

Constitutional Tensions in Agency Adjudication

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ABSTRACT: Last Term the Supreme Court decided two cases—Lucia v. SEC and Oil States Energy Services v. Greene’s Energy Group—that illustrate the potential constitutional tensions in modern agency adjudication: the importance of political accountability, yet the dangers of political control. As part of the Iowa Law Review’s Administering Patent Law Symposium, this Essay examines these constitutional tensions and assesses two ways the Supreme Court (or Congress) could attempt to resolve them—i.e., by turning to Article III adjudication or by transforming agency adjudicators into “true adjuncts” of Article III courts. The Essay concludes by revisiting the patent adjudication proceedings at issue in Oil States to explore how these constitutional tensions and potential solutions may play out at the U.S. Patent and Trademark Office.

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I. INTRODUCTION

Last Term the Supreme Court decided two cases that could potentially shape the constitutional future of agency adjudication. First, in *Lucia v. SEC*, the Court held that administrative law judges (“ALJ(s)”) at the Securities and Exchange Commission (“SEC”) are unconstitutionally appointed because they are, at minimum, inferior “officers of the United States,” yet were not appointed by the President, the head of a department, or a federal court as required by Article II.¹ Second, in *Oil States Energy Services v. Greene’s Energy Group*, the Court upheld the constitutionality of certain agency adjudications at the U.S. Patent and Trademark Office (“Patent Office”) against challenges that they unconstitutionally strip parties of property rights in issued patents.²

The separate opinions issued in these cases illustrate the constitutional tensions in modern agency adjudication. On the one hand, the Court’s treatment of the Appointments Clause and related constitutional removal principles in *Lucia* seems to dictate that agency adjudicators must be appointed and easily removed by the President or department heads in order to provide for sufficient presidential control over federal regulatory activities. One way to frame these appointment and removal concerns is in terms of political accountability: The politically appointed and removable head of the agency must have some form of final decision-making authority. As Justice Thomas, joined by Justice Gorsuch, put it in his *Lucia* concurrence, “the Appointments Clause maintains clear lines of accountability—encouraging good appointments and giving the public someone to blame for bad ones.”³

On the other hand, such political control over agency adjudication that implicates core life, liberty, or property interests potentially raises due process concerns. One concern is that agencies function as both the enforcer and the adjudicator.⁴ Another is the injection of politics into the adjudication of disputes between private parties and/or those implicating private rights. Insulating agency adjudicators from political influence thus becomes a central objective. Indeed, Congress expressly addressed this issue of adjudicative independence in the Administrative Procedure Act (“APA”).⁵ As an administrative law professors’ *amicus* brief in *Lucia* underscored, “[o]ne of the core features of the APA was a complicated set of statutory safeguards to

1. *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018) (citing the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2).

2. *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1375, 1379 (2018).

3. *Lucia*, 138 S. Ct. at 2056 (Thomas, J., concurring).

4. See, e.g., Kent H. Barnett, *Due Process for Article III—Rethinking Murray’s Lessee*, GEO. MASON L. REV. (forthcoming 2019) (manuscript at 23), <https://ssrn.com/abstract=3244637>.

5. See, e.g., 5 U.S.C. § 7521 (a) (2012) (“An action may be taken against an administrative law judge appointed under section 3105 of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.”).

assure that the hearing examiners (later renamed ALJs) who were to preside over most agency hearings did not act in ways that reflected bias in favor of the agency that employed them.”⁶

In his *Oil States* dissent, Justice Gorsuch, joined by Chief Justice Roberts, expressed deep concern about political pressures in agency adjudication (at least in the context of private rights): “Powerful interests are capable of amassing armies of lobbyists and lawyers to influence (and even capture) politically accountable bureaucracies.”⁷ In other words, in the same Term, Justice Gorsuch argued that the Constitution requires agency adjudicators to be hired (and perhaps fired) by the President or agency head (*Lucia*), yet also decried the constitutional dangers of such politically accountable agency officials adjudicating, at least in the context of what he considers to be the adjudication of private rights (*Oil States*).

This Essay examines these constitutional tensions in modern agency adjudication. Part II provides an overview of *Lucia*, *Oil States*, and related precedents, with a particular focus on Justice Gorsuch’s approach in both cases. Taking these expressed constitutional concerns as a given, Part III explores two main ways the Supreme Court (or Congress) could attempt to resolve them: by turning to Article III adjudication or by transforming agency adjudicators into adjuncts of Article III courts. As this Symposium focuses on administering patent law, Part IV returns to the patent adjudication proceedings at issue in *Oil States* to explore how these constitutional tensions and potential solutions may play out in adjudication at the Patent Office.

II. CONSTITUTIONAL TENSIONS IN *LUCIA* & *OIL STATES*

A. THE NEED FOR POLITICAL ACCOUNTABILITY IN AGENCY ADJUDICATION

In *Lucia v. SEC*, the Supreme Court considered whether SEC ALJs are “Officers of the United States” under the Appointments Clause,⁸ as opposed to mere employees.⁹ This distinction is important because the Appointments Clause sets forth requirements for the appointment of officers (but not mere employees): The President shall nominate all principal officers, who shall be appointed “by and with the Advice and Consent of the Senate.”¹⁰ For “inferior Officers,” Congress may vest the appointment power “in the President alone, in the Courts of Law, or in the Heads of Departments.”¹¹

6. Brief Amicus Curiae of Administrative Law Scholars in Support of Neither Party at 4, *Lucia*, 138 S. Ct. 2044 (No. 17-130), 2018 WL 1156622.

7. *Oil States*, 138 S. Ct. at 1381 (Gorsuch, J., dissenting).

8. U.S. CONST. art. II, § 2.

9. *Lucia*, 138 S. Ct. at 2051.

10. U.S. CONST. art. II, § 2.

11. *Id.*

ALJs at the SEC, however, were not appointed by the President, a court, or an agency head. Instead, other SEC staff members selected them.¹² Accordingly, when Raymond Lucia's investment company lost before an SEC ALJ, he argued before the Commission, the D.C. Circuit, and ultimately the Supreme Court that the agency adjudication was invalid because the ALJ who decided the case is an "Officer" of the United States and thus was unconstitutionally appointed.¹³

Prior to *Lucia* reaching the Supreme Court, the Obama Administration had defended the constitutionality of the SEC ALJ selection process.¹⁴ After the election, however, the Trump Administration "switched sides," arguing that an ALJ is an officer and thus unconstitutionally appointed.¹⁵ The Federal Government went one step further and asked the Supreme Court to address a second question that the D.C. Circuit had not addressed: "whether the statutory restrictions on removing the Commission's ALJs are constitutional."¹⁶ The Court refused to address that question, at both the certiorari and merits stages.¹⁷

In a narrow, somewhat anticlimactic opinion, the Court held that ALJs are officers of the United States and thus unconstitutionally appointed by SEC staffers.¹⁸ Justice Kagan, writing for a six-Justice majority as to the constitutional issue, did not endeavor to define what officer means as an original matter. Instead, she concluded that prior precedent controlled.¹⁹ In particular, *Freytag v. Commissioner* held that "special trial judges" of the U.S. Tax Court were officers, and not mere employees, and thus were unconstitutionally appointed by someone other than the department head, an Article III judge, or the President.²⁰ SEC ALJs and Tax Court special trial judges, the *Lucia* Court held, are indistinguishable for Appointments Clause purposes.²¹ As for the remedy, the Court remanded the case to the SEC and held that the same ALJ, even if since properly appointed by the Commission, could not hear the case again.²²

12. *Lucia*, 138 S. Ct. at 2049.

13. *See id.* at 2049–51.

14. *Id.* at 2050.

15. *Id.*

16. *Id.* at 2050 n.1.

17. *Id.*

18. *Id.* at 2049, 2055.

19. *Id.* at 2052. The parties apparently agreed that the ALJs are inferior officers, so the Court had no occasion to address whether they are inferior or principal officers. *Id.* at 2051 n.3.

20. *Freytag v. Comm'r*, 501 U.S. 868, 881–82 (1991). Despite its title, the Tax Court is an Article I legislative court not an Article III judicial tribunal. *See, e.g.*, Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221, 229–33 (2014) (providing literature review and "detail[ing] the Tax Court's historical evolution from an independent executive agency to an Article I court").

21. *Lucia*, 138 S. Ct. at 2053–54.

22. *Id.* at 2055–56.

