DOES *BRAIDWOOD* TREAT INDEPENDENT AGENCIES LIKE A MAJOR QUESTION?

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INTRODUCTION

Consider the following two quotes from recent Supreme Court cases. One: "Congress must speak clearly if it wishes to insulate officers from at-will removal."[1] Two: "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."[2] The first comes from *Kennedy v. Braidwood Management, Inc.*,[3] where the Supreme Court upheld the constitutionality of the U.S. Preventive Services Task Force against an Appointments Clause challenge, relying at least implicitly on unitary executive theory. The second is from *NFIB v. OSHA*,[4] where the Court rejected the Occupational Safety and Health Administration's attempt to implement a vaccine mandate on certain businesses, relying on the major questions doctrine. So, it is fair to ask if the Court employed a method of statutory interpretation in *Braidwood* akin to what it has done in its major-questions-doctrine context. The Supreme Court recently heard oral argument in *Trump v. Slaughter*, a case that many suspect will be one of the most consequential of the term as it could overturn the almost century-old precedent of *Humphrey's Executor v. United States*.[5] But there is a reason the case may not be as consequential as people think. As the similarities between *Braidwood* and the Court's major questions doctrine cases show, the Court has already come up with a way for it—and, importantly, lower courts—to avoid confronting *Humphrey's* or finding an agency structure unconstitutional in a wide swath of challenges to executive agencies.

This Essay asserts that *Braidwood* bears a striking resemblance to the Court's major-questions-doctrine line of cases[6] and attempts to tease out what that means for future litigation. In both situations, the Court presumes that Congress's legislation conforms to the Constitution—to Article I's vesting of legislative power in Congress in the major-questions-doctrine cases and to Article II's vesting of executive power in the President in the unitary-executive cases. So although

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[1] Kennedy v. Braidwood Management, Inc., 606 U.S. ____ (2025) (slip op. at 20).

[2] Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin. (NFIB v. OSHA), 142 S. Ct. 661, 665 (2022) (per curiam) (quoting Alabama Assn. of Realtors v. Dep't of Health and Human Servs., 141 S. Ct. 2485, 2489 (2021) (per curiam)).

[3] 606 U.S. ____ (2025).

[4] 142 S. Ct. 661 (2023).

[5] 295 U.S. 602 (1935).

[6] *See NFIB v. OSHA*, 142 S. Ct. 661 (2022); West Virginia v. EPA, 142 S. Ct. 2587 (2022); Biden v. Nebraska, 143 S. Ct. 2355 (2023).

unitary executive theory applies to agencies' structure and the major questions doctrine speaks to an agency's attempted exercise of substantive power, the similarity between the two hints that the Court's presumptions in each context are the same. These similarities reveal the Court's trend towards a clear statement rule for cases raising unitary executive questions and could also mean that whether *Humphrey's* survives may not be as practically significant as people think.

I. *BRAIDWOOD* IN THE FOREGROUND; UNITARY EXECUTIVE THEORY IN THE BACKGROUND

A. Braidwood

Braidwood dealt with an Appointments Clause[7] challenge to the U.S. Preventive Services Task Force,[8] which comprises sixteen members, all of whom the Secretary of the Department of Health and Human Services (HHS) appointed. The case arose when the Task Force's recommendations on insurance coverage went from advisory to mandatory in the wake of the Affordable Care Act, leading plaintiffs like Braidwood Management to argue that the Task Force exercised powers that made the Task Force's members principal officers.[9] And because the Appointments Clause requires the President to appoint principal officers with the advice and consent of the Senate,[10] Braidwood argued the members' appointment by the Secretary of HHS was unconstitutional. The case thus turned "on whether the Task Force members are principal officers or inferior officers."[11] If inferior, then the "the Head[] of [the] Department[]"[12] could validly appoint them. But it was unclear if the statutes even gave the appointment authority to "the Head[] of" HHS, the Secretary, as the statutes arguably gave the Director of the Agency for Healthcare Research and Quality (AHRQ) the authority to appoint the Task Force.[13] So a second issue was whether the governing statutes vested appointment authority in the head of HHS, a constitutional option, or in the AHRQ Director, an unconstitutional one. The Supreme Court, in a 6-3 decision, held that members of the Task Force are (1) inferior officers and are (2) statutorily appointed by the Secretary of HHS.

