STRUCTURAL PROTECTIONS FOR INDIVIDUAL RIGHTS: THE INDISPENSABLE ROLE OF ARTICLE III—OR EVEN ARTICLE I—COURTS IN THE ADMINISTRATIVE STATE

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INTRODUCTION

Last Term, the United States Supreme Court decided two important cases—*Oil States Energy Services, LLC v. Greene's Energy Group, LLC*[1] and *Lucia v. Securities and Exchange Commission*[2]—that bear on the distribution of the adjudicative power under the United States Constitution. The seemingly technical issues involved in these two cases raise some of the most profound questions about *who* has the power to resolve individual cases that arise under the Constitution and laws of the United States. The relevant issues are far ranging, and they each require discussion of three interrelated core principles of American constitutional law as they play out in connection with the modern administrative state. First, the doctrine of separation of powers; second, the ability of various government officials to appoint "inferior officers" under the Appointments Clause of the Constitution;[3] and third, whether the new procedures implemented under both the America Invents Act ("AIA")[4] and the Dodd-Frank Act[5] are consistent with the requirements of procedural due process under the Fifth Amendment to the Constitution.[6] The

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[1] 138 S. Ct. 1365 (2018).

[2] 138 S. Ct. 2044 (2018) (reversing Raymond J. Lucia Cos. v. SEC, 832 F.3d 277 (D.C. Cir. 2016)).

[3] U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.").

[4] Leahy-Smith America Invents Act, 35 U.S.C. §§ 311–319 (2012) (*inter partes* review).

[5] Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5301–5641 (2012).

[6] U.S. CONST. amend. V ("[N]or [shall any person] be deprived of life, liberty, or property, without due process of law.").

ability to answer these questions requires both a far-reaching inquiry into fundamental questions of constitutional law and a close appreciation of the statutory schemes created by these two explosive statutes.

The many opinions written for these two cases touched on only a fraction of the issues relevant to the intersection of these three separate constraints on the operation of the judicial system to resolve these disputes in both Article III courts and administrative tribunals created by Congress. Accordingly, I shall first state in some detail the procedural histories of both cases in order to set the stage for the analytical overview of the three substantive issues set out above. Thereafter, I shall defend in some detail the following thesis: namely, that the separation of powers, and, to a lesser extent, the Appointments Clause, are prophylactic devices that are intended to protect both procedural and substantive rights—the two go hand in hand—without having to make detailed inquiries into individual cases under some vision of procedural due process to see whether these rights have been threatened. When the separation of powers and the Appointments Clause fail, the Due Process Clause, which itself cannot undo all administrative tribunals, should also be applied as a prophylactic rule by striking down as per se unconstitutional procedures that truncate the right of the parties hauled before these tribunals to be heard, and heard by a neutral judge free of bias one way or another.

The impetus for all of these prophylactic rules is an effort to balance two kinds of errors. The first error type is that the precaution may well be overbroad, so that it will block some institutional initiatives that, in the fullness of time, seem well worth undertaking. The second error type is the opposite: the want of a strong structural protection creates the opportunity for genuine abuse that only can be corrected, if at all, on an erratic basis once the structural safeguards are removed. These prophylactic devices are *by design* overbroad, which means that they necessarily knock out some individual cases that in some ideal world with perfect information should be allowed to go forward. But when the odds of a decent trial are low, these per se tests are easier to apply and paradoxically more accurate in their application. Thus, it may well be known that five percent of cases that are tried by truncated procedures before appointed judges may meet some exacting standard of proof. But no case-by-case analysis will be able to identify which of the thousands of individual cases meet the requisite standard. By using the prophylactic rule, the numbing details of the cases slip away so that the right result is reached more quickly *and* more often than might otherwise be the case.[7] Accordingly, I first turn to the procedural niceties of these two cases before attacking the general thesis.

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[7] On this general theme, see RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995).

I. A TALE OF TWO CASES

A. *Case One:* Oil States v. Greene's Energy

Oil States Energy Services sued Greene's Energy Group in federal district court claiming infringement of one of its drilling patents.[8] Greene's Energy defended against the infringement charges on the ground that the patent's claims were anticipated by the prior art, and the patent was therefore invalid.[9] About a year after those proceedings began, Greene's Energy took advantage of the inter partes review procedure under the AIA to initiate parallel proceedings before the Patent Trial and Appeal Board ("PTAB") to block enforcement of the patent on the same ground, namely that it was anticipated by the prior art.[10] The judge in federal district court interpreted the patent's claims in a manner that "foreclose[d]" Greene's Energy's invalidity arguments.[11] But thereafter, the PTAB entered its decision in support of Greene's Energy and refused to allow Oil States to amend its complaint.[12] Greene's Energy then sought to enforce its PTAB decision, which Oil States claimed was blocked for two reasons: first, that under the doctrine of separation of powers, the PTAB could not deal with the claim; and second, that Oil States was entitled to a jury trial for its "[s]uit at common law" under the Seventh Amendment to the U.S. Constitution.[13] The Court of Appeals for the Federal Circuit summarily affirmed the decision, and the case went to the Supreme Court on these two issues only. The procedural due process question was neither briefed nor argued.

A seven-member majority of the Supreme Court, in an opinion written by Justice Clarence Thomas, held that adjudication over the validity of the patent implicated a "public right," and its validity did not have to be adjudicated before an Article III court.[14] Justice Gorsuch (joined by Chief Justice Roberts) took the contrary position and insisted that the principles of separation of powers required that these cases be adjudicated in a judicial forum.[15] He relied on a long line of nineteenth-century cases holding that once a patent was issued, whether for land or an invention, the only place in which it could be challenged was an Article III court.[16] At no point did either opinion speak to the processes for the appointment of administrative judges to the PTAB.

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8 Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1372 (2018).

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .").

14 *Oil States*, 138 S. Ct. at 1373.

15 *Id.* at 1380 (Gorsuch, J., dissenting).

16 *Id.* at 1384 (citing McCormick Harvesting Mach. Co. v. Aultman, 169 U.S. 606, 608–09 (1898)).

B. *Case Two:* Lucia v. SEC

Shortly thereafter, in *Lucia v. Securities and Exchange Commission*, a divided Supreme Court had to decide whether an administrative law judge ("ALJ") who operated inside the SEC counted as an "inferior officer" under the Appointments Clause such that his appointment had to be vested in the head of a department.[17] The SEC charged Lucia under the Investment Advisers Act[18] and provisions of the Dodd-Frank Act[19] and assigned the case for review before an ALJ.[20] That ALJ, Cameron Elliot, was not appointed by the head of any department, but rather by the staff of the SEC.[21] A divided Supreme Court held that Elliot was an "Officer[] of the United States," and not a mere employee.[22] Justice Kagan rejected the SEC's argument that Elliot was not an inferior officer because he only had power to conduct the trial but lacked final say over the outcome since the matter had to be examined and approved by the Commission (which in fact affirmed the decision by a three-to-two vote).[23] Instead she held that the key test had two parts: first, whether the position in question was one with permanent as opposed to temporary authority;[24] and second, whether he "exercise[ed] significant authority pursuant to the laws of the United States."[25] She found that because he was a long-time ALJ who had extensive control over all trial and pre-trial activities, he counted as an officer.[26]

On a related issue, Justice Kagan then noted that the SEC could not retry the case before Judge Elliot but had to start over with a different judge.[27] On this point, Justice Breyer, joined by Justices Ginsburg and Sotomayor, parted ways with Justice Kagan by insisting that a remand to the same judge was consistent with standard practice for new trials on remand in federal courts and should be applied here.[28] Justice Sotomayor, joined by Justice Ginsburg, dissented more broadly on the ground that "a person who merely advises and provides recommendations to an officer would not herself qualify as an officer."[29]

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

18 Investment Advisers Act of 1940, 15 U.S.C. § 80b–1–21 (2012).

19 Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5301–5641 (2012).

