

## NOTES

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### SEVERABILITY AND STANDING PUZZLES IN THE LAW OF REMOVAL POWER

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One of the “oldest and most venerable debates in U.S. constitutional law” concerns the President’s ability to fire executive branch officers.<sup>1</sup> That debate shows little sign of subsiding. In recent years, the Supreme Court has decided a number of removal power cases that reflect an increasingly formalist turn. These cases have endorsed a version of the unitary executive theory and blessed the President’s ability to remove nominally independent officials. When it comes to questions of severability and remedy, however, the formalist majorities have fractured. *Collins v. Yellen*,<sup>2</sup> decided in 2021, provides the most illuminating example. Justices Thomas and Gorsuch concurred with the holding that a statute restricting the President’s ability to fire an independent agency director violated the separation of powers. But they disagreed with each other on how to “sever” the removal provision from the statute and what remedy to provide for the violation.<sup>3</sup> If the Court is interested in a broader constitutional audit of the administrative state, as the logic of its recent removal power jurisprudence suggests, the formalist bloc will at some point have to account for its internal differences.

This Note argues that Justice Thomas’s approach is the right one and considers what might follow from it. Justice Thomas maintains that a validly appointed executive officer may exercise executive authority notwithstanding any unlawful for-cause removal protection. Because the Constitution automatically displaces any statute contrary

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1 STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE* 3 (2008).

2 141 S. Ct. 1761 (2021).

3 *Id.* at 1789 (Thomas, J., concurring); *id.* at 1795 (Gorsuch, J., concurring in part).

to it, he contends, such removal protections never truly become law. And the proper remedy would not hold agency action unlawful per se, as Justice Gorsuch would have it. But bound up in this analysis are key implications for what the law is, what the judicial power is, and who gets to interpret the Constitution. This Note attempts to spell out those implications.

Part I situates recent developments in the law of removal power, including *Collins's* predecessor, the landmark case *Seila Law LLC v. Consumer Financial Protection Bureau*.<sup>4</sup> This Note identifies where these cases leave the door open to future clarification or expansion of removal power doctrine. Part II examines *Collins's* dueling concurrences between Justices Thomas and Gorsuch over severability and remedy and concludes that, as a formal matter, Justice Thomas has the better of the argument. Part III considers the possibility that if Justice Thomas is correct (and he is able to so persuade his colleagues), the Court may have to confront the possibility that private plaintiffs lack standing to bring removal power suits. Recent years have seen parties regulated by agencies bringing such suits, claiming harm from the agency's purported independence. But even if a removal statute is unlawful in the abstract, it is questionable whether that statute's unlawfulness makes any government action unlawful or gives rise to any injury. A better setting to consider the constitutionality of removal restrictions is the actual firing of a tenured officer by the President. As a corollary, Part IV argues, a President who subscribes to the unitary executive theory should more actively police independent agency officials. This would include removing them from office if necessary. The President has an independent duty to interpret the Constitution, and that duty includes defending presidential prerogatives from encroachment by Congress. If an officer contested his removal from office, the courts would have a cleaner case to decide. Such a case would not raise divisive questions of severability and remedy and would move past the disagreement between Justices Thomas and Gorsuch. The law of presidential removal power would be in a better place for it.

## I. FORMALIST DEVELOPMENTS IN THE LAW OF REMOVAL POWER

Article II of the Constitution vests “[t]he executive Power” in the President and requires him to “take Care that the Laws be faithfully executed.”<sup>5</sup> Article I's Necessary and Proper Clause also grants Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution” the other powers vested in the federal

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4 140 S. Ct. 2183 (2020).

5 U.S. CONST. art. II, §§ 1, 3.

government.<sup>6</sup> Congress uses this power to structure the executive branch by creating departments and offices under the President.<sup>7</sup> While the Appointments Clause provides the method by which the President selects officers of the United States,<sup>8</sup> the constitutional text is silent on the power to remove them. One interpretation of the Necessary and Proper Clause holds that Congress can fill this void and tenure executive officers or set the circumstances of their removal.<sup>9</sup> But many presidents, courts, and scholars have construed Article II's Vesting Clause and Take Care Clause to include an inherent presidential power of at-will removal, since effective execution of the law requires the ability to control one's subordinates.<sup>10</sup>

The First Congress vigorously debated whether the President had the power to remove the heads of departments. During the creation of the first executive offices in 1789, certain members of the House objected to bill language declaring that the President could fire the Secretary of Foreign Affairs, since it seemed to imply the President's removal power was conferred by Congress and not by the Constitution itself. In the end, the House voted to amend the objectionable language.<sup>11</sup> Many consider this "Decision of 1789" to have established an

6 *Id.* art. I, § 8, cl. 18.

7 See Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1787–88 (2006).

8 U.S. CONST. art. II, § 2, cl. 2. The President appoints principal, or superior, officers with the advice and consent of the Senate. The appointment of inferior officers may be vested in the President alone, the courts of law, or the heads of departments. *Id.* This Note focuses on principal officers, including the members of multimember commissions.

9 See *Myers v. United States*, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting); *Seila L.*, 140 S. Ct. at 2224 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

10 See CALABRESI & YOO, *supra* note 1, at 42 (Washington) *id.* at 68 (Jefferson); *id.* at 77–79 (Madison); *id.* at 99–100 (Jackson); *id.* at 125–27 (Van Buren); *id.* at 211–12 (Cleveland); *id.* at 267–68 (Coolidge); *id.* at 283–85 (Franklin Roosevelt); *id.* at 308–09 (Truman); *id.* at 323–24 (Eisenhower); *id.* at 353–55 (Nixon); *id.* at 375–76 (Reagan); *Myers*, 272 U.S. 52; *Seila L.*, 140 S. Ct. at 2197; MICHAEL W. MCCONNELL, *THE PRESIDENT WHO WOULD NOT BE KING* 163–67 (2020); AKHIL REED AMAR, *THE WORDS THAT MADE US* 358 (2021); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 598 (1994); John Harrison, *Addition by Subtraction*, 92 VA. L. REV. 1853, 1862 (2006); Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1212–15 (2014); Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753, 1779–87 (2016) (recounting how Supreme Court decisions have construed the Take Care Clause).

11 As passed, the relevant part of the statute provided that "there shall be in the said department, an inferior officer . . . who, whenever the said principal officer shall be removed from office by the President of the United States . . . shall during such vacancy have the charge and custody of all records, books and papers." Act of July 27, 1789, ch. 4, § 2, 1 Stat. 28, 29 (emphasis added). Earlier draft language had specified that the secretary was "to be removable from office by the President of the United States." CALABRESI & YOO, *supra* note 1, at 35.

authoritative “legislative construction”<sup>12</sup> of Article II recognizing, rather than granting, a presidential removal power.<sup>13</sup>

Disputes over presidential removal power are part of the larger debate over the unitary executive theory. Resting on Article II’s Vesting Clause, the Take Care Clause, and the Decision of 1789, the unitary executive theory holds that “the Constitution creates only three branches of government and that the President must be able to control the execution of all federal laws.”<sup>14</sup> Or as Chief Justice Roberts has succinctly put it, “[u]nder our Constitution, the ‘executive Power’—all of it—is ‘vested in a President.’”<sup>15</sup> Under the unitary theory, the President has an inherent constitutional power to oversee the workings of the entire executive branch. Different unitary theorists argue that the President has the authority to step into any subordinate’s shoes and make all decisions personally,<sup>16</sup> or to remove any officer he wishes,<sup>17</sup> or both. This Note takes no position on the merits of the extensive scholarly literature around removal power and the unitary executive.<sup>18</sup> It

12 *Myers*, 272 U.S. at 153, 175.

13 See, e.g., 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1531, at 390 n.1 (Fred B. Rothman & Co. 1991) (1833); CALABRESI & YOO, *supra* note 1, at 35–36; MCCONNELL, *supra* note 10, at 166–67; Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1067–68 (2006); *Myers*, 272 U.S. at 174–76; Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 537 F.3d 667, 691–92 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *rev’d*, 561 U.S. 477 (2010); *Seila L.*, 140 S. Ct. at 2197. Though she disagrees with this reading of the Decision of 1789, Christine Chabot recognizes that it has undoubtedly “provided the leading originalist precedent on executive removal power.” Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 NOTRE DAME L. REV. 1, 26 (2020).

14 Calabresi & Prakash, *supra* note 10, at 544. For a history documenting each president’s defense of the unitary executive, see generally CALABRESI & YOO, *supra* note 1.

15 *Seila L.*, 140 S. Ct. at 2191 (quoting U.S. CONST. art. II, § 1, cl. 1). Chief Justice Roberts may have been echoing the dissent of Justice Scalia (a unitary theorist if there ever was one) in *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (“[T]he Constitution provides: ‘The executive Power shall be vested in a President of the United States.’ . . . this does not mean *some* of the executive power, but *all* of the executive power.” (quoting U.S. CONST. art. II, § 1, cl. 1)).

16 See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1243–45 (1994).

17 See, e.g., Rao, *supra* note 10.

18 See *supra* notes 10, 13. Recent years have also seen a resurgence in scholarship arguing that the constitutional text and history do not support the unitary executive theory. See Chabot, *supra* note 13; Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019); Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175 (2021); Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. 1479 (2022); Jed Handelsman Shugerman, *Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism*, 33 YALE J.L. & HUMANS. 125 (2022); Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129 (2022); Jed Handelsman Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. PA. L. REV. (forthcoming 2023). In practice, the

proceeds from the assumption that the Supreme Court's jurisprudence in the last decade has endorsed the President's general power to remove executive officers and will continue along a unitary trajectory for some time to come.

Understanding *Seila Law* and *Collins* requires understanding *Humphrey's Executor v. United States*.<sup>19</sup> *Humphrey's Executor* dealt with one of the first independent agencies, the Federal Trade Commission (FTC). Created in 1914, the FTC had five members, each appointed by the President for a seven-year term.<sup>20</sup> Congress empowered the FTC to prevent "unfair methods of competition in commerce" by conducting investigations, holding hearings, and issuing orders against businesses and individuals.<sup>21</sup> It could seek enforcement of its orders in federal court.<sup>22</sup> Most notably for constitutional purposes, the FTC Act provided that the President could remove a commissioner "for inefficiency, neglect of duty, or malfeasance in office."<sup>23</sup>

In 1933, President Franklin D. Roosevelt fired a conservative commissioner, William Humphrey (a Calvin Coolidge appointee). This should have been uncontroversial. Less than a decade before, the Supreme Court had deemed limits on the President's removal power unconstitutional in *Myers v. United States*. Chief Justice Taft's opinion in *Myers* upheld the President's unilateral removal of a postmaster notwithstanding a statutory requirement that the President first receive Senate approval.<sup>24</sup> Furthermore, the 1902 case *Shurtleff v. United States* had resolved a similar case on statutory interpretation grounds.

separation of powers may have been less strict in the early 1790s than today. Chief Justice John Jay, for instance, served on the Sinking Fund Commission and as a commissioner of the Mint. See Justin W. Aimonetti & Jackson A. Myers, *The Founders' Multi-Purpose Chief Justice: The English Origins of the American Chief Justiceship*, 124 W. VA. L. REV. 203, 240 (2021). He also served as acting Secretary of State before Thomas Jefferson took the role, was a close advisor to President Washington, and negotiated the Jay Treaty with Great Britain in 1794, all during his tenure as Chief Justice. *Id.* at 240–47. Such arrangements, though unthinkable today, do not necessarily defeat the unitary executive theory. For instance, the Sinking Fund Commission could take no action without the President's approval and the President could fire three of its five commissioners Commission (the Secretaries of State and Treasury, and the Attorney General). See Chabot, *supra*, at 194–95. It is curious that the Vice President, like the Chief Justice, was statutorily assigned service on a commission. Other than impeachment, the Vice President cannot be removed from office by anyone. It is unclear to what extent the Vice President is even an executive officer. For an argument suggesting that, as President of the Senate, the Vice President is primarily an Article I legislative officer, see Glenn Harlan Reynolds, Essay, *Is Dick Cheney Unconstitutional?*, 102 NW. U. L. REV. 1539 (2008).