"Task Force members," the Court reasoned, "are inferior officers because their work is 'directed and supervised' by the Secretary of HHS, a principal officer."[14] No pertinent statutory provision gave the Secretary removal power over the Task Force, but neither did any provision "restrict[] removal of Task Force members."[15] On the question of statutory appointment authority, the Court reasoned that the law vested this authority in the Secretary through the "Reorganization Plan No. 3 of 1966," later ratified by Congress in 1984, which "transfer[ed] all of the AHRQ Director's functions to the Secretary."[16]

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[7] U.S. CONST. art. II, § 2, cl. 2.

[8] *Braidwood*, slip op. at 1.

[9] *Id.* at 4–5.

[10] *Id.* at 5.

[11] *Id.* at 1.

[12] U.S. CONST. art. II, § 2, cl. 2. The Appointments Clause provides for only two methods of appointment—(1) by the President with advice and consent of the Senate, or (2) by "the Heads of Departments." *Id.*

[13] *See* 42 U.S.C. §299b–4(a)(1).

[14] *Braidwood*, slip op. at 10 (quoting Edmond v. United States, 520 U.S. 651, 663 (1997)).

[15] *Id.* at 12. The Court reached this conclusion despite a provision describing the Task Force as "independent." *See id.* at 19.

[16] *Id.* at 28.

Even when the relevant statutes bore different plausible interpretations, the Court consistently went with the option that maintained a unitary, rather than fractured, Executive Branch. The result is less notable than the analytical moves made to get there. To understand those moves, one must understand unitary executive theory.

Unitary executive theory, in short, maintains that the Vesting Clause of Article II vests *all* executive power in "a president of the United States."[17] Executive power, therefore, must remain "unitary" in nature, meaning it cannot be divided and dispersed to other actors in a way that severs the President from ultimate accountability for executive actions.[18] In *Seila Law LLC v. Consumer Financial Protection Bureau*,[19] the Court explained that the "entire 'executive Power' belongs to the President alone."[20] When government officers exercise executive power, those "officers must remain accountable to the President."[21] And accountability means removability, for "the ability to remove executive officials" is the only authority officials "'must fear and, in the performance of their functions, obey.'"[22] Far from being a one-off, *Seila Law* has proven foundational.[23] In *Trump v. Wilcox*,[24] the Court echoed the reasoning of unitary executive theory: "Because the Constitution vests the executive power in the President, he may remove without cause executive officers who exercise that power on his behalf, subject to narrow exceptions recognized by our precedents."[25] Later when President Trump fired members of the Consumer Products Safety Commission, the Court held that "[t]he application is squarely controlled by *Trump v. Wilcox*."[26] These threads weave a vivid backdrop against which we can contrast the analytical moves made in *Braidwood*.

B. Braidwood's Unitary Executive Moves

The Court's commitment to the unitary executive theory underlies its *Braidwood* decision in three important ways.

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[17] U.S. CONST. art. II § 1; *see also* Steven G. Calabresi and Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696, 1696–97 (2009) ("[T]he Framers of the U.S. Constitution" decided "to create a single unitary executive."); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165 (1992) (arguing that Article II's Vesting Clause, combined with the Take Care Clause, creates "a hierarchical, unified executive department under the direct control of the President"); Ganesh Sitaraman, *The Supreme Court 2019 Term: Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 375 (2020).

[18] *See* Heidi Kitrosser, *"A Government That Benefits From Expertise": Unitary Executive Theory & The Government's Knowledge Producers*, 72 SYRACUSE L. REV. 1473, 1473–74 (2022) ("[U]nitary executive theory posits that the President must control all discretionary activity within the executive branch.").

[19] 140 S. Ct. 2183 (2020).

[20] *Seila Law*, 140 S. Ct. at 2197 (quoting U.S. CONST. art. II, § 1, cl. 1) (citations omitted).

[21] *Id.*

[22] *See id.* at 2197 (quoting Bowsher v. Synar, 478 U.S. 714, 726 (1986)). The Court would later build out the hierarchy in United States v. Arthrex, 141 S. Ct. 1970 (2021). There, the Court explained that the "President is 'responsible for the actions of the Executive Branch' and 'cannot delegate that ultimate responsibility or the active obligation to supervise that goes with it.'" *Arthrex*, 141 S. Ct. at 1978–79 (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 496–97 (2010)).

[23] *See* Collins v. Yellen, 141 S. Ct, 1761, 1783 (2021) ("The Recovery Act's for-cause restriction on the President's removal authority violates the separation of powers. Indeed, our decision last Term in *Seila Law* is all but dispositive.").

[24] 605 U.S. ____ (2025) (slip op. at 1).

