A RESPONSIVE REMEDY FOR UNCONSTITUTIONAL REMOVAL RESTRICTIONS

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INTRODUCTION

This Note is about unsupervised power, and what to do when it inflicts harm.

Most executive officials wield "supervised" executive power; the President may fire them at any time, for any reason. The Damocles' sword[1] of removal keeps their power in check. Knowing that their job is safe only to the extent that the President is satisfied with their performance provides a strong incentive for executive officials not to overstep their station.

But as the sword disappears, so too does the incentive. Unsupervised executive officials—those with tenure protection or so-called removal restrictions—need not fear the repercussions of their actions.[2] The President is statutorily prohibited from firing them at will. But removal restrictions have constitutional limits. When Congress has

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1 *See* MARCUS TULLIUS CICERO, CICERO'S TUSCULAN DISPUTATIONS; ALSO, TREATISES ON THE NATURE OF THE GODS, AND ON THE COMMONWEALTH 185–86 (C.D. Yonge trans., N.Y., Harper & Brothers 1877) (45 C.E.) (describing the tale of Damocles, in which a sword is constantly suspended over the king's neck, hanging by a thread, symbolizing the burden felt by those in positions of power).

2 The incentives this structure creates are fairly intuitive. *See* Marjorie Cohn, *The Politics of the Clinton Impeachment and the Death of the Independent Counsel Statute: Toward Depoliticization*, 102 W. VA. L. REV. 59, 68–70 (1999) (describing the expansive prosecutorial jurisdiction of Independent Counsel Kenneth Starr, a tenure-protected executive official whose investigation received criticism for expanding beyond its initial scope in the Whitewater and Lewinsky scandals during President Clinton's tenure); Mike Rappaport, Essay, *Lawrence Walsh and the Abuse of Power*, LAW & LIBERTY (Mar. 24, 2014), https://lawliberty.org/lawrence-walsh-and-the-abuse-of-power/ [https://perma.cc/D66X-TZQ3] (describing the perceived excesses of tenure-protected Independent Counsel Lawrence Walsh, whose investigation into the Iran-Contra affair spanned six years).

exceeded those limits, the Supreme Court has not hesitated to hold the offending restrictions unconstitutional. In doing so, however, it has failed to develop a consistent approach for the remedy a victorious plaintiff may receive.

The Supreme Court has inconsistently approached the remedies in unlawful removal restriction cases. This inconsistency fails to redress plaintiffs injured by unlawful executive power, blurs the separation of powers, and discourages other constitutional actors from considering their actions' implications.[3] This Note proposes a straightforward solution to those problems.

It begins in Part I by laying out the mechanics of appointment and removal, with special attention to the constitutional and precedential intricacies of the removal power. Part II introduces the remedial problem by describing the Supreme Court's two most recent removal cases and identifying the problematic inconsistencies. Part III discusses in depth the 2021 case *Collins v. Yellen* and introduces the dueling remedial approaches the Justices applied in that case. Finally, Part IV expands upon and argues for Justice Gorsuch's approach: that an unlawful removal restriction renders an official's power per se invalid, and thus entitles successful plaintiffs to a per se remedy.

I. A PRIMER ON EXECUTIVE APPOINTMENT AND REMOVAL

Executive officials wield "[t]he executive Power."[4] The Constitution does not precisely delineate what that power entails, but a few things are clear. First, the executive power "shall be vested in *a* President of the United States."[5] The singular nature of the determiner "a" means that the Constitution grants one individual the whole of the executive power.[6] The Constitution later directs only this individual—the President—to "take Care that the Laws be faithfully executed."[7] But the Framers envisioned that the President would have help. Because of "[t]he impossibility that one man should be able to perform all the great business of the State," the Constitution contemplates executive officials to assist the President.[8] Its drafters

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3 *See* Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. REV. 481, 489 (2014).

4 U.S. CONST. art. II, § 1.

5 *Id.* (emphasis added).

6 For a historical introduction to the unitary executive theory, see STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE 30–36 (2008).

7 U.S. CONST. art. II, § 3.

8 Letter from George Washington to Eléonor François Élie, Comte de Moustier (May 25, 1789), *reprinted in* 30 WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745–1799, at 334 (John C. Fitzpatrick ed., 1939).

wrote the Take Care Clause in the passive voice; it does not require the President himself to faithfully execute all the laws. In addition, several Clauses in Article II expressly mention executive "Officers"[9] and "Departments."[10] The Appointments Clause then grants the President the power to, in most cases, choose those officers.[11]

What is equally clear, though, is that Congress may encroach on the President's power to staff the executive branch as he sees fit.[12] The Constitution does not expressly grant Congress this power, but it grants Congress the authority to create offices.[13] And with the power to create comes the power to dictate the terms of existence, at least in some respects. For certain executive offices, those terms have taken the form of tenure protection.[14] Tenure protections—often called "for cause" removal restrictions—theoretically insulate executive officials from political pressures, both within and without the government.[15] This

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9 U.S. CONST. art. II, § 2, cl. 2. The Appointments Clause gives the President the power to staff the executive branch with "Officers of the United States." *Id.*

10 *Id.* The Opinion Clause empowers the President to order "the principal Officer in each of the executive Departments" to provide a written statement "upon any Subject relating to the Duties of their respective Offices." *Id.*

11 This power is not unchecked, as the Constitution also requires the Senate to confirm noninferior officers. U.S. CONST. art. II, § 2, cl. 2. In addition, Congress may by law vest the President himself, the "Heads of Departments," and the "Courts of Law" with the power to appoint inferior officers. *Id.*

12 *See* Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1212–13 (2014) ("A proper account of presidential control must take into account both the significance of the vesting of executive power in one President as well as the specific grant of power to Congress under the Necessary and Proper Clause.").

13 *See* Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1788 (2006) ("[T]he Constitution strongly implies that Congress must create all offices that the Constitution itself does not establish."). Prakash cites the Appointments Clause's language that the President shall nominate officers "whose Appointments are not herein otherwise provided for, and *which shall be established by Law*" for the implication that Congress must establish offices that the Constitution itself does not specify. *Id.* at 1788 n.30 (quoting U.S. CONST. art. II, § 2, cl. 2). Congress's power pursuant to the Necessary and Proper Clause provides whatever support may still be required for this proposition. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 323–24 (1819).

14 For an early and controversial example of tenure protection, see the Act of March 2, 1967, ch. 154, § 2, 14 Stat. 430, 430 (1867). The "Tenure of Office Act" restricted the President's power to suspend an executive official while the Senate was not in session. *Id.* If, when the Senate reconvened, it did not ratify the official's suspension, that official was to be reinstated, notwithstanding the President's dissatisfaction. *Id.* This Act sparked the conflict that culminated in President Andrew Johnson's impeachment. *See Andrew Johnson*, THE WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/presidents/andrew-johnson/ [https://perma.cc/95T8-MMG6].

15 *See, e.g.*, 42 U.S.C. § 5841(e) (2018) ("Any member of the Commission may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."). The Court in *Humphrey's Executor v. United States* interpreted a statute containing removal

insulation allows a regulator to do her job concerned with neither her boss's policy preferences that run counter to her regulatory mission nor the regulated industry's economic motivations.[16] The neutral actor can act neutrally.

Executive appointments and removal restrictions are firmly entrenched in the constitutional landscape. So too are the procedures by which they come into being. Administrations accomplish most of their executive appointments without major controversy.[17] While removal restrictions are perhaps more constitutionally suspect,[18] courts have validated many currently in existence.[19]

But there are certainly wrong ways to appoint[20] and wrong ways to insulate.[21] In these instances, there is a constitutional defect—an imbalance in the government's separation of powers.[22] An appointment defect fails to lawfully confer executive power on the appointee, and a removal defect precludes the President from lawfully supervising another officer's use of executive power. In both situations, plaintiffs injured by that power can attack the office's unconstitutional structure. This attack is rather straightforward for improper appointments

restrictions to limit the removal power to those enumerated circumstances. *See* 295 U.S. 602, 626 (1935).

16 *See* Michael R. Keefe, Note, *The Constitutionality of the Double For-Cause Removal Restriction:* Free Enterprise Fund v. Public Company Accounting Oversight Board, *537 F.3d 667 (D.C. Cir. 2008)*, 77 U. CIN. L. REV. 1653, 1681 (2009) ("[O]fficers Congress protects with a for-cause removal restriction generally do act independently, and often against the president's interest and the interests of the industries they regulate.").

17 Presidents must fill roughly 4000 politically appointed positions in the executive branch, more than 1200 of which require Senate confirmation. Zach Piaker, *Help Wanted: 4,000 Presidential Appointees*, CTR. FOR PRESIDENTIAL TRANSITION: CTR. BLOG (Mar. 16, 2016), https://web.archive.org/web/20170112205457/http:/presidentialtransition.org/blog/posts/160316_help-wanted-4000-appointees.php [https://perma.cc/H6UB-2D26]. Acrimonious confirmation proceedings are the exception.

18 *See* TODD GARVEY & DANIEL J. SHEFFNER, CONG. RSCH. SERV., R45442, CONGRESS'S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES 6–9 (2021).

19 *See id.*

20 *See, e.g.*, Lucia v. SEC, 138 S. Ct. 2044, 2049–56 (2018) (stating that SEC staff were not "head[s] of department[s]" and therefore could not lawfully appoint administrative law judges, whom the Court ruled were "Officers of the United States" (citing U.S. CONST. art II, § 2, cl. 2)).