19 295 U.S. 602 (1935).

20 Federal Trade Commission Act, ch. 311, § 1, 38 Stat. 717, 717–18 (1914).

21 *Id.* § 5, 38 Stat. at 719–21.

22 *Id.*

23 *Id.* § 1, 38 Stat. at 718.

24 *Myers v. United States*, 272 U.S. 52, 107, 175–76 (1926).

*Shurtleff* considered language identical to the FTC Act and concluded that the President was not limited to removing a customs appraiser *only* for the reasons fixed by statute.<sup>25</sup> President Roosevelt thus seemed to have bulletproof legal authority to fire Commissioner Humphrey.<sup>26</sup> Congress evidently agreed, “offering not a single word of protest to Roosevelt’s actions,” while the Senate “confirmed Humphrey’s replacement without incident.”<sup>27</sup>

Nonetheless, the disgruntled Humphrey contested his removal and the Supreme Court ruled against the President. Limiting *Myers*’s holding to “purely executive officers,”<sup>28</sup> the Court framed the FTC’s authority as “quasi-legislative” and “quasi-judicial.”<sup>29</sup> Since quasi-legislative and quasi-judicial bodies exercise no executive power, the Court reasoned, the President had no inherent authority over them and could only supervise them as Congress specified.<sup>30</sup>

*Humphrey’s Executor* has been widely criticized for its “quasi-legislative” and “quasi-judicial” neologisms and for “gutting, in six quick pages devoid of textual or historical precedent for the novel principle it set forth, [*Myers*’s] carefully researched and reasoned 70-page opinion.”<sup>31</sup> In a way, *Humphrey’s Executor* was technically correct. If a truly

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25 *Shurtleff v. United States*, 189 U.S. 311, 311–16 (1903); *see also* Note, *The SEC Is Not an Independent Agency*, 126 HARV. L. REV. 781, 785–93 (2013) (discussing statutory interpretation of removal provisions and the precedent *Shurtleff* set). President Roosevelt modeled the language of his order firing Humphrey after President McKinley’s dismissal of the customs appraiser. *See* William E. Leuchtenburg, *The Case of the Contentious Commissioner: Humphrey’s Executor v. U.S.*, in *FREEDOM AND REFORM: ESSAYS IN HONOR OF HENRY STEELE COMMAGER* 276, 295 (Harold M. Hyman & Leonard W. Levy eds., 1967).

26 Roosevelt even consulted with one of the drafters of the Federal Trade Commission Act, who advised him he could fire a commissioner at will. Furthermore, once the Supreme Court took up the case, newly minted Solicitor General Stanley Reed picked it as his first to argue before the Court at the Attorney General’s suggestion of starting with a “certain victory.” MARIAN C. MCKENNA, *FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE GREAT COURT-PACKING CRISIS OF 1937* 96–98 (2002).

27 CALABRESI & YOO, *supra* note 1, at 284.

28 *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 632 (1935). The Court declared that the office of postmaster at issue in *Myers* was “so essentially unlike the office now involved that the decision in the *Myers* case cannot be accepted as controlling our decision here.” *Id.* at 627.

29 *Id.* at 628.

30 *Id.* at 629.

31 *Morrison v. Olson*, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting); *see also* *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2211 (2020) (Thomas, J., concurring in part and dissenting in part) (“The decision in *Humphrey’s Executor* poses a direct threat to our constitutional structure and, as a result, the liberty of the American people.”); Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83, 100 (describing *Humphrey’s Executor* as “widely reviled”); Jerry L. Mashaw, *Of Angels, Pins and For-Cause Removal: A Requiem for the Passive Virtues*, 2020 U. CHI. L. REV. ONLINE \*13, \*16 (describing *Humphrey’s Executor* as “constitutional nonsense”).

quasi-legislative or quasi-judicial governmental body existed, there is no reason the President would possess any inherent power over that body. The problem lay with the FTC's statutory mandate to enforce competition laws—almost definitionally an executive action. Declaring that the FTC in 1935 “exercise[d] no part of the executive power” was dubious at best.<sup>32</sup>

Against this backdrop, the Supreme Court decided *Seila Law*.<sup>33</sup> The *Seila Law* story began with the 2010 Dodd-Frank Act, which created the Consumer Financial Protection Bureau (CFPB), an independent regulatory agency headed by a single director for a five-year term.<sup>34</sup> Congress charged the CFPB with enforcing eighteen preexisting consumer protection statutes as well as a new prohibition on “any unfair, deceptive, or abusive act or practice” in certain markets.<sup>35</sup> In aid of this mandate, the CFPB received wide-ranging rulemaking, investigative, enforcement, and adjudicatory powers. At the same time, in a section titled “Removal for Cause,” Congress made the director removable “for inefficiency, neglect of duty, or malfeasance.”<sup>36</sup> To date, no President has fired a director.<sup>37</sup> But when the CFPB issued a civil investigative demand (“CID”) in 2017 to *Seila Law*, a California firm, *Seila Law* refused to comply, objecting that the CFPB's structure was unconstitutional.<sup>38</sup> In a 5–4 vote, the Supreme Court agreed.

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32 *Humphrey's Ex'r*, 295 U.S. at 628.

33 Two other significant removal power cases, not as relevant here, also predated *Seila Law*: *Morrison v. Olson* and *Free Enterprise Fund v. Public Company Accounting Oversight Board*. *Morrison* dealt with the constitutionality of the independent counsel statute while *Free Enterprise Fund* dealt with the members of an oversight board appointed by the SEC. See *Morrison*, 487 U.S. at 660; *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 484–85 (2010).

34 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1011, 124 Stat. 1376, 1964 (2010) (codified at 12 U.S.C. § 5491 (2018)).

35 *Seila L.*, 140 S. Ct. at 2193 (quoting 12 U.S.C. § 5536(a)(1)(B)).

36 Dodd-Frank Act § 1101(c)(3), 124 Stat. at 1964.

37 The Consumer Financial Protection Bureau's (CFPB's) first head, Richard Cordray, was installed by President Obama via recess appointment in 2012 and resigned in 2017 to run for governor of Ohio. Rene Merle, *Richard Cordray Is Stepping down as Head of Consumer Financial Protection Bureau*, WASH. POST (Nov. 15, 2017, 1:30 PM), <https://www.washingtonpost.com/news/business/wp/2017/11/15/richard-cordray-is-stepping-down-as-head-of-consumer-financial-protection-bureau/> [https://perma.cc/73FN-K6T2]. President Trump appointed Kathleen Kraninger in 2018 to succeed acting director Mick Mulvaney. Jon Hill, *Kraninger Resigns as CFPB Director*, LAW360 (Jan. 20, 2021, 1:12 PM), <https://www.law360.com/articles/1346864/kraninger-resigns-as-cfpb-director> [https://perma.cc/AGX8-PPWU]. She resigned in 2021 when President Biden took office. *Id.* Rohit Chopra, President Biden's pick, was confirmed by the Senate nine months later. Aaron Gregg, *Senate Confirms Rohit Chopra to Lead Consumer Financial Protection Bureau*, WASH. POST (Sept. 30, 2021, 4:52 PM), <https://www.washingtonpost.com/business/2021/09/30/rohit-chopra-cfpb/> [https://perma.cc/LT5Z-FT47].

38 See *Seila L.*, 140 S. Ct. at 2194.

The Court held that the Bureau’s “leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers.”<sup>39</sup> Citing the Decision of 1789 and *Myers*, the Court reasoned that the Constitution placed ultimate responsibility for the workings of the national government in the President’s hands and that the CFPB’s concentration of power in one official—not accountable to the President—was unlawful.<sup>40</sup> Writing for the majority, Chief Justice Roberts distinguished *Humphrey’s Executor* by cabining it as an “exception” to *Myers*’s baseline rule.<sup>41</sup> *Humphrey’s Executor*, as he read it, permitted Congress to restrict the President’s removal power in cases of multimember commissions balanced along partisan lines that purportedly did not exercise executive power. The CFPB, he found, was no such agency. Strikingly, the Court noted that “*Humphrey’s Executor* reaffirmed the core holding of *Myers* that the President has ‘unrestrictable power . . . to remove purely executive officers.’”<sup>42</sup>

Justice Thomas wrote separately, joined by Justice Gorsuch. He concurred with the Court’s analysis but called for overruling *Humphrey’s Executor* entirely. Though he saw the Court taking “a step in the right direction” by limiting *Humphrey’s Executor*, Justice Thomas argued that “today’s decision . . . has repudiated almost every aspect” of it and that the Court should “repudiate what is left of this erroneous precedent.”<sup>43</sup>

One year later, the Court took up a sequel, *Collins v. Yellen*.<sup>44</sup> *Collins* dealt with the Federal Housing Finance Agency (FHFA). Like the CFPB, the FHFA was created as an independent agency with a single director appointed for a five-year term, removable by the President only for cause.<sup>45</sup> Congress created the FHFA in the Housing and Economic Recovery Act in 2008 and empowered it to regulate Fannie Mae and Freddie Mac.<sup>46</sup> Fannie Mae and Freddie Mac are federally chartered, for-profit companies owned by private shareholders and are “two of the Nation’s leading sources of mortgage financing.”<sup>47</sup> Soon after its creation, the FHFA placed the two housing giants under its conservatorship, and acting as conservator entered into a series of agreements with the Treasury Department for capital commitments to

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39 *Id.* at 2197.

40 *See id.* at 2197–2204.

41 *Id.* at 2198. The majority opinion read *Humphrey’s Executor* “on its own terms, not through gloss added by a[ny] later Court in dicta.” *Id.* at 2200 n.4.

42 *Id.* at 2199 (quoting *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 632 (1935)).

43 *Id.* at 2211–12 (Thomas, J., concurring in part and dissenting in part).

44 141 S. Ct. 1761 (2021).

45 12 U.S.C. §§ 4512(a)–(b)(2) (2018).

46 *Collins*, 141 S. Ct. at 1770.

47 *Id.*



stay afloat.<sup>48</sup> One of these, known as the “Third Amendment,” required Fannie and Freddie to pay quarterly dividends to Treasury equal to any increase in net worth above a prescribed amount.<sup>49</sup> In other words, although the companies’ losses would be stemmed in a bad quarter, they also couldn’t keep anything gained in a good quarter. Though no Senate-confirmed FHFA head had been removed by the President,<sup>50</sup> a group of shareholders brought suit, alleging (among other claims) that the single-headed independent structure of the FHFA violated the Constitution. Noting that its decision in *Seila Law* was “all but dispositive,” the Court agreed.<sup>51</sup>

Although the holding was limited to the single-headed structure of the FHFA, Justice Alito’s majority opinion contained strong language affirming the importance of broad presidential removal power. Rejecting the argument that the FHFA’s regulatory scope differed significantly from the CFPB’s, the opinion stated that the “nature and breadth of an agency’s authority is not dispositive in determining whether Congress may limit the President’s power to remove its head.”<sup>52</sup> The Court maintained that the removal power “serves vital purposes” and is crucial to the President’s ability to direct the executive branch, which “works to ensure that [it] serve[s] the people effectively and in accordance with the policies that the people presumably elected the President to promote.”<sup>53</sup> Quoting James Madison, the

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48 *Id.*

49 *Id.* at 1773–74, 1773 n.7.