Justice Breyer concurred in the judgment, arguing that the Court should have avoided the constitutional question because the SEC ALJ selection process also violates the APA.²³ In a part joined by Justices Ginsburg and Sotomayor, Justice Breyer also disagreed with the Court’s remedy, arguing that there is no constitutional requirement that the same, yet now Commission-appointed ALJ cannot hear the case on remand.²⁴ Justice Sotomayor, joined by Justice Ginsburg, dissented, arguing that officers should be limited to those who have the authority “to make final, binding decisions on behalf of the Government.”²⁵

For the purposes of this Essay, Justice Thomas’s concurrence, joined by Justice Gorsuch, is the most remarkable. Justice Thomas agreed with the majority that *Freytag* is indistinguishable from this case, but he also addressed the original meaning of “inferior officers.”²⁶ He did so because “precedents like *Freytag* discuss what is *sufficient* to make someone an officer of the United States,” but they “have never clearly defined what is *necessary*.”²⁷ Relying heavily on Professor Jennifer Mascott’s historical work on the subject, Justice Thomas concluded that “Officers of the United States,” as a matter of original public meaning, “encompassed all federal civil officials ‘with responsibility for an ongoing statutory duty.’”²⁸

Justice Thomas grounded this approach in the importance of political accountability in the administrative state: “[B]y specifying only a limited number of actors who can appoint inferior officers without Senate confirmation, the Appointments Clause maintains clear lines of accountability—encouraging good appointments and giving the public someone to blame for bad ones.”²⁹ This is consistent with Mascott’s argument that “realignment of Article II officer status with the original meaning of the Appointments Clause would help to bring about greater democratic accountability by making it clearer that department heads are responsible at every step of the way for properly managing their agencies in the best interest of the public.”³⁰

23. *Id.* at 2058 (Breyer, J., concurring in judgment in part and dissenting in part).

24. *Id.* at 2064.

25. *Id.* at 2065 (Sotomayor, J., dissenting).

26. *Id.* at 2056 (Thomas, J., concurring).

27. *Id.*

28. *Id.* (quoting *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 946 (2017) (Thomas, J., concurring); Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 STAN. L. REV. 443, 564 (2018)).

29. *Lucia*, 138 S. Ct. at 2056. Justice Thomas did not seem moved, at least as an original matter, by the accountability argument that the Commission itself—not the SEC ALJs—is both the de facto and de jure final word in administrative proceedings. See Brief of Amicus Curiae David Zaring in Support of Respondent at 7–10, *Lucia*, 138 S. Ct. 2044 (No. 17-130), 2018 WL 1609129 (reporting empirical findings).

30. Mascott, *supra* note 28, at 564.

B. THE DANGERS OF POLITICS IN AGENCY ADJUDICATION

In *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, the Court considered whether patent rights are private rights, such that certain agency adjudications at the Patent Office are unconstitutional due to the lack of adjudication in an Article III court (and before a jury).³¹ Setting the backdrop for this case is the Leahy–Smith America Invents Act of 2011, wherein Congress created three novel procedures for private parties to challenge issued patents before the newly formed Patent Trial and Appeal Board (“PTAB”).³² Congress enacted the America Invents Act, in part, to respond to growing criticism that the Patent Office issued too many bad patents.³³ These new PTAB proceedings were designed to create a cheaper, faster alternative to patent litigation in the federal district courts.³⁴

Oil States and Greene’s Energy, both oilfield services companies, were involved in a dispute regarding Oil States’ patent on a device and method in hydraulic fracturing for protecting wellhead equipment.³⁵ Oil States sued Greene’s Energy in district court for patent infringement. Greene’s Energy responded by challenging the patent’s validity both in district court and before the PTAB.³⁶ The district court and the PTAB reached conflicting conclusions. The court ruled first, construing the patent claim to foreclose Greene’s Energy’s invalidity argument.³⁷ The PTAB then found Oil States’ patent invalid, though recognizing the court’s contrary prior ruling.³⁸ The Federal Circuit summarily affirmed the PTAB’s final decision.³⁹

When the case reached the Supreme Court, the controversy focused on whether it was constitutionally appropriate for an agency, rather than an Article III court (and jury), to adjudicate patent rights. The plaintiff’s theory

31. *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1370 (2018).

32. Leahy–Smith America Invents Act, Pub. L. No. 112-29, § 6, 125 Stat. 299–311 (2011) (codified as amended at 35 U.S.C. §§ 311–319, 321–329 (2012)) (discussing *inter partes* review and post-grant review proceedings); *id.* § 12, 125 Stat. 325–27 (codified as amended at 35 U.S.C. § 257) (discussing supplemental examination); *id.* § 18, 125 Stat. 329–331 (describing the transitional program for covered business-method patents).

33. See, e.g., Michael D. Frakes & Melissa F. Wasserman, *Does the U.S. Patent and Trademark Office Grant Too Many Bad Patents?: Evidence from a Quasi-Experiment*, 67 STAN. L. REV. 613, 621 (2015) (explaining that “major changes to the patent system [were] driven by concerns that the Agency allows too many invalid patents to issue”).

34. For an overview of the PTAB, see Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 158–62 (2019).

35. *Oil States*, 138 S. Ct. at 1372.

36. See *id.* Simultaneously challenging the validity of a patent in both district court and before the PATB is permissive under the America Invents Act. See Walker & Wasserman, *supra* note 34, at 169–71.

37. *Oil States*, 138 S. Ct. at 1372.

38. *Id.*

39. *Id.*

underlying this controversy was that patent rights are private property rights, such that they may not be adjudicated outside of an Article III court.

The Supreme Court has long interpreted Article III to require that federal judicial power only be exercised by judges who have been nominated by the President, confirmed by the Senate, and who enjoy the tenure and pay protections guaranteed by Article III.⁴⁰ The Court, however, has further defined judicial power to exclude adjudication of “public rights.”⁴¹ Public rights involve matters “which arise between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.”⁴² Under the public-rights doctrine, Congress has flexibility to delegate the adjudicatory power over public rights to federal agencies and other adjudicators outside of the Article III federal judiciary.⁴³

Writing for the Court in *Oil States*, Justice Thomas upheld the constitutionality of PTAB adjudication against the challenge that patent rights are not public rights under the Court’s public-rights doctrine.⁴⁴ Justice Thomas explained that the government’s grant of a patent, which is in essence a grant of a public franchise, is a public right, not a private property right.⁴⁵ So too, then, is the agency’s decision to reconsider the grant of a patent.⁴⁶ Accordingly, Congress has the constitutional authority to delegate such adjudication of patent rights to a federal agency instead of an Article III court.⁴⁷

Justice Breyer, joined by Justices Ginsburg and Sotomayor, filed a short concurrence to note that “the Court’s opinion should not be read to say that matters involving private rights may never be adjudicated other than by Article III courts, say, sometimes by agencies.”⁴⁸ This concurrence merits

40. U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”); *see also, e.g.*, *Stern v. Marshall*, 564 U.S. 462, 484 (2011) (rejecting argument that “the other branches of the Federal Government could confer the Government’s ‘judicial Power’ on entities outside Article III”); *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855) (rejecting argument that “congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty”).

41. *Crowell v. Benson*, 285 U.S. 22, 50 (1932).

42. *Id.*

43. *See Oil States*, 138 S. Ct. at 1373–74.

44. *Id.* at 1374–75.

45. *Id.* at 1373–74.

46. *Id.* at 1374–78.

47. Because the Court had previously held there is no Seventh Amendment right to a jury when Congress has constitutionally delegated adjudicatory authority to a federal agency, the *Oil States* Court easily rejected the jury-right claim. *See id.* at 1379.

48. *Id.* at 1379 (Breyer, J., concurring).

some further discussion, as it touches on the Roberts Court's attempt to narrow—or even revisit—the seminal *Crowell v. Benson* decision, which provided a constitutional basis for agency adjudication of certain private disputes.⁴⁹

In *Stern v. Marshall*, the Roberts Court narrowly read *Crowell's* theory of agency adjudication of private rights.⁵⁰ In striking down as unconstitutional Article I bankruptcy court adjudication of certain counterclaims, the Court refused to apply *Crowell* broadly to encompass bankruptcy courts as Article III adjuncts.⁵¹ Responding to Justice Breyer's dissent, Chief Justice Roberts, writing for the Court, read *Crowell* as specific to “the context of expert administrative agencies that oversee particular substantive federal regimes.”⁵² The *Stern* Court noted that *Crowell's* constitutional approval of agency adjudication of private rights occurred only because the agency adjudicator was “a true ‘adjunct’ of the District Court.”⁵³ That is because, the *Stern* Court observed, “the administrative adjudicator [in *Crowell*] had only limited authority to make specialized, narrowly confined factual determinations regarding a particularized area of law and to issue orders that could be enforced only by action of the District Court.”⁵⁴ Section III.B revisits these cases as the basis of a solution to these constitutional tensions.

