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Jack M. Beermann
Boston University School of Law

Ronald A. Cass

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THE C. BOYDEN GRAY
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Interpretation, Remedy, and the Rule of Law: Why Courts Should Have the Courage of Their Constitutional Convictions

Ronald A. Cass & Jack M. Beermann

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INTERPRETATION, REMEDY, AND THE RULE OF LAW: WHY COURTS SHOULD HAVE THE COURAGE OF THEIR CONSTITUTIONAL CONVICTIONS

RONALD A. CASS[*]

JACK M. BEERMANN[**]

"*Constitutional avoidance is not a license to rewrite Congress's work to say whatever the Constitution needs it to say in a given situation*."
— Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183, 2207 (2020) (Roberts, C.J.)

I. INTRODUCTION

The Supreme Court's decision in *United States v. Arthrex*[1] opens a window on a set of issues debated in different contexts for decades. These issues—how to interpret statutes and constitutional provisions, what sources to look to, whether so far as possible to adopt interpretations that avoid declaring actions of coordinate branches unconstitutional, and where such actions

* Dean Emeritus, Boston University School of Law; Distinguished Senior Fellow, Gray Center for the Study of the Administrative State, George Mason University; Senior Fellow, International Centre for Economic Research; President, Cass & Associates, PC.

** Professor of Law and Harry Elwood Warren Scholar, Boston University School of Law; Advisory Council, Gray Center for the Study of the Administrative State, George Mason University.

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[1] 141 S. Ct. 1970 (2021).

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are deemed to have been unconstitutional whether to provide remedies that cabin the most significant implications of such a declaration—go to the heart of the judicial role and the division of responsibilities among the branches of government.

The *Arthrex* case challenged a decision of the Patent Trial and Appeal Board (PTAB), an entity within the Department of Commerce that is composed of more than 200 Administrative Patent Judges (APJs) plus a Director and Deputy Director of the Patent and Trademark Office (PTO), and the PTO's Commissioner for Patents and Commissioner for Trademarks.[2] While the Director is appointed by the President and confirmed by the Senate, APJs and the other members of PTAB are appointed by the Secretary of Commerce. No provision of the America Invents Act, which created the process involved in *Arthrex*, provided for review of PTAB decisions by the Director or another principal officer. As a result, the Court held that APJs exercised unreviewable discretionary authority which made them principal "officers of the United States" whose appointment constitutionally must be made by the President with confirmation by the Senate. Had the APJs been "inferior officers"—subject to control by superior officers—they properly could have been appointed by the Secretary.

Instead of holding the challenged PTAB decision to be unlawful, however, the Court (by a plurality of justices) held that the statutory provisions that effectively precluded review of PTAB decisions by the Director should be severed from the law as unconstitutional. That step, the plurality said, transformed APJs into inferior officers subject to the Director's control. In other words, the remedy for an unconstitutional administrative decision, was to make it constitutional by revising the law. With that remedy in place, *Arthrex* won the battle but lost the war.

The *Arthrex* Court's application of the constitutional test for appointments to the statute at issue—whether the Director of the PTO lacked a means for reviewing and potentially countermanding a particular PTAB decision—is sensible, although open to question. As discussed below, both the test

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[2] See 35 U.S.C. § 6(a), (c).

itself—especially its fidelity to earlier decisions—and its application in *Arthrex* are contested.[3]

Our principal focus, however, is on the question of remedy. When the Court's members find that a plausible—really, the *most* plausible—reading of a law would make it unconstitutional, what should the Court do? Many Supreme Court pronouncements and much academic commentary suggest that courts should interpret statutes to be consistent with the Constitution whenever possible, even if that requires some degree of judicial creativity. That instinct has a long and distinguished pedigree, but it is ultimately a much-overstated direction to the courts.

Although courts often, and sensibly, choose between two plausible interpretations of a statute to avoid a finding of unconstitutionality, the Court's revision of the statute involved in *Arthrex* is jarring. Not only did the Court rewrite the law to remove the provision that prevented supervision of APJs by the PTAB's Director; it effectively read an implicit review power into the statute where no such power was granted by the law's text. The approach taken in *Arthrex* is not without precedent, but it both strains against the weight of precedent and reflects an unfortunate inclination to sacrifice at least one aspect of the judicial role to practical grounds for remedial modesty.

Part II of this article reviews the background and opinions in *Arthrex*. Part III describes the precedents respecting remedies for structures that the Supreme Court has found violate constitutional requirements. We return in that Part to the reasons that *Arthrex*'s remedy is at odds with generally accepted, and well-grounded, approaches to dealing with separation-of-powers problems. Part IV considers arguments for different approaches to interpretation and remedy when the Supreme Court faces potential constitutional concerns. This Part concludes with discussion of pragmatic problems that *Arthrex*-style remedies pose for decisionmaking by Congress and the Court.

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[3] *See infra*, text at nn. 14–25.

II. *ARTHREX*: APPOINTMENTS AND DISAPPOINTMENT IN REMEDYING CONSTITUTIONAL DEFECTS

A. Patent Contests: The Context for Arthrex

Patents in the United States are granted by the United States Patent and Trademark Office, an agency within the Department of Commerce headed by the Undersecretary of Commerce for Intellectual Property who also holds the title of Director of the PTO. Once a patent is granted, there is more than one way to challenge its validity both in the agency and in court, including by seeking a declaratory judgment and as a defense in an infringement action or in an action to collect unpaid royalties. The America Invents Act established an additional method for challenging patents within the agency: an interested person may seek "inter partes review" before the PTAB.

The inter partes review procedure is quite simple. The challenger files a petition to institute inter partes review and the Director makes the "final and unappealable" determination of whether to go forward with the process.[4] If the Director makes a favorable determination, the petition is then referred to a panel consisting of "at least 3 members" of PTAB "designated by the Director."[5] A dissatisfied party may seek rehearing, which by statute may be granted only by PTAB.[6] This could imply action either by the panel itself or the entire PTAB, consisting of more than 200 APJs plus a handful of others including the Director. Judicial review may also be sought in the United States Court of Appeals for the Federal Circuit.[7] Because the statute specifies that PTAB issues a "final written decision" on patentability[8] and provides for no other method of internal agency review, the *Arthrex* Court correctly concluded that PTAB's decisions on inter partes review are final as far as the Executive Branch is concerned: "no principal officer at any level within the Executive Branch" has the power to review this aspect of the APJs' work.[9]

[4] 35 U.S.C. § 314(d).
[5] 35 U.S.C. § 6(c).
[6] 35 U.S.C. § 6(c).
[7] 35 U.S.C. §§ 141(c).
[8] 35 U.S.C. § 318(a).
[9] *Arthrex*, 141 S. Ct., at 1980.

B. The Arthrex Litigation

Arthrex, Inc., owns a patent on a "surgical device for reattaching soft tissue to bone without tying a knot." After Arthrex won a jury verdict based on infringement of this patent by Smith & Nephew, Inc., and its subsidiary ArthroCare Corp., Smith & Nephew sought inter partes review in PTAB of the validity of the patent.[10] The Director agreed to commence inter partes review of the patent, and the PTAB panel found Arthrex's patent invalid based on the content of "prior art" respecting the claimed invention.[11] Arthrex disputed that conclusion in part because the alleged prior art was contained in "the inventors' own original application."[12]

Arthrex sought judicial review of the PTAB decision in the Federal Circuit. The Court of Appeals did not rule on the validity of the patent. Instead, it held that the PTAB APJs were principal officers whose appointment by the Secretary of Commerce was invalid. Rather than reinstate Arthrex's patent, the Federal Circuit invalidated the for-cause removal protections that applied to the APJs, deciding that this would transform them into inferior officers who were properly appointed by the Secretary of Commerce. The Federal Circuit then remanded the case to PTAB for a new hearing before a different panel of APJs, presumably chosen by the Director.

No one involved was happy with the Federal Circuit's decision. Both the United States Government and Smith &

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[10] After the jury verdict, while post-trial motions were pending, the parties agreed to settle the case with an express reservation of Smith & Nephew's right to seek inter partes review, thus preventing Arthrex from raising any preclusion defense based on the jury verdict. *See* Smith & Nephew's Petition for a Writ of Certiorari at 7, in United States v. Arthrex, Inc., 141 S. Ct. 1970 (2021) (available at 2020 WL 3651171 (June 29, 2020)).

[11] An invention must be "novel" to be patentable; novelty is measured against "prior art," *i.e.* information or earlier inventions that were publicly available before the filing of the patent application that anticipated the new invention. *See* 35 U.S. C. §102(a). The statute itself contains no definition of "prior art" which means that federal courts have been forced to develop an understanding of prior art with minimal legislative guidance. *See* Tun-Jen Chiang, *Defining Patent Scope by the Novelty of the Idea*, 89 WASH. U.L. REV. 1211, 1246-47 (2012).

[12] Brief for Respondent Arthrex, Inc. at 9, in United States v. Arthrex, 141 S. Ct. 1970 (2021).

Nephew disagreed with the conclusion that the APJs were principal officers. Arthrex also was dissatisfied with the remedy. It preferred a decision reinstating its patent rather than subjecting it to another round of inter partes review and argued that the entire process of inter partes review should be struck down. Thus, all parties sought Supreme Court review of the circuit's decision, which the Court granted.

On review, the Supreme Court agreed with the Federal Circuit that the APJs were principal officers but found that subjecting the APJs' decision to review by the Director "better reflects the structure of supervision within the PTO and the nature of APJs' duties." The Supreme Court's remedy was to remand the case to PTAB. It did not direct PTAB to hold a new hearing before a different panel. Instead, the Court remanded to allow the Director to decide whether to rehear Smith & Nephew's petition in light of its decision that the best reading of the statute—the reading that would make the law constitutional—is that it must allow the Director to review all PTAB decisions on inter partes review.[13]

C. APJs as Principal Officers

As already noted, our primary focus in this article is on the remedy. Nonetheless, a brief detour is in order to discuss the Court's determination that under the pre-*Arthrex* PTAB structure the APJs were indeed principal officers.

The Appointments Clause of the Constitution provides that Officers of the United States are appointed by the President with the advice and consent of the Senate. Congress may, however, provide by law for a different method of appointment for "inferior officers," namely appointment by the President alone, by a Department Head, or by a Court of Law.[14] All of these statutory alternatives presumably allow appointment without Senate confirmation—otherwise, the provision for presidential appointment would be redundant of the Constitution's default provision for appointment of officers and the remainder of the

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[13] *Arthrex*, 141 S. Ct. at 1987 ("we hold that 35 U.S.C. § 6(c) is unenforceable as applied to the Director insofar as it prevents the Director from reviewing the decisions of the PTAB on his own.").

[14] U.S. CONST., art. II, § 2, cl. 2.

clause would be incongruous. The statute creating PTAB specified that APJs were "appointed by the Secretary" of Commerce, a Department head, in consultation with the Director, a method of appointment implying that Congress believed them to be inferior officers.[15] APJs could be removed, also by the Secretary of Commerce, but only for "such cause as will promote the efficiency of the service."[16]

The determination of whether a particular officer is principal or inferior turns largely on application of the Supreme Court's decision in the *Edmond* case.[17] In *Edmond*, the Court, accepting a position that commanded only a single justice's vote less than a decade before,[18] specified that "[w]hether one is an 'inferior officer' depends on whether he has a superior" other than the President.[19] In *Edmond*, the Court determined that judges on the Coast Guard Court of Criminal Appeals (within the executive branch) were inferior officers, largely because the Court of Appeals for the Armed Forces (also within the executive branch) had the power to review and reverse the Coast Guard court's decisions[20] but also because the Judge Advocate General had authority to prescribe rules of procedure for the court and had power to remove the judges from the court without cause.[21] While the PTO Director has power to prescribe rules governing many aspects of PTAB procedures,[22] as noted above the Director cannot overturn panel decisions and cannot remove APJs without good cause. In the eyes of the *Arthrex* Court, this made APJs principal officers.