[25] Trump v. Wilcox, 605 U.S. ____ (2025) (slip op. at 1) (citing *Seila Law*, 140 S. Ct. at 2198–2200 (citations omitted)).

[26] Trump v. Boyle, 606 U.S. ____ (2025) (slip op. at 1).

First, confronted with statutory silence on the question of removal, the Court implicitly relied on unitary executive theory to hold that the Task Force members are removable by the Secretary of HHS. Hierarchical removal authority being a key tenet of unitary executive theory, a superior officer does not truly have the ability to control an inferior without the removal power.[27] The Court applied this logic in *Braidwood* when it reasoned that "because the Secretary of HHS appoints the Task Force members, he also has the authority to remove the Task Force members at will," because the "default presumption"[28] is that the appointing officer can remove the members "even if no power to remove is expressly given."[29] Unitary executive theory supplies the analytical infrastructure for the Court to build its *Braidwood* reasoning atop. It concluded that because the "Secretary of HHS has the power to appoint (and has appointed) the Task Force members" and "no statute restricts [their] removal," then "there can be no doubt that the Secretary may remove Task Force members at will."[30]

Second, the Court did not give great weight to a statutory provision stating that the Task Force is "independent."[31] The challengers argued that this "independen[ce]" provided for-cause removal protection for the Task Force members. The Court declined to put dispositive weight on this one word—"Braidwood invites the Court to read a for cause removal restriction into a statute that does not explicitly provide for one," but, the Court extolled, "to 'take away' the power of at-will removal from an appointing officer, Congress must use 'very clear and explicit language.'"[32] The Court added that "'[m]ere inference or implication' does not suffice."[33] The Court reemphasized this point one page later—"The word 'independent' alone in a statute does not make an officer removable only for cause. Rather, Congress must speak clearly if it wishes to insulate officers from at-will removal."[34] Additionally, the Court warned that reading too much into the "independen[ce]" of the agency could run afoul of the Constitution and therefore triggered the canon of constitutional avoidance. "[E]ven if we perceived ambiguity in how [the statute]'s language regarding independence . . . should be construed, constitutional avoidance would counsel against adopting Braidwood's expansive interpretation."[35] To put a finer point on it, constitutional avoidance comes into play because to read "independent" for all its worth would fracture the unitary executive.

Third, when one interpretation would create an unconstitutional appointment structure—namely, the Director of AHRQ appointing the Task Force—the Court cobbled together statutes to ensure that the Task Force is appointed by the head of HHS and not the Director. Rather than a straightforward reading of the statute at issue, which likely would have meant the Director had

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[27] *See Seila Law*, 140 S. Ct. at 2197 (quoting *Bowsher*, 478 U.S. at 726).

[28] Query where the "default presumption" comes from. Perhaps the Court's implicit commitment to the structure of a unitary executive.

[29] *Braidwood*, slip op. at 9 (internal quotation marks omitted).

[30] *Id.* (internal quotation marks omitted).

[31] *Id.* at 19; *see also* 42 U.S.C. § 299b–4(a)(6) (stating that Task Force members shall be "independent and, to the extent practicable, not subject to political pressure"); 42 U.S.C. § 299b–4(a)(1) ("The Director shall convene an independent Preventive Services Task Force.").

[32] *Id.* at 19 (quoting Shurtleff v. United States, 189 U.S. 311, 315 (1903)).

[33] *Id.* (quoting *Shurtleff*, 189 U.S. at 315).

[34] *Id.* at 20.

[35] *Id.* at 24.

appointment authority since the Director is the only person mentioned in the operative statute, the Court looked to another statute entirely to bring the Secretary into the statutory scheme through the backdoor. Thanks to Reorganization Plan No. 3 of 1966, the Secretary now possessed appointment authority. But the only way to say Reorganization Plan No. 3 affected the statute at issue, which was passed well after 1966, was to point to the fact that Congress ratified it in 1984, shifting all authority from the Director to the Secretary. Why go this roundabout route? Because it is consistent with unitary executive theory. Under the theory, complying with the Appointments Clause is not an end in and of itself. Rather, it ensures that all actors in the Executive Branch remain accountable to the President. That is why the Court explains that "[t]he Appointments Clause ensures that the President or his subordinate Heads of Departments play a central role in selecting the officers within the Executive Branch who will assist in exercising the 'executive Power.'"[36] And in discussing how the pertinent statutes required the Secretary of HHS to appoint members of the Task Force, the Court emphasized that principal officers "appoint their subordinates, who would, of course, by chain of command still be under the direct control of the President."[37] These moves ensure that the Task Force does not splinter away from the proper Article II hierarchy.[38]

In sum, unitary executive theory's influence on the Court's statutory interpretation is so strong that despite the statutes being silent on the question of removal, explicitly calling the Task Force "independent," and appearing to grant appointment authority in the AHRQ Director, the Court reads the statute to conform with unitary executive theory's structural requirements.