50 James Lockhart, the director of the Office of Federal Housing Enterprise and Oversight, continued his leadership when the Office was remade into the Federal Housing Finance Agency (FHFA). See Charles Duhigg, *As U.S. Weighs Future of Housing Giants, Overseer Is Leaving*, N.Y. TIMES (Aug. 5, 2009), <https://www.nytimes.com/2009/08/06/business/06lockhart.html> [<https://perma.cc/J54A-4M4A>]. He resigned in 2009. *Id.* Ed DeMarco became acting director until President Obama appointed Mel Watt in 2013. Chris Arnold, *Mel Watt: A New Captain for America’s Housing Market*, NPR (Dec. 13, 2013, 4:00 AM), <https://www.npr.org/2013/12/13/250656141/n-c-rep-mel-watt-confirmed-as-fannie-freddie-regulator> [<https://perma.cc/5E2Q-ZNNE>]. Watt served the full five-year term. Upon the term’s expiration, President Trump designated Joseph Otting as acting director, and appointed Mark Calabria to a full term in 2019. Austin Weinstein, *Fannie-Freddie Getting New Overseer as Senators Approve Calabria*, BLOOMBERG L. (Apr. 4, 2019, 3:35 PM), [https://www.bloomberglaw.com/bloomberglawnews/banking-law/XA5J4I6400000?bna\\_news\\_filter=banking-law#jcite](https://www.bloomberglaw.com/bloomberglawnews/banking-law/XA5J4I6400000?bna_news_filter=banking-law#jcite) [<https://perma.cc/MDN9-73HD>]. When *Collins* came down on June 23, 2021, President Biden fired Calabria that same day. Katy O’Donnell, *Biden Removes FHFA Director After Supreme Court Ruling*, POLITICO (June 23, 2021, 9:40 PM), <https://www.politico.com/news/2021/06/23/supreme-court-biden-fannie-mae-freddie-mac-housing-495673> [<https://perma.cc/WS29-ZM23>]. President Biden has since appointed Sandra Thompson to the role. *Id.*

51 *Collins*, 141 S. Ct. at 1783. The Court went on to state that “[a] straightforward application of our reasoning in *Seila Law* dictates the result here.” *Id.* at 1784.

52 *Id.* at 1784.

53 *Id.*

Court reaffirmed the principle that the full removal power ensures that “the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.”<sup>54</sup>

As he did in *Seila Law*, Justice Thomas concurred. He wrote separately to explain his views further on severability and the proper remedy, although he agreed with the Court’s conclusion on both—severance of the removal provision and a remand to the lower courts for further proceedings.<sup>55</sup> Justice Gorsuch split from Justice Thomas, however, arguing that the constitutional violation rendered the FHFA’s actions ultra vires and that the Court should invalidate them.<sup>56</sup>

One can read *Seila Law* and *Collins* two ways. The first regards the decisions as an affirmation of some congressional limitations on the President’s removal power. On this account, the Court will adhere to precedent (or modestly refashion precedent) and avoid upsetting the modern administrative state but will prevent novel encroachments on presidential power like single-headed independent agencies. The second interpretation reads *Seila Law* as an invitation to broader challenges to the constitutionality of all independent agencies. Cass Sunstein and Adrian Vermeule have argued that on a maximalist reading, “the Court read *Humphrey’s Executor* so narrowly that it might well be taken to have thrown the independence of most of the current independent agencies, and longstanding understandings of that decision, into grave doubt.”<sup>57</sup> Any number of federal boards, bureaus, or commissions might now find themselves in the crosshairs.

Reality should check hope for sweeping change. Mustering five votes is tougher than writing a solo dissent.<sup>58</sup> But there is nonetheless

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54 *Id.* (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 498 (2010) (quoting 1 ANNALS OF CONG. 518 (1789) (Statement of Rep. Madison))).

55 *Id.* at 1789 (Thomas, J., concurring).

56 *Id.* at 1795 (Gorsuch, J., concurring).

57 Sunstein & Vermeule, *supra* note 31, at 85; cf. Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in Free Enterprise Fund v. PCAOB*, 79 FORDHAM L. REV. 2541, 2559–60 (2011) (suggesting the same about *Free Enterprise Fund*); Patricia L. Bellia, *PCAOB and the Persistence of the Removal Puzzle*, 80 GEO. WASH. L. REV. 1371, 1410–12 (2012) (disentangling the formalist unitary executive and functionalist balancing act threads in *Free Enterprise Fund*).

58 See Adrian Vermeule, *Never Jam Today*, YALE J. REGUL.: NOTICE & COMMENT (June 20, 2019), <https://www.yalejreg.com/nc/never-jam-today-by-adrian-vermeule/> [https://perma.cc/28A5-YT26]. (Originalist “eschatological hope isn’t some recent development. It’s the ordinary state of conservative jurisprudence, the perpetual ‘Soon! But not yet’ of conservative constitutional *parousia*.” Legal conservatives tend to “insist[] that this time it’s all different, the ground is shifting, it’s really happening!”—usually only to be disappointed.); Aaron L. Nielson, *The Logic of Collins v. Yellen*, YALE J. REGUL.: NOTICE & COMMENT (July 9, 2021), <https://www.yalejreg.com/nc/the-logic-of-collins-v-yellen/> [https://perma.cc/7VW5-PFKM] (cautioning that precedents are not always brought to their full logical conclusion).

reason to believe the Court may further audit the constitutionality of the administrative state, revisit *Humphrey's Executor*, and continue developing its removal power jurisprudence. Among the Court's formalist members there are at least two votes (Justice Thomas and Justice Gorsuch) to jettison *Humphrey's Executor* entirely. Others (the Chief Justice and Justice Alito) have shown willingness to cabin it, emphasizing the importance of *Myers* and presidential removal power to our constitutional system. Justice Kavanaugh joined the majorities in *Seila Law* and *Collins* apparently without reservation. And while constrained by vertical stare decisis on the D.C. Circuit, he wrote nearly 130 pages during his time there distinguishing, critiquing, or otherwise distancing himself from *Humphrey's Executor*.<sup>59</sup> It appears no removal power case came before Justice Barrett while she served on the Seventh Circuit, but her public admiration of Justice Scalia (the leading critic of *Humphrey's Executor*) and her vote in the *Collins* majority do not suggest she takes warmly to independent agencies.<sup>60</sup>

There is serious interest in revisiting agency independence. What should be done? One path forward would overrule *Humphrey's Executor* and return to the clean *Myers* rule: in vesting the executive power of the United States in the President, the Constitution grants Congress no say in the removal of executive officers.<sup>61</sup> A subspecies of this approach would simply recognize that the Court "long ago abandoned" *Humphrey's Executor*.<sup>62</sup> *Humphrey's Executor* grounds modern agency independence, but its contemplation of quasi-legislative and quasi-judicial bodies has not been taken seriously since it was decided. No Supreme Court majority has cited the case's reasoning approvingly in the last three and a half decades,<sup>63</sup> despite a flurry of separation-of-powers

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59 See Justin Walker, *The Kavanaugh Court and the Schechter-to-Chevron Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L.J. 923, 965 (2020).

60 See Remarks on the Nomination of Amy Coney Barrett To Be a United States Supreme Court Associate Justice, 2020 DAILY COMP. PRES. DOC. DCPD202000728 (Sept. 26, 2020) ("I clerked for Justice Scalia more than 20 years ago, but the lessons I learned still resonate. His judicial philosophy is mine too: A judge must apply the law as written.").

61 Such an approach would also require overruling or reconsidering *Wiener v. United States*, 357 U.S. 349, 356 (1958), a minor offshoot of *Humphrey's Executor*.

62 Cf. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022) (observing the Court's abandonment of the *Lemon* test in Establishment Clause cases).

63 Filtering Supreme Court decisions citing *Humphrey's Executor* by date on Westlaw, it appears the last majority opinion to approvingly cite the case's analysis was *Mistretta v. United States*, 488 U.S. 361, 424 (1989). *Mistretta* invoked it for the proposition that removal provisions prevent the president from exercising "coercive influence" over independent agencies. *Id.* at 411 (quoting *Morrison v. Olson*, 487 U.S. 654, 688 (1988)). A handful of other cases have cited it for the proposition—unrelated to its merits—that dicta are not binding. See, e.g., *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013); *Cent. Green Co. v. United States*, 531 U.S. 425, 431 (2001).

litigation in that time. If even nonunitary scholars view the case as “constitutional nonsense,”<sup>64</sup> it may be worth reconsidering in full.

Another path forward would simply take *Humphrey’s Executor* at its word: quasi-legislative and quasi-judicial bodies do not answer to the President, but executive bodies do. The Court of 1935 did not grapple seriously with the nature of the FTC’s powers, but it was correct (almost to the point of truism) that the chief executive wields no inherent power over nonexecutive actors. The questionable origin of quasi-branch status represents erroneous legal reasoning insofar as no such status is contemplated by the Constitution. But the other problem with *Humphrey’s Executor*—on a formalist account—is that it mischaracterized the FTC’s actual statutory powers. Agencies like the FTC (and the CFPB and FHFA) indisputably exercise executive authority. Today, they wield vast rulemaking, enforcement, and adjudicatory capabilities. To the extent *Humphrey’s Executor* “reaffirmed the core holding of *Myers*,” *Myers* should continue to govern “purely executive officers,” i.e., most or all officers.<sup>65</sup> The virtues of this approach could appeal to Justices who value *stare decisis*, narrower holdings, and judicial minimalism.<sup>66</sup>

Overruling *Humphrey’s Executor* or taking it seriously on its own terms would represent a major development in the law of presidential removal. *Seila Law* and *Collins* may have been one-offs confined to single-headed independent agencies created after 2007. But it is unclear why those cases’ logic would stop there.<sup>67</sup> The *Collins* Court expressly declined to offer a distinguishing principle between tenure protection for single-headed independent agencies and multimember commissions or the federal civil service.<sup>68</sup> Plaintiffs are already bringing challenges to the constitutionality of multimember commissions, and we can expect them to do so until the Court speaks again.<sup>69</sup>

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64 See Mashaw, *supra* note 31, at \*16.

65 *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2199 (2020) (quoting *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 632 (1935)). Obviously, congressional officers (such as the House Sergeant-at-Arms) and judicial officers are supervised by their respective superiors in the legislative and judicial branches.

66 See generally Jonathan H. Adler, *Conservative Minimalism and the Consumer Financial Protection Bureau*, 2020 U. CHI. L. REV. ONLINE \*28.

67 See Aaron L. Nielson, *Three Views of the Administrative State: Lessons from Collins v. Yellen*, 2020–2021 CATO SUP. CT. REV. 141, 158 (“The fact that the Court was unwilling to offer a limiting principle suggests that there may not be one.”); Nielson, *supra* note 58 (suggesting that if the relevant principle is that the president is the head of the executive branch, it would be hard to find any Article II officer whom the principle would not cover). Professor Nielson, who defended the FHFA’s structure as court-appointed amicus in *Collins*, conceded as much at oral argument. See *id.*

68 *Collins v. Yellen*, 141 S. Ct. 1761, 1787 n.21 (2021).

69 See *Axon Enter., Inc. v. FTC*, 986 F.3d 1173, 1176 (9th Cir. 2021), *cert. granted in part*, *Axon Enter., Inc. v. FTC*, 142 S. Ct. 895 (2022) (mem.). Axon, a company under

## II. SEVERABILITY IN REMOVAL POWER CASES

A holding of unconstitutionality is one thing, but a remedy is what matters to the parties involved. The question of what remedy to provide in removal cases has divided the formalists. The best distillation of this debate comes from Justice Thomas's and Justice Gorsuch's concurrences in *Collins*.

Justice Thomas joined the Court's opinion in full, but separately noted he was concerned that the Court and the parties had "glossed over a fundamental problem with removal restriction cases . . . The Government does not necessarily act unlawfully even if a removal restriction is unlawful in the abstract."<sup>70</sup> Justice Thomas observed a sort of "paradox" for the shareholders:

Had the removal provision *not* conflicted with the Constitution, the law would never have unconstitutionally insulated any Director. And while the provision *does* conflict with the Constitution, the Constitution has always displaced it and the President has always had the power to fire the Director for any reason. So . . . the President always had the legal power to remove the Director in a manner consistent with the Constitution.<sup>71</sup>

Therefore, Justice Thomas reasoned, the shareholders were not entitled to invalidation of the FHFA's actions. Justice Gorsuch saw things differently. In his view, the unconstitutionality of the removal provision rendered the FHFA Director "without constitutional authority" in implementing the Third Amendment.<sup>72</sup> He would have set aside the Director's actions entirely.