Although this appears to be a reasonable conclusion, Justices Thomas, Breyer, Sotomayor and Kagan dissented, finding that the supervisory powers of the Director and the Secretary of Commerce were sufficient to make the APJs inferior officers. Most notably, Justice Thomas insisted that the Court misapplied *Edmond*, stating quite strongly that "[t]here can be no dispute

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[15] 35 U.S.C. § 6(a).

[16] 5 U.S.C. § 7513(a); 35 U.S.C. § 3(c).

[17] Edmond v. United States, 520 U.S. 651 (1997) (*Edmond*).

[18] *See* Morrison v. Olson, 487 U.S. 654, 719-23 (1988) (Scalia, J. dissenting).

[19] *Arthrex*, 141 S. Ct. at 1980, quoting *Edmond*, 520 U.S. at 662.

[20] *Edmond*, 520 U.S. at 665.

[21] *Id*. at 664-65.

[22] 35 U.S.C. § 316.

that administrative patent judges are, in fact, inferior: They are lower in rank to at least two different officers" namely the Director and the Secretary of Commerce.[23] In Justice Thomas's view, the APJs were subject to greater supervision than the Coast Guard judges in *Edmond*: the Director sets their rate of pay and prescribes procedural rules and other policies governing PTAB proceedings including matters such as discovery, oral argument, termination of trial, notice, privileges and filing fees. The Director also has power to determine whether a party should be joined to a proceeding, may issue policy directives governing PTAB operation, decides which of the "250-plus [APJs] hear certain cases and may remove [APJs] from their specific assignments without cause."[24] Justice Thomas cited additional powers of the Director that are either explicit or implicit in the structure of the PTAB, such as the power to decide whether inter partes review happens at all, the power to assign a particular case to a panel consisting of herself, the Deputy Director and the Commissioner of Patents, the power to designate certain decisions as precedential and the alleged power, which is unclear from the statute, to add members to a panel and order the case reheard.[25]

There is much to be said in support of the approaches taken by both Chief Justice Roberts and Justice Thomas, especially in light of the relative dearth of precedent on the question of principal officer status. The Chief Justice's approach seems consistent with a preference for clear and relatively simple rules while Justice Thomas's may be more consistent with what little precedent there is and more deferential to Congress. In any case, after *Arthrex*, it appears that any official with final decisionmaking authority for the Executive Branch on an important matter such as the validity of a patent is likely to be considered a principal officer who must be appointed by the President with the advice and consent of the Senate. This provides a simpler starting point than Justice Breyer's functional approach or the more nuanced standard that Justice Thomas sees in *Edmond*. Whether the Chief Justice's approach leads to

[23] *Arthrex*, 141 S. Ct. at 2000 (Thomas, J., dissenting).
[24] *Id*. at 2001.
[25] *Id*. at 2002.

greater clarity or better results remains to be seen. That question, however, is beyond our focus. We turn now to our primary concern, the remedy.

III. REMEDYING UNCONSTITUTIONAL STRUCTURES BEFORE *ARTHREX*: VACATIONS AND STAYS

Both the Federal Circuit and the Supreme Court rejected Arthrex's plea to invalidate the entire system of inter partes review. The Federal Circuit determined that making the APJs subject to removal without cause by the Director was sufficient to convert them into inferior officers. Without stating that this was insufficient, the Supreme Court took a different tack and found that it was more appropriate to subject PTAB decisions to review by the Director. Before exploring the Court's reasoning in support of its remedial decision, we review some of the Court's previous decisions on remedies in cases involving unconstitutional appointment and removal provisions.

Numerous Supreme Court decisions have addressed challenges to actions of government officials whose appointments were alleged to be unconstitutional. Prior to *Arthrex*, in the two successful challenges to appointments of officials exercising executive authority, the Court prevented the agency from taking action until the appointment problems were cured. [26] In one, the Court invalidated the assignment of executive authority to the agency, leaving it to Congress to determine whether to reconstitute the agency with officers eligible to perform the agency's assigned duties.[27] In the other, the Court held that the officers were improperly appointed, and it affirmed a Court of Appeals decision vacating the order that had been issued by the improperly appointed officials.[28]

In cases invalidating restrictions on the President's power to remove officers, the Court usually has excised the removal restriction from the statute without otherwise affecting the agency's operations.[29] In sum, the Court has generally imposed

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[26] *See* Lucia v. Securities and Exchange Commission, 138 S. Ct. 2044 (2018); Buckley v. Valeo, 424 U.S. 1 (1976).

[27] *See* Buckley v. Valeo, 424 U.S. 1 (1976).

[28] *See* Lucia v. Securities and Exchange Commission, 138 S. Ct. 2044 (2018).

[29] *See infra*, text at nn. 40–45.

a narrow remedy, invalidating the action found to violate the constitutional assignment of powers among the branches but otherwise leaving the process involved intact.[30] There have been few, if any, prior cases in which the Court has altered an agency's process as much as it did in *Arthrex* in order to preserve the constitutionality of an agency's function.

A. Vacating Rulings by Unconstitutionally Constituted Authorities

(1) Appointments

The modern era of appointments disputes began with *Buckley v. Valeo*,[31] involving the constitutionality of numerous aspects of the Federal Election Campaign Act of 1971 as amended in 1974 in the wake of the Watergate scandal.[32] The 1974 amendments created the Federal Election Commission (FEC), an eight-member body charged with enforcing numerous aspects of the Act. The act specified that the FEC included two ex officio non-voting members, the Secretary of the Senate and the Clerk of the House of Representatives, and six voting members, two appointed by the President, two appointed by the Speaker of the House and two appointed by the President pro tempore of the Senate. All appointments were subject to the advice and consent of both Houses of Congress. This appointment structure was a blatant violation of the Appointments Clause. No Member of Congress may appoint an Officer of the United States, and, although the Court did not reach the issue, it is also plain that only the Senate may exercise the advice and consent power over such appointments.[33]

Once the Court determined that the appointments of FEC members were unconstitutional, it turned to the remedy. Here, the Court determined that the FEC members could retain their positions but they could not perform those functions that the

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[30] *See infra*, text at nn. 52–56.

[31] 424 U.S. 1 (1976).

[32] Federal Election Campaign Amendments of 1974, Pub. L. 93-443, 88 Stat. 1263 et. Seq. (1974).

[33] 424 U.S. at 127-28. Larry Alexander and Saikrishna Prakash have characterized the possibility that Congress might delegate the Senate's power to confirm presidential nominations, not merely as delegation "running riot," but as "delegation really running riot." *See* Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 VA. L. REV. 1035, 1076-77 (2007).

Constitution reserves to properly appointed Officers of the United States. The Court noted that the Appointments Clause does not govern the appointment of officials who act "merely in aid of the legislative function of Congress" and thus the Commission could continue to collect information and conduct investigations concerning the conduct of campaigns. This preserves Congress's authority to appoint its own officials. As appointed, however, the Commissioners could not exercise the enforcement, rulemaking and adjudicatory functions assigned to it by the Act. As the Court explained, only properly appointed Officers of the United States may perform "a significant governmental duty exercised pursuant to a public law."[34]

In sum, the Court's remedy in *Buckley* was to forbid the improperly appointed officials from exercising those functions that may be performed only by properly appointed Officers of the United States. It does not appear that the Court considered reforming the appointments process by granting the President the power to appoint all six Commissioners, subject only to the advice and consent of the Senate. The Court's decision effectively forced Congress, if its members wanted to continue the FEC's central functions, to legislate a revised method for appointing Commissioners, which it did shortly after the decision.[35]

The Court took a similar remedial tack in *Lucia v. SEC*.[36] Before *Lucia*, the SEC's Administrative Law Judges (ALJs) were appointed by SEC staffers, not the members of the Commission themselves. The Court found that the ALJs exercised powers reserved to Officers of the United States, a fairly obvious conclusion in light of prior decisions.[37] Because this method of

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[34] 424 U.S. at 131.

[35] When Congress amended the statute to conform to the Appointments Clause, it left intact the ex officio non-voting membership of the Secretary of the Senate and Clerk of the House of Representatives. This was struck down as a violation of the Appointments Clause by the D.C. Circuit in FEC v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir 1993). In that case, the court vacated the Commission's enforcement order against the NRA, stating that "we are aware of no theory that would permit us to declare the Commission's structure unconstitutional without providing relief to the appellants." *Id*. at 828.

[36] Lucia v. Securities and Exchange Commission, 138 S. Ct. 2044 (2018).

[37] *See* Freytag v. Commissioner, 501 U.S. 868 (1991).

appointment was improper, the Court determined that the ALJ's decision against Lucia could not stand and that Lucia was entitled to a new hearing before a properly appointed ALJ.[38] Rather than invalidate the entire process or determine that the improperly appointed ALJs were out of a job irrevocably, the justices held that the improperly appointed ALJs, just like the FEC members in *Buckley*, could not perform the decisional functions assigned to them.[39] During the course of litigation, the SEC Commissioners had "ratified" the appointments of the agency's ALJs. The Court did not decide whether that ratification made the then-current SEC ALJs appropriate officers to preside over the rehearing of Lucia's case, going only so far as to determine that the prior decision must be vacated and that the ALJ who had decided Lucia's case could not preside over a rehearing.

(2) Removal Cases

In cases challenging improper restrictions on the President's power to remove Officers of the United States, the Court's remedy generally has been to excise the removal restriction and allow the agency to function as before. This is unsurprising as invalidation of a removal restriction merely requires severing one provision of the statute—the removal restriction—while allowing the remainder of the statute to function as before. The alternative would be invalidation of actions taken by officials functioning under the unlawful removal restriction, an extreme result inconsistent with modern severability doctrine.

The practice of invalidating a removal restriction while preserving the remainder of the administrative function goes

[38] 138 S. Ct. at 2055.

[39] In the only other relatively recent case in which a method of appointing agency officials was held to violate the Appointments Clause, the Court held the appointments invalid, and the officials had to be removed from office. NLRB v. Noel Canning, 573 U.S. 513 (2014). In *Noel Canning*, the Court invalidated President Obama's recess appointments to the National Labor Relations Board (NLRB) as not complying with the constitutional requirements governing recess appointments, resulting in the dismissal of three purported members of the NLRB. The Court treated the remedy as obvious, as there was no doubt that members of the NLRB are Officers of the United States, no available statutory remedy to the problem, and no change in procedure that might have validated the appointments.

back to the very first Supreme Court decision on removal, *Myers v. United States.*[40] In that case, the Court struck down the statutory requirement for Senate consent prior to presidential removal of some Senate-confirmed officials. (Refusal to comply with this requirement was a basis for the impeachment of President Andrew Johnson.)[41] The remedy in *Myers* was simply to invalidate the requirement of Senate consent, severing that requirement from the remainder of the agency structure.[42]

The few instances in which the Court has invalidated a removal restriction follow the remedial choice made in *Myers*—i.e., the Court has severed the problematic removal restriction and allowed the agency to exercise its administrative responsibilities. For example, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[43] in which the Court established its rule against two levels of insulation from at-will presidential removal, the Court decreed that members of the PCAOB must be removable by the SEC without cause. And when it established[44] and applied[45] its rule that single heads of

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[40] Myers v. United States, 272 U.S. 52 (1926) (*Myers*).

[41] *See* Act of March 2, 1867, 14 Stat. 430 (1867). The impetus behind Congress's initial adoption of this requirement was to prevent Johnson from dismissing Secretary of War Edwin Stanton and other members of Abraham Lincoln's cabinet. *See* DAVID O. STEWART, IMPEACHED: THE TRIAL OF ANDREW JOHNSON AND THE FIGHT FOR LINCOLN'S LEGACY 75-77 (Simon & Schuster 2009); ERIC L. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION 490 (Univ. of Chicago Press 1960).

[42] *Myers*, 272 U.S. at 176–77.

[43] 561 U.S. 477 (2010) (*Free Enterprise Fund)*.

[44] *See* Seila Law LLC v. Consumer Financial Protection Bureau, 140 S. Ct. 2183 (2020) (*Seila Law*).