20 *Lucia*, 138 S. Ct. at 2049–50.

21 *Id.* at 2050.

22 *Id.* at 2055.

23 *Id.* at 2053–54.

24 *Id.* at 2051 (citing United States v. Germaine, 99 U. S. 508, 511–12 (1879)).

25 *Id.* (quoting Buckley v. Valeo*,* 424 U.S. 1, 126 (1976) (per curiam)).

26 *Lucia*, 138 S. Ct. at 2053–55; *see also* Freytag v. Comm'r, 501 U.S. 868, 881–82 (1991) (holding that "special trial judges" in the tax court are inferior officers even though they do not have final say in the cases over which they preside).

27 *Lucia*, 138 S. Ct. at 2055.

28 *Id.* at 2064 (Breyer, J., concurring in part and dissenting in part).

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

II. ADMINISTRATIVE DEFERENCE IN BOTH *OIL STATES* AND *LUCIA*.

It should not be surprising that the theme of judicial deference to administrative action runs through both of these decisions. That attitude is not new. Indeed, its origins date back at least as far as the writings of a young Woodrow Wilson. At the age of twenty-nine, he wrote the influential book *Congressional Government* and threw down the gauntlet with this withering condemnation of the separation of powers:

> It is, therefore, manifestly a radical defect in our federal system that it parcels out power and confuses responsibility as it does. The main purpose of the Convention of 1787 seems to have been to accomplish this grievous mistake. The "literary theory" of checks and balances is simply a consistent account of what our constitution-makers tried to do; and those checks and balances have proved mischievous just to the extent to which they have succeeded in establishing themselves as realities. It is quite safe to say that were it possible to call together again the members of that wonderful Convention to view the work of their hands in the light of the century that has tested it, they would be the first to admit that the only fruit of dividing power had been to make it irresponsible.[30]

Socially, of course, there is little doubt that by 1885, one word—railroads—explains why some administrative exercise of power had become necessary. Indeed, two years later, the Interstate Commerce Act marked the first great expansion of administrative powers.[31] And when it came to the Act's interpretation and application, Wilson took the view that judges should take a back seat to the legislature.[32] But this general sentiment was not about the resolution of individual disputes by specialized tribunals housed somewhere in the executive or legislative branches. So, the question of individual rights did not come to the fore. But once the focus turns to that topic, as it does here, the so-called "grievous mistake" of the separation of powers deserved more respect in the beginning of the twenty-first century than it enjoyed toward the end of the nineteenth century. The point here is that efficiency is not determined by a simple metric—speed of adjudication—but two other issues are of real importance to the parties and public at large: the accuracy of the determination, and the legitimacy of the outcome. But the word "error" is never used in Wilson's book in connection with the wrong outcome of a particular dispute; nor does the word "bias" appear. Yet both of these are

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30 WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 284–85 (1885).

31 Interstate Commerce Act of 1887, Pub. L. No. 49-104, 24 Stat. 379 (codified as amended in scattered sections of 49 U.S.C.) (explicitly limited by its terms to common carriers that operate between states or with foreign nations, and of course the District of Columbia).

32 WILSON, *supra* note 30, at 24 ("[I]t has long stood as an accepted canon of judicial action, that judges should be very slow to oppose their opinions to the legislative will in cases in which it is not made demonstrably clear that there has been a plain violation of some unquestionable constitutional principle, or some explicit constitutional provision."). *See generally* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 17 (1893) (making the most famous legal expression of this position).

at risk if procedural safeguards are slighted. Factor these elements into the equation, and the choice of litigation strategy is a constant trade-off among these three variables, whose proper relationship can easily be overlooked when that trade-off is ignored.

A. *The Imbalance in* Oil States

That is the imbalance that can arise here. Start with *Oil States*. The PTAB is an innovation of the AIA, which was designed to cut the federal courts, particularly the federal district courts, out of the control over patent disputes. That ambition covered the desire to limit the influence of the appellate courts in two ways: construing patent statutes and resolving individual cases. So, the question then arises: what was the administrative structure put in place? The claim is that the rigid structure of Article III, with lifetime tenure and a guarantee of independence and a jury trial, is ill-suited for high volume litigation over technical issues. It was to deal with just these situations that Congress created specialized courts for taxation and bankruptcy. Their common home is in Article I, section 8, clause 9: "The Congress shall have Power . . . To constitute Tribunals inferior to the supreme Court."[33] It is difficult to explain how these so-called "Article I" courts fit into the grand constitutional scheme, given that the term "tribunal" usually refers to short-term bodies designed to resolve a particular class of claims.[34] Calling permanent bodies like the Tax Court "quasi-legislative" or "quasi-judicial" raises more questions than it answers, given that the district courts often have concurrent jurisdiction with the Tax Court, subject to this difference: a claim may be adjudicated in the Tax Court before the tax is paid, but not in a district court, where the suit must be brought to recover money already paid into the government.

For these purposes, however, the critical point is not whether their constitutional existence is justified, but how they are organized. In this context, there are key contrasts between the judges who serve on these courts and the PTAB judges in *Oil States* and the ALJ in *Lucia.* Thus, the United States Tax Court consists of nineteen members, each of whom is appointed by the president, subject to Senate confirmation, for fifteen-year terms.[35] Given that they serve for only a limited term, they cannot be treated as Article III judges. Each judge receives a geographic assignment from the chief judge for each

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33 U.S. CONST. art. I, § 8, cl. 9.

34 But this clause cannot be read so broadly as to render Article III irrelevant. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 660, 680 (1981) (upholding the International Claims Tribunal to resolve claims arising out of the Iranian seizure of American assets); Wiener v. United States, 357 U.S. 349, 356 (1958) (holding that members of a three-year War Claims Commission could not be removed by the president without cause).

