.

⁵⁶ *Id.*

⁵⁷ *Id.* at 1796-99 (Gorsuch, dissenting).

⁵⁸ 986 F.3d 1173 (9th Cir. 2021)

⁵⁹ *Free Enterprise Fund v. PCAOB*, 561 U.S. 477.

⁶⁰ *Lucia v. SEC*, 138 S. Ct. 2044.

⁶¹ *Humphrey's Executor v. U.S.*, 295 U.S. 602.

⁶² 5 U.S.C. §7521.

⁶³ *Id.*

⁶⁴ *Id.*

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 invalid because it 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. If the Court holds that the 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. 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*.⁶⁵ 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 problems that the Court is experiencing in choosing remedies for constitutional flaws in agencies is the Supreme Court's 2021 opinion in *United States v. Arthrex*.⁶⁶ The Patent and Trademark Appeals Board (PTAB) employs several hundred Administrative Patent Judges (APJs).⁶⁷ The America Invents Acts confers on each APJ the power to decide that a patent is invalid.⁶⁸ The APJs are appointed by the Secretary of Commerce.⁶⁹ 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 cause for removing an APJ.⁷⁰

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.⁷¹ Since APJs are not appointed through the process of nomination by the president and confirmation by the Senate, they are unconstitutional.

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 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

⁶⁵ 141 S.Ct.1761.

⁶⁶ 141 S.Ct. 1970 (2021).

⁶⁷ *Id.* at 1976-78.

⁶⁸ *Id.* at 1978-80.

⁶⁹ *Id.* at 1980-82.

⁷⁰ 35 U.S.C. §3c.

⁷¹ 941 F. 3d 1320 (Fed. Cir. 2019), rehearing en banc denied, 953 F.3d 760 (2020).

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.⁷² They obviously could not appoint hundreds of additional officers through use of that process.

The Federal Circuit adopted the remedy of deleting 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.⁷³ 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.⁷⁴

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.⁷⁵ 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 investment in new technology by making it easier to challenge the validity of the patents that often discourage investment in new technology.⁷⁶

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.⁷⁷ Notably, the Court did not choose the remedy that it chose in similar circumstances in its 1976 opinion in *Buckley v. Valeo*.⁷⁸ 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.⁷⁹ Congress then saved the statute by amending it in ways that eliminated the flaws that the Court detected.

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

⁷² Anne Joseph O'Connell, Acting, 120 Col. L. Rev. 613 (2020).

⁷³ 541 F. 3d at 1335-39.

⁷⁴ Id.

⁷⁵ 141 S.Ct. at 1985-86.

⁷⁶ Id. at 1986-88.

⁷⁷ Id. at 1986-88.

⁷⁸ 424 U.S. 1 (1976).

⁷⁹ Id. at 142-43.

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 that the Court detected. We described many ways in which Congress could accomplish that relatively simple task. 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 2022.⁸⁰ 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.

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 to the problem effectively and with particularity. Since legislative impotence makes that assumed response to the problem 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 *Arthrex* became far more apparent when the agency and the Federal Circuit attempted to implement the remedy.⁸¹ The position of Director of PTAB was vacant, as was the position of Deputy Director, the only other principal officer in PTAB.⁸²

The decision on remand was made by the Commissioner. The Commissioner is not a principal officer. He is an inferior officer.⁸³ Moreover, he was not even Acting Director or Acting Deputy Director.⁸⁴ 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.⁸⁵ 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.⁸⁶ That rule provided that the duties of the Director and the Deputy Director are delegated to the

⁸⁰ See source cited in note 50 supra.

⁸¹ See *Arthrex v. Nephew & Son*, 35 F. 4th 1328 (Fed. Cir. 2022).

⁸² *Id.* at 1332-33.

⁸³ *Id.* at 1332-33.

⁸⁴ *Id.* at 1336-38.

⁸⁵ Federal Vacancies Reform Act, 5 U.S.C. §§3345 et seq.

⁸⁶ 35 F. 4th at 1333.

Commissioner when both the office of Director and the office of Deputy Director are vacant.

The Federal Circuit held that the Commissioner had the power to review the decision of the APJ based on an 1898 precedent 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.⁸⁷ 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.⁸⁸

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 authority.⁸⁹ The court recognized that its holding created a situation in which the Vacancies Act has “vanishingly small” scope.⁹⁰ 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.⁹¹

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,⁹² 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.

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

⁸⁷ U.S. v. Eaton, 169 U.S. 331 (1898).

⁸⁸ 35 F. 4th at 1337-38.

⁸⁹ Id. at 1337-38.