21 *See, e.g.*, Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2202 (2020) (holding the CFPB Director's tenure protection unconstitutional because it vested too much executive authority in a single individual).

22 *See* Collins v. Yellen, 141 S. Ct. 1761, 1795–96 (2021) (Gorsuch, J., concurring in part) (explaining that the separation of powers is implicated whether an official is unconstitutionally appointed or unconstitutionally insulated from removal).

because there is a neutral, textually grounded standard by which to judge any given appointment: the Appointments Clause.[23]

Removal presents a different problem. Save for impeachment, the Constitution does not specify the procedures by which the President or anyone else may remove executive officials.[24] But the Constitution's history, structure, and subsequent interpretation have established a framework for executive removal procedures.

From the Constitution's earliest days, politicians, scholars, and Justices have debated the presidential removal power. For more than a month at the first Congress, the Representatives discussed the issue.[25] Ultimately, in what came to be known as the "Decision of 1789," the first Congress (after considering several alternatives) concluded that the Constitution itself[26] conferred upon the President the power to remove executive officers.[27] The Decision "provides 'contemporaneous and weighty evidence' of the Constitution's meaning since many of the Members of the First Congress 'had taken part in framing that instrument.'"[28] And it shortly came to be the "settled and well understood construction of the Constitution" regarding the presidential removal power.[29]

The 1926 case *Myers v. United States*,[30] in a "carefully researched and reasoned 70-page opinion,"[31] solidified this understanding.

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23 U.S. CONST. art. II, § 2, cl. 2.

24 Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 516 (2010) (Breyer, J., dissenting) ("[W]ith the exception of the general 'vesting' and 'take care' language, the Constitution is completely 'silent with respect to the power of removal from office.'" (quoting *Ex parte* Hennen, 38 U.S. (13 Pet.) 230, 258 (1839))).

25 Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1023 (2006).

26 *Id.* at 1022–23. Whether that power's constitutional source is the Executive Vesting Clause, the Take Care Clause, the Appointments Clause, or something else is a question beyond the scope of this Note.

27 *Id.* at 1023; *see also* 5 JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON 200 (Philadelphia, C.P. Wayne 1807) (claiming that the Decision of 1789 "has ever been considered as a full expression of the sense of the legislature" that the Constitution granted the President full removal authority). Much more has been said about the circumstances surrounding the Decision. *See generally* Prakash, *supra* note 25. And the idea that the Decision has come to stand for constitutionally granted presidential removal authority is not unanimously accepted. *See, e.g.*, Myers v. United States, 272 U.S. 52, 286 n.75 (1926) (Brandeis, J., dissenting) (concluding that the First Congress's removal debate's history is inconclusive); 1 CORWIN ON THE CONSTITUTION 332 (Richard Loss ed., 1981) (asserting that less than a third of the House favored a constitutional removal power).

28 Bowsher v. Synar, 478 U.S. 714, 723–24 (1986) (quoting Marsh v. Chambers, 463 U.S. 783, 790 (1983)).

29 *Ex parte Hennen*, 38 U.S. at 259.

30 272 U.S. 52 (1926).

31 Morrison v. Olson, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting).

There, the Court held that the Tenure of Office Act of 1876—which barred the President from firing executive officials without the Senate's advice and consent[32]—was unconstitutional.[33] That Act deprived the President of "the unrestricted power of removal of first class postmasters."[34] The Court held, echoing James Madison at the First Congress, that "the power of removal of executive officers was incident to the power of appointment."[35] Therefore, Congress's statutory restriction on the President's ability to remove the postmaster—an executive officer—unlawfully impeded the President's exercise of the executive power.

Less than a decade after *Myers*, the Court decided *Humphrey's Executor v. United States*.[36] In that case, the Court permitted removal restrictions on Commissioners of the Federal Trade Commission (FTC)—without contradicting *Myers*—because the FTC was a multimember Commission that wielded "quasi-legislative" and "quasi-judicial" powers.[37] Accordingly, the Commissioners were not purely "executive" officials and were beyond the scope of the President's unimpeded removal power.[38]

The Court has walked back *Humphrey's Executor* in the years since that decision. As the Court's precedent currently stands, principal officers singly directing executive agencies may almost never have tenure protection.[39] Courts evaluate removal restrictions on

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32 *Myers*, 272 U.S. at 107–08.

33 *Id.* at 176.

34 *Id.*

35 *Id.* at 111–19.

36 295 U.S. 602 (1935).

37 *Id.* at 629.

38 *Id.* at 630–31.

39 Collins v. Yellen, 141 S. Ct. 1761, 1787 (2021) ("[T]he Constitution prohibits even 'modest restrictions' on the President's power to remove the head of an agency with a single top officer." (quoting Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2205 (2020))). After *Collins*, the Social Security Administration was among the few remaining executive agencies with a tenure-protected single top officer. This structure did not last long. *See* Constitutionality of the Comm'r of Social Sec.'s Tenure Prot., 45 Op. O.L.C., slip op. at 6 (July 8, 2021) [hereinafter Constitutionality] (advising the President to disregard the removal restriction on the Commissioner of Social Security); Myah Ward, *Biden Fires Social Security Commissioner, a Trump Holdover*, POLITICO, (July 9, 2021), https://www.politico.com/news/2021/07/09/biden-fires-social-security-commissioner-499009 [https://perma.cc/CX3R-L4MR] (explaining that President Biden fired the Commissioner of Social Security, removal restriction notwithstanding). In its opinion, however, the Office of Legal Counsel (echoing the Supreme Court) explicitly left open the possibility that certain single heads of agencies may have removal restrictions in limited situations. *See* Constitutionality, *supra*, at 10. Its decision on the Commissioner of Social Security did not address "the head of any other agency that does not share the SSA's specific combination of features." *Id.* at 10 n.3.

commissions of multiple principal officers, and all inferior officers, functionally after considering a host of factors.[40] The remedial problems attendant to removal restrictions are applicable to both sets of officers.

The constitutional ground on which removal restrictions stand is shaky at best.[41] But the functional nature of the inquiry into their constitutionality indicates that the Court will eschew a categorical decision, at least for the foreseeable future. For as long as tenure protections are part of our constitutional landscape, plaintiffs will find ways to challenge them. If successful, those plaintiffs should be entitled to relief. The following cases demonstrate, however, that such relief is far from certain.

II. *FREE ENTERPRISE FUND* AND *SEILA LAW*

To properly understand the Court's current remedial quandary, it is helpful to appreciate the steps it took to get here. To that end, I discuss two of the Court's most recent removal power cases.

First, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*,[42] the Court addressed the constitutionality of two layers of removal protection. In 2002, Congress passed the Sarbanes-Oxley Act.[43] Sarbanes-Oxley created the Public Company Accounting Oversight Board (Board), a regulatory entity designed to enforce compliance with commercial accounting standards.[44] Sarbanes-Oxley empowered the Securities and Exchange Commission (SEC) to appoint the Board, but only permitted the SEC to fire Board members

40 *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 496 (2010) (determining that, in the case of a multimember Board, the removal restrictions "impair[]" the President's "ability to execute the laws—by holding his subordinates accountable for their conduct"); Morrison v. Olson, 487 U.S. 654, 689–93 (1988) (applying a multifactored analysis to determine whether an inferior officer's removal restriction impeded "the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed'"). The *Morrison* Court made clear that the inquiry is a functional one; it explained that the "analysis contained in our removal cases is designed not to define rigid categories of those officials who may or may not be removed at will by the President." *Id.* at 689.

41 *See generally* Ilan Wurman, *The Removal Power: A Critical Guide*, 2019–2020 CATO SUP. CT. REV. 157.

42 561 U.S. 477 (2010).

43 Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.), *invalidated in part by* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010).

44 *Id.* § 101, 116 Stat. at 750–53 (codified at 15 U.S.C. § 7211).

"for good cause shown."[45] Under a separate statutory scheme, the President appointed, with the Senate's advice and consent, SEC Commissioners for a five-year term.[46] This structure thus created two degrees of "for cause" removal protection separating the Board from the President.

Sarbanes-Oxley's enforcement provisions gave the Board sweeping regulatory authority. They empowered the Board to enforce several far-reaching federal securities laws as well as the SEC's rules, the Board's own rules, and professional accounting standards.[47] The target of one such enforcement action, a Nevada accounting firm, challenged the Board's removal restrictions. The firm argued that two layers of removal protection separating the Board members from the President violated the separation of powers.[48]

A majority of the Supreme Court agreed; the Board's structure was unconstitutional.[49] In other words, the plaintiffs got the result they wanted. But they received no remedy for their injury. The Court held that because "the Board members have been validly appointed by the full Commission. . . . petitioners are not entitled to broad injunctive relief against the Board's continued operations."[50] Instead, the Court severed the Board's removal restrictions, thereby prospectively enabling the SEC to remove Board members at will.[51] Of course, this remedy did not address the accounting firm's injuries—namely, the costs of complying with and fighting against the Board's enforcement action.[52] In fact, the accounting firm received no relief at all. It recovered neither damages nor attorneys' fees, despite their

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45 15 U.S.C. § 7211(e)(6) (2018), *invalidated by* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010); *see also id.* § 7217(b)–(c).

46 *Id.* § 78d(a). The Securities and Exchange Act of 1934, which created the SEC and lays out the Commissioners' terms of service, does not explicitly give the Commissioners traditional for-cause removal protection. But in *Free Enterprise Fund*, "[t]he parties agree[d] that the Commissioners cannot themselves be removed by the President except under the *Humphrey's Executor* standard of 'inefficiency, neglect of duty, or malfeasance in office.'" *Free Enter. Fund*, 561 U.S. at 487 (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 620 (1935)). The Court "decide[d] the case with that understanding." *Id.* Whether that understanding is correct is a question this Note does not seek to answer.