Returning to *Oil States*, Justice Gorsuch's dissent, joined by Chief Justice Roberts, advances a full-force defense of the importance of Article III judges in adjudicating what he views as private rights. “We sometimes take it for granted today,” Justice Gorsuch began, “that independent judges will hear our cases and controversies. But it wasn't always so.”⁵⁵ He disagreed strongly with the majority about the status of a granted patent, arguing that “most everyone

49. *Crowell v. Benson*, 285 U.S. 22, 51 (1932) (“The present case does not fall within the categories just described, but is one of private right, that is, of the liability of one individual to another under the law as defined. But, in cases of that sort, there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges.”).

50. *Stern v. Marshall*, 564 U.S. 462, 500–01 (2011); see also *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 84–85 (1982) (plurality) (concluding that the prior version of bankruptcy court was not an Article III adjunct because, among other things, the bankruptcy court adjudicated claims that were not created by Congress), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended at 28 U.S.C. 157(b)(5)).

51. *Stern*, 564 U.S. at 500–01.

52. *Id.* at 489 n.6.

53. *Id.*

54. *Id.* In his concurrence in *Stern*, Justice Scalia went one step further: “Leaving aside certain adjudications by federal administrative agencies, which are governed (for better or worse) by our landmark decision in *Crowell v. Benson*, . . . in my view an Article III judge is required in all federal adjudications, unless there is a firmly established historical practice to the contrary.” *Id.* at 504–05 (Scalia, J., concurring) (emphasis omitted) (internal citations omitted).

55. *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1380 (2018) (Gorsuch, J., dissenting).

considered an issued patent a personal right—no less than a home or farm—that the federal government could revoke only with the concurrence of independent judges.”⁵⁶ He concludes by bemoaning the majority’s “retreat from Article III’s guarantees”:

Ceding to the political branches ground they wish to take in the name of efficient government may seem like an act of judicial restraint. But enforcing Article III isn’t about protecting judicial authority for its own sake. It’s about ensuring the people today and tomorrow enjoy no fewer rights against governmental intrusion than those who came before. And the loss of the right to an independent judge is never a small thing. It’s for that reason Hamilton warned the judiciary to take “all possible care . . . to defend itself against” intrusions by the other branches.⁵⁷

For Justice Gorsuch (and Chief Justice Roberts), political control of adjudication of private property rights like patents imposes grave dangers to the guarantees of judicial independence and impartiality set forth in Article III.⁵⁸

III. RECONCILING CONSTITUTIONAL TENSIONS

Taking Justice Gorsuch’s dual concerns at face value (and not attempting to define which adjudications implicate these concerns⁵⁹), this Part sketches out two main paths that someone like Justice Gorsuch could potentially take to balance the conflicting political accountability values in agency adjudication. First, we could turn to Article III for such adjudication by, for instance, replacing Article II agency adjudicators with Article III judges. Second, we could attempt to transform such agency adjudicators into adjuncts of Article III courts per the Court’s guidance in *Crowell v. Benson* and later in *Stern v. Marshall*. This may involve, among other things, removing judicial deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*

56. *Id.*; *see id.* at 1380–86 (detailing argument that a granted patent is a private property right).

57. *Id.* at 1386 (quoting THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 2003)).

58. *See, e.g., id.* at 1381 (“No doubt this efficient scheme is well intended. But can there be any doubt that it also represents a retreat from the promise of judicial independence? Or that when an independent Judiciary gives ground to bureaucrats in the adjudication of cases, the losers will often prove the unpopular and vulnerable? Powerful interests are capable of amassing armies of lobbyists and lawyers to influence (and even capture) politically accountable bureaucracies. But what about everyone else?”).

59. Indeed, as noted in Section III.A, some scholars would include not just private-rights adjudication in this category, but also any agency adjudication where the agency has the power to issue substantial civil monetary penalties against private individuals or entities. Moreover, others, including perhaps Justice Gorsuch, may argue that agency adjudications that implicate core liberty interests should also be included in this category. *Cf.* Michael Kagan, *Chevron’s Liberty Exception*, 104 IOWA L. REV. 491 (2019) (arguing for a “physical liberty” exception to *Chevron* deference).

to such agency adjudications for questions of law⁶⁰ (and maybe even for some factual questions) or even stripping those adjudicators of policymaking authority.

A. *REPLACE AGENCY ADJUDICATORS WITH ARTICLE III JUDGES*

The simplest (albeit sweeping) approach to address these tensions would be for the Court to strike down such agency adjudication of private rights as unconstitutional. This ruling, in turn, would channel such adjudication back into Article III courts. As discussed in Section II.B, Justice Breyer in *Stern v. Marshall* and then in *Oil States* seemed quite concerned that this reform was Chief Justice Roberts' ultimate objective—to reconsider *Crowell v. Benson*.⁶¹ Either in response to the Court's invalidation of such agency adjudications or on its own initiative, Congress could respond by replacing the Article II agency adjudicators with Article III administrative law judges.

Indeed, in 2017 after President Trump's election, Professor Steven Calabresi recommended such congressional action as part of a larger call for Republicans in Congress to expand the federal judiciary by more than 250 judges.⁶² The thrust of Calabresi's proposal, which was set forth in a coauthored memorandum to Congress, was for Congress to add at least 61 new circuit judges and 200 new district court judges.⁶³ The suggestion of expanding the federal judiciary to accommodate increased workloads drew bipartisan backlash.⁶⁴

The second half of the proposal, however, received little attention, despite being similarly ambitious. Calabresi argued that at least some agency adjudications raise constitutional separation-of-powers concerns.⁶⁵ Of the nearly 1,800 administrative law judges at that time, Calabresi focused his

60. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

61. See *Oil States*, 138 S. Ct. at 1379 (Breyer, J., concurring) (discussing impact of *Crowell v. Benson*, 285 U.S. 22 (1932)); *Stern v. Marshall*, 564 U.S. 462, 506, 508–09 (2011) (Breyer, J., dissenting) (same).

62. See Steven G. Calabresi, *Republicans Should Expand the Federal Courts*, NAT'L REV. (Nov. 15, 2017, 6:07 PM), <https://www.nationalreview.com/2017/11/gop-tax-bill-should-expand-federal-courts>.

63. See Memorandum from Steven G. Calabresi & Shams Hirji on Proposed Judgeship Bill to Senate & House of Representatives 21 (Nov. 7, 2017). The authors have since removed this memorandum from the Social Sciences Research Network, but it has been archived here: <https://thinkprogress.org/wp-content/uploads/2017/11/calabresi-court-packing-memo.pdf>.

64. For a sample of the backlash from the left and right, see Linda Greenhouse, *A Conservative Plan to Weaponize the Federal Courts*, N.Y. TIMES (Nov. 23, 2017), <https://www.nytimes.com/2017/11/23/opinion/conservatives-weaponize-federal-courts.html>; Dahlia Lithwick, *Judges Over Principles*, SLATE (Nov. 22, 2017, 3:07 PM), <https://slate.com/news-and-politics/2017/11/the-never-trump-legal-movement-has-morphed-into-a-plan-to-pack-the-courts.html>; William H. Pryor Jr., *Conservatives Should Oppose Expanding the Federal Courts*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/opinion/conservatives-expanding-federal-courts.html>; Ilya Somin, *The Case Against Court-Packing*, WASH. POST (Nov. 27, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/27/the-case-against-court-packing>.

65. See Calabresi & Hirji, *supra* note 63, at 22–36.

reform proposal on just 158: those “ALJs residing in [some 20] federal agencies wielding significant regulatory control over the country’s economy and who have the power to issue substantial civil monetary penalties against private individuals or entities.”⁶⁶ He was not concerned with the vast majority of “ALJs who preside over benefit or entitlement cases in agencies like the Social Security Administration or the Office of Medicare and Medicaid Hearings.”⁶⁷ The former group of ALJs, Calabresi argued, raise more serious constitutional concerns, echoing—at least in part—the private-public rights distinction at issue in *Oil States*.⁶⁸ For these 158 ALJs, Calabresi proposed that they be eliminated and replaced with Article III ALJs, who would subject to both presidential nomination and Senate confirmation.⁶⁹

Calabresi is not alone in arguing for Article III judges as the constitutional cure for agency adjudication. Professor Michael Rappaport has advanced a similar proposal, arguing that ALJs should at least be Article I judges and ideally Article III judges (either of which would be subject to both presidential nomination and Senate confirmation).⁷⁰ Rappaport further recommends that these new administrative law judges should be neither generalists nor agency-specific adjudicators, but instead subject-matter experts in health, science, or economics that adjudicate similar cases coming from various agencies.⁷¹

The mechanics of Calabresi’s and Rappaport’s proposals are a bit unclear. Neither addresses, for instance, other types of non-ALJ agency adjudicators, such as the nearly 300 administrative patent judges Justice Gorsuch expressed concerns about in *Oil States*.⁷² Under Justice Gorsuch’s reasoning, those too fall under Calabresi’s category of administrative judges

66. *Id.* at 22.