This disagreement centers around severability. When a provision of a law is found to be unconstitutional, courts "sever" it from the rest of the statute. Contrary to popular verbiage, courts do not "strike down," "invalidate," "excise," "void," or "nullify" unconstitutional laws.<sup>73</sup> They merely decline to enforce them in the case at hand.<sup>74</sup> The

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investigation by the FTC for antitrust concerns, brought suit against the agency arguing, among other claims, that the Federal Trade Commission's structure violated the Constitution. *Axon Enter.*, 986 F.3d at 1176. The Supreme Court granted certiorari on a jurisdictional question, but not on the agency structure question. *Axon Enter.*, 142 S. Ct. 895.

70 *Collins*, 141 S. Ct. at 1789 (Thomas, J., concurring).

71 *Id.* at 1793.

72 *Id.* at 1795 (Gorsuch, J., concurring in part). Justice Gorsuch also pointed out that he and Justice Thomas had made this point together in *Seila Law*, and that Justice Thomas had now flipped his position. *Id.* at 1798 n.2. Justice Thomas responded that the government had conceded the unlawfulness of the CFPB CID if the removal restriction was found unconstitutional. *Id.* at 1794 (Thomas, J., concurring).

73 See Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933 *passim* (2018).

74 While not a unanimous view, this is the accepted view among many who take a formalist or originalist approach to law. See William Baude, *Severability First Principles*, 109 VA.

Constitution causes invalidity, not courts. Federal courts' judicial power consists of deciding "Cases" or "Controversies" between parties, not revising the U.S. Code.<sup>75</sup> In the course of adjudicating a case, a court may have to choose to enforce one of two conflicting laws—a statute and the Constitution. As fundamental law, the Constitution must win out.<sup>76</sup> In Will Baude's and Kevin Walsh's language, the Constitution automatically "displaces" any form of ordinary law "repugnant to it."<sup>77</sup> Importantly, displacement of a statutory provision occurs only to the extent of unconstitutionality, and no more. If the rest of the statute is lawful, that part remains in force.

The power of judicial review, then, is just an implied power of courts' primary power to adjudicate cases. Properly understood, severability extends no further than declining to give effect to unconstitutional provisions of law. In practice, severability can quickly become more complicated. Congress may provide a rule of severability or inseverability in the statute itself. Sometimes two statutes or statutory provisions are lawful independently, but unlawful in combination.<sup>78</sup> In certain cases, some of a statute's applications—but not all—are unlawful.<sup>79</sup> Courts also frequently employ legislative intent in severability analysis, looking to preserve whatever Congress would have wanted had it known part of the law was unconstitutional.<sup>80</sup> But a formal

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L. REV. 1, 18 (2023); Don R. Willett & Aaron Gordon, *Rights, Structure, and Remediation*, 131 YALE L.J. 2126, 2152 (2022) (reviewing AZIZ Z. HUQ, *THE COLLAPSE OF CONSTITUTIONAL REMEDIES* (2021)); Brian Charles Lea, *Situational Severability*, 103 VA. L. REV. 735, 743–44 (2017); John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 GEO. WASH. L. REV. 56, 85–88 (2014); Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 755–57 (2010); John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 228–29 (1993).

75 U.S. CONST. art. III, § 2, cl. 1.

76 See THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute . . .").

77 Baude, *supra* note 74, at 8 (citing Walsh, *supra* note 74, at 765 n.124); see also Collins, 141 S. Ct. at 1793 (Thomas, J., concurring).

78 See Baude, *supra* note 74, at 41–44; Harrison, *supra* note 74, at 91 n.162.

79 See *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330–31 (2006).

80 See, e.g., *United States v. Booker*, 543 U.S. 220, 246 (2005) ("We answer the remedial question by looking to legislative intent. We seek to determine what 'Congress would have intended' in light of the Court's constitutional holding." (citations omitted) (first citing *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191 (1999); then citing *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987); then citing *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality opinion); and then quoting *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 767 (1996) (plurality opinion)); *Ayotte*, 546 U.S. at 330 ("[T]he touchstone for any decision about remedy is legislative intent, for a court

approach to law disfavors this type of counterfactual statutory *cy pres*.<sup>81</sup> Regardless of a particular case's complexity, the fundamental point remains: courts give effect to laws passed by Congress when they are constitutional, and decline to give effect to anything found unconstitutional. Severability (for a formalist) is thus a question of what counts as valid law. What *is* the law, once we know what is *not* law?<sup>82</sup>

Against this background, we can measure the disagreement between Justice Thomas and Justice Gorsuch in *Collins*. Both found the removal protection for the FHFA Director unconstitutional. But Justice Gorsuch would have gone on to find the Director's *actions* unlawful and set aside the Third Amendment. Justice Thomas (and the Court) did not. Justice Gorsuch argued that because the FHFA Director was purportedly insulated from removal, the Director "was without constitutional authority" in exercising regulatory power.<sup>83</sup> He also stressed the need to provide concrete relief to the victorious plaintiffs. As he saw it, a remand to consider whether the President might have removed the Director had he known he could was inadequate.<sup>84</sup>

As an initial matter, it is true that federal officials may not exercise power exceeding their authority. In *Lucia v. SEC*, the Supreme Court declined to uphold an invalidly appointed administrative law judge's adjudication of Lucia's case, since the ALJ had never legally occupied

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cannot 'use its remedial powers to circumvent the intent of the legislature.' After finding an application or a portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all?" (citation omitted) (quoting *Califano v. Westcott*, 443 U.S. 76, 94 (1979)).

81 See Amicus Brief of U.S. Senators Mike Lee, James Lankford, and M. Michael Rounds Supporting Petitioner at 5–14, *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020) (No. 19-7); see also *United States v. Arthrex*, 141 S. Ct. 1970, 1992 (2021) (Gorsuch, J., concurring in part and dissenting in part) (critiquing "legislative séances").

82 This formulation comes from Professor Baude. See Baude, *supra* note 74, at 5–6.

83 *Collins v. Yellen*, 141 S. Ct. 1761, 1795 (2020) (Gorsuch, J., concurring in part and dissenting in part).

84 See *id.* at 1799.

his office.<sup>85</sup> The Court granted a new hearing.<sup>86</sup> Similarly, in *Buckley v. Valeo* and *Bowsher v. Synar*, the Court concluded that legislative officers or legislatively appointed officers could not be given executive duties.<sup>87</sup> In each case, the official's appointment to office was inconsistent with the power he would have exercised. This is nothing new; a similar case arose during the Washington administration. *United States v. Yale Todd*, an unreported decision concerning the Pension Act of 1792, may have been the first Supreme Court case to hold an act of Congress unconstitutional.<sup>88</sup> The Act assigned the federal circuit courts the task of adjudicating veterans' pension claims.<sup>89</sup> In proceedings under the Act, collected in *Hayburn's Case*, five Supreme Court Justices riding circuit had generally agreed that federal courts could not be required to perform this nonjudicial duty.<sup>90</sup> But one group of judges in Connecticut volunteered to carry out the Pensions Act and awarded Yale Todd a pension.<sup>91</sup> The Attorney General sued to recover the payments. Though there was no written opinion and we must speculate about the Court's thinking, the Court ruled for the Attorney General.<sup>92</sup> The most likely reasoning, in light of *Hayburn's Case*, was that the Court believed

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85 See *Lucia v. SEC*, 138 S. Ct. 2044 (2018); cf. William Baude, *The Unconstitutionality of Justice Black*, 98 TEX. L. REV. 327 (2019) (describing how Justice Black's appointment to the Supreme Court was probably invalid). Historically, parties who wished to contest the election or appointment of a public officer would seek a writ of quo warranto to try that officer's title to office. See *The King v. Mayor of Colchester* (1788) 100 Eng. Rep. 141; 2 T.R. 259; ALBERT CONSTANTINEAU, A TREATISE ON THE DE FACTO DOCTRINE §§ 451–53, at 635–38 (1910). But not every irregularity in the assumption of public office would result in invalidation of official acts. English courts as far back as the fifteenth century employed the *de facto* officer doctrine to “treat[] the past actions of an officer with a colorable claim to office as valid whether or not the officer met all conditions to hold the office.” *Calcutt v. FDIC*, 37 F.4th 293, 343 (6th Cir. 2022) (Murphy, J., dissenting). Early American courts followed suit. The *de facto* officer doctrine “created stability” and permitted citizens “to rely on official acts without fear the acts might unexpectedly be invalidated.” *Rop v. FHFA*, 50 F.4th 562, 586 (6th Cir. 2022) (Thapar, J., concurring in part and dissenting in part). *De facto* officers differed from “mere usurpers,” who took office or exercised power without any color of authority to do so. See CONSTANTINEAU, *supra*, § 25, at 35. By the latter half of the twentieth century, the Supreme Court began retiring the *de facto* officer doctrine. In *Ryder v. United States*, the Court officially buried it for Appointments Clause challenges and announced a policy of encouraging litigants to bring such claims. 515 U.S. 177, 182–83 (1995).

86 *Lucia*, 138 S. Ct. at 2055–56.

87 See *Buckley v. Valeo*, 424 U.S. 1 (1976); *Bowsher v. Synar*, 478 U.S. 714 (1986).

88 Wilfred J. Ritz, *United States v. Yale Todd* (U.S. 1794), 15 WASH. & LEE L. REV. 220, 221 (1958).

89 Act of Mar. 23, 1792, ch. 11, § 2, 1 Stat. 243, 244.

90 *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410–14 (1792) (reprinting an opinion and two letters from the circuit courts); see also William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1818–21 (2008).

91 See Ritz, *supra* note 88, at 227–29.

92 *Id.* at 230.



federal judges could not exercise executive power at all—on a mandatory or voluntary basis.<sup>93</sup>

But these cases concerned appointments issues or a mismatch between appointment and the power granted. In removal cases, the connection between the removal protection and the officer's title to office is more attenuated. In *Seila Law* and *Collins*, the Directors of the agencies had been validly appointed. Their offices were granted certain regulatory powers in statute. Valid appointment plus valid grant of power usually equals valid exercise of power.

An unlawful removal provision does not affect or color the appointment process. A presidential nomination and Senate confirmation look the same regardless of how the office is tenured. Justice Gorsuch (and the *Collins* plaintiffs) focused on the regulatory actions, arguing that the FHFA agreements were “improperly unsupervised.”<sup>94</sup> But this framing of the agency's executive power is a bit of a sleight of hand. The FHFA actions could not have been unconstitutionally unsupervised because the unlawful statutory language was always displaced by the higher law of the Constitution, and no President was ever blocked by any court from supervising or firing the Director. If the President *chooses* to not supervise or direct an agency head, that is another matter.<sup>95</sup> Because no President attempted to fire the CFPB or FHFA head (before *Collins* came down), the removal provisions of the Dodd-Frank Act and the Housing Recovery Act were never enforced. Accepting that these provisions nonetheless have some effect that must be remedied, as Justice Gorsuch did, commits the “fallacy” of thinking “that judges have the power to strike down or erase unconstitutional statutes.”<sup>96</sup> As Professor Baude points out, the Constitution “makes unconstitutional statutes irrelevant, a fact judges simply recognize.”<sup>97</sup>

Thinking about public office in property terms may shed some light on the subject. Eighteenth- and nineteenth-century discourse considered an office a form of property (metaphorically, if not legally).

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93 See Baude, *supra* note 74, at 12–13.

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

95 The obvious reason a President would not fire a protected official before a court found the relevant protection unconstitutional is because the President mistakenly believed (thanks to *Humphrey's Executor* and its progeny) the protection lawful. But the President has an independent duty to interpret the Constitution, and buying into erroneous judicial precedent that leads him to abdicate his power is a choice the President should have to live with. See *infra* Part IV. In a separate line of thought, Justice Thomas also observed that there “is a colorable argument that a Government official's misunderstanding about the scope of the President's removal authority would render an agency action arbitrary or capricious” under the Administrative Procedure Act, though he expressed reservations about such an approach. *Collins*, 141 S. Ct. at 1794 n.7 (Thomas, J., concurring).