35 26 U.S.C. § 7443(b), (e) (2012).

trial session.[36] Reappointment is often done routinely regardless of the political party of the president or the particular judge. In addition, the chief judge of the Tax Court can assign special trial judges to preside over small tax matters, with only a limited power of review—a procedure that is fully consistent with the Appointments Clause.[37] The judgments of the Tax Court may be appealed to the appropriate Court of Appeals, based on where the initial case is heard.[38]

Similarly, bankruptcy judges are treated as judicial officers of the federal district courts and are appointed by the Courts of Appeal to serve for fourteen-year terms.[39] The assignment of cases follows local rules used by federal district courts. In general, these rules require a random drawing of judges in individual cases. In addition, strict procedures for recusal are imposed in order to avoid even the appearance of impropriety.[40] As with the Tax Court, the only serious difference between these judges and ordinary Article III judges is the length of their term, not their independence from political influence.

There are many, myself included, who think that de facto lifetime tenure for Article III judges is a serious mistake in constitutional design and that the judicial system would be better served if all judges—and Supreme Court justices—served for limited terms—or, alternatively, were required to retire by age seventy.[41] By this view, the rules for the Tax Court and the Bankruptcy Court look *superior* to those that are now in place for all Article III judges *and* Justices. Appointments for terms of good behavior, which are effectively lifetime appointments in all but the rarest cases, are the product of a bad (i.e., overbroad, prophylactic) rule. It is easy to imagine a time-bound appointment that protects the independence without preventing the orderly rotation of judges—which itself was always regarded as a virtue of sound government and is thoroughly institutionalized in virtually all federal and state judicial systems, where any effort to game the system is treated with deep suspicion.[42]

Contrast the situation with the appointment structure under the PTAB with appointments pursuant to securities laws. In neither case is there the slightest effort to control against possible abuse by implementing some principle of rotation, which is intended to prevent the chief judge from stacking

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36 Nicholas R. Metcalf & Mary W. Prosser, *Litigating a Case Before the U.S. Tax Court*, 61 FED. LAW. 33, 35 (2014).

37 26 U.S.C. § 7443A(a); U.S. Tax Ct. R. 180.

38 *See* U.S. Tax Ct. R. 190.

39 28 U.S.C. § 152(a)(1).

40 *See* UNITED STATES COURTS, FAQS: FILING A CASE, http://www.uscourts.gov/faqs-filing-case (last visited Feb. 20, 2019).

41 For my contribution, see Richard A. Epstein, *Mandatory Retirement for Supreme Court Justices*, *in* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 435 (Roger C. Cramton & Paul D. Carrington eds., 2006).

42 For extensive discussion defending rotation, see Marin K. Levy, *Panel Assignment in the Federal Courts of Appeals,* 103 CORNELL L. REV. 65 (2017).

a panel in a party's favor. The head of the PTAB is, of course, a political appointee and thus a short-termer. But that person can determine just how many judges should sit on each case—so long as the number is greater than three.[43] In addition, the two previous heads of the PTAB, Michelle Lee and David Ruschke, regarded it as their explicit prerogative to appoint additional members, including themselves, to any ongoing panel in order to "secure and maintain uniformity of the Board's decisions,"[44] as the PTAB insisted in its brief in *Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co*.[45] Obviously, the head of the PTAB always has one safe appointment—the head of the PTAB. Two judges on the Federal Circuit were troubled by due process concerns about the Director adding additional members but saw no reason to address the point definitively given that the particular case was decided on other grounds that mooted the issue.[46] The same question of panel-stacking also occurred in *Oil States*, but again the issue was passed over by the Supreme Court.[47]

The entire issue did not escape the attention of the patent bar, many of whose members protested loudly against the practice. Thus, one account of the issue carried with it the title "Don't Like Your PTAB Decision in IPR? Ask the PTAB to Pack the Court."[48] That article made the explicit comparison to the New Deal court-packing struggles, when Franklin Roosevelt sought authorization from Congress to add up to six new justices to the Supreme Court—one for each Justice who reached the age of 70.5 years.[49] But this scheme is worse. The Supreme Court hears a wide range of cases, and its Justices sit for many years. The presidential choice of Justices is of necessity made partly from behind the veil of ignorance. Quite simply, with the broad basket of cases that will come before the Court, it is hard to pick any Justice who agrees with the president on all matters and will continue to do so in the long run. Just look at the divergent paths of the justices whom President Roosevelt chose after he lost the court-packing fight: Justices Hugo Black, Felix Frankfurter, William O. Douglas, and Robert Jackson, for starters. These Justices were often in conflict with each other on matters that turned out to have great importance down the road.[50]

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43 35 U.S.C. § 6(c) (Each case "shall be heard by at least 3 members of the Patent Trial and Appeal Board, who shall be designated by the Director.").

44 Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co., 868 F.3d 1013, 1020 (Fed. Cir. 2017) (quoting Director Br. 27).

45 868 F.3d 1013 (Fed. Cir. 2017).

46 *Id.* at 1020.

47 *See* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1379 (2018).

48 Charles W. Shifley, *Don't Like Your PTAB Decision in IPR? Ask the PTAB to Pack the Court*, BANNER & WITCOFF PTAB HIGHLIGHTS (Sept. 11, 2017), https://bannerwitcoff.com/wp-content/uploads/2017/09/Dont-Like-Your-PTAB-Decision-in-IPR.pdf.

49 *Id.*

50 *See, e.g.*, A.C. Pritchard & Robert B. Thompson, *Securities Law and the New Deal Justices*, 95 VA. L. REV. 841, 892–912 (discussing the court-packing Justices' vehement disagreements in the late 1940s about whether or not to defer to the SEC).

The situation with the PTAB is far worse. There is no long run, for these appointments are made case by case. There is accordingly no veil of ignorance, but perfect knowledge of what each individual case is and what the views are of each member of the panel who joins it. Worse still, the head of the PTAB gets a second look at each case. As with *Nidec* and *Oil States*, the head of the PTAB can bring reinforcements to his or her side of the issue unilaterally and utterly without any deliberative process. It is rightly called stacking the deck. Can one imagine any Article III court in which the presiding judge would dare announce that he is adding more members to a panel because I disagree with its direction to date? The PTAB purports to be a substitute for a regular court. It claims that it has expertise similar to District Courts, which it has yet to demonstrate. Instead of expertise, the PTAB has shown by its own admission that it is hopelessly partisan in all its decisions, given that its procedures flout each and every procedural safeguard that had been put in place to preserve the independence of its judges. Given this unfortunate procedural morass, it is a source of deep disappointment that a majority of the Supreme Court in *Oil States* blessed a set of procedures that gave the PTAB freedom to choose its own procedures.[51]

Indeed, the situation is, or perhaps was, still worse than this bare account given the serious charges of improper behavior directed against David Ruschke, in such articles as Aaric Eisenstein's *PTAB Chief Judge Ruschke Must Be Beyond Reproach*, which strongly attacked Ruschke for accepting an invitation from Unified Patents to be the keynote speaker at one of its conferences.[52] Unified Patents is an organization that describes itself as "a deterrence entity that seeks to deter the assertion of poor quality patents in certain technology zones."[53] There are multiple ways to interpret this message, but this description makes it clear that the organization consciously puts itself on only one side of patent disputes—invalidating patents. Unified could be correct on every case that it brings, but it was still wholly inappropriate for Ruschke to address them. In making this criticism, Eisenstein confronted the objection that if it is all right for conservative justices to speak before the Federalist Society, it is also appropriate for the head of the PTAB speak before this organization. As Eisenstein writes:

> [T]he critical distinction is that these parties have the bulk of their own regular business operations that are also outside the judges' purview.