67. *Id.* at 25.

68. To be more precise, Calabresi’s approach would not only affect purely private-rights adjudications that are categorized under the framework set forth in *Crowell v. Benson*, 285 U.S. 22, 51 (1932), but also adjudications where the agency can impose civil penalties—adjudications the Court categorized as public-rights cases in *Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 450 (1977); see also Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 GEO. J.L. & PUB. POL’Y 27, 64 (2018) (arguing for the rejection of “*Atlas Roofing’s* categorization of cases involving fines assessed for regulatory violations as public-rights cases”).

69. Calabresi & Hirji, *supra* note 63, 31–32.

70. See Michael B. Rappaport, *Classical Liberal Administrative Law in a Progressive World*, in THE CAMBRIDGE HANDBOOK OF CLASSICAL LIBERAL THOUGHT 107 (M. Todd Henderson ed., 2018).

71. *Id.* at 36. Unlike Calabresi, Rappaport apparently would turn all ALJs (nearly 2,000 in total) into Article III administrative law judges, not just those that adjudicate private rights or otherwise have the authority to impose substantial civil penalties. See *id.* at 34–36. Like Calabresi, Rappaport does not address the “new world” of agency adjudication that consists of more than 10,000 non-ALJ adjudicators who by statute or regulation are required to hold evidentiary hearings. See *infra* note 73 and accompanying text.

72. *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1380–81 (2018) (Gorsuch, J., dissenting); see also Kent Barnett & Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal*, 53 GA. L. REV. 1, 32–33, 33 fig.1 (2019) (reporting 275 administrative patent judges as of 2017).

who should be replaced by Article III judges. As Professor Melissa Wasserman and I explore elsewhere, in this “new world” of agency adjudication the non-ALJ adjudicators outnumber the ALJ adjudicators by a factor of five, exceeding 10,000 agency officials.⁷³ Likewise, one could imagine the scope of covered agency adjudications extending to any adjudication that affects core liberty interests.⁷⁴ For example, the Federal Bar Association, among others, has urged Congress to create an Article I immigration court.⁷⁵ Immigration judges, like administrative patent judges, are among this new world of non-ALJ agency adjudicators.⁷⁶

In some parts of his proposal, moreover, Calabresi seems to suggest that Congress should create a new category of specialized Article III judges—Article III ALJs—yet he later suggests that Congress should convert these 158 positions into generalist federal district judges. In other words, “The new Administrative Law judges would hear the same types of cases as the judges in the judicial districts to which they would relocate, and all of the judges would share in the caseload of the district, including all agency adjudications that would be brought before them.”⁷⁷ The value of the former approach, like Rappaport’s proposal of health, science, or economics experts, is that the Article III ALJs would develop specialized expertise over certain regulatory subject matters. The latter approach, however, would encourage more generalized judging, more geographically decentralized adjudication of regulatory cases, and more flexibility in docket management.

Under either approach, there would be no agency-head review of these adjudications, leaving appellate review to the Article III judiciary. The lack of agency-head review would have at least two collateral consequences. First, because the agency no longer conducts the adjudication, this proposal would eliminate *Chevron* deference to agency statutory interpretations made in these adjudications.⁷⁸ Second, and related, the proposal would foreclose those adjudications as a means for agencies to promulgate policy, thus limiting the scope of the holding in *SEC v. Chenery Corp.* that “the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.”⁷⁹

73. Walker & Wasserman, *supra* note 34, at 148–57 (describing survey findings reporting 10,831 non-ALJ adjudicators among the surveyed agencies in 2017).

74. *Cf.* Bernick, *supra* note 68, at 30 (arguing for de novo Article III review of agency factual adjudications of “core private rights to life, liberty, and property”).

75. *See Congress Should Establish an Article I Immigration Court*, FED. BAR ASS’N, <http://www.fedbar.org/Advocacy/Article-1-Immigration-Court.aspx> (last visited May 14, 2019).

76. Walker & Wasserman, *supra* note 34, at 154.

77. Calabresi & Hirji, *supra* note 62, at 32.

78. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (commanding a reviewing court to defer to an agency’s reasonable interpretation of an ambiguous statute that the agency administers).

79. *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). *See generally* Aaron L. Nielson, *Beyond Seminole Rock*, 105 GEO. L.J. 943, 958–64 (2017) (discussing evolution of this *Chenery* doctrine).

Assessing the normative value of the Calabresi proposal exceeds the ambitions of this Essay. Needless to say, it is by no means a modest change. There would be severe costs to administrative governance. Agency adjudication can often be tailored to be more efficient for governance and less costly for litigants. It leverages the agency's expertise in the subject matter, allows the agency to direct regulatory policy, ensures more consistency in adjudicative outcomes, and helps the agency be aware of how the regulatory system is functioning.⁸⁰ As evidenced by the bipartisan backlash to the proposal, moreover, the idea that Congress would pass legislation to create more Article III judgeships—and then use precious Senate floor time to confirm these new judges—seems quite unrealistic, at least in the present political climate.⁸¹

B. TRANSFORM AGENCY ADJUDICATORS INTO ARTICLE III ADJUNCTS

A second path to mitigate these constitutional tensions in agency adjudication may be to embrace Chief Justice Roberts's narrowing of *Crowell v. Benson*'s constitutional blessing of agency adjudication of private rights and then apply that framework to a broader set of agency adjudications that implicate core liberty or property interests.

As discussed in Section II.B, Chief Justice Roberts, writing for the Court in *Stern v. Marshall*, narrowly read *Crowell* to allow for agency adjudication of private rights only when the agency adjudicator is “a true ‘adjunct’ of the District Court.”⁸² To be a “true adjunct,” Chief Justice Roberts seemed to outline three requirements. First, Congress must limit such adjudication to agencies “that oversee particular substantive federal regimes.”⁸³ Second, the agency adjudicator must have “only limited authority to make specialized, narrowly confined factual determinations regarding a particularized area of

80. See, e.g., Walker & Wasserman, *supra* note 34, at 175–78 (exploring these values in the context of agency-head control of adjudicative outcomes).

81. It is also unclear whether these 158 new district judges would really be necessary to handle the increased workload. Perhaps those adjudications could just be absorbed by the current district judges. To somewhat reduce the Article III workload, one variant would be to allow ALJs to continue to adjudicate the matters if the parties consent, similar to how the magistrate-judge system works. See 28 U.S.C. § 636(c) (2012); FED. R. CIV. P. 73. Indeed, in the context of SEC enforcement, the U.S. Chamber of Commerce has advanced such a proposal where the regulated has a choice of forum between agency adjudication and federal-court litigation. See CTR. FOR CAPITAL MKTS. COMPETITIVENESS, U.S. CHAMBER OF COMMERCE, EXAMINING U.S. SECURITIES AND EXCHANGE COMMISSION ENFORCEMENT: RECOMMENDATIONS ON CURRENT PROCESSES AND PRACTICES 19 (2015), https://www.centerforcapitalmarkets.com/wp-content/uploads/2015/07/021882_SEC_Reform_FIN1.pdf.

82. *Stern v. Marshall*, 564 U.S. 462, 489 n.6 (2011) (discussing *Crowell v. Benson*, 285 U.S. 22, 51 (1932)).

83. *Id.*

law.”⁸⁴ Third, the agency adjudication must have the authority “to issue orders that could be enforced only by action of the District Court.”⁸⁵

So, what would Chief Justice Roberts’s vision of a true Article III adjunct look like in agency adjudication?

As to the first requirement, all of the relevant agency adjudications arguably are already limited to “particular substantive federal regimes.”⁸⁶ These are not tribunals with general jurisdiction; nor do they generally adjudicate rights not created by federal statute.⁸⁷ Instead, Congress has usually vested the agency with broad authority over a particular federal regulatory scheme and the agency adjudicators with specific, related adjudicatory functions.

How to satisfy the second requirement, however, is less clear. If the agency adjudication is limited to “specialized, narrowly confined factual determinations,”⁸⁸ it appears that *Chevron* deference would no longer be available for legal interpretations adopted in that adjudication.⁸⁹ Although this may seem like a dramatic change, it is not as dramatic as the Calabresi proposal to shift all such adjudication to the Article III judiciary. Under the true adjunct approach, the agency may lack *Chevron* deference, but it remains the “prime mover,” as Professor John Golden has argued, to drive regulatory policy in that area.⁹⁰

But getting rid of *Chevron* deference is likely not sufficient to meet *Stern*’s second requirement. It may be the case that the agency’s ability to make policy

84. *Id.*

85. *Id.*

86. *Id.*

87. *Cf.* *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 85 (1982) (plurality) (distinguishing agency adjudication in *Crowell* from the bankruptcy-court context because “the subject-matter jurisdiction of the bankruptcy courts encompasses not only traditional matters of bankruptcy, but also all civil proceedings arising under title 11 or arising in or related to cases under title 11” (internal quotation marks omitted)), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended at 28 U.S.C. 157(b)(5) (2012)).