96 Baude, *supra* note 74, at 40.

97 *Id.*

Statesmen and public figures spoke in terms of “title” to office, implying some sort of interest in the office.<sup>98</sup> The British political system tended “to regard public office as a form of personal property” which for some, like the nobility, was hereditary.<sup>99</sup> The nature of the British office rankled many American colonists, and the Framers of the Constitution subjected officeholders and office appointers to strict separation-of-powers limits.<sup>100</sup> But the notion of offices as a sort of property lived on in the United States, albeit circumscribed by republican principles (noninheritability, for instance).

In *Taylor v. Beckham*, a case concerning the disputed Kentucky gubernatorial election of 1899, the Supreme Court recognized the common conception that public offices were not “property as such,” but instead “mere agencies or trusts.”<sup>101</sup> *Taylor* echoed the sentiments of James Madison, who in *Federalist No. 46* contemplated the state and federal governments as “agents and trustees of the people.”<sup>102</sup> The trust metaphor works well on a basic level—the people, as both settlor and beneficiary, set up the government (the trustee) to act on their behalf and for their benefit. Officers of the United States are agents of the President, who is an agent of the whole populace. As trustees,

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98 See, e.g., EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 21 (J.G.A. Pocock ed., Hackett Publ'g Co. 1987) (1790) (defending the legal legitimacy of King James II's reign despite his poor job, calling him “a bad king with a good title, and not an usurper”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 155 (1803) (“[I]f [Marbury] has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.”); FLOYD R. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS *passim* (Chicago, Callaghan & Co. 1890); CONSTANTINEAU, *supra* note 85, § 452, at 286; cf. Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RESV. L. REV. 905, 929 (1989–90) (“We live in a constitutional republic. Contemporary officeholders are but squatters in that mansion.”).

99 LIBR. OF CONG. CONG. RSCH. SERV., 94TH CONG., HISTORY OF CIVIL SERVICE MERIT SYSTEMS OF THE UNITED STATES AND SELECTED FOREIGN COUNTRIES 14 (Comm. Print 1976).

100 Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 STAN. L. REV. 443, 493–94 (2018).

101 *Taylor v. Beckham*, 178 U.S. 548, 577 (1900); see also MECHEM, *supra* note 98, at 2 n.1 (“An office is a special trust or charge created by competent authority.” (quoting *Throop v. Langdon*, 40 Mich. 673, 682 (1879))). The U.S. Constitution itself links public office and trusts four times: first, in Article I, Section 3, Clause 7 (disqualifying the impeached from holding “any Office of honor, Trust or Profit under the United States”); second, in Article I, Section 9, Clause 8 (prohibiting anyone “holding any Office of Profit or Trust” from accepting foreign emoluments); third in Article II, Section 1, Clause 2 (prohibiting any “Person holding an Office of Trust or Profit under the United States” from serving as an elector); and fourth in Article VI, Clause 3 (prohibiting religious tests as a “Qualification to any Office or public Trust under the United States”). If public office is a trust, then the *de facto* officer doctrine, see *supra* note 85, probably worked as a sort of constructive trust.

102 THE FEDERALIST NO. 46, at 294 (James Madison) (Clinton Rossiter ed., 1961).

federal officers take legal title to their offices upon their appointment (though of course they manage this trust for the benefit of the people, who effectively retain “equitable title”).<sup>103</sup> Just as trustees with good title manage trusts validly unless and until they breach some duty and are removed, so do officers with good title to office validly exercise power until they are removed (or leave). The office vests upon appointment, and so does the grant of power.

So too with the law of tenancy. The executive branch relationship conceived of by unitary theorists is essentially a tenancy at will, “the duration of which is determinable by either party.”<sup>104</sup> In a tenancy at will, the tenant may leave at any time and the landlord may exercise the right of reentry at any time. Cabinet positions work this way; the Secretary of Labor may resign whenever he chooses, and the President may fire him whenever he chooses. Under traditional rules, a defect in a lease for a term of years (such as an unexecuted lease or one violating the statute of frauds) generates a tenancy at will.<sup>105</sup> The landlord may exercise his reentry right whenever he finds such a tenancy. But his failure to exercise the right does not render the tenant’s occupation unlawful. This is essentially what happened in *Collins*. If removal restrictions are unconstitutional, an office with these provisions automatically defaults to the constitutional backdrop of at-will removal. But the President’s choice not to interfere with the FHFA’s decisions should not have tainted the FHFA Director’s occupation of the office.

These property metaphors are imperfect, but they capture something about the nature of public office and the titles that validly appointed officers hold. They underscore the idea that bad removal clauses need not corrupt appointment to office and exercise of its powers. And they are consistent with Justice Thomas’s formalist approach in *Collins*. The Constitution may displace a statutory removal clause, but that has no bearing on provisions for appointment or the office’s power. The latter remain in effect.

Justice Gorsuch also stressed the need to provide the shareholders of Fannie Mae and Freddie Mac with a real remedy—setting aside the Third Amendment. He criticized the Court for “declar[ing] a constitutional violation only to head for the hills as soon as it’s faced with a request for meaningful relief.”<sup>106</sup> A number of commentators have

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103 See RESTATEMENT (THIRD) OF TRS. § 42 cmt. a (AM. L. INST. 2003).

104 1 H.C. UNDERHILL, A TREATISE ON THE LAW OF LANDLORD AND TENANT § 133, at 186 (1909).

105 See *id.* §§ 140–41, at 194–97; RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT § 2.3 (AM. L. INST. 1977).

106 *Collins v. Yellen*, 141 S. Ct. 1761, 1799 (2021) (Gorsuch, J., concurring in part); see also Willett & Gordon, *supra* note 74, at 2156 (noting the “remedial poverty” of the recent “hollow victories” won by separation-of-powers claimants).

also noticed this feature of recent removal cases, identifying several reasons in support of Justice Gorsuch's more muscular approach.<sup>107</sup> First, a win for the constitutional principle without invalidation of past regulatory actions does nothing for a case's plaintiffs.<sup>108</sup> Second, it disincentivizes future challenges to unlawful removal provisions.<sup>109</sup> New plaintiffs are unlikely to invest time and resources in lawsuits where courts refuse tangible results. And third, it fails to hold Congress accountable for enacting bad law.<sup>110</sup> If the CFPB or FHFA could not lawfully regulate, Congress would have to reconstitute them—no small ask. As it stands, the courts shoulder the burden and “fix” the constitutional flaw.

These arguments carry some weight, practically speaking. A *per se* rule holding “unsupervised power” void would guarantee results. Winning plaintiffs would gain reprieve, other regulated entities would have incentives to sue, and Congress might consider the consequences when crafting new agencies.

But these arguments sound more in pragmatic policy aims than in legal doctrine. If a formalist disposition of a case generates awkward outcomes, perhaps courts should reconsider taking that case in the first place.<sup>111</sup> The substantive analysis should dictate the remedy, not the other way around. A majority of the Supreme Court appears (mostly) to agree. Justice Alito's majority opinion in *Collins* duly noted the Constitution's displacement of the for-cause removal and declined a *per se* harm rule, though it did not determine whether any harm took place and remanded that issue to be resolved by the lower courts.<sup>112</sup>

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107 See William C. Eisenhauer, Note, *A Responsive Remedy for Unconstitutional Removal Restrictions*, 97 NOTRE DAME L. REV. 2195 (2022); Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. REV. 481 (2014).

108 See Eisenhauer, *supra* note 107, at 2203; Barnett, *supra* note 107, at 485.

109 See Eisenhauer, *supra* note 107, at 2203; Barnett, *supra* note 107, at 485, 509–11; see also ROGER G. NOLL, REFORMING REGULATION: AN EVALUATION OF THE ASH COUNCIL PROPOSALS 40 (1971) (“In order for a group to decide to carry a battle with a regulatory agency to either the courts or the political arena, the group must expect a substantial gain if the regulatory decision is overturned. Appealing the decision of an agency, either legally or politically, is expensive.”).

110 See Eisenhauer, *supra* note 107, at 2203; Barnett, *supra* note 107, at 485, 514–15.

111 See *infra* Part III (examining standing problems with private plaintiff removal cases, and proposing a return to cases over the actual contested removal of an executive officer).

112 *Collins v. Yellen*, 141 S. Ct. 1761, 1789, 1788–89 (2021). Justice Alito's majority opinion was joined, in relevant part, by the Chief Justice and Justices Thomas, Breyer, Sotomayor, Kagan, Kavanaugh, and Barrett. Justice Gorsuch did not join this section of the opinion. *Id.* at 1769. This voting pattern suggests there may be some common ground between the formalist and nonformalist Justices moving forward on the severability of removal restrictions, and that there is little appetite for Justice Gorsuch's expansion of the *ultra vires* doctrine.

Appointments challenges and removal challenges are two qualitatively different things. The proper resolution of a case with an invalid appointment does not necessarily apply in the removal context. An appointment defect taints entry into office such that the appointee is not really an appointee and cannot occupy the office or exercise the powers it brings. Removal clauses only come into play if the President has decided to oust an officer. Once we recognize the unconstitutionality of a removal restriction, Professor Baude writes, “[n]obody should apply it, nobody should enforce it, and if nobody does, all is right with the legal world.”<sup>113</sup> That is the subtext of *Collins*, “and that is all fine and good.”<sup>114</sup>

### III. ARTICLE III STANDING IN REMOVAL POWER CASES

Since the Constitution displaces removal restrictions such that they never have force, it is unclear how private parties have standing to bring these types of suits. A lawful statute empowered the President to appoint an FHFA Director, which he did. A lawful statute empowered the FHFA Director to regulate Fannie and Freddie, which he did. An unlawful statutory provision prohibited the President from firing the Director at will, but no President ever bothered to attempt such a thing. So how did the Article II violation cause any injury?

According to Justice Thomas (and echoed by Justice Kagan’s concurrence), it probably didn’t.<sup>115</sup> And if the alleged injury—the agency action—bears no connection to the constitutional claim, one questions whether such a claim is amenable to judicial resolution. Justice Thomas does not say so explicitly, but his logic hints at it.

The Constitution permits the federal courts to hear and decide “Cases” or “Controversies.”<sup>116</sup> To qualify as a case or controversy, a dispute must have a plaintiff with a real, personal stake in the dispute. Article III does not let courts “adjudicate hypothetical or abstract disputes . . . [,] possess a roving commission to publicly opine on every legal question . . . [,] exercise general legal oversight of the Legislative and Executive Branches . . . [,] or] issue advisory opinions.”<sup>117</sup> So to bring a suit, a plaintiff must show three things: (1) that he suffered an injury in fact that is concrete, particularized, and actual or imminent,

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113 Baude, *supra* note 74, at 41 (footnote omitted).

114 *Id.*

115 See *Collins*, 141 S. Ct. at 1795 (Thomas, J., concurring); *id.* at 1801–02 (Kagan, J., concurring in part and concurring in the judgment in part).

116 U.S. CONST. art. III, § 2, cl. 1.

117 *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021).