[45] *See* Collins v. Yellen, 141 S. Ct. 1761 (2020) (*Collins*). The decision in *Collins* can be viewed as an extension rather than an application of *Seila Law* because in *Seila Law* the Court appeared to rely at least in part on the extent of CFPB's powers when it concluded that the President must have the power to remove the CFPB director at-will. *See* 140 S. Ct. at 2204 ("With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may dictate and enforce policy for a vital segment of the economy affecting millions of Americans."). Justice Kavanaugh, while on the D.C. Circuit, similarly found it significant that the Director of the CFPB exercised "massive power." PHH Corp. v. CFPB, 839 F.3d 1, 16 (D.C. Cir. 2016), vacated and contrary result reached en banc in PHH Corp. v. CFPB, 881 F.3d 75 (D.C. Cir. 2018). In *Collins*, however, the Supreme Court disavowed this power-based aspect of *Seila Law*. *See Collins*, 141 S. Ct. at 1784 ("The President's removal

independent agencies must be subject to at-will presidential removal, the Court preserved the agencies' functions and simply excised agency heads' removal protections.

The only apparent deviation from this pattern is not really an exception but an exceptional case in which the problem was not the imposition of a removal restriction but rather the identity of the entity empowered to remove the official. *Bowsher v. Synar*[46] involved the constitutionality of delegating authority to the Comptroller General of the United States to establish binding limits on federal spending. The problem is that the Comptroller General, who is the head of the Government Accountability Office (formerly the General Accounting Office), is removable, for cause, not by the President but by a Joint Resolution of Congress.

The Court in *Bowsher* decided that congressional control over the Comptroller's removal was incompatible with his exercise of executive power. The Court's remedy was similar to what the Court has done in appointments clause cases: it prohibited the Comptroller General from establishing binding targets on the ground that an official removable by, and thus beholden to, Congress cannot exercise the functions of an Officer of the United States.[47] The Court explained that it chose this remedy, rather than invalidating Congress's power to remove the Comptroller General, because it had always been understood that the GAO is an agency of Congress rather than the Executive Branch and the GAO's responsibilities primarily involved serving Congress as a sort of watchdog over government spending. Thus, the Court declined to "perform the type of creative and imaginative statutory surgery urged by

power serves vital purposes even when the officer subject to removal is not the head of one of the largest and most powerful agencies.") It now appears that the Court has constructed a per se rule against insulation from presidential removal for the single head of an independent agency. President Biden, relying on this interpretation of *Collins* and *Seila Law*, fired the head of the Social Security Administration without relying on a claim of good cause as required the governing statute. *See* Jim Tankersley, *Biden Fires Trump Appointee as Head of Social Security Administration*, Jul. 9, 2021, NY TIMES, available at https://www.nytimes.com/2021/07/09/business/biden-social-security-administration.html.

[46] 478 U.S. 714 (1986).

[47] 478 U.S. at 732, 735–36.

appellants"[48] and instead held that the Comptroller could not be "entrusted with executive powers."[49]

B. Constitutional Rulings and Retroactivity

In all the cases discussed above, severability doctrine justified the Court's willingness to excise unconstitutional provisions rather than invalidate entire regulatory structures. The severability inquiry is supposed to be aimed at Congress's intent: would Congress have preferred excision or total invalidation? Often, however, this inquiry is more imagined than real, for in many cases it is well-nigh impossible to predict what the enacting Congress's collective reaction would have been to the possibility that a method of appointment, restriction on removal, or other statutory feature might be invalid.

Often, Congress assists in this inquiry by including a severability clause in the statute itself. Typically, such clauses provide that the invalidity of one provision does not affect the validity of the remainder of the statute. Even then, difficult questions can arise over the scope of severability. For example, in *INS v. Chadha*,[50] relying on a severability clause, the Court invalidated and excised a one-House veto over the Justice Department's decision to suspend the deportation of a deportable alien. This, in effect, made the suspension decision final and unreviewable. In dissent, Justice Rehnquist pointed out that "Congress consistently rejected requests from the Executive for complete discretion in this area . . . and always insisted on retaining ultimate control." Thus, he and Justice White would have found the veto provision unseverable from the remainder of the suspension procedure despite the presence of the severability clause. While we have sympathy for Justice Rehnquist's skepticism over Congress's willingness to give up control over the process, and we are aware that the Court continues to examine Congress's likely intent even in the presence of a severability clause,[51] in our view the better course

[48] 478 U.S. at 736.

[49] 478 U.S. at 731.

[50] 462 U.S. 919 (1983).

[51] *See* National Federation of Independent Businesses v. Sibelius, 567 U.S. 519, 586-588 (2012) ("The other reforms Congress enacted, after all, will remain 'fully operative as a law,' and will still function in a way 'consistent with

is for the Court to take Congress at its word and apply the severability clause whenever what remains is workable, leaving to Congress the task of cleaning up any problems it might have caused by including the clause.[52]

Notice also that when a regulated party has challenged an agency's adverse action, the Court has invalidated the action if it was taken by an improperly appointed official. That is, the Court's decisions applied retroactively to remedy the constitutional problem in the case at hand. In *Lucia*, for example, the SEC's order against Lucia was invalidated and the case was remanded for a new hearing before a properly appointed ALJ (or the Commission itself). This approach is typical of court remedial actions on review of, and finding invalidity of, agency decisions.

In contrast, there have been cases in which the Court has recognized that its decision would be so disruptive that it has applied its holding only prospectively and allowed time for Congress to step in to remedy the constitutional infirmity. The most prominent example of this is the *Northern Pipeline* case,[53] in which the Court invalidated a provision of the federal Bankruptcy Act that granted jurisdiction over certain state common law claims to the non-Article III bankruptcy courts. Primarily because "retroactive application . . . would surely visit substantial injustice and hardship upon those litigants who relied on the Act's vesting of jurisdiction in the bankruptcy courts," the Court held that the decision would apply prospectively only, allowing decisions made previously to stand despite the fact that they were rendered by a tribunal without constitutional jurisdiction.[54] The Court also delayed the effective date of its judgment for three months to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt

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Congress' basic objectives in enacting the statute.' Confident that Congress would not have intended anything different, we conclude that the rest of the Act need not fall in light of our constitutional holding." (citations omitted)); Alaska Airlines, Inc. v. Brock480 U.S. 678, 684 (1987).

[52] *See* Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 HARV. J. ON LEGIS. 227, 234–37 (2004) (arguing that courts should treat severability clauses as dispositive.)

[53] Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

[54] 458 U.S. at 88.

other valid means of adjudication, without impairing the interim administration of the bankruptcy laws."[55] This in effect allowed the bankruptcy courts to continue to exercise unconstitutional jurisdiction while Congress constructed a solution.

Similarly, in *Buckley*, the Court applied the "de facto validity" doctrine and upheld the actions that had been taken by the Federal Election Commission before the Court decided that the commission's members had been appointed unconstitutionally. The Court also stayed its judgment in *Buckley* for 30 days to "afford Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms without interrupting enforcement of the provisions the Court sustains, allowing the present Commission in the interim to function de facto in accordance with the substantive provisions of the Act."[56] These remedial determinations demonstrate a facet of the Court's remedial practice which is relevant to what it did in the *Arthrex* case: the Court often attempts to minimize the disruption to agency functioning caused by its decisions even if that perpetuates an unconstitutional structural feature.

C. Arthrex*'s Remedy: Adding Insult to Injury?*

As noted, Arthrex argued that the remedy for improper appointment of APJs should have been to invalidate the entire system of inter partes review. Although this may appear to be an extreme request, it would actually have been consistent with prior cases, such as *Buckley*, in which the Supreme Court determined that improperly appointed officials could not exercise powers reserved to Officers of the United States. Similarly, Arthrex was arguing that the APJs could not exercise a function reserved to principal officers, i.e., the power to make the Executive Branch's final decision on the validity of a patent. The Federal Circuit's approach was to convert the APJs to inferior officers (or, at least, to confirm their status as inferior officers) by making them removable without cause by the Director. In Arthrex's view, however, this alteration of the

[55] 458 U.S. at 88.
[56] 424 U.S. at 143–44.

method of removal did not cure the problem with their appointment and presented a constitutional problem of its own: Arthrex argued that it is inconsistent with due process to entrust determination of the validity of patents to an adjudicator who does not enjoy the independence traditionally expected for those engaged in judicial functions.

The Supreme Court did not enter this fray, but instead took a different tack, converting the APJs to inferior officers by subjecting PTAB decisions to review by the Director. Arthrex had argued against this remedy as well, insisting that the Court should leave the cure to Congress as it had done in *Buckley* and *Marathon Pipeline*. Arthrex pointed out that there were numerous possible cures for the improper appointment of the APJs, including legislation requiring presidential appointment, stripping away removal restrictions, subjecting APJ decisions to the Director's review, or simply abolishing the whole process of inter partes review. Congress, the legislative branch, was best suited to make this determination.

The Chief Justice's opinion for the Court in *Seila Law* provides perhaps the most persuasive argument against the remedy chosen in *Arthrex*. Recall that in *Seila Law*, the constitutional infirmity was that the CFPB's single director could be removed only for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S. C. §§ 5491(c)(1), (3). The defenders of the statute urged the Court to avoid striking it down. They urged the Court to construe "neglect of duty" as allowing the President to remove the CFPB director over policy disagreement. That construction would have preserved the President's authority over the operations of the Executive Branch without invalidating the law. The Court rejected this suggestion, pointedly observing that "[c]onstitutional avoidance is not a license to rewrite Congress's work to say whatever the Constitution needs it to say in a given situation." [57] Rather, the Chief Justice insisted that any interpretation it might adopt to avoid unconstitutionality must be "rooted in the statutory text and structure."[58] Finding no plausible construction of the CFBP's removal provision that would allow the President to remove the director over policy

[57] *Seila Law*, 140 S. Ct. at 2207.
[58] *Id*.

disagreement, the Court felt obligated to strike it down. This resulted in unlimited presidential removal power of the CFBP Director, a somewhat ironic outcome given the Court's partial reliance on Congress's intent to create an independent CFPB as a reason for rejecting the proffered limiting construction.[59]

For present purposes, the question is whether the remedy in *Arthrex*, construing the governing statute to allow the Director to review PTAB decisions, amounts to a re-write of Congress's work. Arguably, the Chief Justice's observation in *Seila Law* does not apply because, in *Arthrex*, the Court was not engaged in constitutional avoidance of the usual sort. It did not adopt a saving construction of the statute governing PTAB review. Rather, it struck down the provisions of the statute governing inter partes review that prevented the Director from reviewing PTAB decisions. But technicalities aside, the linguistic and structural surgery that the Court performed on the statute at issue in *Arthrex* seems equivalent to the sort of creative construction it rejected in *Seila Law* because,in short, there was no possible reading of the statute governing PTAB review that granted the Director the review power that the Court ultimately constructed. To understand this point, we need to examine closely the statutory provisions at issue.

No statutory provision explicitly prohibits the Director from reviewing PTAB decisions. Rather, that understanding results from considering the absence of a provision granting the Director a power of review together with the operation of other provisions of the governing statute. These provisions include 35 U.S.C. § 6(b)(4), which assigns authority to conduct inter partes review to the PTAB, and § 6(c), which specifies that each inter partes review must be heard by at least three members of PTAB (designated by the Director) and that only the PTAB itself (consisting of hundreds of APJs and a handful of administrators) may grant rehearings.[60] While other provisions empower the

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[59] *Id*. at 2206–07 ("Neither Amicus nor the House explains how the CFPB would be 'independent' if its head were required to implement the President's policies upon pain of removal."). *See also* discussion *infra*, text at nn. 84–101 (discussing reliance on legislative intentions as a mode of statutory interpretation).

[60] The Court notes that government argued that rehearing petitions may be acted upon by a panel chosen by the Director rather than by the entire PTAB,

Director to issue binding rules and designate particular PTAB decisions as precedential,[61] they do not empower the Director to review individual PTAB decisions. The result is that, under the law's terms, actual review of PTAB decisions is available in the Court of Appeals for the Federal Circuit[62] and nowhere else, rendering PTAB decisions the Executive Branch's final word on patent validity in cases that come before it.