88. *Stern*, 564 U.S. at 489 n.6.

89. *Cf.* Rappaport, *supra* note 70, at 37 (“This argument against *Chevron* and *Skidmore* deference is especially strong in the context of formal adjudications. When an agency adopts an interpretation in a legislative regulation, the public will know the agency’s interpretation prior to enforcement. By contrast, when the agency interprets the statute in a formal adjudication, it imposes an interpretation that the public may not know ahead of time. Moreover, the agency can often apply a new legal interpretation retroactively so long as the effect is not deemed too burdensome or unfair.”); *see also* David Hahn, *Silent and Ambiguous: The Supreme Court Dodges Chevron and Lenity in Esquivel-Quintana v. Sessions*, 103 MINN. L. REV. DE NOVO (Nov. 29, 2017) (arguing that *Chevron* should trump the rule of lenity for agency interpretations promulgated via rulemaking but not for interpretations advanced via adjudication).

90. John M. Golden, *Working Without Chevron: The PTO as Prime Mover*, 65 DUKE L.J. 1657, 1691–92 (2016) (arguing that “the [Patent Office] can still accomplish much through adjudicatory processes as patent law’s probable ‘prime mover’—the government body that is likely to be the first to address many patent law issues in a centralized and systematic fashion”).

via adjudication under the *Chenery* doctrine must also be eliminated.⁹¹ And the Supreme Court—or Congress—may have to eliminate judicial deference for certain types of factual determinations but maybe not others.⁹² Yet even those reforms may not be sufficient for the adjudicative authority to be adequately cabined to only “make specialized, narrowly confined factual determinations regarding a particularized area of law.”⁹³

How to satisfy the third requirement is similarly murky. Under the Article III adjunct model, a final agency decision in these adjudications would not be self-executing, but instead require an Article III court order to become effective.⁹⁴ This probably requires more than just the availability of judicial review for the losing party; the prevailing party likely must seek Article III judicial confirmation of the agency’s final decision.⁹⁵ It is possible that the Court would require a more-exacting judicial-approval function, perhaps similar to that of non-Article III federal magistrate judges who, absent consent of the parties, merely make findings and recommendations that are subject to objections and *de novo* review in federal district court.⁹⁶ Further research is needed to understand which agency adjudications, if any, incorporate a version of this third requirement today and to scope out the full extent of the requirement. Perhaps, for instance, the agency adjudicators may need to be appointed by Article III courts instead of by the President or Article II heads of departments.⁹⁷

91. Cf. Rappaport, *supra* note 70, at 38 (“One attractive proposal that I support is simply to prohibit agencies from making policy determinations in these adjudications. Agencies arguably do not need to make policy at this stage. Instead, they can enact policy through legislative regulations and then adjudicate in accordance with those regulations.”).

92. See, e.g., *id.* at 39–40 (distinguishing between adjudicative, legislative, and judgmental facts); Bernick, *supra* note 68, at 30 (arguing “that judicial deference to agency fact-finding is unconstitutional in cases involving deprivations of what I refer to as *core private rights* to life, liberty, and property”); cf. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 85 (1982) (plurality) (observing that, “while orders issued by the agency in *Crowell* were to be set aside if ‘not supported by the evidence,’ the judgments of the bankruptcy courts are apparently subject to review only under the more deferential ‘clearly erroneous’ standard”), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended at 28 U.S.C. 157(b)(5)).

93. *Stern*, 564 U.S. at 489 n.6.

94. See *Stern*, 564 U.S. at 489 n.6 (limiting agency adjudication of private rights “to issue orders that could be enforced only by action of the District Court”).

95. Cf. *Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 455 n.13 (1977) (“We note that the decision of the administrative tribunal in these cases on the law is subject to review in the federal courts of appeals, and on the facts is subject to review by such courts of appeals under a substantial-evidence test. Thus, these cases do not present the question whether Congress may commit the adjudication of public rights and the imposition of fines for their violation to an administrative agency without any sort of intervention by a court at any stage of the proceedings.”).

96. See 28 U.S.C. § 636(b).

97. But see *Stern*, 564 U.S. at 486, 501 (finding it constitutionally insufficient for adjunct-theory purposes—at least in the context of Article I bankruptcy judges—that “Congress provided

The above discussion is necessarily cursory. Much theoretical, doctrinal, and historical work needs to be done if the Supreme Court (or Congress) intends to pursue the Article III adjunct approach to address these constitutional tensions in agency adjudication. One may wonder whether the work would be worth it when there is a simpler solution of just replacing these agency adjudicators with Article III judges.⁹⁸ A full answer to that question exceeds the scope of this Essay. But three core reasons for this alternative approach come immediately to mind: It would preserve the agency's critical role as prime mover of regulatory policy, and it would leverage the agency's comparative expertise (compared to generalist Article III courts) over the particular, specialized subject matter.⁹⁹ It may well also be more efficient for the government and less costly for litigants. This Essay returns to these policy tradeoffs in the following Part, in the context of agency adjudication at the Patent Office.

IV. THE FUTURE OF ADJUDICATION AT THE PATENT OFFICE

Writing for the Court in *Oil States*, Justice Thomas rejected a core constitutional challenge to certain adjudications (i.e., *inter partes* review) before the PTAB, holding that such adjudications to reconsider issued patents do not implicate private rights and thus do not require adjudication in an Article III court (and before a jury).¹⁰⁰

Near the end the opinion, however, Justice Thomas underscored “the narrowness of [the] holding.”¹⁰¹ He explained that the opinion did “not address whether other patent matters, such as infringement actions, can be heard in a non-Article III forum”; “whether *inter partes* review would be constitutional without any sort of intervention by a court at any stage of the proceedings”; or whether “patents are not property for purposes of the Due Process Clause or the Takings Clause.”¹⁰² Nor does the opinion address any due process or retroactivity challenges that could be raised against the adjudicative process.¹⁰³

Many of those challenges will no doubt work their way through the agency and the federal courts in the years to come. This Essay does not endeavor to explore that constitutional terrain. Instead, this Part returns to

that the judges of the new bankruptcy courts would be appointed by the courts of appeals for the circuits in which their districts are located”).

98. See *supra* Section III.A.

99. Cf. Walker & Wasserman, *supra* note 34, at 176–77 (outlining the policy case for agency-head decision-making authority in agency adjudication, which includes the ability to direct regulatory policy, to “ensure consistency in adjudicative outcomes,” and to “help[] the agency head gain . . . awareness of how [the] regulatory system is functioning”); see also John M. Golden, *supra* note 89, at 1691–92 (coining the phrase “prime mover” in the patent context).

100. *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1370–73 (2018).

101. *Id.* at 1379.

102. *Id.* (internal quotations omitted).

103. *Id.*

the dual constitutional tensions outlined in Part II to assess how those tensions, and the potential solutions outlined in Part III, may play out in the context of patent adjudication at the Patent Office.

A. POLITICAL ACCOUNTABILITY IN PTAB ADJUDICATION

The Patent Office confronted the *Lucia* Appointments Clause issue about a decade before *Lucia*,¹⁰⁴ and some three years before the America Invents Act expanded the PTAB's adjudicative powers to include the trial-like proceedings at issue in *Oil States*.¹⁰⁵ This was due in large part to Professor John Duffy.

In a law review essay first made public in 2007,¹⁰⁶ Duffy argued that the appointment of administrative patent judges (“APJ(s)”) under a 1999 amendment to the Patent Act was unconstitutional because they were inferior officers yet were not appointed by a department head; instead, Patent Office Director, which Duffy argued was not a department head, appointed administrative patent judges.¹⁰⁷ Duffy's argument foreshadowed essentially the same argument later advanced by the challengers in *Lucia*: “[A]dministrative patent judges exercise significant authority within the meaning of the Supreme Court's Appointments Clause jurisprudence,” such that they are inferior officers under *Freytag v. Commissioner*.¹⁰⁸

Shortly after a draft of Duffy's article became public, Congress and the courts began to address these constitutional issues.¹⁰⁹ While a certiorari petition that raised the challenge was pending, Congress enacted legislation in 2008 to restore the pre-2000 statutory approach of appointment by the Secretary of Commerce.¹¹⁰ So when the *Lucia* Court finally ruled a decade later that similarly situated ALJs are at least inferior officers and thus must be appointed by the head of a department,¹¹¹ the Patent Office had no need to respond. Thanks to Duffy, Congress had already addressed that potential constitutional problem at the PTAB.