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51 For a detailed discussion, see Richard A. Epstein, *The Supreme Court Tackles Patent Reform: Inter Partes Review Under the AIA Undermines the Structural Protections Offered by Article III Courts*, 19 FEDERALIST SOC'Y REV. 188, 195 (2018) [hereinafter *OS III*].

52 *See* Aaric Eisenstein, *PTAB Chief Judge Ruschke Must Be Beyond Reproach*, IPWATCHDOG (Nov. 28, 2017), http://www.ipwatchdog.com/2017/11/28/ptab-chief-judge-ruschke-must-be-beyond-reproach/.

53 *FAQ*, UNIFIED PATENTS, https://www.unifiedpatents.com/faq/ (last visited Feb. 5, 2019).

> In contrast, the hearing rooms overseen by Judge Ruschke and his corps of Administrative Patent Judges are the only places where Unified Patents ever does business. Unified Patents did not even exist before the America Invents Act became law nor before the PTAB began operations.[54]

The appearance of bias is too great. No one knows whether or not Ruschke was pushed upstairs into his new position as a "Senior Advisor"[55] at the PTO, but it allowed the new PTO Director Andrei Iancu to name a new PTAB director capable of reversing the previous practices.[56]

Perspective matters. The issue here is not how this particular piece of internal intrigue eventually resolves itself. Whether Iancu wears a black hat or white hat is not the issue. The ultimate structural issue is that no office that purports to have judicial functions should be subject to that rate of turnover, such that the people who are riding high one day are shunted off to administrative Siberia the next. Rapid turnover has always been dangerous, whether or not it has policy implications, and the ongoing saga at the PTAB is further evidence that its structure is flawed root and branch.

B. *The Imbalance in* Lucia

The background situation in *Lucia* was every bit as troublesome as that in *Oil States*. The Supreme Court, from its high appellate perch, spent no time whatsoever looking at either the substantive allegations against Lucia or the behavior of the ALJ, Cameron Elliot, in evaluating the case. The first point to note is the nature of the underlying charges, which were speculative at best. Lucia was a seasoned professional who for many years made general public presentations about his "Buckets of Money" system that he claimed was a solid way to make money.[57] This system consisted of buying a wide range of assets from debt to equity, and then slowly removing the debt issues from the portfolio after the equity issues had a chance to grow.[58] The false and misleading statements that he was said to have made did not relate to any particular transactions with individual customers, but were only directed to a public audience who were then encouraged to come to Lucia for particular advice.[59] The so-called violation was the use of the word "backtests" in an

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54 Eisenstein, *supra* note 52.

55 *See* Email from Andrei Iancu, Under Secretary of Commerce for Intellectual Property and Director of the USPTO, to Christopher Shipp, Chief Communications Officer of the USPTO (Aug. 14, 2018, 2:39 PM), https://images.law.com/contrib/content/uploads/documents/398/21558/PTAB.Email_.pdf.

56 *See* Scott Graham, *PTAB Chief Judge Taking New Role at USPTO*, NAT'L L.J. (Aug. 15, 2018, 11:01 PM), https://www.law.com/nationallawjournal/2018/08/15/ptab-chief-judge-taking-new-role-at-uspto/.

57 Brief for Petitioners at 4–5, Lucia v. SEC, 138 S. Ct. 2044 (2018) (No. 17-130).

58 *Id.* at 5.

59 *Id.* at 5–6.

example, labeled as such, that looked at historical rates of return in connection with hypothetical assumptions about other key indicators, most notably on inflation and nonstick financial interests.[60] The SEC did not explain how these would mislead, given all the disclaimers. No one who came to these presentations raised any fraud claims based on the transaction, and the SEC did not charge that any of these transactions were tainted by fraud.[61] The case therefore looks to be a clear instance in which the supposed fraud was, on the full statement of facts, harmless with respect to the outcome. The SEC claimed that the various techniques used overstated the rates of return.[62] Lucia had even presented his slides to the SEC and to the Financial Industry Regulatory Authority ("FINRA"), which was set up by Congress to help firms comply with securities law.[63]

The SEC could have prosecuted this shaky case in federal district court, where it might well have lost. Instead, it took advantage of the provisions of the Dodd-Frank Act that allowed it to pursue these cases with a home court advantage, in front of an Administrative Law Judge whom its staff picked for the occasion. Around eighty percent of SEC prosecutions now take place in this forum, for the stated reason that they "involve less discovery than federal courts actions and do not involve depositions, interrogatories, juries or rules of evidence"—all of which are generally regarded as essential protections for private litigants.[64] These proceedings also disallowed challenges that could be made in an Article III court, most notably any direct challenge to the legality of the rules that the agency uses in litigation.[65] It should come as no

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60 *Id.* at 5.

61 See petitioners' brief on this point:

> There was no evidence, much less a finding, that the conduct at issue caused *any* investor losses. Nevertheless, Judge Elliot imposed monetary sanctions based on "the substantial financial success" Lucia and his company had purportedly "enjoyed at their clients' expense." In addition, Judge Elliot barred Lucia from working as an investment adviser or associating with broker-dealers (including his own son) for the rest of his life, in keeping with his established practice of "never giv[ing] less than a permanent bar" as a sanction against an investment adviser in a contested proceeding.

Id. at 8 (citations omitted).

62 *Id.* at 5–6.

63 *See* Brief for Petitioners at 5–6, Lucia v. SEC, 138 S. Ct. 2044 (2018) (No. 17-130). "FINRA is the Financial Industry Regulatory Authority, an independent, non-profit organization tasked by Congress to ensure the securities industry operates fairly and according to government regulations. FINRA examines firms to ensure compliance with finance and securities policies. These efforts seek to protect investors and promote transparency." *See What is FINRA?*, REFERENCE.COM, https://www.reference.com/business-finance/finra-9fb0b6524b260a06?aq=who+is+finra&go=cdpArticles (last visited Feb. 5, 2019).

64 Hazel Bradford, *Fate of SEC Administrative Law Judges to Be Decided by High Court*, PENSIONS & INVESTMENTS (Jan. 22, 2018), http://www.pionline.com/article/20180122/PRINT/180129985/fate-of-sec-administrative-law-judges-to-be-decided-by-high-court; *see* Richard A. Epstein, *Miscarriage of Justice at the SEC*, HOOVER INST.: DEFINING IDEAS (Apr. 30, 2018), https://www.hoover.org/research/miscarriage-justice-sec.

65 For discussion, see the Brief of the New Civil Liberties Alliance as Amicus Curiae in Support of Petitioners at 16, Lucia v. SEC, 138 S. Ct. 2044 (2018) (No. 17-130).

surprise that in the five year period from October 2010 to March 2015, the ALJs strongly favored the SEC's views, and in turn, the full commission later adopted the ALJ's decision about ninety-five percent of the time.[66] The home court advantage really works. So why not use it?