(2) that the injury is fairly traceable to the defendant, and (3) that the injury would be redressed by judicial relief.<sup>118</sup>

But in removal power cases, the unlawfulness of a removal clause has no bearing on the agency's actions, at least not where the President has not intervened. The effect of a removal statute is between an officer and the President, but unless activated and enforced, it changes nothing about an officer's relationship with private individuals. Where the chain of causation between an unlawful statute and an agency's action is "corrode[d]," private plaintiffs' standing is questionable at best.<sup>119</sup>

The unusual posture of these cases has attracted little attention from commentators.<sup>120</sup> But it bears significantly on the justiciability of removal cases and is worth exploring. Consider *Seila Law*. The CFPB issued its CID to the law firm in 2017 (at the end of Director Cordray's tenure), and a California district court upheld its validity. The Ninth Circuit affirmed in 2019, and the Supreme Court decision was handed down in 2020. Nothing suggests the CFPB's investigation was particularly high-stakes or driven by partisan goals; it appears to have been fairly rote. President Trump's Senate-confirmed director, Kathleen Kraninger, took the position that her removal protection was unconstitutional but went on the record affirming her agency's issuance of the CID.<sup>121</sup> The removal language could not have unconstitutionally tainted the investigation because the agency believed itself to be supervised by the President and issued the demand anyway. This was, in part, the argument made by Paul Clement, who was appointed as amicus to defend the judgment below (since both *Seila Law* and the government agreed on the constitutional merits question).<sup>122</sup>

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118 *Id.* (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). Whether modern standing doctrine fails to pass historical muster has been a subject of recent debate. Compare Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689 (2004) (arguing that it does not), with *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016) (Thomas, J., concurring), and Cass R. Sunstein, *Injury in Fact, Transformed*, 2021 SUP. CT. REV. 349 (arguing that it does). That debate falls outside the scope of this Note, which rests its analysis on the current law of standing.

119 Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1477–78 (2013).

120 *But see* John Harrison, *Seila Law and the Law of Judicial Review*, 2020 U. CHI. L. REV. ONLINE \*77, \*82–84.

121 *See Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2195 (2020).

122 *See* Brief for Court-Appointed Amicus Curiae in Support of Judgment Below at 18–19, 21–24, *Seila L.*, 140 S. Ct. 2183 (No. 19-7). *Collins*, once again, proved to be *Seila Law* redux. Because no party disputed the unconstitutionality of the FHFA Director's removal provision, the Court appointed Aaron Nielson as amicus to defend the agency's structure. *See* Brief for Court-Appointed Amicus Curiae, *Collins v. Yellen*, 141 S. Ct. 1761 (2021) (No. 19-422 & 19-563).

The final decision dispensed with this threshold issue by looking to precedent. The Court noted that in *Bowsher v. Synar*, it had deemed separation of powers claims sufficient when the “challenger ‘sustain[s] injury’ from an executive act that allegedly exceeds the official’s authority.”<sup>123</sup> The Court also cited *Morrison v. Olson* and *Free Enterprise Fund v. Public Accounting Oversight Board* as favoring regulated party claims.<sup>124</sup>

But *Bowsher*, *Morrison*, and *Free Enterprise Fund* all dealt with thornier combinations of constitutional violations, including appointments challenges. *Bowsher* was a sui generis case concerning the assignment of executive duties to the Comptroller General, an officer appointed by the President but removable by Congress. The Court deemed the Comptroller General a legislative officer, lacking authority to wield Article II power in the first place. *Morrison* considered whether a court-appointed prosecutor’s duties were those of an inferior officer or those of a principal officer (in which case her appointment would have been inconsistent with her authority).<sup>125</sup> And *Free Enterprise Fund* dealt with similar questions, whether the members of an SEC oversight board were supervised or not in their duties and whether they were appointed by a “Head of Department” within the meaning of Article II—both appointments challenges.<sup>126</sup>

The removal issues in each of these cases were bound up with the appointments claims, for which regulated parties clearly had standing. As discussed earlier, appointments violations differ significantly from removal violations in that someone with defective (or no) title to office may not exercise the office’s power in the first place. Errors in appointment bear directly on the legality of an officer’s action. A removal statute’s unlawfulness does not. In this respect, the intertwined nature of the issues in *Bowsher*, *Morrison*, and *Free Enterprise Fund* renders them distinguishable from *Seila Law*, a pure removal case.<sup>127</sup>

It is true that *Seila Law* was the defendant, not the plaintiff, in the district court.<sup>128</sup> (The CFPB had brought the suit to force the firm to comply with the CID.)<sup>129</sup> Standing doctrine serves to prevent plaintiffs from bringing suits courts should not decide. Defendants are already

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123 *Seila L.*, 140 S. Ct. at 2196 (quoting *Bowsher v. Synar*, 478 U.S. 714, 721 (1986)).

124 *See id.* (first citing *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 487 (2010); and then citing *Morrison v. Olson*, 487 U.S. 654, 688–669 (1988))

125 *Morrison*, 487 U.S. at 653–54.

126 *Free Enter. Fund.*, 561 U.S. at 510–13.

127 Email from William Baude, Professor of L., U. Chi. L. Sch., to Jack Ferguson (Nov. 6, 2022, 4:20 PM) (on file with author).

128 *Consumer Fin. Prot. Bureau v. Seila L., LLC*, No. 17-cv-01081, 2017 WL 6536586 (C.D. Cal. Aug. 25, 2017).

129 *Id.* at \*2.

in court and may raise any objection to the suit against them.<sup>130</sup> But even if Article III does not prevent a defendant from raising a claim, the claim may still be ill-suited to judicial resolution. Standing is in part about prudential limits on what courts should decide.<sup>131</sup> If Justice Thomas is right, one struggles to see how deciding a question of removal power can call into question the lawfulness of an agency's actions.

*Collins* lacked any saving grace *Seila Law* might have had. It was the Fannie Mae and Freddie Mac shareholders who brought the suit and raised a constitutional claim against the FHFA. They probably lacked standing to do so. Like *Seila Law*, *Collins* was a pure removal case without any Appointments Clause or other constitutional issues to get it into court. *Collins* rested its finding of standing in relevant part on a citation to *Seila Law*.<sup>132</sup> But if *Seila Law*'s ability to raise its claim derived from its position as defendant, the *Collins* shareholders should have lacked any such ability.

In a way, the Court had to decide these cases to realize it didn't have to decide them. The constitutional merits and the severability analysis may not have been obvious *ex ante*, and the cases have otherwise helpfully clarified the legal status of single-headed agencies. But moving forward, the Court may want to reconsider—or stop taking—removal power suits brought by private party plaintiffs.

This would not require full reappraisal of *Seila Law* or *Collins*. Declining private plaintiff suits at the certiorari stage would prove the most straightforward path. The Court exercises great discretion over which cases it hears and manages its docket closely.<sup>133</sup> There is no need to unsettle other separation-of-powers precedents either, from *Bowsher* and *Morrison to Free Enterprise Fund* and *Lucia*, since they each involved more complex issues that did give rise to standing. If the Court does grant certiorari in a new removal power case with a private plaintiff, it should at least require briefing on standing and causation. The same

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130 *Bond v. United States*, 564 U.S. 211, 217 (2011). Still, the fact that standing is dispensed claim by claim (not in gross), *see Davis v. FEC*, 554 U.S. 724, 733–34 (2008) (first quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996); and then quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)), and the fact that the removal power claim was the only one at issue on appeal, *see Seila L., LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 427, 427–28 (2019) (mem.), push *Seila Law* uncomfortably close to the line.

131 *See Allen v. Wright*, 468 U.S. 737, 750–51 (1984) (citing *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178–79 (D.C. Cir. 1983) (Bork, J., concurring)).

132 *See Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021). Whether the shareholders had standing on their separate statutory claim is irrelevant for the constitutional claim. *See supra* notes 130–31 and accompanying text.

133 *See Amy Coney Barrett, Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1930–31 (2017). Of course, the Supreme Court is out of the standing woods if it no longer takes such cases, but the lower courts will be left to deal with them for some time.



goes for the lower courts. And all courts should require briefing on severability. Though we should be cautious about “bootstrapping” standing to severability,<sup>134</sup> courts could use severability analysis in a pure removal case to dispose of justiciability issues a priori.<sup>135</sup>

None of this means that the President’s ability to supervise and remove independent agency officials is unimportant or nonjusticiable. This Note advocates abandoning the modern, private plaintiff case model, but courts should welcome a return to the older paradigm—the actual contested firing of an officer. The President and a fired officer are the proper parties to litigate presidential removal power.

For most of our history, removal cases from *Ex parte Hennen*<sup>136</sup> (decided in 1839) to *Wiener v. United States*<sup>137</sup> (decided in 1958) arose in this context. *Hennen* dealt with a Louisiana district court clerk removed by a judge. The clerk protested and sued for his job and salary, but the Supreme Court found (anticipating *Myers*) that the judicial power of appointing clerks included, as a necessary incident, the power to remove them.<sup>138</sup> From there, every removal power case until the twilight of the twentieth century revolved around an actual removal from office. Most involved suits in the old Court of Claims for back-pay.<sup>139</sup> The 1855 case *United States ex rel. Goodrich v. Guthrie*,<sup>140</sup> for instance, considered the removal of a territorial judge by the President, while *United States v. Perkins*<sup>141</sup> considered the removal of a naval cadet by the Secretary of the Navy. In 1897, *Parsons v. United States*<sup>142</sup> upheld President Cleveland’s firing of a district attorney. And *Shurtleff v. United States*,<sup>143</sup> decided in 1903, affirmed President McKinley’s removal of a customs appraiser. *Myers*, of course, concerned President Wilson’s firing of a postmaster,<sup>144</sup> and *Humphrey’s Executor* took up President Roosevelt’s firing of an FTC commissioner.<sup>145</sup> This model continued through the 1950s when the Court decided *Wiener*, which dealt

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134 Compare *Lea*, *supra* note 74, at 758–60 (cautioning that merits inquiries should generally be kept separate from jurisdictional ones), with *Baude*, *supra* note 74, at 51–52 (warning that an assumption of standing for purposes of severability gets things out of order).

135 Adjudicating these cases may also raise ripeness issues.

136 38 U.S. (13 Pet.) 225 (1839).

137 357 U.S. 349 (1958).

138 *Hennen*, 38 U.S. (13 Pet.) at 227, 230.

139 Congress refashioned the Court of Claims into the modern Court of Federal Claims at the end of the twentieth century. UNITED STATES COURT OF FEDERAL CLAIMS: THE PEOPLE’S COURT 10, [https://www.usfc.uscourts.gov/sites/default/files/usfc\\_court\\_history\\_brochure\\_20210325.pdf](https://www.usfc.uscourts.gov/sites/default/files/usfc_court_history_brochure_20210325.pdf) [<https://perma.cc/8NSS-4PV8>].

140 58 U.S. (17 How.) 284, 284–85 (1855).

141 116 U.S. 483, 483 (1886).

142 167 U.S. 324, 324–25 (1897).

143 189 U.S. 311, 319 (1903).

144 *Myers v. United States*, 272 U.S. 52, 106–07 (1926).

145 *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 618 (1935).

with the removal of a member of the War Claims Commission by President Eisenhower.<sup>146</sup> Though the Supreme Court's modern cases have shifted away from this paradigm, fired officials have continued to bring suits in the lower courts.<sup>147</sup>

A case over the contested firing of an officer does not raise divisive questions of standing, severability, and proper remedy in the way private plaintiff suits do. A contested removal case is much more straightforward. It provides a cleaner vehicle for considering the constitutionality of removal restrictions. Hearing such a case is less likely to produce fractured majorities and generate doubtful concurrences on secondary problems. This approach could result in clearer decisions without vote differences between the reasoning and the judgment. And it furthers judicial modesty by waiting to decide weighty constitutional issues of presidential power until the President is willing to exercise that power. Until then, it might be prudent to let *Seila Law* and *Collins* work their way through the federal judiciary and put private plaintiff removal cases on the backburner.

#### IV. PRESIDENTIAL CONSTITUTIONAL INTERPRETATION AND REMOVAL POWER

None of this need unsettle unitary theorists, or originalists, or those more broadly concerned with the President's power to supervise the executive branch. If courts were to adopt a standing-skeptical attitude toward regulated party suits, removal power would not disappear from federal dockets. Progress would not halt with the CFPB and the FHFA, leaving the rest of the independent agencies to continue ossifying. The burden for challenging the constitutional status of independent agencies would simply move from private plaintiffs to the President. So long as the President acquiesces in an agency's actions, he is likely to leave it alone. But when an officer's (or commission's) decision stands as an impediment to the President's exercise of the executive power and impedes the faithful execution of the law, the President should remove that person from office notwithstanding any statute to the contrary. The President has an independent duty to interpret the Constitution and should prefer the Constitution to any unlawful

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146 *Wiener v. United States*, 357 U.S. 349, 350–51 (1958).