47 15 U.S.C. § 7215(b)(1), (c)(4) (2018).

48 *Free Enter. Fund*, 561 U.S. at 487.

49 *Id.* at 492.

50 *Id.* at 513; *cf.* United States v. Arthrex, Inc., 141 S. Ct. 1970, 1988 (2021) ("Because the source of the constitutional violation is the restraint on the review authority of the Director, rather than the appointment of APJs by the Secretary, Arthrex is not entitled to a hearing before a new panel of APJs." (citing Lucia v. SEC, 138 S. Ct. 2044, 2055–56 (2018))).

51 *Free Enter. Fund*, 561 U.S. at 508.

52 *See* Barnett, *supra* note 3, at 485.

availability.[53] Nor, more importantly, did the Court invalidate any of the Board's past actions, require a new administrative investigation, or enjoin the Board from reinvestigating the very firm that successfully sued them.[54] The action the Board took while unlawfully insulated from removal was, in effect, valid. The only comfort the plaintiffs could take was that the SEC would lawfully supervise *future* Board actions.[55]

The remedial shortcomings here are significant. For all intents and purposes, "[t]he new proceedings . . . picked up where the 'tainted' proceedings left off," and the investigation the unlawfully unsupervised Board initiated could continue.[56] This remedial failure is a problem for three reasons. First, it failed to provide the subject of unlawfully unsupervised power—the accounting firm—relief.[57] Everything the Board did while unlawfully insulated remained in place. Second, it failed to incentivize future structural challenges.[58] Most plaintiffs, despite their potentially meritorious claims, will be loath to challenge government structure for a pyrrhic victory.[59] And third, it disincentivized Congress to consider constitutional structure in crafting agency legislation.[60] Why would Congress pay close attention when drafting removal restrictions if the Court will simply sever the unconstitutional ones for them?

Next, in *Seila Law LLC v. Consumer Financial Protection Bureau*[61] the statute at issue directed the newly created Consumer Financial Protection Bureau (CFPB) to implement and enforce a large body of consumer protection laws. Those laws "ensur[e] that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive."[62] A lone Director led the CFPB,[63] and the President could remove him only for "inefficiency, neglect of duty,

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53 *Id.*

54 *Id.*

55 *See id.* at 519.

56 *Id.*

57 *See id.*; *see also* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2366 (2020) (Gorsuch, J., concurring in part and dissenting in part) ("Severing and voiding [the challenged statutory provision] does nothing to address the injury [plaintiffs] claim . . . .").

58 *See* Barnett, *supra* note 3, at 520.

59 *See Barr*, 140 S. Ct. at 2366 (Gorsuch, J., concurring in part and dissenting in part) ("What is the point of fighting this long battle, through many years and all the way to the Supreme Court, if the prize for winning is no relief at all?").

60 *See* Barnett, *supra* note 3, at 520.

61 140 S. Ct. 2183 (2020).

62 12 U.S.C. § 5511(a) (2018).

63 *Id.* § 5491(b).

or malfeasance in office."[64] The Director launched several enforcement actions, one of which targeted Seila Law.[65]

When Seila Law challenged that enforcement action, the Court held that the Director's removal restriction was unconstitutional.[66] Again, as far as the removal question was concerned, the plaintiff won. But again, the Court left it empty-handed. Despite Seila Law's injury, and despite the decidedly unlawful removal restriction, the Court severed the removal restriction and remanded for the lower courts to determine whether a lawfully constituted Director "ratified" the unlawfully constituted Director's actions.[67] That is, if the former signed off on the latter's actions, those actions would be constitutionally valid.

This remedy is both ineffectual and inconsistent with *Free Enterprise Fund.* As a practical matter, it fails to make the victorious plaintiffs whole. As a constitutional matter, ratification does not transform the nature of the underlying action.[68] By the Court's reasoning, whether the unconstitutionally insulated Director lawfully wielded executive power turns on whether an uninsulated Director ratified that power after the fact. Unlawful executive power wielded at time zero is still unlawful at time one, regardless of whether any properly supervised official bottom-lined it. In addition, despite the invitation,[69] the remedy here does not, in any meaningful way, increase pressure on Congress to take care when crafting removal restrictions. By severing the removal restriction, just as it did in *Free Enterprise Fund*, the Court did Congress's job itself. Finally, by remanding for a ratification determination, the Court implied that a remedy would be available if that ratification had not occurred—a possibility it did not countenance in *Free Enterprise Fund.*

As *Free Enterprise Fund* and *Seila Law* show, the Court has inconsistently remedied plaintiffs in removal restriction cases. A common theme of each case, however, is the remedial inefficacy. "[W]hen it comes to finding a remedy for the assorted constitutional problems with our regulatory apparatus," explains Professor David Zaring, "the courts have fallen over themselves to assure everyone that

64 *Id.* § 5491(c)(3).

65 *Seila L.*, 140 S. Ct. at 2193–94.

66 *Id.* at 2192.

67 *See id.* at 2211.

68 *See id.* at 2221 (Thomas, J., concurring in part and dissenting in part) (explaining that "the alleged ratification does not cure the constitutional injury").

69 *See id.* at 2211 (majority opinion) (clarifying that the Court's opinion "does not foreclose Congress from pursuing alternative responses to the problem—for example, converting the CFPB into a multimember agency").

unconstitutional agency powers should continue to be exercised almost exactly as before."[70] The natural follow-up question is clear: "[W]hy hold a government program to be unconstitutional if you aren't going to do anything about it?"[71]

Scholars have justified the Court's doing so by invoking such values as judicial modesty,[72] settled expectations,[73] avoiding complete system failure,[74] and just plain impracticability.[75] To be sure, these values serve important ends in the judicial system. But voiding unconstitutionally insulated officials' actions implicates none of them to such an extent as to justify acquiescence once the Court has identified the unconstitutionality. When the Court most recently *did* identify that very unconstitutionality, it again failed to provide the victorious plaintiffs relief.

III. *COLLINS V. YELLEN*

Collins v. Yellen[76] centered around the Federal Housing Finance Agency (FHFA). The FHFA is an independent regulatory body which oversees government intervention in the mortgage market. Its primary charges are two companies, the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac).[77] Fannie Mae and Freddie Mac are government-backed, for-profit, privately owned companies.[78] They buy mortgages from banks and other lenders, securitize those mortgages, and sell the new mortgage-backed securities.[79] This arrangement increases stability in the housing market during times of financial stress.[80] Lenders know

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70 David Zaring, *Toward Separation of Powers Realism*, 37 YALE J. ON REGUL. 708, 712 (2020).

71 *Id.* at 713.

72 *Id.* at 727.

73 *Id.* at 745.

74 *See* Nicholas Bagley, Opinion, *'Most of Government Is Unconstitutional,'* N.Y. TIMES (June 21, 2019), https://www.nytimes.com/2019/06/21/opinion/sunday/gundy-united-states.html [https://perma.cc/K93M-HU8P] (giving remedial fangs to separation-of-powers doctrines would "call[] into question the whole project of modern American governance").

75 *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 858 (1999) (explaining that "pure constitutional value[s]" cannot be translated "into a remedial apparatus" without being "corrupted[,] . . . distorted[,] and diluted").

76 141 S. Ct. 1761 (2021).

77 *See id.* at 1770–71.

78 *See About Fannie Mae & Freddie Mac*, FED. HOUS. FIN. AGENCY, https://www.fhfa.gov/about-fannie-mae-freddie-mac [https://perma.cc/A79F-ERZY].

79 *Id.*

80 *See Collins*, 141 S. Ct. at 1770–71.

that Fannie Mae and Freddie Mac will guarantee the loans they make, so the lenders need not hedge their risk of default with higher interest rates or stricter credit-eligibility requirements.[81] This in turn keeps the market accessible for a wider range of home buyers.

In the leadup to the 2008 financial crisis, lenders began issuing subprime mortgages.[82] A subprime mortgage is, in broad terms, a mortgage at an increased risk of default.[83] Lenders, in an effort to resecuritize and sell these mortgages as investments, preferred to conceal the underlying risk using complex financial instruments.[84] Fannie Mae and Freddie Mac purchased these mortgages and were therefore on the hook for the risk of default which, by 2008, was high.[85] So when the housing bubble burst, the companies suffered tremendous losses.[86] They remained solvent, but many feared the companies would eventually fail and plunge the mortgage market into an even steeper downward spiral.[87]

In response, Congress passed the Housing and Economic Recovery Act of 2008 (Recovery Act), which created the FHFA.[88] The FHFA has the power to regulate "nearly every aspect of the companies' management and operations."[89] The Recovery Act gave the FHFA a single Director with a five-year term whom the President could remove only "for cause."[90]

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81 *See id.*

82 *See* MARTIN NEIL BAILY, ROBERT E. LITAN & MATTHEW S. JOHNSON, BROOKINGS, THE ORIGINS OF THE FINANCIAL CRISIS 14 (2008).

83 *See id.* (explaining that the term "subprime" generally refers to high interest rate loans made to borrowers with low credit scores).

84 *See, e.g.*, *Collateralized Debt Obligation (CDO)*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/knowledge/trading-investing/collateralized-debt-obligation-cdo/ [https://perma.cc/W4AW-ZWZC].

85 *See* BAILY ET AL., *supra* note 82, at 22–23 (explaining that Fannie Mae and Freddie Mac together bought between $340 billion and $660 billion in securitized subprime mortgages from 2002 to 2007).