104. *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018).

105. *Oil States*, 138 S. Ct. at 1370; Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified in scattered sections of 35 U.S.C.).

106. John F. Duffy, *Are Administrative Patent Judges Unconstitutional?*, 77 GEO. WASH. L. REV. 904, 916 (2009).

107. *See id.* at 904-07 (discussing appointment provisions in 35 U.S.C. § 6 (2006)).

108. *Id.* at 906 (citing *Freytag v. Comm'r*, 501 U.S. 868, 880-82 (1991)).

109. *See id.* at 916-22 (detailing “Ongoing Epilogue” to original publication of article).

110. Pub. L. No. 110-313, § 1(a)(1), 122 Stat. 3014, 3014 (2008) (to be codified at 35 U.S.C. § 6). As Duffy details, Congress had created this problem when it changed the appointments process in 1999. *See Duffy, supra* note 106, at 914-16. Duffy further argues that Congress's 2008 legislative fix may have been insufficient in terms of addressing retroactive appointments. *See id.* at 919-22.

111. *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018).

The lack of political accountability in PTAB adjudication at the Patent Office, however, did not fully disappear by fixing the “Duffy defect.”¹¹² Elsewhere, Wasserman and I have situated PTAB adjudication within administrative law’s larger modern landscape of agency adjudication.¹¹³ The vast majority of agency adjudication today does not take place before an ALJ under the APA’s formal adjudication provisions. Instead, the new world of formal-like adjudication outside of the APA is procedurally and substantively diverse, with more than 10,000 non-ALJ adjudicators holding hearings in various regulatory contexts.¹¹⁴

Despite this diversity of agency adjudicative formats, we find that “the ‘standard federal model’ continues to vest final decision-making authority in the agency head.”¹¹⁵ Even in this new world of agency adjudication, agency-head control remains a touchstone. In other words, in addition to political accountability through the appointments process, agency adjudicators are politically accountable because their agency heads have the final say at the agency as to adjudicative outcomes.

That is not true at the Patent Office. To be sure, PTAB adjudication embraces most of the best practices that administrative law experts have identified to ensure these formal-like agency adjudications are procedurally fair, substantively consistent, and accurate.¹¹⁶ But in the America Invents Act, Congress did not grant the Patent Office Director final decision-making authority over PTAB adjudications.¹¹⁷ Agency adjudicators on the PTAB are thus more insulated from political control than their peers at other agencies.

Perhaps to address these political-accountability and policymaking concerns, the Director has attempted to influence PTAB outcomes through a panel-stacking strategy. The Patent Act enables the Director to designate members of the PTAB for any particular case and vests exclusive authority to grant a rehearing to the PTAB.¹¹⁸ Over the years, the Director has utilized this ability to designate like-minded members to a panel to ensure PTAB outcomes align with her desired policy preferences.¹¹⁹ This panel-stacking

112. See Gary Lawson, *Appointments and Illegal Adjudication: The AIA Through a Constitutional Lens*, 26 GEO. MASON L. REV. 53 (forthcoming 2019) (manuscript at 53), <https://ssrn.com/abstract=3105511> (“Congress solved the ‘Duffy defect’ by making all members of the PTAB properly appointed inferior officers. But there are still miles to go before the Constitution sleeps.”).

113. See Walker & Wasserman, *supra* note 34, at 148–57.

114. *Id.*

115. *Id.* at 143–44 (quoting Ronald M. Levin, *Administrative Judges and Agency Policy Development: The Koch Way*, 22 WM. & MARY BILL RTS. J. 407, 412 (2013)).

116. See *id.* at 165–68 (detailing agency-adjudication best practices embraced by the PTAB).

117. See *id.* at 158–62 (discussing the PTAB’s statutory and regulatory scheme).

118. 35 U.S.C. § 6(c) (2012).

119. See Walker & Wasserman, *supra* note 34, at 178–87 (detailing history of panel-stacking effects by the Patent Office Director).

tactic is unusual; it even raised Chief Justice Roberts's eyebrows at oral argument in *Oil States*.¹²⁰

In his contribution to this Symposium, John Golden argues that such panel stacking is likely unconstitutional under the Due Process Clause and, at the very least, raises serious constitutional concerns that warrant construing the Patent Act to prohibit the practice.¹²¹ In our analysis of the issue, Wasserman and I were less persuaded by the constitutional arguments, but we agreed that courts may invoke the constitutional avoidance canon in order to interpret the Patent Act more narrowly to prohibit the practice.¹²²

Eliminating the Patent Office Director's ability to influence PTAB outcomes through panel stacking, however, may well exacerbate a distinct constitutional problem: Administrative patent judges have final decision-making authority, yet they are not appointed by the President and confirmed by the Senate. As Gary Lawson has argued, "[t]he bottom line is that the PTAB is the final authority within the executive department . . . on matters of substantive law. That is the very definition of a principal officer."¹²³ Under the Appointments Clause, principal officers must be appointed by the President and confirmed by the Senate.¹²⁴ Yet, as discussed above, the Secretary of Commerce, in consultation with the Patent Officer Director, appoints administrative patent judges (without confirmation by the Senate).¹²⁵

This Essay does not endeavor to assess the strength of Lawson's constitutional argument. But it is worth noting that legal challenges are working their way through the federal courts.¹²⁶ Earlier this Term, the Supreme Court denied one petition that raised the constitutional challenge in a case where the petitioner conceded it did not raise the issue before the PTAB or the Federal Circuit.¹²⁷ The Federal Circuit is presently considering

120. See Transcript of Oral Argument at 45–47, *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365 (2018) (No. 16-712).

121. See generally John M. Golden, *PTO Panel Stacking: Unblessed by the Federal Circuit and Likely Unlawful*, 104 IOWA L. REV. 2447 (2019).

122. See Walker & Wasserman, *supra* note 34, at 188–96.

123. Lawson, *supra* note 112 (manuscript at 46). But see Daniel J. Gifford, *Adjudication in Independent Tribunals: The Role of an Alternative Agency Structure*, 66 NOTRE DAME L. REV. 965, 983 (1991) (arguing that panel-stacking allows the Patent Office Director to “retain[] formal control over” the PTAB).

124. U.S. CONST. art. II, § 2, cl. 2. See generally Lawson, *supra* note 112 (manuscript at 38–53) (fleshing out constitutional argument that administrative patent judges are principal “Officers of the United States” for Appointments Clause purposes).

125. 35 U.S.C. § 6(a) (2012).

126. Ryan Davis, *Are PTAB Appointments Unconstitutional? A Closer Look*, LAW360 (Sept. 5, 2018, 9:14 PM), <https://www.law360.com/appellate/articles/1080125>.

127. See *Smartflash LLC v. Samsung Elecs. Am., Inc.*, 139 S. Ct. 276 (2018) (denying certiorari); see also Petition for Writ of Certiorari at 18, *Smartflash LLC v. Samsung Elecs. Am., Inc.*, 718 F. App'x 985 (Fed. Cir. 2018) (No. 18-189), 2018 WL 3913634 (conceding issue not raised below).

the constitutional challenge as well,¹²⁸ meaning that a more appropriate vehicle to consider the issue may well be on its way to the Supreme Court soon.

No doubt motivated by the political-accountability concerns discussed in this Section, in September 2018 the Patent Office substantially revised the PTAB's standard operating procedures to allow the Patent Office Director to have greater influence in PTAB adjudicative outcomes (without having to engage in panel stacking).¹²⁹ These revisions are two-fold.

First, they establish procedures for "Precedential Opinion Panel Review."¹³⁰ Unless the Director otherwise designates, the Precedential Opinion Panel will be composed of the Director, the Commissioner for Patents, and the Chief Administrative Patent Judge—thus bringing such decision-making under greater agency-head control.¹³¹ This review aims "to address constitutional questions; important issues regarding statutes, rules, and regulations; important issues regarding binding or precedential case law; or issues of broad applicability to the Board."¹³² It "also may be used to resolve conflicts between Board decisions, to promote certainty and consistency, or to rehear any case it determines warrants the Panel's attention."¹³³ The procedures make clear that such review is discretionary and the decision to review is unreviewable.¹³⁴ In sum, this Precedential Opinion Panel review replaces the Director's prior panel-stacking practice with a new rehearing process that arguably avoids the constitutional concerns of the prior practice while still achieving its objectives of greater agency-head control and thus greater political accountability.