The creativity of the Court's remedy in *Arthrex* is revealed most clearly by the fact that the Court did not identify any specific statutory provision it was striking down but rather effectively added provisions to the statutory scheme. While the Court stated that "Section 6(c) cannot constitutionally be enforced to the extent that its requirements prevent the Director from reviewing final decisions rendered by APJs," every provision of § 6(c) remains operative after the *Arthrex* decision: inter partes review is still conducted by a panel of at least three PTAB members chosen by the Director, and PTAB may still grant rehearings. The Court's remedy does not require removing any statutory language unless review by the Director is necessarily considered a "rehearing."[63] Rather than excising

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and that this provides a mechanism for the Director to review PTAB decisions. 141 S. Ct. at 1981. We are not sure of the correctness of either the government's interpretation of the legal provision at issue or the Court's rejection of the argument that this interpretation establishes a means of Director review sufficient to conclude that the APJs were inferior officers, hence properly appointed prior to *Arthrex*. We observe, however, that this interpretation would have been a less radical solution than the Court's creation of Director review in the absence of suitable statutory text. *See infra*, text at nn. 63–65.

[61] 35 U.S.C. §§ 3(a)(2)(A), 316(a)(4).

[62] 35 U.S.C. § 319.

[63] Section 6(c) provides that "*Only* the Patent Trial and Appeal Board may grant rehearings." Perhaps after *Arthrex* the Director may also grant rehearings, but we do not believe that review by the Director would constitute a rehearing. Ordinarily, review by a supervisory authority within an agency is not denominated as a "rehearing"—as usually there is no additional presentation of evidence, apart from written objections to the decision based on the hearing already held. As of April 22, 2022, there have been approximately 188 requests for Director review, and it appears that the process involves written submission of legal arguments, not new presentation of evidence. The Director granted review to only three of those 188 requests. All three involved claims by a patent owner that the panel's decision was inconsistent with a Federal Circuit decision on another patent. In all three cases, the Director remanded the case to the PTAB for reconsideration. Review

language from the statue as unconstitutional, the remedy chosen in *Arthrex* required the effective addition of a provision granting the Director power to review PTAB decisions. This need not necessarily include the power to grant rehearings, although the Court's decision is not clear on this point. The decision, thus, may or may not have been intended to remove the word "only" from § 6(c).

This remedy is unusual (perhaps unprecedented) and plainly in tension with the Court's observation in *Seila Law* that "constitutional avoidance is not a license to rewrite" statutes.[64] The *Seila Law* observation is based on the Constitution's allocation of the lawmaking function to Congress, not the courts. Prior cases in which the method of appointing an officer was determined to be unconstitutional disabled the improperly appointed official from carrying out the functions beyond that official's constitutional remit. In removal cases, the Court's remedy of invalidating a removal restriction while leaving the remainder of the statute in place might be considered to stretch the judiciary's power more, as it results in an agency structure different from the one Congress established. But in no case we know of other than *Arthrex* has the Court enhanced the power of an appointed officer by effectively *adding* a provision to a statutory scheme to cure a constitutional defect.[65]

The closest analogue may be the Court's remedy in *Buckley*, which allowed the FEC commissioners to continue to perform non-executive tasks such as maintaining information and performing research for Congress. Preserving officials' power to perform those constitutionally permissible functions when they were not properly appointed to take executive actions, however, is a far cry from *increasing* the power of an official in order to preserve the operation of an executive function. It is possible

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was denied or dismissed in 174 cases and is pending in eleven more. *See* https://www.uspto.gov/patents/patent-trial-and-appeal-board/status-director-review-requests.

[64] *Seila Law*, 140 S. Ct. at 2207.

[65] Excision of a removal restriction enhances the power of the President, or in some cases a principal officer, but that is the result of the excision of an unconstitutional statutory provision, not the addition of a provision enhancing anyone's power. *See*, *e.g.*, *Free Enterprise Fund*, 561 U.S. 477 (enhancing the power of the SEC to remove PCAOB members); *Seila Law*, 140 S. Ct. 2183 (enhancing the power of the President to remove the director of the CFPB).

that Congress would not have committed those powers to the FEC in the absence of authority to take actions that only can be granted to properly appointed Officers of the United States, but that is hardly obvious, nor is it clear what constitutional harm is done by this aspect of the *Buckley* Court's statutory construction.

This brings us back to the question, why didn't the *Arthrex* Court accept the Federal Circuit's approach and make the APJs removable at will by the Director? Although the Court did not explain why it rejected that solution, there are two reasons that this approach might have been a less attractive option.

First, it is not clear whether at-will removal status would be sufficient to convert the APJs into inferior officers. Cabinet Secretaries and other high-ranking officers are removable at will, and yet nearly all of these officers undoubtedly are principal officers. Further, even if it had accepted the excision of protections against removal of APJs at will, the Court still would have had to deal with the fact that, once rendered, PTAB decisions were unreviewable within the Executive Branch. The Court majority simply may have disagreed with the Federal Circuit's view that at-will removal was sufficient to remedy the constitutional defect respecting PTAB decisions. At least, the majority may have had serious enough doubts about the matter to prefer Director review, which overcomes the primary objection to APJs' possible principal officer status.

Second, subjecting an adjudicator to at-will removal raises concerns of its own. It might be viewed as a threat to due process or at least as an undesirable diminution of the APJs independence.[66] For similar reasons, the Court has not decided whether its ban on two levels of for-cause insulation from presidential removal applies to restrictions on removal of Administrative Law judges.[67] The majority of justices may have found their approach to construing the law in *Arthrex* preferable to becoming entangled in the thicket implicit in at-will removal of adjudicators.

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[66] We view the due process problem as a red herring, or at least a deep pink one, but the question of the exact scope of authority for first-level administrative adjudicators is, as a matter of *policy*, a serious one.

[67] *See* PCAOB, 561 U.S. at 507 n. 10.

There is, of course, more than one way to avoid that thicket. Our question, then, becomes why the Court found its statutory surgery—creating authority for superior-officer review—more supportable than simply holding the appointments of the APJs unconstitutional and prohibiting them from adjudicating inter partes cases (or taking any other unsupervised actions within their statutory jurisdiction). The Court did not comment on why it rejected the second possibility, but we are left with a sense that the *Arthrex* majority was trying to minimize the disruption inherent in its enforcement of this feature of constitutional separation of powers.[68]

There are other examples of this inclination, for instance in the Court's *King v. Burwell* opinion preserving the Affordable Care Act's system of subsidies for purchasing health insurance.[69] That result was reached through what on its face appears to be a feat of counter-textual statutory interpretation.[70] In support of the Court's creative reading of the Affordable Care Act, Chief Justice Roberts noted that "in every case we must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan."[71] In other words, the Chief Justice's position seems to be that the Court should partner with Congress and facilitate, not frustrate, the achievement of Congress's legislative goals (as the justices' see them—a caveat of major proportions, as it turns out).

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[68] For a description of different methods of minimizing disruption of legislative schemes, along with one view of the relation of different methods to alternative theories of judicial avoidance of conflicts with the other branches, see Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945 (1997). Readers should note that the approach taken here differs from Professor Vermeule's view respecting the relationship between severability and respect for legislative (majoritarian) "supremacy" over matters within the scope of Congress's power. Where he views "vigorous severability" as "deferential to legislative policies," *id*. at 1946–47, we see that approach as potentially invasive of the legislature's domain absent clear statutory directives regarding what should be treated as severable. *See* discussion *infra*, text at nn. 72–101.

[69] *See* King v. Burwell, 576 U.S. 473, 489–98 (2015) ("construing" a provision providing subsidies to purchases of health insurance through "an Exchange established by the State" to include an exchange established by the federal government.) *See* discussion *infra*, text at nn. 87–88.

[70] King v. Burwell, 576 U.S. at 489–98.

[71] King v. Burwell, 576 U.S. at 498.

One can take a similar view of the Court's employment of the severability doctrine in removal cases and in other separation-of-powers cases such as *Chadha*. Rather than sever the offensive provisions, the Court could shut down entire programs, for example by holding that that no more suspensions of deportation may occur until Congress amends the statute to remove the legislative veto (and perhaps provide an alternative method of congressional supervision) or that the CFPB cannot continue to operate until Congress establishes a constitutional structure for it. On this view, by not choosing more draconian remedies, the Court cooperates with Congress by preserving, as much as possible, the integrity of the federal programs Congress has designed and provided for by law.

Hence, concerns about minimizing judicial interference with the operation of important federal statutes, implicit in other cases, also may explain an approach that limits disruption to inter partes review. While not as visible to most people as the arguments for adopting the ACA, the establishment of inter partes review responded to widespread complaints that grants of large numbers of dubious patents were interfering with innovation and harming the economy more generally.[72] The Court struggled to preserve as much of the inter partes system

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[72] For general criticisms of the U.S. patent system that sparked the push for many of the reforms embodied in the American Invents Act, see JAMES BESSEN & MICHAEL MEURER, PATENT FAILURE: HOW JUDGES, BUREAUCRATS PUT INNOVATORS AT RISK (2008). The AIA did not solve—and almost inevitably could not (or should not) solve—what Bessen and Meurer saw as the biggest problem, the inability of innovators to figure out in advance whether what they are working on is already covered by a patent. For one view on this, see Rob Wheeler & James Allworth, *U.S. Patent Overhaul Won't Help Innovators*, HARV. BUS. REV. (Sep. 15, 2011), available at https://hbr.org/2011/09/the-america-invents-act-rearra. For divergent views of the patent system, raising some critical points but mostly more supportive of its functioning and more in line with limits on the changes to it, see Alice Corp. Pty. Ltd. v. CLS Bank Int'l, 573 U.S. 208 (2014); RONALD A. CASS & KEITH N. HYLTON, LAWS OF CREATION: PROPERTY RIGHTS IN THE WORLD OF IDEAS ch. 5 (Harv. Univ. Press 2013); John R. Allison & Ronald J. Mann, *The Disputed Quality of Software Patents*, 85 WASH. U.L. REV. 297, 334 (2007); Ronald A. Cass, *Lessons from the Smartphone Wars: Patent Litigants, Patent Quality, and Software,* 16 MINN. J.L. SCI. & TECH. 1, 52–56 (2015).

as possible just as it struggled to preserve the ACA from statutory and constitutional difficulties.[73]

Is this the right approach for courts to adopt in fashioning remedies for violations of constitutional provisions rooted in the separation of powers, or should the Court impose more disruptive remedies when those better address a statute's infirmities? Should the Court have invalidated the entire system of inter partes review in *Arthrex* or narrowed the scope of health insurance subsidies in *King v. Burwell*? Is the inclination to search for ways of reconstituting statutes to save them a product of the times in which, due to polarization and gridlock, it appears far less likely that Congress will cure constitutional problems, allowing important federal interests to go unaddressed? Or is the Court simply concerned with making it easier for the nation's governance system to take the medicine of stricter enforcement of separation of powers, perhaps out of worry over its own political capital? We turn next to the subject of these questions: the constitutional propriety and consequences of remedial choices.

IV. JUDICIAL ROLE: STATUTORY REVISION VERSUS STATUTORY CONSTRUCTION

The Court's remedies in *Arthrex*, *King v. Burwell*, and similar cases raise questions both of institutional role and of pragmatic effects. First, by revising statutory provisions, even when the goal is to save as much as possible of Congress's work product, the Court may be taking on an inappropriately legislative role.[74] This role may require reliance on skills that are not within the judiciary's special expertise and reach questions not properly framed for judicial disposition. In fact, regardless of the ultimate propriety of the practice, divining legislative intent in order to justify constructive remedial action seems out of step with the textualist interpretive methodology that characterizes contemporary statutory analysis at the Court. Second, in

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[73] *See* NFIB v. Sebelius, 567 U.S. 519 (2012) (upholding Congress's power to impose a tax on the failure to purchase health insurance despite Congress's declaration that the payment was not a tax).

[74] *See*, *e.g.*, Frederick Schauer, Ashwander *Revisited*, 1995 SUP. CT. REV. 72, 97–98 (1995) (*Ashwander*).

reconstituting laws to avoid excessive disruption of statutory schemes, the Court may produce both unintended and unfortunate practical results.