86 *See* Jason Thomas, *Fannie, Freddie, and the Crisis*, NAT'L AFFS., Fall 2013, at 36, 43 (describing Fannie and Freddie's combined $213 billion in losses between 2008 and 2011).

87 *See* Alice Gomstyn, *Did Market Overreact on Fannie, Freddie?*, ABC NEWS (July 14, 2008), https://abcnews.go.com/Business/PersonalFinance/story?id=5373707&page=1 [https://perma.cc/CT57-M9T4].

88 Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 1101, 122 Stat. 2654, 2661–63 (codified at 12 U.S.C. §§ 4511–12).

89 Collins v. Yellen, 141 S. Ct. 1761, 1771 (2021); *see* 12 U.S.C. § 4541(a) (2018) (requiring FHFA approval of new products); *id.* § 4513(a)(2)(A) (allowing the FHFA to reject certain of the companies' acquisitions and controlling-interest transfers); *id.* § 4518 (allowing the FHFA to cap the companies' executive compensation); *id.* § 4514(a)(2) (giving the FHFA the authority to require written reports on the companies' condition or "any other relevant topics").

90 12 U.S.C. § 4512(b) (2018).

The Recovery Act also gave the Department of the Treasury the authority to buy stock in Fannie Mae and Freddie Mac,[91] which Treasury exercised shortly after the Recovery Act passed.[92] Pursuant to that authority, Fannie Mae, Freddie Mac, and Treasury entered into a series of share purchase agreements in which Treasury committed to providing each of the companies with up to $100 billion in capital in exchange for stock.[93] Those agreements were designed to increase the companies' cash reserves to stabilize their net worth.[94] At first, they didn't work. Fannie Mae and Freddie Mac continued to lose money despite Treasury's intervention, so the three of them restructured their arrangement several times.[95] The third such restructuring—the "third amendment"—required Fannie Mae and Freddie Mac to pay Treasury any capital earned in a given quarter above a specified threshold.[96]

Shortly after the third amendment took effect, the companies' financial situation improved. Their incomes greatly exceeded the third amendment's threshold.[97] But the third amendment required them to transfer that excess income directly to Treasury as opposed to their net worth (and, therefore, their shareholders).[98] A group of shareholders sued, arguing that the FHFA's Director had no authority to enforce the third amendment.[99] They argued that, due to his allegedly unconstitutional removal restriction, he never had any constitutional power at all.[100]

Addressing the removal restriction was a relatively simple matter. The Fifth Circuit held that it violated the separation of powers,[101] and the federal parties did not contest that conclusion at the Supreme Court.[102] Despite briefing and argument on the issue from amicus Aaron Nielson, the Court agreed that the removal restriction was unconstitutional.[103] The remedy, however, was not as simple.

91 *See id.* §§ 1455(*l*)(1), 1719(g)(1).

92 *Collins*, 141 S. Ct. at 1772–73.

93 *Id.*

94 *See id.* at 1770.

95 *Id.* at 1773.

96 *Id.* at 1773–74.

97 *See id.* at 1774.

98 *See id.* (explaining that, under the third amendment, Fannie and Freddie paid $124 billion more than they would have under the pre–third amendment regime).

99 *Id.* at 1775.

100 *See id.*

101 Collins v. Mnuchin, 938 F.3d 553, 587–91 (5th Cir. 2019), *rev'd on other grounds sub nom.*, Collins v. Yellen, 141 S. Ct. 1761 (2021).

102 *Collins*, 141 S. Ct. at 1775.

103 *See id.* at 1775, 1783.

"All the officers who headed the FHFA during the time in question were properly *appointed*," explained Justice Alito for the Court.[104] "Although the statute unconstitutionally limited the President's authority to *remove* the confirmed Directors, there was no constitutional defect in the statutorily prescribed method of appointment to that office."[105] Therefore, he concluded, "there is no basis for concluding that any head of the FHFA lacked the authority to carry out the functions of the office."[106]

Everyone agreed that the removal restriction was unlawful. And the Court concluded that the plaintiffs had suffered an injury.[107] Unlawful action plus injury in fact caused by that unlawful action, of course, likely equals a remedy for the injured party.[108] But the Court remanded the question of remedy back to the Fifth Circuit to determine whether the removal restriction itself—as opposed to the Director's action—injured the plaintiffs. "Were it not for that provision," the Court held, "the President might have replaced one of the confirmed Directors who supervised the implementation of the third amendment, or a confirmed Director might have altered his behavior in a way that would have benefitted the shareholders."[109] The Court directed the lower courts to "resolve[] [these issues] in the first instance" on remand.[110]

In doing so, the Court staked out a constitutional no-man's-land. After deciding that the Director's *tenure protection* was unconstitutional, it evaluated for constitutionality the Director's *action* taken under that protection. That action was neither constitutional because of his proper appointment nor unconstitutional because of his unlawful removal restriction. The question of constitutionality could only be answered after a search for evidence of the President's past desire (or lack thereof) to remove the Director. As a practical matter, this

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104 *Id.* at 1787.

105 *Id.*

106 *Id.* at 1788.

107 *Id.* at 1779 (explaining that the plaintiffs successfully alleged "that sort of pocketbook injury [which] is a prototypical form of injury in fact").

108 *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 561–62 (1992) (noting that if the plaintiff challenges the legality of government action or inaction and is the object of that action or inaction, "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it"); *see also* Lewis v. Casey, 518 U.S. 343, 350 (1996) (explaining that plaintiffs need "actual or imminent harm" to "invoke intervention of the courts" and that "merely the status of being subject to a governmental institution that was not organized or managed properly" is insufficient to challenge that governmental institution's actions).

109 *Collins*, 141 S. Ct. at 1789.

110 *Id.*

search's unlikelihood of success leaves the plaintiffs' injury unredressed. Moreover, this remedial calculus accepts a line of argument the Court had already squarely rejected.

In *Seila Law*, the Court-appointed amicus defending the CFPB Director's removal restriction argued that "a litigant wishing to challenge an executive act on the basis of the President's removal power must show that the challenged act would not have been taken if the responsible official had been subject to the President's control."[111] This should sound familiar, as it is precisely what the Court ordered the *Collins* plaintiffs to prove on remand. But in *Seila Law*, the Court explicitly rejected this course of action. It explained that, when challenging government action as void due to a separation-of-powers violation (precisely as the *Collins* plaintiffs did), the plaintiff need not prove that the government's action would have been different in a "counterfactual world."[112] The Court's reversal on this point is inexplicable.

The same remedial shortcomings from *Free Enterprise Fund* and *Seila Law* are present here. The shareholders, despite proving that they were on the receiving end of unconstitutionally unsupervised governmental action, go unredressed. In addition, the practical effect of the Court's remand is to all but stamp the *executive* overreach taken pursuant to *congressionally* granted tenure protection with the *judicial* imprimatur. No branch emerges unscathed from this separation-of-powers morass. Finally, by minimizing the real-world consequences of the unconstitutional tenure protection (that is, by not setting aside the Director's injurious actions), the Court ensures that Congress does not feel the repercussions of its unconstitutional legislation.

Justice Gorsuch identified a more straightforward solution that would have alleviated these problems. To him, "[i]t is unclear . . . why this distinction [between unlawful appointments and unlawful removal restrictions] should make a difference" for the purpose of crafting a remedy.[113] "Either way," he continued, "governmental action is taken by someone erroneously claiming the mantle of executive power."[114] When viewed this way, the remedial question is easier; the official's actions lack the force of law—the actor's power is per se tainted—and the Court must set them aside. Accordingly, Justice Gorsuch would have "take[n] a simpler and more familiar path."[115] He would have set

111 Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2195–96 (2020).

112 *Id.* at 2196 (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 512 n.12 (2010)).

113 *Collins*, 141 S. Ct. at 1795 (Gorsuch, J., concurring in part).

114 *Id.*

115 *Id.* at 1799.

aside the Director's action as void without remanding for any further analysis.[116]

The Justices' conflicting treatments of the case reveal different baseline approaches for dealing with an unconstitutional removal restriction. The majority and Justice Thomas in concurrence apply a presumption that the official's action—if not the removal restriction—is constitutional.[117]

Justice Thomas argued that, because the Constitution automatically displaces an unconstitutional statute, the unconstitutional removal restriction was never actually law in the first place. Therefore, the President really could have fired the Director whenever he wanted; he just never tried.[118] For the plaintiffs to prevail, according to Justice Thomas, they would need to establish that the Director took some other unlawful action while unlawfully insulated from removal.[119]

Professor William Baude recently addressed the Gorsuch/Thomas split on this question. To him, Justice Thomas has the better of the argument. "An unconstitutional statute is void," Professor Baude explains, because the Constitution (of its own force) displaces that statute the moment the President signs it.[120] Thus, unconstitutional removal restrictions, though they exist as positive enactments, are utterly without the force of law.[121] Therefore, when faced with an unconstitutional removal restriction, "[n]obody should apply it, nobody should enforce it, and if nobody does, all is right with the legal world."[122] On this theory, Justice Thomas's argument makes perfect sense. For a judicially cognizable injury to occur, an executive official's action taken while protected by an unconstitutional removal restriction must *also* violate some other law because that removal restriction is completely illusory.