Second, the new procedures address designating PTAB decisions as precedential, again vesting more power in the Director. By default, PTAB decisions (other than Precedential Opinion Panel decisions) are routine, not

128. See Amanda James, *Patent Holder Challenges PTAB Decision's Constitutionality*, LAW360 (July 12, 2018, 11:26 PM), <https://www.law360.com/articles/1062350> (discussing *Polaris Innovations Ltd. v. Kingston Techn. Co.*, 223 F. Supp. 3d 1026 (C.D. Cal. 2016)).

129. See *Revisions to Standard Operating Procedures: Paneling and Precedential Decisions*, U.S. PATENT & TRADEMARK OFFICE (Sept. 21, 2018, 12:35 PM), <https://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/procedures/revisions-standard-operating>.

130. PATENT TRIAL & APPEAL BD., STANDARD OPERATING PROCEDURE 2 (REVISION 10): PRECEDENTIAL OPINION PANEL TO DECIDE ISSUES OF EXCEPTIONAL IMPORTANCE INVOLVING POLICY OR PROCEDURE (2018), <https://www.uspto.gov/sites/default/files/documents/SOP2%20R10%20FINAL.pdf>.

131. *Id.* at 4.

132. *Id.* at 3-4.

133. *Id.* at 4.

134. *Id.* at 6. The Director may convene the panel in a given case *sua sponte*, any party may request such review, and, indeed, even any other PTAB member may request such review. See *id.* at 5-6. To assist the Director in considering review requests raised by parties or other PTAB members, the new procedures establish a screening committee that makes recommendations to the Director. See *id.* at 6-7. If the Director decides to grant such review, the parties will be notified and may be given an opportunity to provide additional briefing. *Id.* at 7.

precedential or informative.¹³⁵ Under the new procedures, “[a]ny person, including for example Board members and other USPTO employees and members of the public, may nominate a routine decision of the Board for designation as precedential or informative.”¹³⁶ The Director ultimately decides whether to designate an opinion as precedential or informative, and an Executive Judges Committee reviews designation requests and makes recommendations to the Director.¹³⁷

In sum, the Patent Office Director still lacks unilateral final decision-making authority over PTAB decisions. Accordingly, Lawson would likely conclude that administrative patent judges remain principal officers and thus unconstitutionally appointed by the department head.¹³⁸ But these revisions to the PTAB’s standard operating procedures address many of the concerns about the lack of political accountability in PTAB adjudication. The Precedential Opinion Panel review process should allow the Director to exert more control over PTAB outcomes, and the new precedential-designation process should empower the Director to better shape policymaking and ensure consistency in PTAB adjudication.¹³⁹

B. INSULATION FROM POLITICS IN PTAB ADJUDICATION

In his *Oil States* dissent, Justice Gorsuch cogently articulated the dangers of political control of PTAB adjudication.¹⁴⁰ Section II.B surveys the highlights from his dissent, and they need not be repeated here.

135. *Id.* at 8–9. “A precedential decision is binding Board authority in subsequent matters involving similar facts or issues.” *Id.* at 11. “Informative decisions,” by contrast, “set forth Board norms that should be followed in most cases, absent justification, although an informative decision is not binding authority on the Board.” *Id.*

136. *Id.* at 9.

137. *Id.* at 9–11. “The Executive Judges Committee consists of five members, and includes the Chief Judge, the Deputy Chief Judge and the Operational Vice Chief Judges, in order of seniority and based on availability.” *Id.* at 10. “[T]he Executive Judges Committee may present the nominated decision to all members of the Board for comment during a Board review period.” *Id.* If the Director decides to accept the Committee’s designation recommendation, the designation decision will be published following the public notice and comment period. *Id.* at 11.

138. *Cf.* Lawson, *supra* note 112 (manuscript at 51) (arguing that the only way to cure the constitutional defect would be if “the Director could unilaterally overturn any [PTAB] decision”). Aside from giving the Patent Office Director unilateral control over PTAB outcomes or moving all patent adjudication to Article III courts, another cure for the constitutional defect would be to have the President appoint, and the Senate confirm, all members of the PTAB. It is highly unlikely that the Senate would agree to consume valuable floor time for these hundreds of administrative appointments. If Congress were forced to address the issue, the simplest legislative fix would be to vest the Director with final decision-making authority.

139. This easier precedential-designation process should also strengthen the case for *Chevron* deference in PTAB adjudication. See Stuart Minor Benjamin & Arti K. Rai, *Administrative Power in the Era of Patent Stare Decisis*, 65 DUKE L.J. 1563, 1584–87 (2016); Christopher J. Walker, *Chevron Deference and Patent Exceptionalism*, 65 DUKE L.J. ONLINE 149, 153 (2016).

140. *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1380–86 (2018) (Gorsuch, J., dissenting).

Turning to potential solutions, the Calabresi–Rappaport approach detailed in Section III.A would be a simple solution and, indeed, is essentially what the petitioner advocated for in *Oil States*: Patent adjudication should be prohibited at the Patent Office and, instead, must be litigated in an Article III court. This would not be a novel approach. Before the America Invents Act of 2011, Article III courts were the exclusive forum to challenge the validity of issued patents. Even today, parties can pursue such patent challenges in federal court, before the PTAB, or both!¹⁴¹

The practical problem with this Article III solution is that Congress created the PTAB proceedings expressly because it wanted an alternative to federal-court litigation. Congress enacted the America Invents Act, in part, to respond to growing criticism that the Patent Office issued too many “bad” patents.¹⁴² With the costs of patent litigation skyrocketing, patent holders with meritorious claims were discouraged from challenging invalid patents in federal court.¹⁴³ By congressional design, these new PTAB proceedings were a cheaper, faster alternative to federal district court patent litigation.¹⁴⁴

For someone like Justice Gorsuch who has concerns about the dangers of political control of agency adjudication, is there a less-drastic solution short of requiring all such adjudication to return to Article III federal courts?

As suggested in Section II.B, we could attempt to transform administrative patent judges at the PTAB into Article III adjuncts. In reviewing the three requirements for a “true ‘adjunct’” set forth in *Stern v. Marshall*,¹⁴⁵ one quickly—and perhaps surprisingly—realizes that PTAB adjudication is more similar to *Crowell*’s Article III adjunct model than most other agency adjudication proceedings in the modern administrative state.

First, like virtually all other agency adjudications today, PTAB adjudication satisfies the first requirement because it takes place at an “agenc[y] that oversee[s] [a] particular substantive federal regime[.]”¹⁴⁶ Under the Patent Act, the Patent Office is “responsible for the granting and issuing of patents.”¹⁴⁷ The Patent Office Director, moreover, is statutorily “responsible for providing policy direction and management supervision for

141. See Saurabh Vishnubhakat et al., *Strategic Decision Making in Dual PTAB and District Court Proceedings*, 31 BERKELEY TECH. L.J. 45, 49–50 (2016).

142. See *supra* note 33 and accompanying text.

143. Compare AM. INTELLECTUAL PROP. LAW ASS’N, REPORT OF ECONOMIC SURVEY 2001, at 84 (2001) (noting that for controversies ranging from 1–25 million dollars the average costs through trial were \$797,000), with AM. INTELLECTUAL PROP. LAW ASS’N, REPORT OF ECONOMIC SURVEY 2015, at 40 (2015) (noting that the average costs through trial were \$3.5 million for controversies ranging from 10–25 million dollars).

144. See Walker & Wasserman, *supra* note 34, at 157–61 (discussing the emergence of PTAB adjudication).

145. *Stern v. Marshall*, 564 U.S. 462, 489 n.6 (2011).

146. *Id.*

147. 35 U.S.C. § 2(a)(1) (2012).

the [Patent] Office and for the issuance of patents and the registration of trademarks.”¹⁴⁸

Second, unlike most other agency adjudication systems, the PTAB arguably is closer to satisfying the second requirement because it has much more “limited authority to make specialized, narrowly confined factual determinations regarding a particularized area of law.”¹⁴⁹ The Leahy–Smith America Invents Act established three specific proceedings through which the PTAB exercises its particular expertise to make determinations about the validity of issued patents.¹⁵⁰ Despite some scholarly calls to the contrary, the PTAB presently does not receive *Chevron* deference for its interpretations of substantive provisions of the Patent Act.¹⁵¹ Indeed, as Professor Rebecca Eisenberg explores in her contribution to this Symposium, the Federal Circuit currently reviews *de novo* even many PTAB determinations on mixed questions of law and fact.¹⁵² In other words, the Federal Circuit—and not the agency—“is unquestionably the most influential player in the U.S. patent system.”¹⁵³ In that policymaking sense, the Patent Office is an Article III adjunct.