The selection of the ALJ raises similar concerns. The SEC selects the judges in connection with an individual case, with full knowledge of the relevant issues. To that end, the SEC can choose ALJs that have passed tests conducted by the Office of Personnel Management, but it is also able to choose judges who do not come from within the agency, but who serve in other parts of the system. The importation of these judges undercuts any claim that ALJs have a special expertise that offsets the risk of bias within the organization. In this instance, Cameron Elliot, the judge who was chosen in *Lucia*, had his background in the Social Security Administration and did not come up through the OPM.[67] But once selected, he showed no mercy in dealing with these cases:

> Judge Cameron Elliot, a 49-year-old former nuclear-submarine officer and SEC judge since 2011, has found the defendants liable in every contested case he has heard . . . Mr. Elliot told the defendants during settlement discussions on a case they should be aware he had never ruled against the agency's enforcement division.[68]

None of these issues were addressed in any of the judicial opinions, all of which turned solely on the niceties of the Appointments Clause. But while that decision provides a stopgap measure that is good in the individual case, it hardly addresses the root of the problem. The case may be reheard before another ALJ who is picked by the same process. The only change this decision requires is that the party who makes the appointment be the head of the department.[69] But that appointment need only rubber stamp the decisions made below. This travesty could not happen if the doctrine of separation of powers applied and extended to this delegated authority. Having looked at the gory particulars of *Oil States* and *Lucia*, it is important now to look at the substantive evolution of administrative law that allows Justices of the Supreme Court to turn a blind eye to the evidence of bias that is in plain view. But as the jurisdictional and Appointments Clause arguments do not dispose of these cases, the next line of challenges may well come from the Fifth Amendment's due process provisions, which were not discussed in this case.

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66 *See* Gideon Mark, *SEC and CFTC Administrative Proceedings*, 19 U. PA. J. CONST. L. 45, 47–48 (2016).

67 *See* Brief of the New Civil Liberties Alliance as Amicus Curiae in Support of Petitioners at 6, Lucia v. SEC, 138 S. Ct. 2044 (2018) (No. 17-130).

68 Jean Eaglesham, *Fairness of SEC Judges is in Spotlight*, WALL ST. J. (Nov. 22, 2015, 9:25 PM), https://www.wsj.com/articles/fairness-of-sec-judges-is-in-spotlight-1448236970.

69 Lucia v. SEC, 138 S. Ct. 2044, 2051 (2018).

III. STRUCTURAL PROTECTIONS OF PROPERTY AND LIBERTY

To recapitulate, the patent tribunals and the SEC ALJs raise serious questions of propriety which garner three different kinds of responses. The first suggestion is to use separation of powers doctrine to cabin possible abuses by a broad prophylactic principle. The second is to use the Appointments Clause to find ways to gain accountability through the chain of command. The third is to switch gears and rely on notions of procedural due process to deal with these abuses, either by broad per se rules or more individuated treatment of individual cases. This section assesses these three methods in succession to determine their relative strengths and weaknesses and how they interact with one another.

A. *Separation of Powers Versus Checks and Balances*

The Supreme Court case law contains strong support for the principle of separation of powers as the guardian of individual liberty. That position is found, for example, in *Bowsher v. Synar*,[70] where Chief Justice Burger wrote: "Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty."[71] *Bowsher* does not contain any systematic explanation as to why this proposition should be the case. Instead, it relies in truncated form on statements made by James Madison in Federalist Paper 47, tracing the concern, sensibly enough, back to Montesquieu and *The Spirit of the Laws*.[72] Madison made it clear that all three branches of government are covered by one basic proposition: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny."[73] And further, quoting Montesquieu: "'There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates,' or, 'if the power of judging be not separated from the legislative and executive powers.'"[74] So far, so good.

It is at just this juncture, however, that the chinks in his intellectual armor reflect the current debate over the judicial role. What Madison demanded in one breath, he undercut in the next. Madison acknowledged that these three

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70 478 U.S. 714 (1986).

71 *Id.* at 722. *See also* INS v. Chadha, 462 U.S. 919, 951 (1983); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

72 THE FEDERALIST NO. 47 (James Madison).

73 *Id.*

74 *Id.*

branches "are by no means totally separate and distinct from each other,"[75] which is surely the case under the United States Constitution, where judges in the federal court system are appointed by the president, subject to the advice and consent of the Senate. In this situation, the power of each branch is plenary. The president can nominate whom he chooses, and the Senate can, collectively, confirm or reject a nominee for whatever reason it sees fit, on the same plenary basis.[76] The showdown situation is probably the best of all possible solutions, for any effort to impose some extrinsic "good cause" ground for Senate rejection (or presidential nomination) means that the process is no longer self-enforcing because some independent party then has to pass upon the reasons given, a task for which the courts are singularly ill-suited. But as things stand, the president has two advantages. The first is that he may act unilaterally while members of the Senate have to cooperate. Second, if the Senate turns down the first nominee, it faces the prospect of the second. But still the struggle is likely to get tense, as with the Brett Kavanaugh nomination, for time cuts against the president and in favor of the senatorial opposition.

But Madison waded into treacherous waters in further explication of his stirring declaration when he insisted:

> [Montesquieu] did not mean that these departments ought to have no PARTIAL AGENCY in, or no CONTROL over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the WHOLE power of one department is exercised by the same hands which possess the WHOLE power of another department, the fundamental principles of a free constitution are subverted. This would have been the case in the constitution examined by him, if the king, who is the sole executive magistrate, had possessed also the complete legislative power, or the supreme administration of justice; or if the entire legislative body had possessed the supreme judiciary, or the supreme executive authority.[77]

Yet there is a vast middle ground between having the whole power and having no power at all. The checks and balances over the appointment processes and the protection of judicial salaries are fine because they do nothing to compromise the way in which judges discharge their work once they are appointed and compensated. But Madison's statement goes far beyond those bounded constraints and leaves open the possibility that the president could override a final judgment of the courts if he were persuaded that it was clearly erroneous: after all he has not taken the whole power, only the most critical bits. It might well be that this newly coined presidential power would be exercised only rarely, and perhaps even prudently. But it is equally the case that in judging the constitutionality of various structural protections, it is

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75 *Id.*

76 John McGinnis, *Advice and Consent: What the Constitution Says*, HERITAGE FOUND. (July 19, 2005), https://www.heritage.org/courts/report/advice-and-consent-what-the-constitution-says.

77 Madison, *supra* note 72.

dangerous in the extreme to indulge in certain behavioral predictions that could prove either usually correct or catastrophically wrong.