As a theoretical matter, this may well be correct. But as a practical and political matter, it does not solve the remedial problem. Executive officials, themselves political actors, are incentivized not to question their tenure protections' constitutionality: who doesn't want job security? Accordingly, that official will behave as if his tenure

116 *See id.*

117 *See id.* at 1793 (Thomas, J., concurring) ("The mere existence of an unconstitutional removal provision, too, generally does not automatically taint Government action by an official unlawfully insulated.").

118 *See id.* at 1793–94.

119 *Id.* at 1795.

120 William Baude, *Severability First Principles*, 109 VA. L. REV. (forthcoming 2023) (manuscript at 33–38), https://papers.ssrn.com/abstract=4064156.

121 *See id.* (manuscript at 37).

122 *Id.* (footnote omitted).

protection is fully effective, despite the fact that perhaps as a constitutional matter it has no effect at all. By the time a court can issue a judgment saying as much, it will be too late for the injured plaintiffs. Politically, a President will likely hesitate to risk an acrimonious confrontation by firing a purportedly tenure-protected official without a court-issued judgment in hand.[123] It is not enough to simply say that the removal restriction never had any legal force. The relevant constitutional actors caused real-world harm.

If the Court's goal is to remedy unconstitutionally unsupervised government action, it must account for these practical and political realities. So while Professor Baude's argument is theoretically compelling, the remedial discussion demands a more accommodating approach in practice.[124]

The *Collins* majority's approach is similar to the one the Court took in *Seila Law*. Instead of ratification, however, the lower courts were tasked with identifying proof that the President would have fired the Director but for the removal restriction. I call this "the presumption of constitutionality" or the "case-by-case" approach, as it requires a case-by-case inquiry beyond simply whether the removal restriction was constitutional.

Another approach, as Justice Gorsuch identified, is to hold that unlawful removal restrictions per se taint executive action. Because the removal restriction unconstitutionally taints the actor's office, that actor's power is simply invalid ab initio. Therefore, when it is injuriously wielded, the Court must set its effects aside in a per se fashion. I call this the "per se" approach.

IV. THE BENEFITS OF THE PER SE APPROACH

In light of the inconsistent and ineffectual remedies in past removal restriction cases, courts should apply Justice Gorsuch's per se approach. Doing so serves two similar but distinct goals, from both of which the case-by-case approach derogates. First, it would better align remedies in removal restriction cases with the Court's remedial practice in other structural power violations. Plaintiffs who successfully challenge the use of unlawfully unsupervised or improperly constituted government power against them will be consistently and

123 *But see supra* note 39. This assertion carries less weight when the President and the official are on opposite political sides.

124 *Cf.* Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 322 (1999) ("We do not question the proposition that equity is flexible; but in the federal system, at least, that flexibility is confined within the broad boundaries of traditional equitable relief.").

predictably made whole. And second, it would solve the remedial shortcomings that have become the hallmark of the Court's removal restriction doctrine.

A. *Unifying Remedies Across the Constitutional Landscape*

Adopting the per se remedial approach to unconstitutional removal restrictions would introduce consistency to the Court's treatments of defective government power. In each branch of government—including the executive—the Court has adopted a per se approach when constitutional actors exercise flawed government power. Whether that power is unlawfully unsupervised as in the Article I context, or the body exercising it is unlawfully constituted as in the Article II and Article III contexts, the Court has not countenanced a retrospective, counterfactual inquiry of the type it has in removal restriction cases. It has invalidated the flawed proceedings in a per se fashion. Applying the same per se approach to removal restrictions would conform the removal doctrine to these analogous situations.

1. Unconstitutional Article I Courts

The 2011 case *Stern v. Marshall*[125] provides an example of how the Court has addressed the unconstitutionally unsupervised exercise of government power. That case concerned the late J. Howard Marshall II's estate. Marshall was thought to be "one of the richest people in Texas," and his survivors' battle over his fortune was protracted, acrimonious, and involved multiple trips to every level of the federal judiciary.[126] Before reaching the Article III courts, however, the Bankruptcy Court resolved many of the survivors' competing claims. A brief introduction to the Bankruptcy Court is in order.

The Bankruptcy Court is a statutorily created tribunal to which federal district courts may refer certain matters pertaining to, unsurprisingly, bankruptcy.[127] Congress explicitly outlined the matters the Bankruptcy Court may resolve with finality.[128] One of those sets of matters concerns "core proceedings arising under title 11."[129] Core proceedings include, as relevant in *Stern*, "counterclaims by [a debtor's] estate against persons filing claims against the estate."[130] In cases that are not core proceedings but are "otherwise related to a case

125 564 U.S. 462 (2011).
126 *Id.* at 468.
127 28 U.S.C. §§ 151, 157(a) (2018).
128 *Id.* § 157(b)(1)–(2).
129 *Id.* § 157(b)(1).
130 *Id.* § 157(b)(2)(C).

under title 11," the judge may only "submit proposed findings of fact and conclusions of law to the district court."[131]

The questions in this case were whether the Bankruptcy Court had both the statutory and constitutional authority to hear a survivor's counterclaim—a "core proceeding." To the statutory question, the Court answered yes.[132] But to the constitutional question, it answered no.[133]

The Court first discussed the importance of giving effect to separation-of-powers principles.[134] It is true that "the three branches are not hermetically sealed from one another,"[135] but it is equally true that the Constitution "imposes some basic limitations that the other branches may not transgress."[136] In this case, Congress transgressed the limits of its power. By vesting the Bankruptcy Court with the power to decide debtors' suits in bankruptcy proceedings, Congress granted the judicial power to an actor other than an Article III judge in an Article III court.[137] Having identified the constitutional defect, the only remaining question was the remedy.

The remedial question for the Court was straightforward. Answering it required only that it affirm the Ninth Circuit's judgment, which held the Bankruptcy Court's ruling void on procedural vice constitutional grounds.[138] Different means, same end; the Supreme Court identified a constitutional defect in the Bankruptcy Court's power which nullified the subsequent exercise of that power.

In one sense, the Court's conclusion was expressly a "narrow" one.[139] The Bankruptcy Court, because it is not an Article III court, may not decide questions of law traditionally decided by Article III courts. Without Article III review, the Bankruptcy Court was wielding government power in an unconstitutionally unsupervised manner. The Court highlighted this point when it declared that "[a] statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely."[140] More generally, unless the power vested in a constitutional actor is *fully* intact, that power is ineffectual. There

131 *Id.* § 157(c)(1).
132 *See* Stern v. Marshall, 564 U.S. 462, 475–78 (2011).
133 *Id.* at 482.
134 *See id.* at 482–84.
135 *Id.* at 483 (citing Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977)).
136 *Id.*
137 *See id.* at 503.
138 *See* Marshall v. Stern (*In re* Marshall), 600 F.3d 1037, 1060 (9th Cir. 2010).
139 *Stern*, 564 U.S. at 502.
140 *Id.* at 502–03.

is, after all, no such thing as "mostly constitutional" government power. Without proper supervision, that power is not fully intact.[141]

The problem with the Bankruptcy Court's power was ultimately one of supervision. It exercised the Article III judicial power without any accountability to an Article III actor. When it did so and inflicted a legal harm on an individual, the Court set the proceeding aside as void. The Court did not remand for lower courts to determine whether an Article III court would have come to the same conclusion in a counterfactual world. All the same in the removal context. Executive officials with unconstitutional removal restrictions are free from supervision of, and lack accountability to, an Article II actor.

Apart from a lack of supervision, one may also consider an unlawfully unsupervised executive actor's office as being altogether unconstitutionally structured. In this sense, the problem is not necessarily a lack of supervision but a defect in the office itself.[142] In cases dealing with such offices in the Article II context, the Court has applied a per se remedial approach.

2. Unconstitutional Article II Appointments

Recall that in *Collins*, the Court held that because the Director was *appointed* properly, his power was valid, unconstitutional removal restriction notwithstanding.[143] Justice Gorsuch, in his *Collins* partial concurrence, identified the incongruity in that statement. "Whether unconstitutionally installed or improperly unsupervised," he explained, "officials cannot wield executive power except as Article II provides."[144] And, he continued, the Court's "novel and feeble" remedy drew a distinction between appointment and removal supported by "not a single precedent in 230 years."[145] In fact, the

141 *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 87 (1982) (plurality opinion) (holding that a statute unconstitutionally removed "most, if not all, of 'the essential attributes of the judicial power' from . . . Art. III courts" (quoting Crowell v. Benson, 285 U.S. 22, 51 (1932))).

142 An analogy may be helpful here: Imagine an electrical circuit. For the circuit's load, say, a light bulb, to have power, the circuit must be fully intact. If any portion of the circuit is open, the light bulb will not illuminate; current will not reach it. We can think of government offices in the same way. In order for the bulb to light—for the office to have power—the entire "circuit" must be intact. That means the official must be appointed properly, must be acting within his statutory authority, and must be subject to constitutionally proper supervision. If any of these attributes is lacking, the bulb will not light, so to speak, and the official's office is improperly constituted.

143 *See supra* notes 103–05 and accompanying text.

144 Collins v. Yellen, 141 S. Ct. 1761, 1799 (2021) (Gorsuch, J., concurring in part).

145 *See id.* at 1795–97; *see also id.* at 1799 ("[T]he Court has in the past consistently vindicated Article II both in reasoning and in remedy.").

Court's precedents cut in the opposite direction. The principles underlying the remedies in Appointments Clause cases are no less applicable to removal cases, as a brief look at those cases shows.