147 *See, e.g., Swan v. Clinton*, 100 F.3d 973, 974 (D.C. Cir. 1996) (upholding President Clinton's removal of a National Credit Union Administration Board member); *Spicer v. Biden*, No. 21-cv-2493, 2022 WL 2663823, at \*1 (D.D.C. July 11, 2022), *appeal filed*, *Spicer v. Biden*, No. 22-5215 (D.C. Cir. Aug. 12, 2022) (upholding President Biden's removal of Sean Spicer and Russ Vought from the Naval Academy Board of Visitors); *Severino v. Biden*, 581 F. Supp. 3d 110, 112 (D.D.C. 2022) (upholding President Biden's removal of Roger Severino from the Administrative Conference of the United States), *appeal filed*, *Severino v. Biden*, No. 22-5047 (D.C. Cir. Aug. 12, 2022).

statutory provision. If the Constitution grants the President an inherent power of removal, nothing Congress says may take that away.

Presidential constitutional interpretation has a long history. Associated with James Madison, Thomas Jefferson, Andrew Jackson, and Abraham Lincoln, the notion of departmentalism—that each branch of government is a coordinate equal with some degree of interpretive authority—has fueled constitutional debates since the Founding. Departmentalism rejects judicial supremacy, and holds that legislative, executive, and judicial actors have a duty to independently interpret and apply the Constitution.

For the President, this may take a number of forms. When presented with a bill, the President should consider whether it is constitutional before signing it. For much of our early history, Presidents exercised the veto power on the basis of constitutional objections rather than policy objections. In his veto of the chartering of a national bank, President Jackson informed Congress that

[t]he Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of [Congress] . . . and of the President to decide upon the constitutionality of any bill or resolution . . . as it is of the supreme judges when it may be brought before them for judicial decision.<sup>148</sup>

Despite the fact that the Supreme Court had previously found a national bank constitutional, Jackson exercised his veto prerogative to shut the bank bill down. The same goes for the pardon power. After he pardoned those convicted under the Sedition Act, President Jefferson wrote to Abigail Adams arguing that the judiciary and the executive “are equally independent in the sphere of action assigned to them.”<sup>149</sup> This meant that judges, “believing the law constitutional, had a right to pass a sentence of fine and imprisonment,” but the executive, “believing the law to be unconstitutional, was bound to remit

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148 Veto Message of President Andrew Jackson (July 10, 1832), *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 576, 582 (James D. Richardson ed., Washington, Gov’t Printing Off. 1896). Two years later, James Madison echoed these sentiments, writing that “[a]s the Legislative, Executive & Judicial Departments of the U. S. are co-ordinate, and each equally bound to support the Constitution, it follows that each must . . . be guided by the text of the Constitution according to its own interpretation of it.” Letter from James Madison to [Unknown] (Dec. 1834), NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/99-02-02-3067> [https://perma.cc/5XLL-DXBN].

149 Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), *in* 8 THE WRITINGS OF THOMAS JEFFERSON 310 n.1, 311 n.1 (Paul Leicester Ford ed., New York, G.P. Putnam’s Sons 1897).

the execution of it; because that power has been confided to him by the Constitution.”<sup>150</sup> Other forms of presidential interpretation are equally elementary: in addition to vetoes and pardons, Presidents exercise prosecutorial discretion, issue signing statements, and may decline to enforce laws they deem unconstitutional.<sup>151</sup>

Abraham Lincoln was perhaps the strongest presidential defender of nonjudicial constitutional interpretation. In opposing the *Dred Scott* decision, Lincoln found it necessary to appeal over the head of the Supreme Court to the true understanding of the Constitution. During his debates with Stephen Douglas, Lincoln rejected the notion that *Dred Scott* had established a binding norm for the whole country. The decision may have rendered a judgment for the two parties, but it did not create “a political rule which shall be binding on the voter, to vote for nobody who thinks it wrong, which shall be binding on the members of Congress or the President to favor no measure that does not actually concur with the principles of that decision.”<sup>152</sup> Lincoln’s argument distinguished between the Supreme Court’s reasoning and its judgment. He made clear that he did not propose that “we, as a mob, will decide [Dred Scott] to be free,”<sup>153</sup> but nonetheless maintained that the Court’s judgment was, in Michael Stokes Paulsen’s words, the “law for the case, but not the law of the land.”<sup>154</sup> Lincoln carried on this theme as President, rejecting judicial pronouncements as the last word on the Constitution. In his first inaugural address, he stated that

if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.<sup>155</sup>

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150 *Id.*

151 See Calabresi & Prakash, *supra* note 10, at 621–22; Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1303 (1996); William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 873–77 (2001); Neomi Rao, *The President’s Sphere of Action*, 45 WILLAMETTE L. REV. 527, 527 (2009).

152 Abraham Lincoln, Sixth Debate with Stephen A. Douglas, at Quincy, Illinois (Oct. 13, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 245, 255 (Roy P. Basler ed., 1953).

153 *Id.*

154 Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 89 (1993).

155 Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 152, at 262, 268.

He would go on to further ignore *Dred Scott's* reasoning by issuing passports and patents to Black Americans.<sup>156</sup> Lincoln rejected any inherent identity between the Constitution and the Supreme Court's view of the Constitution.

None of this is incompatible with *Marbury v. Madison* or judicial review. The judicial power that federal courts wield authorizes them to decide cases and controversies, and when constitutional issues arise courts must decide a case for one party or another according to constitutional directives. As the Constitution is fundamental law, courts must adhere to it over ordinary statutory law when the two conflict.

Nor does departmentalism license chaos. A federal court's *judgment* is final as to other governmental actors, and not subject to legislative or executive revision.<sup>157</sup> As Professor Baude has explained, under Article III the judicial power "was the power to make authoritative and final judgments in individual cases."<sup>158</sup> So long as a court has jurisdiction, "the power to decide cases is constitutionally final."<sup>159</sup> After the parties have exhausted any avenues of appeal, other governmental actors must respect and enforce that judgment. In this respect, Andrew Jackson's (possibly apocryphal) response to the Supreme Court's decision in *Worcester v. Georgia*—"John Marshall has made his decision, now let him enforce it"<sup>160</sup>—falls outside the bounds of permissible presidential review. Furthermore, the Supreme Court sits atop the Article III hierarchy and the lower courts must follow its precedent. Unlike the President, inferior federal courts are not coordinate equals to the Supreme Court. Vertical *stare decisis* thus prevents the judiciary from devolving into constitutional *sola scriptura*.

But judgment finality is not the same thing as judicial supremacy. Judgments bind parties; they do not enact universal law. Where a court has not entered a judgment against the executive on a particular issue, the President remains free to execute federal law as faithfully as he can in the gaps. Of course, this requires executing lawful statutes according to the will of Congress, following procedural requirements, and so on. But in contested legal zones, faithful execution may mean changing a legal position from a prior administration, or taking regulatory

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156 See Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 785 (2002).

157 See Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1541 (2005) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)). See generally Baude, *supra* note 90.

158 Baude, *supra* note 90, at 1815.

159 *Id.* at 1862. One exception to this rule is a presidential pardon for criminal convictions, but this is an exception the Constitution expressly authorizes. U.S. CONST. art. II, § 2, cl. 1.

160 See Rao, *supra* note 151, at 542 (referencing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)).

action that challenges prevailing Supreme Court caselaw. Such a challenge will be litigated, and if the President loses, he is bound to respect a final judgment, even where he believes the judgment wrong. But until that happens, the President has the duty to follow the proper understanding of the Constitution over judicial precedent, where the two diverge.

This discussion should not distract from the political reality that the executive branch rarely takes on Supreme Court precedent directly.<sup>161</sup> To many, the Supreme Court's statements of constitutional doctrine are what the Constitution really is. First, institutional inertia exerts a strong pull. Justice Departments and agency counsels may be reluctant to sail into strong headwinds. Having the legal ability and the political ability to press a course of action are two different things. Agencies work on limited resources and must choose where to spend their time and money. Second, Supreme Court decisions often get it right. Any given opinion may be true to the Constitution and shed light on its meaning. Presidents may agree with a constitutional decision in one case and decide to implement its logic in analogous cases. When the Court found sex-based differences in social welfare statutes unconstitutional in the 1970s, the executive branch applied the Court's rationale to many related statutes and declined to enforce them.<sup>162</sup> The Court's reasoning did not itself supply the constitutional rule for the analogous cases it never decided. The Constitution supplied the rule, and the executive branch found the judicial branch's reading of that rule persuasive. In this way, presidential interpretation actually brought federal law into quicker compliance with the Constitution than it would have been had the courts needed to decide every case.<sup>163</sup>

But what the courts say the Constitution means is not necessarily what the Constitution means. The resounding declaration of judicial supremacy in *Cooper v. Aaron* notwithstanding,<sup>164</sup> the *U.S. Reports* are

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161 See *id.* at 546.

162 See Easterbrook, *supra* note 98, at 913.

163 *Id.* at 928–29.

164 See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (finding the “basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has . . . been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system,” and declaring “[i]t follows that the interpretation of the Fourteenth Amendment enunciated by this Court . . . is the supreme law of the land”). These sentiments are not novel. In a sermon given to British royal dignitaries in 1717, Bishop Benjamin Hoadly proclaimed that “whoever hath an *absolute Authority to interpret* any written, or spoken Laws; it is He, who is truly the Law giver, to all Intents and Purposes; and not the Person who first wrote, or spoke them.” BENJAMIN HOADLY, *THE NATURE OF THE KINGDOM, OR CHURCH OF CHRIST: A SERMON PREACH'D BEFORE THE KING AT THE ROYAL CHAPEL AT ST. JAMES'S, ON SUNDAY MARCH 31, 1717*, at 7 (London, Booksellers of

not the highest law of the United States. The Constitution is, and courts merely give it effect in particular cases. Judicial opinions express the reasoning for a decision, but it is the judgment that is binding.<sup>165</sup> As Gary Lawson and Christopher Moore put it, the duty to enforce judgments “does not impose on the President any requirement in future cases to follow the reasoning that led to the court’s judgment or to extend the principles of that judgment beyond the issues and parties encompassed by it.”<sup>166</sup> For the same reasons judges may advocate original constitutional meaning over erroneous precedent,<sup>167</sup> so too may the President challenge the judiciary when he believes the Constitution trumps a particular line of caselaw.

To be clear, “challenge” only means something like “press an issue in litigation where there are good faith, well-grounded reasons for believing a judicial precedent is erroneous or inapplicable.” The executive branch may attempt to persuade the courts that its position is correct. But when courts render a final judgment, that is it. A President would violate the Constitution by not respecting Article III’s grant of the judgment power to the courts. Presidential interpretation is not nullification. Just because the President has a particular interpretation does not mean he will prevail, or even that he is correct. But neither is judicial review perfect. For every *Brown v. Board of Education*, there is a *Dred Scott*. Vesting interpretive authority in any actor inevitably

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London & Westminster n.d.). For recent high-profile examples of this mindset, see *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 550–51 (2021) (Sotomayor, J., concurring in the judgment in part and dissenting in part); *SisterSong Women of Color Reprod. Just. Collective v. State*, No. 2022CV367796, 2022 WL 16960560, at \*2 n.5 (Ga. Super. Ct. Nov. 15, 2022).

165 See Baude, *supra* note 90, at 1844 (“*Judgments* become binding law, not *opinions*. Opinions merely explain the grounds for judgments, helping other people to plan and order their affairs. Conflicts are thus settled case by case, by judgments issued in concrete controversies between two parties, rather than in abstract prospective opinions.”); cf. Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017) (critiquing the practice of national injunctions for ignoring the traditional equitable principle that injunctions bind only the parties before the court).