The question of just how the pieces fit together thus becomes urgent, for there is an evident tension between separation of powers, which allows each party to go it alone on some key decision, as with the pardon power that is lodged exclusively in the president, and checks and balances, which require two or more branches of government to complete any given official act. As Justice Robert Jackson identified the point in *Youngstown Sheet & Tube Co. v. Sawyer*,[78] "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[79]

It is important to tease out the reasons Jackson's elegant characterization is so discomfiting the moment the trade-offs between two strategies—separation of powers versus checks and balances—becomes apparent. With that realization, the analytical framework changes so that what looked to Montesquieu as an eternal truth turns into a grubby form of utilitarian error-minimization fraught with uncertainty over which method is best in any particular context. But in fact, there is no other alternative, as a comparison to private litigation seems to be most relevant here. The formation of structures does not involve the rectification of past wrongs where all the facts of a case have been fixed, so that the only question before a court is to decide who is responsible to whom and for what. In that closed universe, the only remedy that matters is either restoration of a thing or the payment of damages. There are no future uncertainties to address. But when the question comes to whether the court should enjoin certain conduct because it *may* result in the creation of a nuisance, or keep drivers off the road because they *may* cause injury, remedial uncertainties dominate the inquiry. In these cases, it is taken as a given that pollution, property damages, and bodily injuries are all tortious wrongs to be prevented if possible. Yet we do not know whether the risk of serious damage is high enough to justify intervention prior to harm, either by private injunction or public action. And even if intervention before the fact is desirable, the questions rise to the surface of *when* it should be imposed and whether it should be categorical (no one can drive under the age of 16) or a particularized determination (drivers at fault in two or more serious accidents within a given year shall surrender their licenses for six months). The law is replete with hard choices as to what kind of intervention, public or private, is needed, and on those issues single a counterexample never counts as a decisive argument against a rival position because *every* rule of future conduct is subject to uncertainty in multiple dimensions.

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78 343 U.S. 579 (1952).

79 *Id.* at 635 (Jackson, J., concurring).

B. *Finding the Ideal Constitutional Answer to Small Questions*

It is just these same issues that dominate so many fields, such as environmental law. Even if we confined its operation to the control of nuisances, the administrative agency has to face these choices. Ultimately, it is this type of uncertainty that makes any inquiry into the ideal constitutional structure so vexing. We have to imagine a very broad class of cases that might occur, and then figure out in the blind exactly what should be done to all or some of them. In addressing this question, some collective choice must be made among many permutations. Nothing is more common than allowing administrative agencies in the first instance to decide whether a person can practice a profession, receive a pension, drive a car—long before we get to the question of whether someone can get a permit to open up a factory. It would not be tenable to insist that all routine administrative actions made by federal officials require a full trial before an Article III judge. But that said, the question then arises whether anyone who suffers some serious deprivation should be denied access to independent adjudication on the question of possible redress. There are some issues that do count as de minimis, so that if they do go to court, they go to a small claims court which itself has abbreviated procedures consistent with the limited harms that are involved.

In these cases, some deference to standard practice is more than welcome. The constant repetition of small cases before an administrative body involves mid-level administrative officers who know far more about the standard and sensible patterns of practice in a given area. Where there are multiple exposures to a raft of small cases, some judicial deference to their judgment is fully warranted, at least in the absence of some deliberate and conscious deviation from prior accepted practice. So long as their judgments conform to common practice, the outcomes will tend to be consistent. There is therefore a strong likelihood that the administrative officers will get it right—or at least get it right more frequently than any court that wants to challenge their judgment without having a firm grounding in the area. Indeed, the claim that earlier judges lived on a culture of deference is wholly misguided if it meant that they were indifferent to whether administrators respected the established legal framework of those decisions. The basic rule of statutory interpretation, which is to discern the best meaning of a disputed phrase from its common meaning in light of background legal norms, was pretty consistently applied—indeed it is hard to think of what other metric one might use. In dealing with these issues, Professor Aditya Bamzai concluded after an exhaustive review of the nineteenth-century case law: "Under the traditional interpretive approach, American courts 'respected' longstanding and contemporaneous *executive* interpretations of law as part of a practice

of deferring to longstanding and contemporaneous interpretation *generally*."[80]

To see how these principles played out, it is critical to look in some detail at the factual patterns in some of the key cases to which he referred,[81] which show that far from any kind of deference, what was at work was the traditional contractual interpretive pattern of giving a practical reading to the disputed provisions. In *Edwards' Lessee v. Darby*,[82] the question was whether the plaintiff could succeed in recovering a small plot of land in Nashville, which the plaintiff and defendant claimed under different titles.[83] Conveyancing confusions of this sort were a virtual certainty given the literally millions of land patents issued by the United States.[84] After reviewing the evidence, Justice Trimble observed as follows:

> In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect. The law was not only thus construed by the commissioners, but that construction seems to have received, very shortly after, the sanction of the legislature.[85]

It is also worth noting that the Supreme Court agreed *substantively* with both the commission and the lower court, in giving preference to the plaintiff Edwards, whose title was prior in time to Darby's. So understood, *Edwards' Lessee* did not give rise to any issue of deference that arises when the two bodies come up with different interpretations. Indeed, the Trimble opinion reads like one of de novo review: "We, therefore, accord in opinion with the Circuit Court, that the grant to Patrick H. Darby [the defendant] is void."[86]

Next, in *Brown v. United States*,[87] the plaintiff sought to recover certain retirement benefits on behalf of the decedent at a rate higher than that allowed by the relevant commission.[88] The decedent was a boatswain whom this commission classified as a warrant officer.[89] The question was whether his case

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80 Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 916 (2017).

81 *See id.* at 930–39.

82 25 U.S. (12 Wheat.) 206 (1827) (cited without analysis in Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 n.14 (1984)).

83 *Id.* at 208–09.

84 A topic this large has attracted its own literature. On the legal matters, see GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY (2004). For a more historical account, see PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 75–85 (1968).

85 *Edwards' Lessee*, 25 U.S. at 210.

86 *Id.* at 212.

87 113 U.S. 568 (1884).

88 *Id.* at 573–74.

89 *Id.* at 570.

fell under the same statutory scheme that applied to commissioned officers.[90] Again, the case turned on administrative custom:

> [I]t had been the uniform practice of the President to place warrant officers on the retired list, and large numbers of these officers had been so retired. No protest or objection was made by Brown during his lifetime either to his retirement or rate of pay. The accounting officers of the treasury had uniformly held that longevity pay to retired officers was not authorized by [statute].[91]

The Court then noted that the proper construction might be an issue if it had been a "new" statute not subject to previous consistent interpretation, and it further noted that many retired parties had relied on this particular construction.[92] The accumulated weight of past practice was thus decisive. Although the exact question was not addressed, it seems highly likely that if the commission had deviated from the practice in this case alone, it would have been overturned. And it is highly likely that a complete switch in practice would have required a very powerful explanation inconsistent with the more modern views of *Chevron* deference.

Similarly in *United States v. Moore*,[93] the Supreme Court had to decide when an assistant-surgeon was entitled to a pay increase after he passed an examination to become a full surgeon.[94] The plaintiff claimed that the phrase "after date of appointment" referred to the date of his initial appointment as a surgical assistant.[95] The Court held that it ran only from the date that he passed his promotion examination.[96] Clearly, as the Court noted, only the latter date makes sense from a business point of view, because it would be odd to give a higher salary to those who took years to pass the exams than to those who passed it quickly. Accordingly, citing *Edwards' Lessee*, the Court concluded:

> The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret.[97]

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90 *Id.*

91 *Id.* at 569.