A. Separating Functions of Court and Congress

Our first concern is whether the sort of statutory reconstruction illustrated by *Arthrex* is an appropriate project for courts or, instead, falls within the legislature's domain. The overarching question is whether the court in *Arthrex* or *King v. Burwell* is impinging on the exercise of power committed to a coordinate branch. This concern presents two distinct but related questions respecting, first, the skill set that is required for what the Court does and, second, the manner in which the question to be resolved comes to the Court.

(1) Interpretation vs. Intuition: Judicial or Extra-Judicial Skills

The first question is one of judicial capacity. Justice Antonin Scalia defended interpretive approaches that elevate attention to legal texts, as opposed to the purposes behind them, in significant measure as more congruent with judges' skills.[75] Judges can read legal documents and say what the words mean.[76] They can employ numerous canons of construction to determine what is the best reading of the law. And while some scholars have made fun of these canons as contradictory and spongy nostrums,[77] others have explained how the canons can aid decision-making and advance rule-of-law values.[78] Judges

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[75] *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 25–47 (Amy Guttman ed., Princeton Univ. Press 1997) (*Interpretation*) (articulating the benefits of certain approaches to interpretation that can be described as "lawyers' work, *id*. at 46); John Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747 (2017).

[76] *See*, *e.g.*, Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347 (2005).

[77] *See*, *e.g.*, KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 521–35 (Little, Brown & Co. 1960); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950).

[78] *See*, *e.g.*, Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825 (2017) (marshaling evidence that the canons are more useful and less self-contradictory than Llewellyn claimed); Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*,

also can say what the ordinary meaning of a word or phrase was at the time a text was adopted as law. The skills needed for such determinations are those in which judges are trained, though, to be fair, some element of historiography that is not entirely within judges' training surely is helpful in the second task.[79]

The more judges and justices focus on the task of reading law—of looking to texts and trying to understand their meaning based on the texts' words and context—the more likely they are to be utilizing skills common to lawyers and to be constrained in what they do. That was Justice Scalia's principal argument for textualism based in publicly understood meaning.[80] One doesn't have to fully embrace Scalia's approach to textualism—or any specific version of it—to appreciate the point that construing text based on the meaning of the words and their use in context has a constraining effect.[81] Justice Elena Kagan, while not committed to Scalia's textualism, made that point in declaring "we are all textualists now."[82] Further, the degree of agreement among

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45 VAND. L. REV. 647 (1992) (explaining how the canons are used and how they may prove helpful, even if Llewellyn's critique is largely correct in respect of the determinacy of the entire body of constructive canons). *See also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 69–339 (Thomson/West 2012) (cataloguing and explaining a wide array of different canons, both individually and by categories).

[79] *See*, *e.g.*, Matthew J. Festa, *Applying a Useable Past: The Use of History in Law*, 38 SETON HALL L. REV. 479 (2008); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. L. REV. 119 (1965).

[80] *See* Scalia, *Interpretation*, *supra* note 75; Ronald A. Cass, *Administrative Law in Nino's Wake: The Scalia Effect on Method and Doctrine*, 32 J.L. & POL. 277, 279–80 (2017); Manning, *supra* note 75; Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION, *supra* note 75, at 129–49.

[81] For discussions of various versions of textualism and originalism, including some anchored in authorial intentions, see for example Larry Alexander, *Originalism, the Why and the What*, 82 FORDHAM L. REV. 539 (2013); John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 NW. U. L. REV. 1371 (2019); Stephen B. Presser, *Should the "Hollow Core" of Constitutional Theory Be Filled with the Framers' Intentions?*, 22 FED. SOC. REV. 210 (2021) (reviewing DONALD L. DRAKEMAN, THE HOLLOW CORE OF CONSTITUTIONAL THEORY: WHY WE NEED THE FRAMERS (Cambridge Univ. Press 2021).

[82] *See* Lee Epstein, William M. Landes & Richard A. Posner, *Why (And When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101, 106 & n. 9 (reporting a dissent rate in the U.S. Courts of Appeals of 2.6% in all decisions and 7.8% in published decisions from 1990 to 2007 and 62% in the same period at the Supreme Court). Despite a far larger proportion of non-

judges and justices—over ninety percent on the U.S. courts of appeals and the most common outcome even at the Supreme Court—underscores the impact of a common skill in reading law and a broad commitment to law-bound judging.[83]

Different approaches to remedies for unconstitutionality draw on different skills, some within judges' core competence and some decidedly outside. Deciding whether a specific provision can be excised from a statute consistent with the terms of the law itself draws on basic skills of statutory construction. At least for a fairly substantial set of cases, it does not require judges to go beyond the ordinary bases for interpreting texts. If there is a provision on severability, the question for the Court is simply,

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unanimous decisions at the Supreme Court, year after year, unanimity is the most *common* outcome at the Court, even though it does not represent more than half of all outcomes. For example, in the Supreme Court's October 2020 Term, more decisions were unanimous (forty-three percent) than any other vote distribution. The second most common vote distributions were 6-3 and 5-3 (due to recusals), together making up twenty-four percent of decisions—just slightly more than half as large a share of the Court's decisions as the share of unanimous decisions. In contrast, although getting a large amount of attention, only twelve percent of the Court's decisions were made by a vote of 5-4. *See* https://www.scotusblog.com/statistics/. For a general discussion of the dynamics of consensus and dissent on the United States Courts of Appeals, see VIRGINIA A. HETTINGER, STEFANIE A. LUNDQUIST & WENDY L. MARTINEK, JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING (Univ. of Virginia Press 2006).

[83] *See* STEPHEN G. BREYER, THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS 34–36 (Harv. Univ. Press 2021); RONALD A. CASS, THE RULE OF LAW IN AMERICA 35–45, 72–97, 150–51 (Johns Hopkins Univ. Press 2001); *The District of Columbia Circuit: The Importance of Balance on the Nation's Second Highest Court: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. On the Judiciary*, 107th Cong. 45–54 (2002) (statement of Ronald A. Cass, Dean of Boston University School of Law) (noting unanimity of results in more than 98 percent of decisions from the D.C. Circuit, a court often described as deciding highly politicized cases and reflecting political influence on the judiciary); Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1358–60 (1998) (providing a similar argument based on experience as a member of that court).

To be sure, not all judges and justices agree on the best approach to weighing different inputs to interpretation of law—including the best way of reading texts, *see*, *e.g.*, Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265 (2020). Nonetheless, the judges' and justices' commitment to basing decisions on extrinsic authority, including the increased reliance on anchoring decisions in the text of governing authority referenced by Justice Kagan, is an essential attribute for consensus on the courts, including the Supreme Court.

what does the provision say is severable? Does it allow the excision of the provision that has been found to be unconstitutional? If so, the Court should declare the constitutionally defective part of the law unenforceable and then decide how much of the work of the agency can proceed under what remains of the law. Each of these steps draws on traditional judicial skills in service of a traditional judicial function.

Deciding whether Congress would have *wanted* a law to be kept without the excised provision, however, is a very different task calling on very different skills.[84] The difference between reading the law's text and attempting to construct what might have been desired but not explicitly said is that, for the latter approach, judges must identify a purpose underlying the law from which to infer more determinate meaning.[85] The asserted futility of this endeavor has been a driving force in the move toward textualist statutory interpretation. That is why, in our view, the remedies in *Arthrex* and *King v. Burwell* are in tension with the current dominant textualist methodology at the Court.[86]

This purpose-based approach was the route taken quite boldly in *King v. Burwell*, where the majority divined the major purposes behind the ACA, decided that those purposes would be frustrated by reading the text of the law to mean what it clearly said, and then construed the law in a manner that is at odds with the text adopted by Congress.[87] The result was that a law granting tax subsidies to purchases of health insurance

[84] Although it might seem that this observation applies only in the absence of a severability clause, it actually applies more broadly for two reasons. First, while in our view this is often misguided for reasons discussed above, the Court's decisions applying severability clauses still ask whether Congress would have enacted the remaining provisions had it known which particular provisions would be struck down. Second, when the Court constructs a new provision, as it did in *Arthrex*, rather than simply excise defective features of a statute, it explains its action in light of likely congressional intent.

[85] *See* Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. U.L. REV. 1610, 1612 (2012).

[86] *See* Michael D. Shumsky, *supra* note 52. One of us is not convinced of the merit of textualist statutory interpretation methodologies and is not troubled by judicial creativity in statutory construction designed to further Congress's overriding purposes. *See* Jack M. Beermann, *The Turn Toward Congress in Administrative Law*, 89 B.U. L. REV. 727 (2009).

[87] *See* King v. Burwell, 576 U.S. at 493-97.

through a specific mechanism under a specific section of law was construed to grant those subsidies to purchases through a different mechanism under a completely separate section of the law.[88] The end result was that the law itself was rewritten to reflect the purpose that the majority of justices found motivated the law.

The approach of *King v. Burwell* is akin to saying that Tom went to the grocery store to buy dinner, so he must have wanted to purchase meat (or tofu) (commonly understood as a central element of a fulfilling dinner and something Tom had once said he liked). Under this approach, the fact that Tom *didn't* actually purchase meat (or tofu) is subordinated to the understanding that he *must have wanted to*, given the judicially identified purpose of his trip.[89]

The obvious problem is that constructing the purpose of legislation—like constructing the purpose of Tom's trip to the store—requires intuiting the preferences of the critical actors. In the case of legislation, that means the preferences of the majority of Representatives and Senators voting for a statute (and, presumably, the President who signs it). Construing actors' intentions at times is required for legal judgments, as occurs regularly when juries determine whether an actor intended to harm the person he shot or, instead, shot the victim unintentionally.[90] Yet, the required construction of intentions behind legislation is a much more difficult task.

Despite recent arguments to the contrary,[91] Congress is not an entity with a single, unified, corporate intention in enacting

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[88] *See id.*, at 489-90 (reading "established by the *State under Section 1311*" to include exchanges established by the *federal government under section 1321*) (emphasis added).

[89] One of us is a vegetarian, or more accurately a pesce-dairy-eggatarian. Tofu references as a substitute for meat should be understood as a personal accommodation to dietary differences between the authors.

[90] *See generally* Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV 463 (1992) (discussing range of mental states that lead to culpability in criminal law and liability in tort law).

[91] *See* Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979 (2017); Brian D. Feinstein, *Congress Is an It*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4031134&dgcid=ejournal_htmlemail_u.s.:constitutional:law:interpretation:judicial:review:ejournal_abstractlink.

legislation.[92] Individual members of Congress vote for legislation for a variety of reasons, and the purposes ascribed to the legislation by its most vocal champions may not at all describe the purposes of the majority much less the purposes of the member whose vote determined whether the law passed or failed.[93] These divergent intentions do not necessarily contradict a shared understanding of what the law—or, more to the point, a given provision in the law—is supposed to accomplish. But, apart from the text of the law itself, the materials commonly available to support inferences about the understood purpose of the law have deficiencies as guides, not least because they are often intended by specific individuals to serve as guides for judicial construction of the law.[94]

In addition, materials of "legislative history" do not always precede legislation, further compromising their reliability as evidence of understood purposes.[95] Although materials respecting modern legislation tend to be much more plentiful than materials respecting the adoption of constitutional text, they are far more likely to have been generated with an eye to biasing subsequent judicial interpretations.[96] Ultimately, parsing the evidence respecting legislators' understanding of the purposes of a particular law and then drawing inferences about those purposes' effect on the meaning of a specific point

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[92] Although many scholars have made this point over the past 60 years, the pithiest and most noted exposition is Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

[93] For discussion of the operation of Congress and strategic behavior in political positioning, as well as the importance of the median voter's preferences in determining legislative outcomes, see DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (Yale Univ. Press 1974); KENNETH A. SHEPSLE & MARK S. BONCHEK, ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS 115-19, 142-57 (W.W. Norton 1997).

[94] *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 61 (1994) (*Text, History*); Scalia & Manning, *supra* note 85, at 1612.

[95] *See* Clarke v. Securities Indus. Assn., 479 U.S. 388, 407 (1987); Kenneth W. Starr, *Observations About the Use of Legislative History*, DUKE L.J. 371, 377 (1987).