166 Lawson & Moore, *supra* note 151, at 1327; accord John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371, 372 (1988).

167 See *Gamble v. United States*, 139 S. Ct. 1960, 1981–85 (2019) (Thomas, J., concurring) (“[T]he Court’s typical formulation of the *stare decisis* standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution . . . . This view of *stare decisis* follows directly from the Constitution’s supremacy over other sources of law—including our own precedents. . . . Notably, the Constitution does not mandate that judicial officers swear to uphold judicial precedents. . . . [B]ecause the Constitution is supreme over other sources of law, it requires us to privilege its text over our own precedents when the two are in conflict.”).

comes with error costs. Presidents make mistakes too, and big ones. In this, they differ little from the courts or Congress.

In this context, consider presidential removal power. While courts may not hear cases where plaintiffs lack standing, only private party plaintiffs struggle to meet this threshold. In contrast, an officer fired by the President would have a real claim to legal injury. The Supreme Court should decline to develop its removal power jurisprudence further until a President actually fires a (purportedly) protected officer, and that officer contests his removal.

As a natural corollary, a President who adheres to the unitary executive theory should actively police his subordinates in the independent agencies, including by firing them when they obstruct the President's faithful execution of the law. If the President correctly judges a statute unconstitutional, it is his duty to disregard it. More specifically, when he finds a removal provision unconstitutional—even before a court has pronounced it so—what he finds is that the provision is not really operative law at all, having been displaced by the higher law of the Constitution. If the courts disagree with the President, their judgment controls. But if the courts agree, all is right with the world. When both the President and the courts recognize a law's unconstitutionality, it matters little whether the executive or the judiciary says it first.

The weight of enforcing executive prerogatives should fall on the chief executive. Courts should speak to the legitimacy of a presidential power only when the President actually employs that power. The separation of powers is indeed meant to promote individual liberty,<sup>168</sup> as the *Seila Law* and *Collins* challengers argued, but in this context that protection must be channeled *through the President*. So long as the President permits agency regulatory action (as the Trump administration approved of the CFPB's investigation of *Seila Law*), plaintiffs cannot invoke the removal power in the abstract to gain relief. A President who declines to exercise his removal power may do so, and the courts cannot force him to use it. But one President's acquiescence in Congress's demand that certain officers remain in office does not bind the next President to do likewise.

Practically speaking, even if a President adopts the position outlined here, the cash-out might seem anticlimactic. For several reasons, chaos would not ensue in a unitary executive administration. First, many officers of the United States have no statutory removal

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168 See PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 326–30 (2014); Bond v. United States, 564 U.S. 211, 222 (2011) (“Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. Yet the dynamic between and among the branches is not the only object of the Constitution’s concern. The structural principles secured by the separation of powers protect the individual as well.”).



protections. Cabinet secretaries and many inferior officers are typically removable at will.<sup>169</sup> Their knowledge of their removability increases compliance with presidential directives and minimizes firing-worthy friction. Second, while a fair number of board or commission members are statutorily removable only for cause,<sup>170</sup> the President usually appoints a majority of these bodies from his preferred political party. Effectively, their legal and policy priorities mirror the President's, and he may leave them alone. Third, while an incoming President may inherit opposite party commissioners whose term have not ended, the commission chair often resigns from the commission as a matter of courtesy and tradition, handing the new President an opening and tie-breaking appointment.<sup>171</sup> Fourth, removal of one commissioner is no guarantee of appointing another. If the President fires a tenured officer for a Senate-confirmed position, the Senate may decline the President's preferred replacement or ask the President for a more moderate choice. And fifth, the court of public opinion always looms in the background. Firing certain officials and defying Congress can prove politically costly.<sup>172</sup> The predicted toll may outweigh the benefits. Each of these reasons helps minimize opportunities for or the desirability of firing executive officers.

Despite these mitigating factors, Presidents should still insist on maintaining their supervision of the executive branch, including the independent agencies. So long as *Humphrey's Executor* and *Morrison* are still on the books, those decisions will continue to mislead Congress, the executive branch, and the public that the Constitution permits statutory removal restrictions. Sometimes, tenured officials do continue serving into presidential terms where the White House disagrees with their policy agenda.<sup>173</sup> If the President is unwilling to fire them, so be it. But all it would take to set off the next major case is one determined holdover chair and one determined President. In the wake of *Seila*

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169 See Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 786 (2013).

170 See *id.* (finding around twenty such agencies).

171 See *id.* at 821; Terry M. Moe, *Regulatory Performance and Presidential Administration*, 26 AM. J. POL. SCI. 197, 200 (1982).

172 Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2274 (2001) (observing that "the President often cannot make effective use of his removal power given the political costs of doing so"). Think also of President Nixon and the Saturday Night Massacre.

173 See, e.g., Victoria Guida, *FDIC's GOP Chair to Resign After Partisan Brawl*, POLITICO (Dec. 31, 2021, 6:23 PM), <https://www.politico.com/news/2021/12/31/fdic-chair-jelena-mcwilliams-to-resign-526295> [<https://perma.cc/J2EE-2GVJ>] (describing how Jelena McWilliams, the Trump-appointed chair of the Federal Deposit Insurance Corporation, served nearly a year into the Biden administration).

*Law* and *Collins*, presidential willingness to challenge removal restrictions is probably on the rise.

The actual contested firing of an officer lends itself much more suitably to a federal case. If the President notified an independent agency official of that official's removal, one of two things would happen. The officer might see the writing on the wall and depart quietly. Or he could sue, arguing that his for-cause removal protection proscribed the President's action. There would be clear injury (loss of office) stemming from an allegedly unlawful action. Citing *Humphrey's Executor*, a district and circuit court would likely block the removal and the withholding of any salary. The Supreme Court could then decide the constitutionality of the removal provision with reference to the one thing at issue—whether to enforce the provision or not. Questions of standing would not plague such a case, nor would the severability analysis cause doubts about remedies. Judgment for the President would uphold the removal and set aside as ultra vires any regulatory action the officer took after the removal. Judgment for the officer could grant him continuance in office, preserve his compensation, or ratify any regulatory action. Such a case would move past the differences between Justice Thomas and Justice Gorsuch's respective approaches in *Collins* and would create a path for cleaner vote blocs.

President Wilson had no issue with firing Postmaster Myers in the face of a statutory limit. President Roosevelt lost no sleep over firing Commissioner Humphrey. The Supreme Court adjudged the former decision constitutional, and the latter probably should have been, on the basis of precedent if nothing else. More recently, President Biden fired the Social Security Commissioner before his term expired, despite his statutory removal protection.<sup>174</sup> In an exemplary act of executive constitutional interpretation, the Office of Legal Counsel signed off on President Biden's decision by analogizing to *Seila Law* and

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174 See Myah Ward, *Biden Fires Social Security Commissioner, a Trump Holdover*, POLITICO (July 9, 2021, 7:42 PM), <https://www.politico.com/news/2021/07/09/biden-fires-social-security-commissioner-499009> [<https://perma.cc/6UXM-5L99>]. The Social Security Administration statute permitted the President to remove the Commissioner “only pursuant to a finding by the President of neglect of duty or malfeasance in office.” 42 U.S.C. § 902(a)(3) (2018). Presidential interpretation of the executive power has recently taken place outside the removal context too. President Obama's administration refused to comply with a statute that would have had the State Department list “Israel” as the place of birth on the passport of certain Americans born in Jerusalem. *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2081–83 (2015). Because the administration did not recognize Israel's sovereignty over Jerusalem, and because the administration construed the presidential power of receiving foreign ministers as an exclusive power of recognizing foreign sovereigns, the administration believed the statute unconstitutional. *Id.* at 2084. The State Department ignored the statute and won at the Supreme Court. *Id.* at 2096.

*Collins*.<sup>175</sup> Future Presidents should follow this lead and read the tea leaves of these precedents as best they can. To the extent that law is a matter of prediction,<sup>176</sup> concluding after *Seila Law* that the President has the constitutional power to remove FTC or FCC Commissioners at will (and that the Supreme Court will so hold) is not far-fetched.

Declining to enforce a statute is one thing. Taking affirmative action that a statute forbids is a little more aggressive. While judicial review of nonenforcement decisions tends toward the deferential,<sup>177</sup> executive actions contrary to statute present a case of prime justiciability. Presidents should not take such action lightly. But if, after good faith and well-grounded consideration, a President finds a statute repugnant to the Constitution, he should disregard it. Congress may not encroach upon core presidential prerogatives. If Congress passed a law barring the President from receiving ambassadors or granting pardons, we would all expect the President to ignore that law. So too with the removal power. If the removal power is an exclusive presidential power, it would be strange to demand a President's acquiescence in congressional base stealing.

Presidential interpretation of the law is commonplace in our constitutional system. It has been so since the beginning. Judges say what the law is—in the context of deciding cases. Presidents may also say what the law is—in the context of giving effect to federal statutes and exercising the executive power. Presidents are duty-bound to faithfully execute constitutional statutes, but that obligation derives from the Constitution, which Presidents must prefer over unconstitutional statutes. Making that determination requires interpretation. Judicial precedents may supply a persuasive guide for presidential interpretation, but any deference to those precedents is epistemological rather than legal.<sup>178</sup> Judicial pronouncements shouldn't spook Presidents away from their duty. When it comes to removal power, Presidents must independently interpret the Constitution in the face of oscillating Supreme Court doctrine. Presidents Wilson, Roosevelt, and Biden did just that. The Court will have the final say as to particular judgments, but Presidents must do their best until then.

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175 See *Constitutionality of the Comm'r of Soc. Sec.'s Tenure Prot.*, 45 Op. O.L.C. (July 8, 2021).

176 O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457–62 (1897).

177 See Bellia, *supra* note 10, at 1778–89 (describing *Heckler v. Chaney*, 470 U.S. 821 (1985), as relying “in part on the Faithful Execution Clause to endow executive nonenforcement decisions with presumptions of regularity,” and quoting *Chaney* (an APA case) which found that “an agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special providence of the Executive Branch,” (quoting *Heckler*, 470 U.S. 821, 832 (1985))).

178 Cf. Jeffrey A. Pojanowski, *Without Deference*, 81 MO. L. REV. 1075, 1087 n.70 (2016).

## CONCLUSION

*Seila Law* and *Collins* nudged the law of removal power along a unitary executive trajectory. But these cases leave as many questions open as they answered. Will they lead to more line drawing around particular agency structures? Will the Court revisit *Humphrey's Executor*? Do private plaintiffs really have standing in pure removal cases, and may they obtain real relief? Thanks to Justice Thomas's and Justice Gorsuch's writings, these issues are quite live.

Justice Thomas's approach to removal cases seems the most formalist, prudent, and consistent with the judicial role. Since the Constitution displaces unconstitutional law, unconstitutional law never actually becomes law. Severing unconstitutional law means simply recognizing that fact. Where a severed provision is never enforced, it causes no harm. If it causes no harm, regulated entities probably lack standing to challenge it. Given the awkward presentation of these suits, the federal courts should try to avoid them. They should carefully consider standing and severability complications if they cannot.

The better case to use to develop removal power jurisprudence is that of a fired official—the model American courts used for two centuries. Contested removals are cleaner and lack the jurisdictional and remedial problems associated with private plaintiff cases. But no such case will arise if Presidents acquiesce in congressional infringement their powers. So long as no unitary theorist President occupies office, that is fine. A President's acquiescence reflects that President's view of what the Constitution permits. But a unitary theorist President should faithfully follow the Constitution as the presidential oath requires him to do and supervise the administrative state without regard for unlawful statutory limits on his powers.

If the unitary executive theory is correct, our constitutional order sanctions no administrative free agents. In an era of administrative supremacy over American life, control over the workings of the executive branch is of cardinal importance. Constitutional interpretation is a three-branch enterprise. The President, like the courts, should do what he can to build on the work of *Seila Law* and *Collins* and advance the law of removal power.