II. THE MAJOR-UNITARY-EXECUTIVE-QUESTIONS DOCTRINE?

Some of these moves may sound familiar. Expecting Congress to speak clearly when it wants to provide removal protections, reading in a removal power where the statute is silent and thus plausibly ambiguous, and relying on constitutional avoidance to reject a plausible reading that would transgress the separation of powers—these all reflect moves the Court makes in the major-questions-doctrine context.

A. The Major Questions Doctrine

The major questions doctrine posits that before an administrative agency can issue regulations of economic and political significance, the agency "must point to clear congressional authorization for the power it claims," meaning that "something more than a merely plausible textual basis for the agency action is necessary."[39] Much ink has already been spilled on the major questions doctrine.[40] Suffice it to say that the major questions doctrine is a way to grapple with

[36] *Id.* at 8 (quoting U.S. CONST. art. II, § 1, cl. 1).

[37] *Id.* at 9; *see also id.* at 42–43 ("[T]he Task Force members remain subject to the Secretary of HHS's supervision and direction, and the Secretary remains subject to the President's supervision.").

[38] The Court again relied on constitutional avoidance. *See id.* at 41 (internal quotation marks and citations omitted).

[39] West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (internal quotation marks and citations omitted); *see also* NFIB v. OSHA, 142 S. Ct. 661 (2022); Biden v. Nebraska, 143 S. Ct. 2355 (2023).

[40] *See generally, e.g.*, Cass R. Sunstein, *There Are Two "Major Questions" Doctrines*, 73 ADMIN. L. REV. 475 (2021); Eloise Pasachoff, *Executive Branch Control of Federal Grants: Policy, Pork, and Punishment*, 83 OHIO ST. L.J. 1113 (2022); Austin Piatt & Damonta D. Morgan, *The Three Major Questions Doctrines*, 2024 WIS. L. REV. F. 19 (2024).

ambiguities in a statute—either in the form of a clear statement rule[41] or by invoking context and common sense[42]—when facing important questions. The Court has shown that it will expect Congress to speak clearly before allowing agencies to exercise broad power, read statutory ambiguity against agencies, and rely at least implicitly on constitutional avoidance to reject textually plausible readings of a statute that would offend principles of nondelegation.

B. This Sounds Familiar…

Under the major questions doctrine, the Court will not read an ambiguous statute to confer sweeping power on an agency for fear that such a grant might offend the separation of powers, namely Article I's Vesting Clause. So too, under unitary executive theory, the Court will not read elliptical text to establish a constitutionally problematic agency structure, for fear that such structure may upset the separation of powers, namely Article II's Vesting Clause and the Appointments Clause. So, both the major questions doctrine and unitary executive theory steer statutory interpretation in a way that conforms to underlying constitutional tenets by using presumptions about statutory text and principles of constitutional avoidance.

In *Braidwood*, the Court stated that "to 'take away' the power of at-will removal from an appointing officer, Congress must use 'very clear and explicit language.'"[43] It emphasized that "'[m]ere inference or implication' does not suffice" "to read a for-cause removal restriction into a statute that does not explicitly provide for one."[44] And "Congress must speak clearly if it wishes to insulate officers from at-will removal."[45] Likewise, in major-questions-doctrine cases, the Court "expect[s] Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance."[46] So an agency "must point to 'clear congressional authorization' for the power it claims."[47] And the Court will "not assume that Congress entrusted that task to an agency without a clear statement to that effect."[48] Additionally, the Court in *Braidwood* explained that "[i]t would be odd . . . to attribute to Congress the intent to create such a powerful independent agency . . . when the text of the statute says nothing of the sort."[49] Instead, "[w]hen Congress wants to create an independent agency, it generally does so by explicitly conferring for-cause removal protection on the agency's leadership."[50] Contrast this with *West Virginia v. EPA*: "Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle devices,'" and Congress "typically" does not "use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme."[51]

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[41] *NFIB v. OSHA*, 142 S. Ct. at 667 (Gorsuch, J., concurring); Piatt & Morgan, *supra*, note 41, at 21–23.