Perhaps because the Appointments Clause is itself an explicit constitutional requirement, the Court has endorsed an explicit remedial approach in unconstitutional appointment cases.[146] In *Ryder v. United States*, a unanimous Court held that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits . . . and whatever relief may be appropriate if a violation indeed occurred."[147] To adopt any other approach, the Court continued, "would create a disincentive to raise Appointments Clause challenges with respect to questionable judicial appointments."[148] From *Ryder*, a couple of things are clear: First, the remedial decision begins and ends with the validity of the officer's appointment. The Court did not contemplate an inquiry into whether, absent the appointment defect, the plaintiffs would have wound up injured anyway. And second, the Court is interested in encouraging, or at least not discouraging, separation-of-powers challenges.

These principles were broadened and strengthened in *Lucia v. Securities and Exchange Commission*.[149] There, quoting *Ryder*, the Court held that a successful plaintiff in an Appointments Clause case "is entitled to relief."[150] This language is more categorical than *Ryder*'s. And, as did the *Ryder* Court, the *Lucia* Court explained that Appointments Clause remedies are designed to encourage

146 One possible variant is Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam). There, the Court "accorded *de facto* validity" to actions that the Federal Election Commission took while the Commissioners were in power pursuant to an unconstitutional appointment. *Id.* at 142. But *Buckley* is not representative of most Appointments Clause cases. At the district court in *Buckley*, the plaintiffs sought a declaratory judgment holding that certain campaign finance laws were unconstitutional as well as an injunction against future enforcement of those laws. Buckley v. Valeo, 387 F. Supp. 135, 137 (D.D.C. 1975). The plaintiffs did not ask the court to set aside any specific enforcement action. Declaratory judgments and injunctions are, by their nature, prospective only. And because "parties with sufficient concrete interests at stake have been held to have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights," the case presented a justiciable question for the Court to answer without needing to redress any past injury. *Buckley*, 424 U.S. at 12 n.10. So based on the unique posture of the *Buckley* plaintiffs, the Court could not have employed a per se remedial approach even if it wanted to. There was no specific agency action to set aside in a per se fashion.

147 515 U.S. 177, 182–83 (1995).

148 *Id.* at 183.

149 138 S. Ct. 2044 (2018).

150 *Id.* at 2055 (citing *Ryder*, 515 U.S at 182–83).

Appointments Clause challenges.[151] They do so by directly advancing the Appointments Clause's structural purposes.[152] Those purposes, drawn from *Freytag v. Commissioner* as cited by Justice Breyer,[153] include "guard[ing] against [the] encroachment" on one branch's power by another, "preventing the diffusion of the appointment power," and, more generally, "preserv[ing] . . . the Constitution's structural integrity."[154] *Lucia*, therefore, solidifies the idea that plaintiffs who successfully prove that an appointment is unconstitutional are per se entitled to relief. It also affirms the notion that remedies in separation-of-powers cases should be fashioned to reinforce separation-of-powers norms.

The principles underlying the remedial strategy in Appointments Clause cases apply equally to removal cases. A defective appointment taints an executive official's office; power wielded pursuant to an unconstitutional appointment is invalid and the effects of its exercise, when challenged, are categorically set aside. An official who is lawfully appointed but unlawfully free from supervision possesses similarly flawed executive power; the flaw is simply on the back end instead of the front. Indeed, "removal restrictions may be a greater constitutional evil than appointment defects."[155] Once an executive official has gained his office, "it is only the authority that can remove him, and not the authority that appointed him, that he must fear."[156] Wielding lawfully conferred government power without supervision is thus no more constitutionally valid—and *more* constitutionally problematic—than wielding unlawfully conferred but properly supervised government power.

Beyond the Appointments Clause itself, the Court's treatment of other appointment defects is consistent. In *National Labor Relations Board v. Noel Canning*,[157] the Court affirmed the D.C. Circuit's holding that the Board's action was void when the Board was unlawfully constituted.[158] The President appointed three of the NLRB's five

151 *Id.* at 2055 n.5.

152 *Id.* (explaining that "[the Court's] Appointments Clause remedies are designed . . . to advance those purposes directly").

153 *See id.* at 2064 (Breyer, J., concurring in the judgment in part and dissenting in part) (citing Freytag v. Comm'r, 501 U.S. 868, 878 (1991)).

154 *Freytag*, 501 U.S. at 878.

155 Collins v. Yellen, 141 S. Ct. 1761, 1796 (2021) (Gorsuch, J., concurring in part).

156 *Id.* (quoting Synar v. United States, 626 F. Supp. 1374, 1401 (D.D.C. 1986) (per curiam)).

157 573 U.S. 513 (2014).

158 *Id.* at 557; *see* Noel Canning v. NLRB, 705 F.3d 490, 513–14 (D.C. Cir. 2013), *aff'd*, 573 U.S. 513 (2014).

Board members pursuant to the Recess Appointments Clause.[159] But because the Senate was not actually in recess when the President made the appointments, those appointments were invalid.[160] Therefore, the Board lacked a quorum, and its order lacked the force of law.[161]

The Court affirmed the D.C. Circuit's remedial judgment, and the D.C. Circuit did not equivocate in its remedial tone. Nor did the D.C. Circuit tie the remedy directly to the appointment defects. It concluded that "none of the three appointments" made during what the President thought was a recess was valid.[162] But that alone did not invalidate the Board's decision. The result of those unlawful appointments was that "*the Board lacked a quorum.*"[163] *That* was why its decision was vacated. The problem was not with the unconstitutional appointments themselves; the problem was that those appointments rendered the Board's structure unconstitutional, and an unconstitutionally structured Board's decision "must be vacated."[164] In the same way that unlawful appointments invalidated the Board's action by tainting its underlying structure, an unlawful removal restriction introduces a flaw into the actor's office. The flaw is simply a lack of supervision of lawfully transferred power as opposed to a properly supervised but unlawful transfer of power.

3. Unconstitutionally Structured Article III Courts

Judicial disqualification is a doctrine rooted in the Fourteenth Amendment's Due Process Clause. In judicial disqualification cases, "the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor" and "clearly requires a 'fair trial in a fair tribunal.'"[165] The Supreme Court has repeatedly required reviewing courts to set aside lower court judgments when that lower court, for whatever reason, was improperly structured.

Courts can be improperly constituted in a number of ways. For example, the deciding vote in the lower court's decision might have a

159 *Noel Canning*, 573 U.S. at 520; U.S. CONST. art. 2, § 2, cl. 3.

160 *Noel Canning*, 573 U.S. at 550.

161 *Noel Canning*, 705 F.3d at 513–14.

162 *Id.*

163 *Id.* at 514 (emphasis added).

164 *Id.*; *cf.* Freytag v. Comm'r, 501 U.S. 868, 879 (1991) ("The alleged defect in the appointment of the Special Trial Judge goes to the validity of the Tax Court proceeding that is the basis for this litigation.").

165 Bracy v. Gramley, 520 U.S. 899, 904–05 (1997) (quoting Withrow v. Larkin, 421 U.S. 35, 46 (1975)).

personal financial stake in the outcome.[166] Or the reviewing court may have a member with too close a connection to the proceedings below.[167] Either way, the results of the unlawfully constituted court's decisions are void.

An early disqualification case highlights the point. In *William Cramp & Sons Ship & Engine Building Co. v. International Curtiss Marine Turbine Co.*,[168] a district court judge entered a *pro forma* decree to allow the Third Circuit to hear the case on the merits in the first instance.[169] When the Third Circuit heard the case, the very same judge that presided over the trial below sat on the reviewing panel.[170] The situation's impropriety is obvious enough, but there was a wrinkle: the parties agreed that this arrangement was not a problem.[171] And because the offending judge only issued a pro forma decree, he did not "express an opinion on the case in the first instance."[172] To put it in *Collins* terms, the litigants here did the counterfactual analysis themselves.

Nonetheless, the Court held that the judge's participation on the panel was unlawful. Specifically, it violated Section 120 of the Judicial Code.[173] That section provided that "no judge before whom a cause or question may have been . . . heard in a district court . . . shall sit on the trial or hearing of such cause or question in the circuit court of appeals."[174] The parties' consent and the procedural posture were immaterial; the judge's judicial power was tainted by his statutory violation. The statutory taint rendered the appellate panel "a court organized[] not in conformity to law."[175] As a result, the Court "at once reverse[d] and remand[ed] to the court below so that the case may be heard by a competent court" whose power could be lawfully wielded.[176]

Nowhere did the Court entertain a counterfactual inquiry into whether a properly constituted lower court would have arrived at the

166 *See* Aetna Life Ins. v. Lavoie, 475 U.S. 813, 822–25 (1986); Tumey v. Ohio, 273 U.S. 510, 523–25 (1927). In each of these cases, the Court did not hesitate to invalidate the improperly constituted court's decisions and remand for new proceedings before a lawfully structured court.

167 *See infra* notes 168–81 and accompanying text.

168 228 U.S. 645 (1913).

169 *Id.* at 645–48.

170 *Id.* at 648.

171 *Id.* at 650.

172 *Id.* at 649.

173 *Id.* at 649–50.

174 Judicial Code, ch. 231, § 120, 36 Stat. 1087, 1132 (1911).

175 *William Cramp & Sons*, 228 U.S. at 650.