⁹⁰ Id. at 1337-38.

⁹¹ Id. at 1337-38.

⁹² Anne Joseph O’Connell, *supra*. note 71.

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.⁹³ 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. Second, some unsuccessful applicants argue that the SSA ALJs were unconstitutionally appointed.

The first dispute raises the combination of remedial problems that are discussed in sections IIA and C. The second dispute raises the remedial problems that are discussed in section IID, but it raises those problems in a context in which the adverse effects of any choice of remedies are far worse. It also raises an additional serious remedial problem.

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. They are reviewable only by the Social Security Appeals Council.⁹⁴ The Council is comprised 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, but the Commissioner does not have the power to review the decisions of ALJs. SSA ALJs are appointed by the Commissioner.

If the Court uses the reasoning it used in *Arthrex* to characterize 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. 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*.⁹⁵ 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.

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

⁹³ Social Security Administration website.

⁹⁴ Social Security website.

⁹⁵ 424 U.S. 1.

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 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*.⁹⁶ 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.⁹⁷ Second, it held that SEC ALJs are unconstitutional because they are not subject to at will removal by the SEC.⁹⁸ Third, it held that the SEC decision to assign an ALJ to preside deprived the defendant of its Seventh Amendment right to jury trial.⁹⁹

The first holding creates the remedial problems described in section IID. The second holding creates the remedial problems described in section IIC. 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.¹⁰⁰ 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 1789.¹⁰¹ 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 in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority."¹⁰²

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. It also changed the test that the

⁹⁶ 34 F. 4th 446 (5th Cir. 2022).

⁹⁷ Id. at 459-463.

⁹⁸ Id. at 463-465.

⁹⁹ Id. at 459-463.

¹⁰⁰ *Oil States Energy Services v. Greene Energy Group*, 138 S.Ct. 1365 (2018); *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989); *Atlas Roofing v. OSHA*, 430 U.S. 442 (1977). See generally *Hickman & Pierce*, supra. note 2, at §2.8.

¹⁰¹ *Granfinanciera v. Nordberg*, 492 U.S. at 52.

¹⁰² *Stern v. Marshall*, 564 U.S. 462, 490-91 (2011).

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. It held that the Seventh Amendment right to 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 1789.¹⁰³

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 regulatory 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. Congress has since included it as a decisional standard in hundreds of other statutes.

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.¹⁰⁴ 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 for centuries.¹⁰⁵

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 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, e.g., replacing review by one inferior officer with review by another inferior officer; (2) remedies that create constitutional flaws that are worse than the flaw that is being remedied, e.g., sacrificing due process values by making ALJs removable at will by agencies; or (3) remedies that make it impossible for government to function, e.g., 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.

The Court can continue to pursue its goal of improving the fit between the constitution and the structure of government and the allocation of power within government without creating intractable choice of remedy problems if it takes a less rigid approach that confers an appropriate degree of deference on Congress. 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. It 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

¹⁰³ *Jarkesy v. SEC*, 34 F. 4th at 452.

¹⁰⁴ *Atchison, Topeka & S.F. F.R. Co. v. Denver & N.O.R.*, 110 U.S. 667 (1884).

¹⁰⁵ *Scofield v. Lake Shore & M.S.R.*, 43 Ohio State 571,619 (1885).

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 government without creating unacceptable problems in its choice of remedies. They are: to reject the Fifth Circuit's holding in *Jarkesy*, change the definition of inferior officer to exclude ALJs that make benefit decisions, change the definition of inferior officer by accepting as adequate a wide range of supervisory relationships between principal officers and inferior officers, 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 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*,¹⁰⁶ the Supreme Court held that ALJs at the SEC are inferior officers rather than employees. 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.¹⁰⁷ It 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.¹⁰⁸ 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.

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

¹⁰⁶ 138 S. Ct. 2044.

¹⁰⁷ E.g., *Reno Catholic Social Services*, 509 U.S. 43 (1993).

¹⁰⁸ E.g., *Carr v. Saul*, 141 S.Ct. 1352 (2019); *Sims v. Apfel*, 530 U.S. 103 (2000).

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—the power to remove the officer, the power to review the decisions made by the officer, and other ways in which the principal officer supervises the officer.¹⁰⁹ 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 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 an 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 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 solid 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. 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.

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 insure that ALJs act as neutral decision makers 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. 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. 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. Thus, it was an unprecedented attempt to use an old broadly worded statute to address a hazard that had been well known for decades.

¹⁰⁹ E.g., *Edmond v. U.S.*, 520 U.S. 651.

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 major new problem. 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.