[42] *Nebraska*, 143 S. Ct. at 2378 (Barrett, J., concurring); Piatt & Morgan, *supra*, note 41, at 24–26.

[43] *Braidwood*, slip op. at 19 (quoting *Shurtleff*, 189 U.S. at 315).

[44] *Id.*

[45] *Id.* at 20.

[46] *NFIB v. OSHA*, 142 S. Ct. at 665 (quoting *Alabama Ass'n. of Realtors*, 141 S. Ct. at 2489).

[47] *West Virginia*, 142 S. Ct. at 2609 (quoting Util. Air. Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

[48] *Nebraska*, 143 S. Ct. at 2375 (quoting *King*, 576 U.S. at 485).

[49] *Braidwood*, slip op. at 26.

[50] *Id.*

[51] *West Virginia*, 142 S. Ct. at 2609 (quoting *Whitman*, 531 U.S. at 468; MCI Telecommunications Corp. v. AT&T Co., 512 U.S. 218, 229 (1994)).

Constitutional avoidance also plays a role in both situations. The Court will not follow a statute to an unconstitutional destination when there is an alternative, constitutional route available. Rather, when possible, the Court will adopt an interpretation of the statute that safely renders the statute constitutional. In fact, both the majority and dissent in *Braidwood* invoke constitutional avoidance to bolster their interpretation of the statute.[52] The majority in *Braidwood*, for example, reasoned that "even if the statute's references to 'independent' . . . created ambiguity," "constitutional avoidance would counsel against adopting" an "expansive interpretation" that would not comport with the requirements of the Appointments Clause.[53] Later, when faced with two options, one that led to constitutionally permissible appointment by the Secretary and one that led to unconstitutional appointment by the AHRQ Director, the Court blazed a roundabout route to reach the constitutional destination.[54] Likewise, though not as explicit, the major question cases rely on similar principles to avoid potentially unconstitutional results. The Court has said that in "certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us reluctant to read into ambiguous statutory text the delegation claimed to be lurking there."[55] And "something more than a merely plausible textual basis for the agency action is necessary"[56] because the Court will eschew a constitutionally problematic interpretation "[d]espite its textual plausibility."[57] So in both situations, the Court relies on principles of constitutional avoidance—evading Appointments Clause problems in unitary executive theory and dodging separation of powers problems (read, nondelegation)[58] when it comes to major questions.

III. FORESHADOWING?

What does all this mean for the future of administrative agencies? What is different post-*Braidwood*? What's different is that it will now be easier for courts to bring so-called "independent" agencies in line with a unitary executive. *Braidwood* shows that a challenger need not rely on a constitutional claim to enjoin the action of an allegedly unconstitutionally structured agency when a statutory claim will suffice to show that the pertinent provisions do not establish an independent agency. This point deserves an explanation. In *Braidwood*, the private party challenging the structure of the Task Force lost because the Court found, in part, that the members were inferior officers lawfully appointed by the HHS Secretary, an arrangement permitted by the Appointments Clause.[59] But tweak the facts a bit and one can see how *Braidwood* could be

[52] For uses in the majority opinion, *see Braidwood*, slip op. at 24, 41. For uses in the dissenting opinion, *see* slip op. at 9, 15–17, 20–21, 26, 29, 32 (Thomas, J., dissenting).

[53] *Id.* at 24.

[54] *Id.* at 41.

[55] *West Virginia*, 142 S. Ct. at 2609 (internal quotation marks omitted); *see also Nebraska*, 143 S. Ct. at 2375 (expressing "separation of powers concerns" over an expansive reading of the statute and thus avoiding such a reading).

[56] 142 S. Ct. at 2609.

[57] *Id.* at 2608; *see also Nebraska*, 143 S. Ct. at 2378 (Barrett, J., concurring) (though ultimately disagreeing, acknowledging that "one could walk away from our major questions cases with th[e] impression" that the doctrine "function[s] like constitutional avoidance").

[58] *NFIB v. OSHA*, 142 S. Ct. at 668 (Gorsuch, J., concurring) ("[T]he major questions doctrine is closely related to what is sometimes called the nondelegation doctrine.").

[59] Indeed, HHS changed its practices in 2023 "after questions arose about the AHRQ Director's appointment of the Task Force members." *Braidwood*, slip op. at 27.

important for future cases. What if the Director were still appointing Task Force members? Under the traditional approach to litigating these types of issues, the private party regulated by the Task Force could bring a constitutional claim arguing that appointment by the Director violates the Appointments Clause. But *Braidwood* charts a new path forward. The private party could now bring a statutory interpretation claim, eschewing the traditional constitutional challenge, and instead argue that the statutory scheme gives the Secretary the authority to appoint the members, thus rendering the Task Force's current appointments unlawful.