176 *Id.* at 651.

same conclusion. Indeed, the Court expressly rejected that line of inquiry in a later judicial disqualification case. In *Nguyen v. United States*,[177] the Chief Judge of the District Court for the Northern Mariana Islands—an Article IV territorial court—sat on a three-judge Ninth Circuit panel with two Article III judges.[178] Neither party objected to this "highly unusual" panel composition.[179] Nonetheless, the Supreme Court vacated the panel's judgment and remanded for another hearing.[180]

Its reasoning is instructive. "Even if the parties had *expressly* stipulated to the participation of a non-Article III judge in the consideration of their appeals," the Court explained, "such a stipulation would not have cured the plain defect in the composition of the panel."[181] In other words, there was no action the parties could have taken that would have excused the panel's unconstitutionality. So, naturally, the Court felt no need to order a retrospective inquiry into whether a properly constituted panel would have ruled the same way as the improperly constituted panel. In the judicial context, government power wielded by an improperly constituted government actor is simply void.

Judicial disqualification cases and removal restriction cases present the same problem. In both situations, a government actor with the power to define private citizens' legal obligations is unlawfully structured. In judicial disqualification cases, that fact has been sufficient to taint the entire proceeding. The Court's remedies have paid no mind to parties' agreements that the disqualified judge did not render the proceedings invalid. If the Court is willing to set aside the judgments of courts improperly wielding government power, there is no reason that it shouldn't do the same for executive actors.

As the cases above show, the Court is willing to invalidate *judicial* action when it stems from an unlawfully structured court.[182] The courts had jurisdiction and the cases were justiciable, but the improperly

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177 539 U.S. 69 (2003).

178 *Id.* at 72–73.

179 *Id.* at 73.

180 *Id.* at 83.

181 *Id.* at 80–81 (citing *William Cramp & Sons*, 228 U.S. at 650).

182 The cases discussed above are demonstrative, but not exclusive, in supporting this proposition. *See, e.g.*, Moran v. Dillingham, 174 U.S. 153, 153, 158 (1899) (decision made by improperly constituted lower court "must certainly be set aside and quashed, without regard to its merits" and remanded to be "heard and determined according to law by a bench of competent judges" (emphasis omitted)); Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry., 148 U.S. 372, 387 (1893) (explaining that a proceeding below with an improperly sitting judge "was unlawful, and perhaps absolutely void, and should certainly be set aside or quashed by any court having authority to review it").

exercised judicial power tainted the proceedings. Invalidating unlawfully structured *executive* action due to a removal defect, therefore, is an a fortiori case. The executive is limited only by the Constitution itself and congressional grants of authority.[183] And the current state of the nondelegation doctrine[184] incentivizes Congress to continue granting the executive significant authority. If the judiciary "may truly be said to have neither force nor will, but merely judgment,"[185] and the Court rigorously enforces against the judiciary the requirements for exercising government power, it should be all the more inclined to enforce those requirements against "the sword of the community."[186]

B. Alleviating the Problems with Presuming Constitutionality

The proceedings in each of the three categories above can be characterized in two ways. One is to say that the proceedings were flawed due to a lack of supervision from a constitutional actor. The Bankruptcy Court exercised the judicial power free from supervision by an Article III actor. As such, that power was void. Another is to characterize the flaw as a defect in the office's structure. Improper appointments or improperly seated judges taint the government actor's makeup such that the office lacks constitutional power altogether. Each characterization leads to the same result. The government actor's power is flawed, and the results of that power's use are per se void and vacated.

Whether we consider unconstitutional removal restrictions a failure of supervision, a failure of structure, or both, yet unanswered is the following question: despite the consistency it would introduce, should the Court redress removal restrictions in the same way it redresses other separation-of-powers problems? After all, not every constitutional doctrine lends itself to a formal remedial structure.[187]

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183 *See* INS v. Chadha, 462 U.S. 919, 953 n.16 (1983) (contrasting legislative action, which requires strict adherence to Article I's procedures, and executive action, which is not subject to any procedural review because "the Constitution does not so require").

184 *See* Gundy v. United States, 139 S. Ct. 2116, 2131–42 (2019) (Gorsuch, J., dissenting) (describing the Court's nearly nonexistent standard for enforcing the nondelegation doctrine as "delegation running riot" (quoting A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring))).

185 THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis omitted).

186 *Id.*

187 *See, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 392–97 (1971) (providing a freestanding federal cause of action when the government violates the Constitution as to a particular plaintiff). Scholars have criticized

But recall the three main remedial failures in the case-by-case approach, as seen in *Free Enterprise Fund*, *Seila Law*, and *Collins*. Each is alleviated by applying the per se approach.

First, and perhaps most importantly, the per se approach would consistently and predictably redresses the actual target of removal-restricted executive action. Noble as the cause may be, a victory is of little practical consequence for a successful plaintiff if the Court only prospectively invalidates the official's tenure protection, as it did in *Free Enterprise Fund*. In addition, it is little more than a token victory when, as it did in *Seila Law* and *Collins*, the Court conditions recovery on proving an exceedingly unlikely retrospective hypothetical.[188]

Looming large in the remedial debate is the question whether individuals have a freestanding right to injunctive relief against unlawful government action against them. The Supreme Court has indicated that individuals do possess this right, provided they meet Article III's other requirements (e.g., standing). If that is indeed the case, courts need not require an additional showing beyond the fact that the adversarial government actor injured the plaintiff while unlawfully insulated from removal.[189] By requiring something more, the case-by-case approach prioritizes minimizing the decision's

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the *Bivens* line of cases for its malleability. *See* Gene R. Nichol, Bivens, Chilicky, *and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1129 (1989) ("The doctrinal tensions and inconsistencies that the [*Bivens*] cases reveal are overt, not latent; direct, not inferential; and fundamental, not peripheral."). In addition, the Court in recent years has significantly backtracked on *Bivens* actions' availability. *See* Cassandra Robertson, *SCOTUS Sharply Limits* Bivens *Claims—and Hints at Further Retrenchment*, A.B.A. (Apr. 14, 2020), https://www.americanbar.org/groups/litigation/committees/civil-rights/practice/2020/scotus-sharply-limits-bivens-claims-and-hints-at-further-retrenchment/ [https://perma.cc/VLL5-9KX7].

188 *See* Collins v. Yellen, 141 S. Ct. 1761, 1799 (2021) (Gorsuch, J., concurring in part) ("It's hard not to wonder whether . . . [the Court] intends for this speculative enterprise to go nowhere. Rather than intrude on often-privileged executive deliberations, the Court may calculate that the lower courts on remand in this suit will simply refuse retroactive relief. . . . But if this is what the Court intends, why not just admit it and put these parties out of their misery?" (citing *id.* at 1802 (Kagan, J., concurring in part and concurring in the judgment in part))).

189 The Supreme Court and lower federal courts have even suggested that being subject to unconstitutional government authority is *itself* a judicially cognizable injury. *See* Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2196 (2020) ("[W]hen [a tenure protection] provision violates the separation of powers it inflicts a 'here-and-now' injury on affected third parties that can be remedied by a court." (quoting Bowsher v. Synar, 478 U.S. 714, 727 n.5 (1986))); Axon Enter., Inc. v. FTC, 986 F.3d 1173, 1195–96 (9th Cir. 2021) (Bumatay, J., concurring in the judgment in part and dissenting in part) ("[A] government agency inflicts injury on a person whenever it subjects that person to unconstitutional authority . . . ."), *cert. granted in part*, Axon Enter., Inc. v. FTC, 142 S. Ct. 895 (2022) (mem.).

implications as opposed to redressing the plaintiffs' injuries. The per se approach realigns those priorities.

In addition, the per se approach's consistency would encourage litigants to challenge potentially unconstitutional removal restrictions. Additional encouragement of this nature is important because the average litigant will probably not be concerned with the big picture structural questions arising from his lawsuit. Most plaintiffs, explains Professor Barnett, "may care only marginally . . . about the boundaries of administrative structures or these structures' effect on constitutional or administrative law theory."[190] Therefore, to the extent the assurance of a meaningful remedy encourages a potentially meritorious plaintiff to sue, it collaterally helps to alleviate the second remedial failure: the blurring of the separation of powers.

The per se approach would encourage the Court to enforce the separation of powers. To understand why, consider the alternative. By presuming the constitutionality of unlawfully tenure-protected executive action, the Court implicates the separation of powers in all three branches. First, it stamps tentative approval on the exercise of unlawful executive power. Second, it fails to address a decidedly unconstitutional statutory provision. Severability—the Court's preferred answer to this problem—is no more permissible as a separation-of-powers matter than simply leaving the unconstitutional removal restriction in place. And third, it minimizes the Court's role in addressing unconstitutionality when it sees it.

Start with the executive. By leaving in place (pending additional proceedings on remand) action taken under the cover of an unlawful removal restriction, the Court encourages misdirected accountability for that action. Removal restrictions diffuse accountability.[191] When an unlawfully insulated official acts, he does so free from the political repercussions normally attendant to the executive.[192] And officials accountable neither to the President nor to the electorate "pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances."[193] Therefore, to prevent "diminish[ing] the intended and necessary responsibility of the [c]hief [m]agistrate himself,"[194] the Court should, in a per se

190 Barnett, *supra* note 3, at 496.

191 Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 497 (2010) ("The diffusion of power carries with it a diffusion of accountability.").

192 *See id.* at 497–98 ("The people do not vote for the 'Officers of the United States.'" (quoting U.S. CONST. art. II, § 2, cl. 2)).

193 PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

194 THE FEDERALIST NO. 70, at 429 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

fashion, set aside actions taken by officials unconstitutionally shielded from accountability.

The legislative branch fares no better in a separation-of-powers analysis under the case-by-case approach. When Congress allows the Court to surgically excise[195] unconstitutional removal restrictions by invoking the severability doctrine, as it did in *Seila Law*, it abdicates *its* legislative power.[196] One can see this approach's appeal, from both the Congress's and the Court's perspective. Congress need not pay close attention when drafting removal restrictions because the Court will simply "rewrite the law" for them.[197] In addition, when the Court holds removal restrictions unconstitutional, it acts as a convenient political scapegoat for the Congress that drafted them.