92 *Id.* at 570–71.

93 95 U.S. 760 (1878).

94 *Id.* at 762.

95 *Id.*

96 *Id.* at 763–64.

97 *Id.* at 763 (citing United States v. MacDaniel, 32 U.S. (7 Pet.) 1, 13–14 (1833); United States v. State Bank of N.C., 31 U.S. (6 Pet.) 29, 37–38 (1832); Edwards' Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827)).

Finally, heavy reliance on custom explains the decision in *United States v. Alabama Great Southern Railroad Co.*,[98] which addressed the size of rebate from regular fares that the railroad had to give to the United States for carrying the mails.[99] The literal language of the statute seemed to suggest that the rebate percentage had to be calculated for the entire route over which the mails were carried, even though only the construction of a fraction of that line had received a federal subsidy.[100] The alternative position tied the amount of the rebate to the amount the subsidy actually received.[101] The Court opted for the second construction, explaining it would have been odd if the rebate was the same whether the government subsidized ten percent or ninety percent of the line:

> We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that department—a construction which, though inconsistent with the literalism of the act, certainly consorts with the equities of the case—should be considered as decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced.[102]

At this point, the typical agency action of the nineteenth century replicated the emergence of custom as it was used to resolve private disputes in both contract and tort. In dealing with the former, a rule of practical construction allowed the literal terms of the contract to be read in light of accumulated usages that arose in day-to-day practice. These notions are well understood as part of ordinary contractual interpretation. Thus, Section 1-303 of the Uniform Commercial Code notes that a course of performance, a course of dealing, or a trade usage "is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement."[103] It is just that process that has been used to deal with the statutory schemes for conveyance or compensation that are at issue in all these cases, none of which involve efforts by the government to regulate private conduct outside of contract. In similar fashion, during the nineteenth century, the custom of the trade set the standard of care for ordinary negligence cases,[104] at least before that principle

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98 142 U.S. 615 (1892).

99 *Id.* at 619.

100 *Id.* at 619–20.

101 *Id.* at 620.

102 *Id.* at 621.

103 U.C.C. § 1-303(d) (AM. LAW INST. & UNIF. LAW COMM'N 2017).

104 For discussion, see generally Richard A. Epstein, *The Path to* The T.J. Hooper*: The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1 (1992).

was unwisely compromised by Learned Hand in *The T.J. Hooper*.[105] Hand went so far astray when he misconstrued the applicable custom so as to make it appear that reckless conduct—ignoring storm warnings from a naval broadcast—was somehow customary conduct.[106] Even though Bamzai did not draw the explicit connection to role of custom in nineteenth-century law of contract and tort, he fully endorsed that view under a different rubric by noting the importance of the Latin phrase, "*optimus interpres legum consuetudo*," meaning "usage is the best interpreter of laws."[107]

Understanding the logic of these nineteenth-century cases helps explain why Justice Thomas so mangled the issue of what counts as a "public right" in *Oil States*. There is little point in reviewing yet again the treatment of the individual cases discussed in *Oil States*, which I have covered exhaustively in my earlier articles on the subject.[108] But it is worth noting that the origin of the doctrine lies in the 1856 Supreme Court decision in *Murray's Lessee v. Hoboken Land and Improvement Co*.,[109] which applied the public rights doctrine to sidestep the use of Article III courts. The Court approved of an 1820 act that allowed the government to use a summary procedure outside of an Article III tribunal to collect monies from a customs collector in accordance with the "settled usages and modes of proceeding existing in the common and statue [sic] law of England."[110] *Murray's Lessee* thus showed the same deference to customary practices as the cases discussed above, all of which involved disputes over government conveyances and contracts. Consistent with this tradition, in *Crowell v. Benson*[111] Chief Justice Charles Evans Hughes concluded that an ordinary dispute between two private parties over whether compensation was owed under a worker's compensation statute "is

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105 60 F.2d 737 (2d Cir. 1932), *rev'g* 53 F.2d 107 (D.N.Y. 1931).

106 Judge Learned Hand's error was to assume that there was no custom on whether to carry a receiving radio on board coastal ships to receive warnings from the Naval broadcast. Clearly, the information was hugely valuable and all the other tugs sailing north were able to put into safety behind the Delaware breakwater after they got the needed information. Starting with the assumption that there was no custom on this issue, Hand concluded that the entire industry had "lagged" behind what due care required. But he misconstrued the record. Of course, there was a custom to carry receiving radios on board. *Id.* There was no custom as to whether it should be supplied by the boat or the captain, so long as it was done by one or the other. *See id.* That one bad apple ruined the barrel because afterwards in every case the custom could be challenged on the authority of *The T.J. Hooper* when in fact the market at the time had worked perfectly well. The district court got it right and found that the ship was unseaworthy because of the want of a working receiver on board. The massive increase in judicial intervention was felt most keenly in product liability cases nearly two generations later.

107 Bamzai, *supra* note 80, at 937 (quoting DIG. 1.3.37 (Paulus, Quaestiones 1)).

108 *See generally* Richard A. Epstein, *The Supreme Court Tackles Patent Reform: Why the Supreme Court Should End Inter Partes Review in* Oil States, 19 FEDERALIST SOC'Y REV. 172 (2018) [hereinafter *OS I*]; *OS III*, *supra* note 51.

109 59 U.S. (18 How.) 272 (1856).

110 *Id.* at 277.

111 285 U.S. 22 (1932).

one of private right, that is, of the liability of one individual to another under the law as defined."[112]

This earlier regime was wholly misconstrued in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[113] Justice Stevens cited the first three nineteenth-century cases described above, without discussion, in *Chevron.*[114] He did not cite or discuss *Alabama Railroad*. Unfortunately, Justice Stevens missed all the nuances of this entire line of cases when he wrote: "We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations."[115] No, no, no. His capsule summation failed to pay the slightest attention to the internal logic of those nineteenth-century decisions. All of these cases stressed the need for a consistent interpretation over time and thus favored the initial construction placed upon a statute and followed consistently thereafter. The nineteenth-century cases gave no deference whatsoever to the most recent executive twist in statutory interpretation. As with the development of custom and trade usage in private law, all of these norms evolved, typically rapidly, out of multiple small decisions in which expertise was established as part of an ongoing course of business with government grantees, suppliers, employees, and retirees.[116] Nothing in the earlier cases contains so much as a hint that some administrator is free to disregard earlier decisions by some exercise of ad hoc executive discretion. Indeed, it was just that kind of sudden administrative switch in position that *Chevron* allows, disregarding the judicial practice of the earlier era. So, there is greater power and fewer constraints. Most importantly, the rulemaking at stake in *Chevron* was one to which the method of incremental interpretation could never apply because of the total absence of any pattern of past practice.