This is significant for two reasons. First, courts are typically more receptive to statutory claims due to strong principles of constitutional avoidance.[60] Second, *Braidwood* could have important implications for lower courts that are bound by Supreme Court precedent and thus could not issue an Appointments Clause ruling at odds with higher precedent because lower courts do not apply Supreme Court precedent regarding the Appointments Clause when considering statutory interpretation questions about a particular agency's structure.

To illustrate the first point, look again to the major-questions-doctrine-cases. Those show that the Supreme Court is more open to ruling on statutory rather than constitutional grounds. Consider the fact that successful constitutional nondelegation challenges are exceedingly rare.[61] So it is a daunting task to convince the Court that a statute effectuates an unconstitutional delegation of legislative power. But thanks to the major questions doctrine, it is far less daunting to now convince the Court that a statute does not give the agency the power it seeks to deploy. Therefore, when a party wishes to challenge the structure of an agency, it of course could elect to make the constitutional argument along the lines of *Seila Law*. But in the wake of *Braidwood*, it could also make a pure statutory interpretation argument. *Braidwood* suggests the Court is receptive to such arguments.

On the second point, the courts of appeals are of course bound by Supreme Court precedent.[62] And even when the Supreme Court itself has greatly weakened a precedent, a lower court cannot anticipate its downfall.[63] The lower court instead must continue to apply the zombified precedent until the Supreme Court finally kills it. On the statutory side of things, however, absent an on-point Supreme Court precedent about the statutory question at issue, a lower court can assess statutory interpretation arguments *de novo* and decide for itself if an agency does indeed have for-cause removal protections or other markers of an independent agency. In other words, lower courts could employ the same type of reasoning used in *Braidwood* to find that an agency in fact is not independent. And zombified Supreme Court precedents like *Humphrey's Executor* would prove no obstacle to such a holding. Lower courts would not need to hold that the agency's structure violates the Constitution; they would just need to hold that a proper reading of the

[60] *See, e.g.*, Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.").

[61] For a recent example of a failed nondelegation challenge, *see* FCC v. Consumers' Rsch., 145 S. Ct. 2482 (2025).

[62] *See, e.g.*, Hutto v. Davis, 454 U.S. 370, 375 (1982) ("[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.").

[63] *See, e.g.*, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

agency's governing statutes does not actually render it independent just as the Court did in *Braidwood*.

Given that the Supreme Court hears only a small percent of cases decided by lower courts each year and may indeed decide not to hear a case for a variety of reasons, courts of appeals utilizing *Braidwood*-like reasoning to rein in administrative agencies could occur without the need for *Humphrey's* to be overturned. Put simply, *Braidwood* could greenlight the restructuring of the federal Executive Branch without needing to wait for the Supreme Court to say "go."

Recently Justice Kavanaugh, *Braidwood*'s author, remarked that "many of the broader structural concerns about expansive delegations have been substantially mitigated by this Court's recent case law in . . . the Court's application of the major questions canon of statutory interpretation."[64] In other words, who needs to revive the nondelegation doctrine when the Court has the major questions doctrine? Given the similarities between *Braidwood* and the major questions line of cases, could we soon be saying the same about constitutional challenges to the structure of executive agencies? Sure, the Court may decide to go all the way and overrule *Humphrey's Executor*. But until then, perhaps lower courts will conclude that "many of the broader structural concerns about [so-called independent agencies] have been substantially mitigated by this Court's recent case law in [*Braidwood*.]"

And even if the Supreme Court overturns *Humphrey's Executor*, *Braidwood* will prove consequential. Were the Court to say that at-will removal is required for all principal officers, lower courts will have to answer the question of whether numerous "independent" agencies like the SEC or FDA have been operating unconstitutionally for the past several decades. But with a *Braidwood*-type interpretation, lower courts can instead interpret the relevant statutes to hold either that these government officials are not principal officers or may be removed at-will. As demonstrated by *Braidwood*, any ambiguity in those statutes should be construed in favor of a unitary executive, so lower courts could more easily find that the law actually does not establish an independent agency led by principal officers without having to consider the constitutional question, thus sidestepping *Humphrey's* entirely.

[64] *Consumers' Research*, 606 U.S. at 705 (Kavanaugh, J., concurring).