[96] *See* Scalia & Manning, *supra* note 85, at 1612 ("Downtown Washington law firms make it their business to create legislative history.")

of interpretation requires information difficult to unearth and skills that lie outside the judicial domain.[97]

Our aim here is not to score a point for the anti-legislative-history side of the interpretive debate.[98] Instead, our purpose here—and with only two authors it should be far easier than with 537 lawmakers[99] to accept the stated purpose as real—is to underscore the difficulty of evaluating what lawmakers would have wanted to do with laws in the absence of a clear declaration respecting severance. Would those who passed the law have preferred a truncated version of the law, with a given provision excised, or no law? How do judges know?

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[97] *See* Frank H. Easterbrook, *Statute's Domains*, 50 U. CHI. L. REV. 533, 547-48 (1983). This is especially true as the federal judiciary, including the Supreme Court, increasingly is composed of members who have been judges at other levels, professors, lawyers, and executive officials, but who have not been legislators or served in elective office. Consider, for example, that the current Supreme Court (at the time of this writing) includes eight justices who previously served on a U.S. Court of Appeals, eight who had served in the Executive Branch, three who had been full-time law professors, and none who had held elective office.

[98] Among the entries into this debate, see for example STEPHEN BREYER, AMERICA'S SUPREME COURT: MAKING DEMOCRACY WORK 98–102 (Oxford. Univ. Press 2010); DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 61 (1991); Lisa Schutz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside: An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013); *Part II*, 66 STAN. L. REV. 725 (2014) (marshaling evidence that those who are most involved in the law-drafting process generally see their efforts reflected in the committee reports that compose the most-referenced parts of legislative history); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); Easterbrook, *Text, History*, *supra* note 94; Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI-KENT L. REV 441 (1990); McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 L. & CONTEMP. PROBS. 3, 26 (1994); Scalia, *Interpretation*, *supra* note 75, at 16–23, 29–37; Scalia & Manning, *supra* note 85; Starr, *supra* note 95. The authors differ on their skepticism of legislative history (Beermann, less; Cass, more), but agree that it is not likely to answer precise questions about what would have occurred had legislators known the likelihood of judicial invalidation of a particular provision. *See also* text and note 148, *infra*.

[99] We are not miscounting members of the Senate and House of Representatives; instead, we are including the Vice-President, whose vote breaks ties in the Senate and the President, who may sign legislation or veto it and consequently has considerable influence in shaping important legislation, as a lawmaker.

This point is apposite to the remedial issue in *Arthrex*, even though the decision there is more easily justified as consistent with the law as enacted than the decision in *King v. Burwell*. After all, the law respecting APJs generally treats them as officers not intended to have broad, final decisional authority for their employing agency.[100] But we must add an "except" to this conclusion: that is, *except* for the fact that no provision was made in the law for review of APJs' inter partes decisions. In fact, no plausible reading of the text even suggests that the Director has authority to review the APJs' decisions. The opinions in *Arthrex* do not resolve whether insulation of APJs' decisions supports larger purposes for the America Invents Act or other provisions of patent law, focusing more on the nature of APJs' authority and their place in the Commerce department's hierarchy rather than on broader aspects of the law. The remedy adopted, however, required judicial creation of a new authority—intra agency review—not present in the law prior to the *Arthrex* decision, offering the possibility that it advanced one purpose of the law while potentially undercutting other purposes.

Further, saying that the *Arthrex* Court's remedy most likely fit the overall design of the law, thus helping achieve its understood purposes, is not the same as saying that the decision followed from *interpreting* the law on the basis of texts that arguably should govern the justices' decisions. Even where the justices' construction of purposes for lawmaking is not controversial and where a remedy seems to advance those purposes, the Court should not be in the position of rewriting a law to make it constitutional.

Obviously, the Court would not appropriately be asked to serve as a Council of Revision to oversee and improve legislation (especially its constitutionality) prior to its enactment, a role considered and rejected by the Constitutional Convention.[101] If, having found that the sort of rewriting needed to make a challenged provision constitutional is the wrong task for a judicial body when the law is being framed, the Court should

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[100] *See* Arthrex, 141 S. Ct. at 2000 (Thomas, J., dissenting).

[101] Jack Rakove, *Judicial Power in the Constitutional Theory of James Madison*, 43 WM. & MARY L. REV 1513, 1517-23 (2002); James T. Barry III, Comment: *The Council of Revision and the Limits of Judicial Power*, 56 U. CHI. L. REV. 235, 248-57 (1989).

not presume to exercise a similar revisory authority at second-hand. That is, if the Court is not to be a Commission of Revision as a general matter, it should not become one after passing judgment on a specific provision of the law. That, however, is the function the Court exercises when, as in *Arthrex*, it reframes a law to make it constitutional after opining on how the Congress would have written the law if it had known what the decision on constitutionality with respect to a given provision would be.

(2) Deciding Cases: Advice or Adjudication

Another set of reservations about the approach taken in *Arthrex* is rooted in considerations respecting the basis for judicial power to declare laws unconstitutional. The classic, widely accepted, explanation for judicial review authority is Chief Justice John Marshall's statement in *Marbury v. Madison*:

> [T]hose who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature repugnant to the Constitution is void....
>
> It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.[102]

Marshall's reasoning is a simple, three-part syllogism. Courts are called upon when deciding cases to interpret the legal rules that govern the case at hand. Interpreting and applying rules includes determining when legal rules conflict. And when a statute-based rule conflicts with a constitution-based rule, the constitutional rule must prevail. *Marbury* asserts that the inherent nature of a written constitution is that its rules are a species of law, hence, courts must interpret them and apply them in the same way they would other laws, but constitutional law trumps congressional law.[103]

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[102] 5 U.S. (1 Cranch) 137, 177 (1803) (*Marbury*).

[103] *Marbury*, 5 U.S. at 176–79.

Anchoring judicial review in courts' obligation to "say what the law is" in order to decide cases, as *Marbury* does, suggests limits to when and how federal courts properly exercise their review authority. Most obvious, the case that requires a court to say what the law is must be properly before the court *as a case*. If litigants are free to come to court simply to ask for judges' view on the law's meaning and constitutionality, courts are not answering those questions to decide a case; they are answering them to satisfy litigants' desires—and perhaps their own—for judges to shape future debates.

Put differently, if legal rights are not determined, the dispute being resolved is not a case in law. Instead, the dispute in effect is merely a request for an advisory opinion or is being treated by the courts as if it were just that. Openness to such a use of the courts is at odds with the Constitution. That document specifically authorizes the President to request opinions of his Department Heads,[104] but there is no similar provision for the President or anyone else to request advisory opinions from the courts. This has long been understood as a basis for rejecting the power of judges to render such opinions.[105]

This has also been the basis for rejecting litigation by individuals who have nothing significant to gain from it—at least, nothing that would distinguish the individuals seeking to invoke judicial process from the mass of fellow citizens. The Supreme Court made that reasoning clear 80 years ago in *Massachusetts v. Mellon*, underscoring the need for a litigant to have a significant personal stake in a controversy apart from mere philosophical interest in a point of legal construction.[106] In the Court's words, failing to observe this requirement would have courts acting "not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and coequal department, an authority which plainly we

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[104] U.S. CONST., art. II, § 2, cl. 1.

[105] *See* William Casto, *The Early Supreme Court Justices' Most Significant Opinion,* 29 OHIO NORTHERN L. REV. 174, 189 (2002) (discussing Letter from Justices of the Supreme Court to George Washington (Aug. 8, 1793), reprinted in 6 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800 app., at 743–58 (Maeva Marcus et al. eds., 1998)).

[106] 262 U.S. 447, 487–89 (1923).

do not possess."[107] Similarly, in *Lujan v. Defenders of Wildlife*, the Court emphasized requirements that plaintiffs assert a distinctive, concrete injury-in-fact and identify a remedy that would alleviate, ameliorate, or compensate for the injury.[108]

One of the most acute observers of early American life and institutions, Alexis de Tocqueville, applauded our limitations on when courts can pass on the meaning and constitutionality of statutes.[109] The critical feature that permits judges in America the "judicial authority … [is] carefully restricted … to the ordinary circle of its functions."[110] De Tocqueville explained that letting courts pronounce broadly on the validity of legislation outside the narrow context where it is necessary to resolve a case inevitably invites judges to "play[] a prominent part in the political sphere."[111] But if the judge is called on to decide whether a law can apply in the case at hand, that reduces both the visibility and the political entwinement of the decision.[112] These observations reprise arguments advanced by Alexander

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[107] *Id.*, at 489.

[108] 504 U.S. 555, 560–62 (1992). Justice Scalia wrote for the Court—though only for a plurality with respect to redressability—in laying out the general requirements for standing and their result in the case. We note, however, that the concurring and dissenting justices demurred from the plurality discussion of redressability either because they deemed it unnecessary to reach that issue given the facts of the case or because they viewed the facts as sufficient to make a prima facie case of redressability, rather than because they disagreed with the essence of the concept of redressability as part of standing.

Although Justice Scalia's tripartite analysis has become the dominant understanding of the law of standing, it was greeted at the time with skepticism from commentators who saw it as a "transformation in the law of standing" and "difficult to square with the language and history of Article III." Gene R. Nichol Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L. J. 1141, 1142-43 (1993). *See also* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 166 (1992) ("*Lujan*'s invalidation of a congressional grant of standing is a misinterpretation of the Constitution. . . . It has no support in the text or history of Article III. It is essentially an invention of federal judges, and recent ones at that.").

[109] *See* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 100–06 (Henry Reeve trans., Schocken Books 1961) (1835).

[110] *Id.*, at 101.

[111] *Id.*, at 105.

[112] *Id.*, at 103–06.

Hamilton in *Federalist 78*,[113] but from the perspective of an observer rather than a participant in framing the powers and limits of each branch.

The argument for pronouncing on constitutional questions as a matter of ordinary law and necessity to the disposition of a case only permits such decisions when they are essential to the disposition of the case. Hence, in *Arthrex*, announcing that APJs finally decide patent issues in inter partes review in violation of the Constitution would require the Court to hold the PTAB's decision of Arthrex's case invalid. Without that remedy, the Court has made a free-standing constitutional determination that in essence constitutes an advisory opinion.[114] This is not a function given to the federal courts or a proper exercise of Article III power.

B. Pragmatic Effects on Congress and Courts

Despite the tension between the *Arthrex* Court's approach to remedy and the considerations discussed above respecting judges' skills and courts' constitutionally assigned role, another set of arguments over best behavior for courts might offer some support the plurality's decision. These arguments revolve around the pragmatic effects of judicial decisions and reasons judges might temper their decisional inclinations out of regard for them. We examine these below, although we do not find them suitable defenses for *Arthrex*, nor in large degree convincing templates for the wider run of cases.

(1) Bickel's "Passive Virtues"

There has been debate for almost a century over the Supreme Court's perceived turnabout on the scope of federal commerce power in the 1930s. Some commentary lauds the change as "the

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[113] *See* THE FEDERALIST NO. 78 (Alexander Hamilton).

[114] The unnecessary pronouncement on a legal issue that does not resolve rights of litigants should be distinguished from a properly constructed declaratory judgment, which can resolve rights of litigants in political entities' boundary disputes, suits to quiet title, and similar cases seeking resolution of legal rights. *See* Edwin M. Borchard, *The Constitutionality of Declaratory Judgments*, 31 COLUM. L. REV. 561, 570, 594–600 (1931); David P. Currie, *Misunderstanding Standing*, 1981 SUP. CT. REV. 41, 45–46 (1982); Abraham A. Ribicoff, Note: *The Constitutionality of the Declaratory Judgment*, 1 U. CHI. L. REV. 132, 136 (1933).

switch in time that saved nine,"[115] assuming that Justice Owen Roberts changed his vote in *West Coast Hotel Co. v. Parrish*[116] to avoid reactions—including President Franklin Roosevelt's threatened Court-packing—to decisions striking down laws that formed (or were in line with) Roosevelt's New Deal. Others treat the turnaround as an unprincipled capitulation to the politics of the day.[117]

Whether Justice Roberts' *West Coast Hotel* vote in fact was at odds with his vote a year earlier in a similar case[118] is contested, as is the reason for his famous vote.[119] Whatever the truth, the widespread perception that Roberts' vote responded at least in part to concerns about consequences if the Supreme Court continued swimming against the political tides of the day has been grist for argument over judicial advertence to the political impact of the Court's decisions.[120]

The perils of judges' tacking before the prevailing political winds—that is, as those winds are perceived by the judges—seem obvious and obviously at odds with the role of judges as bulwarks of law in the face of political pressures. Giving judges space to perform that role is the principal reason for insulating

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[115] *See* John Q. Barrett, *Attribution Time: Cal Tinney's 1937 Quip, "A Switch in Time'll Save Nine,"* 73 OKLA. L. REV. 229 (2021).