From the Court's perspective, it need not worry about the big picture implications of holding a removal restriction unconstitutional.[198] Rather than require the legislative process to produce a constitutional statute, the Court can order enforcement of everything except the unconstitutional provision, thereby minimizing the shock to the governmental system.[199] The practical effect, however, is a new statute—one that neither passed both Houses of Congress nor received the President's signature.[200]

Finally, the case-by-case approach minimizes the judiciary's role in policing the separation of powers. Generally, the remedies litigants

195 Of course, neither the Supreme Court nor any federal court *actually* excises anything. *See* Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933, 936 (2018) ("The federal courts have no authority to erase a duly enacted law from the statute books, and they have no power to veto or suspend a statute."). Severability refers to the practice of declining to order enforcement of specific statutory provisions rather than allow the offending provision to render the entire law unenforceable.

196 For a thorough (and critical) discussion of severability doctrine, see generally John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203 (1993).

197 *See* Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2365 (2020) (Gorsuch, J., concurring in the judgment in part and dissenting in part).

198 *See* Jonathan H. Adler, *Supreme Court Reaffirms Traditional Severability Principles in* Barr v. AAPC, REASON: VOLOKH CONSPIRACY (July 6, 2020, 11:07 PM), https://reason.com/volokh/2020/07/06/supreme-court-reaffirms-traditional-severability-principles-in-barr-v-aapc/ [https://perma.cc/BB9L-VCFH].

199 *But see* Bowsher v. Synar, 478 U.S. 714, 736 (1986) (explaining that the "fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution" (quoting INS v. Chadha, 462 U.S. 919, 944 (1983))).

200 *See* Clinton v. City of New York, 524 U.S. 417, 439–40 (1998) ("[T]he power to enact statutes may only 'be exercised in accord with a single, finely wrought and exhaustively considered, procedure.'" (quoting *Chadha*, 462 U.S. at 951)); *see also* Tom Campbell, *Severability of Statutes*, 62 HASTINGS L.J. 1495, 1498–505 (2011).

seek and courts award drive substantive norms.[201] In particular, structural remedies seek to drive substantive separation-of-powers norms. "Structure is destiny,"[202] and the separation of powers is how we avoid "[t]he accumulation of all powers . . . in the same hands," which "may justly be pronounced the very definition of tyranny."[203] Structural separation-of-powers principles are not necessarily self-executing;[204] the courts are the prime movers in constitutional line drawing.[205] It is therefore consistent with the judicial role to police the boundaries of power among the branches of government. Identifying unconstitutionality, however, is only step one; the next step is doing something about it. The Court should give full effect to its findings of unconstitutionality by properly redressing the action taken pursuant to that unconstitutionality. To do otherwise is to avoid "say[ing] what the law is,"[206] and redressing removal restriction violations is in keeping

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201 Barnett, *supra* note 3, at 496 ("[I]t is all but meaningless to consider one without the other.").

202 *Justices Scalia and Ginsburg on the First Amendment and Freedom*, C-SPAN (Apr. 17, 2014) (Justice Scalia speaking in interview), https://www.c-span.org/video/?c4717289/user-clip-scalia-structure-destiny [https://perma.cc/8VK4-CY9X].

203 THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

204 *See* Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 10–11 (1994) (explaining that "it is unclear, in advance, whether a structure that violates the constitutional blueprint is a benign innovation or a malignant threat to liberty"). Therefore, McCutchen argues, the separation of powers is "prophylactic." *Id.* at 11. The idea of a prophylactic is that it prevents the creation of an untenable situation by proceeding on the assumption that, in individual instances, it will be impossible to determine the existence of a threat to the system's underlying values. *See* Martin H. Redish & Elizabeth J. Cisar, *"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449, 477 (1991). Treating the separation of powers as a prophylactic rule thus requires courts to act in cases where that separation is implicated; it is a "preventive methodology." *Id.*

205 This is not meant to suggest that federal courts—including the Supreme Court—conclusively and permanently *define* the Constitution. *See* Mitchell, *supra* note 195, at 936 ("[T]he [unconstitutional] statute continues to exist, even after a court opines that it violates the Constitution, and it remains a law until it is repealed by the legislature that enacted it."). *But see* Cooper v. Aaron, 358 U.S. 1, 18 (1958) (explaining that "the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land"); Whole Woman's Health v. Jackson, 142 S. Ct. 522, 550–52 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part) (rejecting the notion that the Supreme Court's interpretations of the Constitution are not the Constitution itself). It should only be taken to mean that, because the Court goes last in constitutional disputes, it is its judgment as to the boundaries of constitutional power by which the parties to the case must abide, and by which future litigants would be prudent to abide, lest they make an argument that precedent squarely forecloses.

206 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

with "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers."[207]

The last of the case-by-case approach's remedial shortcomings—disincentivizing Congress from carefully crafting legislation—is ameliorated by applying the per se approach. As discussed above, the case-by-case approach's use of the severability doctrine disincentivizes Congress from taking care when drafting its legislation.[208] Congress has no incentive to do so when it knows that the Court will fix the problem itself.[209] On the contrary, applying the per se approach would increase political pressure on Congress when plaintiffs successfully challenge unconstitutional removal restrictions. Executive branch enforcement actions are time-consuming and expensive.[210] Were the Court to set aside those actions (when taken unlawfully) without presuming their constitutionality, a "redo" would be necessary.[211] Under the per se approach, the Court would nullify the action, restore the status quo ante, and give a lawfully constituted actor the chance to independently decide how to proceed.

This litigation would be tedious and inefficient. The executive, knowing what litigation is to come if Congress passes an unconstitutional removal restriction, would ensure that the restriction is constitutional before acting. If not, the executive would send the law back to Congress so as to avoid future litigation. This process is itself inefficient. The interbranch lawmaking incentive structure under the per se approach thus places the onus on the branch best able to avoid these negative externalities in the first place—the legislature.

CONCLUSION

Unconstitutional tenure protections that lead to unsupervised executive overreach must be checked and challenged. When a plaintiff does so successfully, that plaintiff should be made whole.

This Note has argued that when a plaintiff is injured by an unconstitutionally tenure-protected executive official, doctrine and

207 Glidden Co. v. Zdanok, 370 U.S. 530, 536 (1962) (plurality opinion of Harlan, J.).

208 *See* Campbell, *supra* note 200, at 1519 ("[A] more limited use of severability . . . would cause Congress and legislatures to devote more time to writing laws that are constitutional in the first instance.").

209 *See id.* at 1521 ("Congress passed a bill with several parts and even though the product was flawed, Congress should have an opportunity to fix it.").

210 *See* U.S. SEC. & EXCH. COMM'N, FISCAL YEAR 2022 CONGRESSIONAL BUDGET JUSTIFICATION 16 (2021) (showing the SEC's 2022 enforcement budget request of $638,972,000); FED. TRADE COMM'N, CONGRESSIONAL BUDGET JUSTIFICATION FISCAL YEAR 2022 48 (2021) (showing total enforcement budget for fiscal year 2021 of $389,800,000).

211 *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2423–24 (2019).

policy justify a per se remedy. In examining the Supreme Court's treatment of other government-power problems, demonstrating the virtues of the per se approach, and highlighting the weaknesses of the case-by-case approach, this Note has built upon Justice Gorsuch's *Collins* concurrence. It has advocated a straightforward and constitutionally consistent remedial scheme which would solve the Court's current shortcomings in removal restriction remedies.

The days of removal restrictions may be numbered, as popular skepticism of executive administration is on the rise.[212] But for as long as they are part of our government, they will bring with them the temptations concomitant with unsupervised authority. While that is the case, the people—and the courts—must remain wary of executive overreach.[213] Effectively redressing the targets of such overreach is a step in that direction.

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212 *See* City of Arlington v. FCC, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting) ("[T]he danger posed by the growing power of the administrative state cannot be dismissed."). *See generally* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

213 The pace of tenure-protection litigation does not appear to be slowing. For a recent challenge, see Axon Enter., Inc. v. FTC, 986 F.3d 1173 (9th Cir. 2021), *cert. granted in part*, Axon Enter., Inc. v. FTC, 142 S. Ct. 895 (2022) (mem.). In *Axon*, the FTC brought an enforcement action against Axon in an effort to prevent Axon from acquiring one of its competitors. *Id.* at 1176. In response, Axon raised two challenges against the FTC in federal district court. *Id.* First, Axon claimed that the district court, rather than the FTC's administrative process, was the proper forum to hear constitutional challenges (which Axon was bringing) in the first instance. *See id.* And second, that the FTC's structure—tenure protection for both Commissioners and administrative law judges—violated the separation of powers. *See id.* Although Axon "raise[d] substantial questions about whether the FTC's dual-layered for-cause protection for ALJs violates the President's removal powers under Article II," the Ninth Circuit held that the district court lacked jurisdiction to hear Axon's claims. *Id.* at 1187. Because that issue was dispositive, the court did not reach the constitutional question. *Id.* Axon petitioned the Supreme Court for certiorari and presented two questions—the jurisdictional question and the tenure-protection question. Petition for Writ of Certiorari at i–ii, Axon Enter., Inc. v. FTC, 142 S. Ct. 895 (2022) (mem.) (No. 21–86). The Supreme Court, alas, granted certiorari only as to the former. *Axon Enter., Inc.*, 142 S. Ct. 895.