It is unclear whether the PTAB’s current relationship to the Federal Circuit is sufficiently “adjunct” for purposes of *Stern* and *Crowell*. Many no doubt would argue that the PTAB’s authority is not limited to just “mak[ing] specialized, narrowly confined factual determinations.”¹⁵⁴ Some may argue that the PTAB members should be appointed by the Federal Circuit, as opposed to the agency head.¹⁵⁵ But especially in light of the Federal Circuit’s

148. *Id.* § 3(a)(2)(A).

149. *Stern*, 564 U.S. at 489 n.6.

150. See Leahy–Smith America Invents Act, Pub. L. No. 112–29, § 6, 125 Stat. 284, 299–311 (2011) (codified as amended at 35 U.S.C. §§ 311–19, 321–29 (2012)) (establishing post-grant review proceedings); see *id.* § 12 (codified as amended at 35 U.S.C. § 257) (adding supplemental examination); see *id.* § 18 (codified at 35 U.S.C. § 321) (describing transitional program for covered business-method patents).

151. See, e.g., *Brand v. Miller*, 487 F.3d 862, 869 n.3 (Fed. Cir. 2007) (reiterating that the Patent Office “does not earn *Chevron* deference on questions of substantive patent law”). Compare Melissa F. Wasserman, *The Changing Guard of Patent Law: Chevron Deference for the PTO*, 54 WM. & MARY L. REV. 1959, 1966 (2013) (arguing that in light of the America Invents Act, precedential PTAB interpretations of substantial patent law are entitled to *Chevron* deference), with Golden, *supra* note 89, at 1659 (arguing that, “[c]ontrary to recent arguments by some commentators, . . . recent additions to the Patent Act are unlikely to change courts’ perception of the level of PTO interpretive authority”).

152. Rebecca S. Eisenberg, *A Functional Approach to Judicial Review of PTAB Rulings on Mixed Questions of Law and Fact*, 104 IOWA L. REV. 2387, 2398–400 (2019).

153. Lee Petherbridge & R. Polk Wagner, *The Federal Circuit and Patentability: An Empirical Assessment of the Law of Obviousness*, 85 TEX. L. REV. 2051, 2053 (2007); accord Michael J. Burstein, *Rules for Patents*, 52 WM. & MARY L. REV. 1747, 1757 (2011) (“[T]he Federal Circuit has become the most important expositor of the substantive law of patents in the United States.”).

154. *Stern*, 564 U.S. at 489 n.6.

155. Cf. *id.* at 501 (“It does not affect our analysis that . . . bankruptcy judges under the current Act are appointed by the Article III courts, rather than the President. . . . If—as we have

unique role in shaping patent law and policy, the scope of the PTAB's adjudicative authority is much narrower than most other agency adjudicators, which receive *Chevron* deference in adjudication such "that it is for agencies, not courts, to fill statutory gaps."¹⁵⁶

When it comes to the final requirement, the current statutory framework does not seem to limit the PTAB "to issue orders that could be enforced only by action of the District Court."¹⁵⁷ To be sure, judicial review of the PTAB decision is available in the Federal Circuit. But the prevailing party need not seek Article III judicial relief to enforce a final PTAB decision. Instead, the "dissatisfied" party must appeal the adverse agency decision to invalidate it.¹⁵⁸ That is unlikely to be sufficient for Article III adjunct purposes.

There is one statutory wrinkle. A PTAB decision is not self-executing. Instead, the Patent Office Director must, after "the time for appeal has expired or any appeal has terminated, . . . publish a certificate canceling any claim of the patent finally determined to be unpatentable . . ."¹⁵⁹ That said, that a PTAB decision is not self-executing likely does not suffice for the Article III adjunct analysis. After all, it is the agency head—not an Article III court—that must issue the cancellation order. But if Congress amended the Patent Act to require the Federal Circuit to issue the cancellation order, that would seem to satisfy *Stern's* third requirement for an Article III adjunct.

From this preliminary analysis of the statutory framework, the PTAB is not an adjunct of an Article III court. But it is much closer to being a "true adjunct" than the vast majority of agency adjudication systems in the modern regulatory state. Perhaps a few, relatively minor statutory revisions would suffice to achieve the Article III adjunct status Chief Justice Roberts envisioned in *Stern v. Marshall*.¹⁶⁰ The unique features of PTAB adjudication—i.e., the lack of *Chevron* deference and the lack of policymaking authority over substantive patent law—may not be enough to eliminate the constitutional tensions Justice Gorsuch and others perceive in agency

concluded—the bankruptcy court itself exercises the essential attributes of judicial power [that] are reserved to Article III courts, . . . it does not matter who appointed the bankruptcy judge or authorized the judge to render final judgments in such proceedings." (citations omitted) (internal quotation marks omitted).

156. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005); *accord Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 740–41 (1996) (noting that under the *Chevron* deference doctrine, Congress "understood that the [statutory] ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows").

157. *Stern*, 564 U.S. at 489 n.6.

158. 35 U.S.C. § 141(c) (2012).

159. *Id.* § 318(b); *see, e.g., In re Certain Network Devices, Related Software & Components Thereof (II) Notice of Comm'n Determination to Modify the Remedial Orders to Suspend Enf't as to U.S. Patent No. 7,224,668, Invoice No. 337-TA-945*, 2018 WL 1805742, at *3 (USITC Apr. 5, 2018) (Notice) (suspending enforcement of certain exclusion orders pending official cancellation of the patent claims at issue).

160. *Stern*, 564 U.S. at 489 n.6.

adjudication. But these features may help relieve at least some of those tensions, and thus may be worth exporting in some form to other agency adjudication contexts.

V. CONCLUSION

The Supreme Court's decisions last Term in *Oil States Energy Services v. Greene's Energy Group*¹⁶¹ and *Lucia v. SEC*¹⁶² will certainly not be the last word on the constitutionality of agency adjudication. Indeed, they likely mark only the beginning of a sustained inquiry. As *Oil States* and *Lucia* illustrated, Justice Gorsuch and others are deeply concerned about the constitutional tensions between the importance of political accountability in the administrative state and the dangers of politics in agency adjudication.

This continuing judicial scrutiny may be explained, at least in part, by the current state of the federal judiciary. Scholarly inquiry and popular attention still focus, somewhat myopically, on the Article III federal judiciary. But in the modern administrative state, much more attention needs to be paid to the federal administrative judiciary. Consider, for instance, the current personnel of the federal judiciary: Congress has authorized 860 Article III federal judgeships, including nine Supreme Court Justices, nine judges on the U.S. Court of International Trade, 179 circuit court judges, and 663 district court judges.¹⁶³ By contrast, there are more than 1900 ALJs in the federal administrative judiciary,¹⁶⁴ plus more than 10,000 non-ALJ agency adjudicators who conduct evidentiary hearings that are required by statute or regulation.¹⁶⁵ And there are tens of thousands more agency officials who carry out hundreds of thousands of less-formal adjudications each year in a variety of regulatory contexts.¹⁶⁶

In other words, Article III of the U.S. Constitution may be the wrong starting place to understand the federal judiciary today. Instead, we need to look within the regulatory state. Accordingly, perhaps the closing lines of

161. *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1370 (2018).

162. *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018).

163. ADMINISTRATIVE OFFICE OF U.S. COURTS, AUTHORIZED JUDGESHIPS 8 (2018), <http://www.uscourts.gov/sites/default/files/allauth.pdf>. There are also four Article I territorial judges and sixteen judges on the Article I Court of Federal Claims. *Id.* And there are currently nineteen Article I judgeships on the Tax Court, see 26 U.S.C. § 7443(a), five Article I judgeships on the Court of Appeals for the Armed Forces, see 10 U.S.C. § 942(a), and three-to-seven Article I judgeships on the Court of Appeals for Veterans Claims, see 38 U.S.C. § 7253(a).

164. U.S. OFFICE OF PERSONNEL MANAGEMENT, ADMINISTRATIVE LAW JUDGES (2017), <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency>.

165. Barnett & Wheeler, *supra* note 72, at 32.

166. To provide just one example, the IRS audits or reviews more than five million returns each year—roughly five percent of all returns filed. *See, e.g.*, TAXPAYER ADVOCATE SERVICE, 2016 ANNUAL REPORT TO CONGRESS 28 (2016), https://taxpayeradvocate.irs.gov/Media/Default/Documents/2016-ARC/ARC16_Volume1.pdf (reporting that the IRS audited or reviewed 6,825,987 of the 146,777,623 tax returns filed in tax year 2014).

Justice Gorsuch's *Oil States* dissent have some force in this broader context as well: "[T]he loss of the right to an independent judge is never a small thing. It's for that reason Hamilton warned the judiciary to take 'all possible care . . . to defend itself against' intrusions by the other branches."¹⁶⁷

¹⁶⁷ *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1386 (2018) (Gorsuch, J., dissenting) (quoting THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 2003)).