[116] 300 U.S. 379 (1937).

[117] For a long list of commentators who view the "switch in time" as capitulation to politics, see, e.g., Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 202 n. 1 (1994) (citing, *inter alia*, JOSEPH ALSOP & TURNER CATLEDGE, THE 168 DAYS (1938), EDWARD S. CORWIN, COURT OVER CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT 121-28 (1950), and EDWARD S. CORWIN, CONSTITUTIONAL REVOLUTION, LTD. 39-79 (1941).

[118] Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936).

[119] *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 5 (Oxford Univ. Press 1998); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 343 (Harv. Univ. Press 1998)

[120] *See*, *e.g.*, Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201 (1994); Daniel E. Ho & Kevin Quinn, *Did a Switch in Time Save Nine?*, 2 J. LEGAL ANALYSIS 69 (2010); William Leuchtenberg, *When the People Spoke, What Did They Say?: The Election of 1936 and the Ackerman Thesis*, 80 YALE L. J. 2077 (1999); G. Edward White, *Cabining the Constitutional History of the New Deal in Time*, 94 MICH. L. REV. 1392 (1996). *See generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (Farrar, Straus & Giroux 2009).]

federal judges with lifetime appointments and irreducible pay.[121] Looking at potential political reactions to judicial decisions—and, especially, changing positions on legal interpretation to mute critical reactions—would seem to violate the fundamental predicates of judicial independence and principled decisionmaking, the supposed hallmarks of proper judging and of the rule of law.[122] Even if the judge's departure from what otherwise would seem the appropriate, principled decision is predicated on concern for the Court as an institution, that hardly justifies distorting the law. Changing course to avoid a feared constitutional collision that would seriously diminish the Court's ability to play its role of neutral law interpreter (where necessary to resolve legal disputes properly presented to it) so fully undermines the Court's legitimacy as to be akin to killing the patient in order to save him.[123] Further, doesn't giving in to perceived threats of punishment for unpopular decisions—threats such as Roosevelt's Court-packing plan or more recent moves to expand and alter judicial personnel or jurisdiction[124]—simply encourage further threats?[125]

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[121] *See, e.g.*, THE FEDERALIST NO. 78 (Alexander Hamilton).

[122] *See* Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964); Herbert Wechsler, *Toward Neutral Principles in Constitutional Law*, 73 HARV. L. REV. 1 (1959). *But see* Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155 (2007) (arguing that there are legitimate reasons for judicial caution in swimming against the tide of public concerns).

[123] This essentially is Professor Gunther's complaint about the avoidance techniques championed by Professor Bickel. *See* discussion, *infra*, text at nn. 126–132.

[124] *See, e.g.*, William E. Leuchtenberg, *FDR's Court-Packing Plan: A Second Life, a Second Death*, 1985 DUKE L. J. 673 (1985); Jess Bravin, *Democratic Lawmakers Present Plan to Expand Supreme Court*, WALL ST. J., Apr. 15, 2021, available at https://www.wsj.com/articles/group-of-democratic-lawmakers-to-present-plan-to-expand-supreme-court-11618447336.

[125] *See, e.g.*, Ronald A. Cass, *Property Rights Systems and the Rule of Law*, in THE ELGAR COMPANION TO THE ECONOMICS OF PROPERTY RIGHTS 222, 227–30 (Enrico Colombatto ed., Edward Elgar Pub. 2004) (describing the experience in Zimbabwe, with President Robert Mugable altering the personnel of the Supreme Court of Zimbabwe and having a case reheard after first ruling of the Supreme Court held his taking of private lands unconstitutional); John Fritze, *"Think Long and Hard": Supreme Court Justice Stephen Breyer Pushes Back on "Court-Packing"*, USA TODAY, Apr. 7, 2021, available at

A different, though related, argument for considering practical consequences of judicial decisions is identified most prominently with writings of Professor Alexander Bickel. In a famous article and book, Bickel championed the "passive virtues" of forbearance where, in his estimation, the costs of judicial decision on the merits exceed its benefits.[126] While any short summary cannot do it justice, Bickel's position was that judicial review is a "potentially deviant institution in a democratic society"[127] and can only be made tolerable to the majority by forms of compromise that show respect for the dominant place given to majoritarian governance.[128] The Court, in Bickel's view, must find ways to avoid making decisions that will unnecessarily weaken its position as a bulwark against forces at odds with the rule of law. These ways primarily consist not in making wrong, unprincipled decisions—the charge against Justice Roberts' change of position in *West Coast Hotel*—but in avoiding too-early or too-broad pronouncements of principles that will provoke a substantial portion of the citizenry to resist their application.[129]

The problem with Bickel's approach, as recognized contemporaneously by Professor Gerald Gunther, is its lack of a principled anchor.[130] Bickel appreciates the importance of principled decisionmaking by courts, not least the Supreme Court, and his avoidance project is justified in part by a hope

https://www.usatoday.com/story/news/politics/2021/04/07/supreme-court-justice-stephen-breyer-warns-against-packing-bench/7116124002/ (discussing problems with proposals to expand Supreme Court); William H. Pryor, Jr., *Conservatives Should Oppose Expanding the Federal Courts*, NY TIMES, Nov. 29, 2017, available at https://www.nytimes.com/2017/11/29/opinion/conservatives-expanding-federal-courts.html (discussing efforts to expand judgeships on other federal courts).

[126] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (Bobbs-Merrill 1962); Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961) (*Passive Virtues*).

[127] Bickel, *Passive Virtues*, *supra* note 126, at 47.

[128] BICKEL, *supra* note 126, at 64–68; Bickel, *Passive Virtues*, *supra* note 126, at 49–51.

[129] *See* BICKEL, *supra* note 126, at 95–97; Bickel, *Passive Virtues*, *supra* note 126, at 49–50, 57.

[130] *See* Gunther, *supra* note 122, at 3, 7, 10-13.

that it will guide the Court away from decisions on constitutional questions that are not grounded in sound, neutral principles.[131] Yet, in choosing which times to elide constitutional decisions, Bickel relies on a loose set of considerations that lack any solid superstructure.[132] He appeals to expediency in the service of principle, but provides no principle to cabin the Court's judgment on when to avoid a particular constitutional issue. What is left is expediency that serves the views of its advocate at a given moment, freed from significant constraints that should guide judicial decisions under law.

This raises another reason for questioning the propriety of the remedial decision in *Arthrex* and other similar instances of judicial creativity. Although this is admittedly highly speculative, it may be that empowering judges to declare Acts of Congress unconstitutional without visiting serious consequences on anyone makes the declaration of unconstitutionality more attractive to the courts. This may be desirable insofar as it minimizes disruption of government, instructs future Congresses on the limits of their powers, and provides the Executive with grounds for disregarding Congress's clear, but unconstitutional, commands. These potential benefits should be weighed against the costs of a judiciary more willing to impose limits on the other branches in cases of constitutional doubt. Just as retroactive consequences that come from application of a decision on the law to the parties at hand have long been understood as a bulwark against judicial creativity in private law matters, requiring that courts immediately face whatever disruption comes with a specific decision may create headwinds against assertion of new separation of powers holdings resting on uncertain grounds.

Returning to our concerns with *Arthrex* illustrates why Bickel's "passive virtues" cannot provide justification for the Court's remedial choice. The problem identified above with *Arthrex* is the Court's decision to craft a remedy that does not provide any relief to the plaintiff—*after* finding that the law at issue unconstitutionally granted final decisional authority to APJs. The Court did not avoid declaring that the law Congress

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[131] *See* Bickel, *Passive Virtues*, *supra* note 126, at 47-51.

[132] *See* Gunther, *supra* note 122, at 11–13, 16–17, 20–21, 24–25.

designed (and, with presidential concurrence, enacted) could not stand. Instead, it merely avoided imposing a remedy that would require congressional action to put the inter partes review mechanism on constitutional footing.

(2) True versus Faux Avoidance: A Role for "Constitutional *Chevron*"?

Bickel recognized that the Supreme Court can, in fact, avoid a thorny constitutional problem by refusing to grant petitions for certiorari raising the problem.[133] The Court can wait until the lower courts have had time and opportunity to consider the problem in different settings with different fact patterns. The Court can wait to see whether the arguments for and against a given legal principle evolve as cases raising the problem arrive in other courts at different times.[134]

The passage of time might allow courts access to more than simply greater information on where and how the problem might arise. It also might see arguments about the problem change as lawyers and scholars think of new aspects of the problem, new edges that connect to other legal issues and doctrines, or new ways of conceiving issues addressed by a formerly well-accepted doctrine.[135] Delaying resolution of a problem also might permit more clear-sighted engagement with principle in addressing that task, as public passions on some aspect of the problem cool.[136] In the end, waiting to confront the issue may improve the Court's resolution of it.

Beyond the accretion of information and reduced concern with the public's willingness to accept a proper resolution of the

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[133] *See, e.g.*, Bickel, *Passive Virtues*, *supra* note 126, at 46, 51, 52.

[134] *See* Michael Coenen & Seth Davis, *Percolation's Value*, 73 STAN. L. REV. 363 (2021); William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 11 (1986).

[135] With respect to the evolution of constitutional law doctrines, see, for examples, Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593 (1990); William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

[136] *See* Gunther, *supra* note 122, at 22, 25 (praising the instincts behind some of Professor Bickel's cautions about deciding issues too soon, while also criticizing the unprincipled nature of other aspects of Bickel's argument).

constitutional problem, there may be an improvement in the Court's appreciation of legal principles that might frame a solution. The point is not that the Constitution changes over time or that justices should look to current public views to anchor constitutional interpretation. Rather, it is that appreciating the way legal doctrines encapsulate constitutional commands can change over time, even for those whose lodestar is the Constitution's original meaning.[137] Think, for example, of the justices' commentary on *Korematsu*[138] decades removed from World War II[139] or on the Sedition Act more than 165 years after its passage,[140] commentary that reflects changed ways of thinking as much as distance from potentially hostile public responses. These changes can be better incorporations of original understandings as opposed to being based on new conceptions of constitutional language.[141] Regardless of

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[137] *Cf.* Gunther, *supra* note 122 (explaining how deferring some questions until properly presented in a concrete context can improve decisions, but arguing against deferring judgment where a case already presents such a context); Harold Leventhal, *A Modest Proposal for a Multi-Circuit Court of Appeals*, 24 AM. U. L. REV. 881, 907 (1975) (explaining, *inter alia*, the value of percolation broadly for development of the law). By and large, the value of allowing arguments respecting particular positions on legal issues to evolve and sharpen over time holds even in settings, such as *Arthrex*, where the issue is likely to be addressed only by a single lower court (there, the Federal Circuit). Given changes in both personnel and the arguments that might be put forward—or the manner in which they are made—delay may improve the decision being made on the issue.

[138] Korematsu v. United States, 323 U.S. 214 (1944) (upholding the U.S. government's forced removal of Japanese citizens and immigrants of Japanese descent to internment camps during the course of World War II) (*Korematsu*).

[139] *See* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (stating that it is "obvious" that "Korematsu was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—"has no place in law under the Constitution" (citing Justice Robert Jackson's dissent in *Korematsu*)).

[140] *See* New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) (declaring that, although the Sedition Act of 1798, 1 Stat. 596, was never held unconstitutional in a court of law, "the attack upon its validity has carried the day in the court of history").

[141] *See* Ronald A. Cass, *Weighing Constitutional Anchors:* New York Times Co. v. Sullivan *and the Misdirection of First Amendment Doctrine*, 12 FIRST AMEND. L. REV. 399, 416–21 (2014); Scalia, *Interpretation*, *supra* note 75, at 37–47; Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981). Again, our focus here is not on the choice of interpretive methodology but on potential gains from deferring decision on some

methodological inclination, judicious use of the Court's ability to control a docket almost entirely assembled at the justices' discretion may allow an approach akin to the 1970s commercials of Paul Masson Wines, in which Orson Welles intoned, "We will sell no wine before its time."[142]

It is wrong, however, to conflate actual avoidance of constitutional questions—of having to confront a question before the justices feel ready to resolve it; as it were, "before its time"—with the use of techniques that merely appear to avoid decision.[143] Some doctrines often characterized as doctrines of avoidance, such as the political question doctrine, in fact resolve constitutional issues. The political question doctrine holds that specific decisions are constitutionally delegated to the discretion of Congress or the President or both.[144] If there is a constitutional question appropriate for judicial resolution, it does not extend to what is inside the scope of discretionary judgment assigned to the coordinate branches of government. This form of what might be termed "constitutional *Chevron*" analysis appropriately allows courts to decide the judicially necessary interpretive issue while recognizing the scope of discretion granted elsewhere.[145]

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constitutional questions. (Among other reasons, differences between our own views respecting the best interpretive methodology preclude advocacy of one specific methodology.)

[142] *See* Orson Welles' 1978 Paul Masson Wine Commercial, available at https://www.youtube.com/watch?v=PUunRgUkRjQ.

[143] *See* Gunther, *supra* note 122, at 15–17 (making point with respect to Bickel's arguments, especially his reliance on Justice Louis Brandeis's *Ashwander* rules for decision on Supreme Court jurisdiction, taken from Ashwander v. TVA, 297 U.S. 288, 345–48 (Brandeis, J., concurring)).

[144] *See* Vieth v. Jubelirer, 541 U.S. 267, 277 (2004) (declaring that a political question is an issue "that the judicial department has no business entertaining . . . because the question is entrusted to one of the political branches or involves no judicially enforceable rights."); Rucho v. Common Cauise, 139 S. Ct. 2484, 2500 (2019) (concluding that partisan gerrymandering claims are political questions due to the lack of clear governing legal standards).

[145] For explanation and analysis of the operation of review under the formula articulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), see Jack M. Beermann, *End the Failed* Chevron *Experiment Now: How* Chevron *Has Failed and Why It Can and Should Be Overruled*, 42 CONN. L. REV. 779, 781–87 (2010) (describing the scope of the Court's authority as originally intended in *Chevron*, and later exploring the ways *Chevron* has been implemented and problems with its implementation); Clark Byse, *Judicial Review of Administrative Interpretation of Statutes: An*

To be clear, we use the term "constitutional *Chevron*" here to denote a decision by courts on whether an institution of governance has been given discretion, followed by deference (of some dimension) to the institution's decision in its exercise of discretion. This is the essence of administrative law's *Chevron*.[146] One difference between *Chevron* and the political question doctrine is that political questions at times primarily involve disputes between the other two branches of government, while *Chevron* more directly implicates the division of authority between the Executive Branch and the courts.[147] Still, the issue for judicial disposition in both instances is the extent to which a matter properly has been delegated to one or another part of the government.

Analysis of Chevron*'s Step Two*, 2 ADMIN. L.J. 255, 262–63, 266–67 (1988) (arguing for a more nuanced analysis in step-two of *Chevron* to ensure agencies remain within their statutory authority); Ronald A. Cass, *Is* Chevron*'s Game Worth the Candle? Burning Interpretation at Both Ends*, *in* LIBERTY'S NEMESIS: THE UNCHECKED EXPANSION OF THE STATE 57 (Dean Reuter & John Yoo eds., 2016) (arguing that, because of the decision's imprecise language, *Chevron* in practice often diverges from actual and defensible *Chevron* analysis); Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 742–43 (2002); Gary Lawson & Stephen Kam, *Making Law out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1, 3–5 (2013) (explaining how *Chevron* transformed from mere restatement of established law to a new deference test); Thomas W. Merrill, *The Story of* Chevron*: The Making of an Accidental Landmark*, *in* ADMINISTRATIVE LAW STORIES 398, 398–402 (Peter L. Strauss ed., Foundation Press 2006) (same); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512–16 (1989) (examining different justifications for *Chevron* deference).

[146] *See* Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 740–41 (1996); Beermann, *supra* note 145, at 871–72; Ronald A. Cass, Auer *Deference: Doubling Down on Delegation's Defects Doctrine for the Modern Administrative State*, 87 FORDHAM L. REV. 531, 543–44 (2018); Lawson & Kam, *supra* note 145, at 3–5; Scalia, *supra* note 145, at 512–14.

[147] This is not to say either that disposition of matters as political questions always involves divisions among the political branches or that treatment of a matter as a political question does not have implications for the scope of judicial authority. Rather, the statement in text reflects the fact that the treatment of a matter as presenting a political question states a conclusion about the constitutional assignment of a matter to a branch other than the judiciary. *See*, *e.g.*, John Harrison, *The Political Question Doctrines*, 67 AM. U. L. REV. 457, 460–85 (2017). The essential question in *Chevron*'s application is how much authority Congress has assigned to executive officials.

Neither the sort of judgment represented by the Supreme Court's disposition of petitions for certiorari nor the sort represented by determination that a matter raises a political question applies to *Arthrex*. It surely is possible that the plurality in *Arthrex* endeavored to limit the degree to which the Court would impose on Congress and the President an obligation legislatively to reconstitute the inter partes review process. The *Arthrex* remedy, thus, may reflect a genuine effort to limit intrusion on the other branches. Viewed this way, the Court's view was that, within constitutional strictures, Congress and the President are free to tailor working arrangements for APJs. In keeping with that view, the justices doubtless endeavored to keep as much as they could of the existing legislative scheme.

After finding the APJs' appointment unconstitutional, however, the approach most respectful of other branches' domain is to leave the tailoring to them. Rather than *avoid* a constitutional question or deem a matter within another branch's *discretion*, *Arthrex* first answered the constitutional question and then took on the responsibility that lay within the other branches' purview. No matter what motivated the *Arthrex* decision, including preserving the other branches' work so far as possible, the result was at odds with the sort of judgment represented by both avoidance and deference regimes. Here, the passive virtues were passive indeed.

(3) What the *Arthrex* Approach Might Do

Putting aside questions respecting the fit between *Arthrex*'s remedy and jurisdictional limitations on courts, what are the consequences of this approach for legislative and judicial decisionmaking? The approach raises potential problems for both legislative and judicial behavior.

On the legislative side, an expanded scope for the Court could enable Congress to ignore problems, both constitutional and otherwise, with the statutes it produces. After all, if members of Congress can count on courts to reconfigure legislation to pass constitutional muster, why should legislators take the trouble,

and the political risks, of fashioning the requisite compromises themselves?[148]

On the judicial side, deploying remedial measures that save at least parts of the legislative product may serve as a sort of "release valve" for the Court as well. That is, the justices may be willing to fashion bolder substantive constitutional rules—rules that sweep more broadly against existing legislation—if their remedial decisions permit them simultaneously to soften the rules' immediate impact. In this sense, it is possible that, if its approach is followed in other cases, *Arthrex* will have the opposite effect from limiting interference with other branches' prerogatives.

We do not predict that there will be great changes in either the Congress's behavior or the Court's. Legislators do not often seem duly, much less unduly, troubled by the prospect that their work-product could be constitutionally suspect. Moreover, legislators may gain political advantage in passing legislation that is later overturned, reverting the issues that led to legislation once again to the law-making process. As Professor Fred McChesney observed, politicians may benefit from repeated opportunities to impose rules favorable or unfavorable to particular constituencies.[149] There may be occasions when the benefits of crafting legislation are reduced sufficiently by the prospect of judicial reversal to undermine the interests of legislators and, perhaps, the public as well. We do not, however, have a basis for predicting that the net result of this effect would be detrimental to the public.

Similarly, although it is a genuine concern, we think it unlikely that judicial behavior would be much affected by an expansion of *Arthrex*'s remedial approach. If some justices on some occasions might feel emboldened to adopt rules that normally would have immediate effects the justices are hesitant

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[148] While raising that question, we do not assume a conclusive answer to what the impact of judicial declarations of unconstitutionality—past or expected in the future—will be with respect to congressional lawmaking. It well might, as suggested above, alter the compromises struck in legislating, or it might leave those unaffected. *See, e.g.*, Schauer, *Ashwander*, *supra* note 74, at 92.

[149] *See* Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987).

to countenance, there might equally be others who will be concerned about the consequences of departures from the norms of ordinary rule adoption and application. That is, for every justice encouraged to expand adoption of broad rules, there may be another justice pushed in exactly the opposite direction.

In the end, we cannot with confidence criticize the remedial approach of *Arthrex* for its likely consequences on either legislative or judicial behavior. We can, however, reprove the failure to grant meaningful relief to a successful plaintiff as undermining the basis—recognized by Hamilton[150] and by Chief Justice Marshall's opinion in *Marbury*—for permitting judicial review of legislation's constitutionality. We also question whether creativity in fashioning separation of powers remedies is consistent with the current conception—and, in our view, the constitutionally correct prescription—of the proper judicial role.

V. CONCLUSION

Although this is a difficult issue with legitimate considerations pointing in opposite directions, we are convinced that the decision in *Arthrex* would have been easier to accept if the Court had struck down the PTAB process and left it to Congress to decide what steps to take. Congress might have chosen to resurrect the process with review by the Director or perhaps might have opted for decision by another agency appellate body composed of principal officers. This remedy would have vindicated Arthrex's interest in preserving its patent while minimizing what looks like judicial assumption of a legislative role.

To be clear, our objection is not to the particular structure the Court chose in *Arthrex*. There are numerous examples in federal law in which the ultimate decision for the Executive Branch in an adjudicatory matter is reserved to a Department Head or other principal officer or officers.[151] In fact, that is the dominant

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[150] *See* THE FEDERALIST NO. 78 (Alexander Hamilton).

[151] With regard to most agencies, Congress delegates decisionmaking power to the agency head who then creates a structure within the agency under which initial decisions are rendered by other officials. In the case of adjudication, these include, in various agencies, Administrative Law Judges (ALJs), Administrative Judges, Administrative Patent Judges, and Immigration

structural arrangement across multiple substantive areas. Just as rulemaking in agencies is best conceived as a part of the executive process rather than a substitute for actual lawmaking, adjudication in agencies should be conceived as a part of the executive process and not a substitute for judicial decisionmaking by courts. With that in mind, perhaps review by the PTAB Director is the best fix for the statute's infirmities, both as fitting the constitutional place of agency decisionmaking and fitting the statutory framework as well. Even so, we think the mechanic in this case—the one adjusting the law to fit constitutional commands—should be Congress, not the Supreme Court.

Judges. *See*, *e.g.*, 7 U.S.C. §§ 193, 194 (granting Secretary of Agriculture power to issue final orders under the Packers and Stockyards Act). *See also* Kent Barnett, Against Administrative Judges, 49 U.C. DAVIS L. REV. 1643 (2016) (describing the range and operation of various administrative judges, especially those not within the protections accorded to ALJs). The power to subdelegate also includes the power to reserve the right to exercise directly the authority originally delegated to the superior officer. *See*, *e.g.*, 8 U.S.C. §1003(g)(2); 8 C.F.R. §1003.1(h)(1); Matter of Castro-Tum, 27 I&N Dec. 271 (A.G 2018) (Attorney General has authority to certify immigration cases for direct personal review). With respect to ALJ adjudications, the APA specifies that on review of an initial decision by an ALJ, the agency head retains "all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." 5 U.S.C. §557(b). The statute governing inter partes review of patents, and review of other decisions regarding patents, however, specifies decisionmaking by PTAB, not by the Secretary of Commerce. *See* 35 U.S.C. §6. *See also* 35 U.S.C. §1609 (specifying review of trademark examiners' decisions by Trademark Trial and Appeal Board, not Secretary of Commerce). This vesting of ultimate pre-judicial review decisionmaking authority in the PTAB and not in the Secretary of Commerce may indicate that Congress would have been less likely to accept review of patent and trademark decisions by any other Executive Branch official to preserve the systems' functionality.