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112 *Id.* at 51. As defined, that list of public rights as defined was, if anything, too broad: "Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans." *Id.* The first two categories, dealing commerce and taxation, are very broad and if read broadly could cover every piece of legislation under Article I, Section 8's Spending Clause and Commerce Clause (which post-1932, is hugely comprehensive). Another reading would limit these powers to tariff adjustment disputes like those in *Murray's Lessee*. *See Ex parte* Bakelite Corp., 279 U.S. 438, 460–61 (1929), (discussing what type of dispute legislative courts had power to decide under Article I); *OS I*, *supra* note 108, at 174–77.

113 467 U.S. 837 (1984).

114 *Id.* at 844 n.14 (some citations omitted).

115 *Id.* at 844 (footnote omitted).

116 On the rate of convergence to customary norms, see Epstein, *supra* note 104, at 21–25. There are four basic settings: high frequency, low value; high frequency, high value; low frequency, low value; and low frequency, high value. *Id.* at 13–16. The most rapid convergence is with the first, and the slowest with the last. *Id.* The first looks like the nineteenth-century cases. *See id.* at 13–14. The last looks like the twentieth-century cases. *See id.* at 15–16.

The implication should be clear. Bereft of any external guidelines, the only approach left in high-stakes, low-frequency contexts is to give the best reading of the statute or regulation. And that is only possible when the ultimate responsibility for text falls on the independent courts, which can operate outside the realm of political influence—as was so evident in *Oil States* and *Lucia.* It also goes almost without saying that the Supreme Court had to clamp down on the unbridled discretion in *Auer v. Robbins*,[117] whereby the Court allowed the Department of Labor to reverse prior interpretation with its own forced and dubious reading of a well-established rule dealing with the scope the exception under the Fair Labor Standards Act for bona fide executive, administrative, and professional exception, in, alas, the exact manner condemned earlier in *Alabama Railroad*. And *Alabama Railroad* offered a parallel condemnation to *Perez v. Mortgage Bankers Ass'n*,[118] which also allowed for an administrative flip-flop for no principled reason. None of these flip-flops could take place under a judicial regime, for it is far harder to overrule precedent than it is to change course through an interpretive ruling.

It is at this point that the contrast between the orderly administration of nineteenth-century statutes and the heavy politicization in *Oil States* and *Lucia* becomes most vivid. Neither case sought to find, let alone rely on, some customary interpretation. Both had stacked their administrative panels with heavy political orientation. A robust doctrine of separation of powers forced these cases into the courts, where rules of ordinary statutory construction, identical to those that had until late been uniformly followed since Roman times, could have avoided the farcical administrative interpretation.

Here, the separation of powers objections to *Chevron* show their full power. Madison may have thought that some partial separation of powers might suffice, but there is no pattern of deference to customary behavior that is permissible under his traditional rules. That result is in complete accordance with Section 706 of the Administrative Procedure Act,[119] which should be treated as having constitutional force, and not just as some nicety of the APA. Any court that cedes this power to the executive branch runs afoul of Chief Justice Marshall's famous pronouncement, with which every discussion of judicial review necessarily begins: "It is emphatically the province and duty of the judicial department to say what the law is."[120]

The conceptual difficulty of *Chevron* should now become clear. If a statute is truly unambiguous, then it is of no consequence who decides its

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117 519 U.S. 452 (1997). For my detailed criticism, see Richard A. Epstein, *The Regulatory Hour: The History, Law and Economics of Minimum Wage and Maximum Hours Legislation*, 12 N.Y.U. J.L. & LIBERTY 447 (2019).

118 135 S. Ct. 1199 (2015).

119 5 U.S.C. § 706 (2012) ("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."). Note that although the statute does not use the term *de novo*, it is hard to attach any other meaning to the phrase "decide all relevant questions of law.").

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

meaning. Clear statutes will receive a single interpretation, so courts and agencies should necessarily come out the same way. Who cares who has the final say when it does not lead to a difference in outcome? The only time that it matters who decides is when the statute is ambiguous, or, as commonly happens, it is unclear whether it is clear or not. In these few conflicted cases, the choice of decider could be critical. Hence if courts defer to agencies in all cases of asserted or actual ambiguity, they have ceded their judicial power to decide questions of law, which thus insulates the legislative and executive branches from judicial oversight. It is for that reason that both *Oil States* and *Lucia* have gone so far off course—and why the processes that they both used failed to meet the minimal standards of decency—such that one hopes for procedural due process.

The prophylactic rule makes sense. Leave the decision in either of the two political branches and it becomes political quickly. The separation of powers does indeed create the structure in which honest and unbiased litigation can be used to translate abstract rights into concrete applications. In this regard procedural and substantive due process have this powerful connection: procedural bias leads to substantive takings. If the honest odds in a given case worth $1,000 are 50-50, each party has an expected value of $500. But if a biased judge shifts the odds to 60-40, then one claim increases by $100 and the other falls by that same amount. There is no principled difference between that result and a taking of $100 from A to B. All parts of the system have to work for it to be viable—and that includes separation of powers.[121]

IV. POWERS OF APPOINTMENT

The second issue relevant to both *Oil State* and *Lucia* involves the Appointments Clause, which outlines cryptically the rules for appointing principal and inferior officers. The Appointments Clause issue was not litigated in *Oil States*, but Professor Gary Lawson, relying on earlier work by Professor John Duffy,[122] has made the trenchant argument that all the judges who sit on the PTAB are in fact *principal* officers, because only principal officers can have the statutory authority to cancel patents that are given to the PTAB.[123] The gist of the argument is that PTAB judges have statutory authority far in excess of the limited authority given to the special trial judges in *Freytag v. Commissioner*,[124] which relegated those judges to the status of

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121 For further discussion, see RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT 318–19 (2014).

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

123 *See* Gary Lawson, *Appointments and Illegal Adjudication: The America Invents Act Through a Constitutional Lens*, 26 GEO. MASON L. REV. 26, 29 (2018).

124 501 U.S. 868 (1991).

inferior officers. But the plenary authority of the PTAB judges requires that they receive Senate confirmation. But they receive no such thing because they are appointed by the head of the PTO.[125] That position is at best the operator of a sub-unit of the Department of Commerce and therefore does not even qualify as a head of department capable of making inferior appointments.[126] I regard their joint critique as sound on all points, but I shall not defend their conclusion here. Indeed, the Duffy-Lawson thesis is part of a larger movement in originalist scholarship that indicates that, as Professor Jennifer Mascott argues, the key phrase "Officers of the United States" reaches beyond the "significant authority" test[127] announced by the Supreme Court in *Buckley v. Valeo*.[128] By her account, "In the Founding era, the term 'officer' was commonly understood to encompass any individual who had ongoing responsibility for a governmental duty."[129] This broad definition "included even individuals with more ministerial duties like recordkeeping."[130]

For these purposes, however, the two parts of the Appointments Clause raise very different issues. With respect to those elusive principal officers, the system of checks and balances is in place, given the need for Senate confirmation. But both separation of powers *and* checks and balances take a beating when dealing with those inferior officers—a term that is hardly self-defining—for whom alternative routes of appointment are possible. These officers can go through the Senate Confirmation process, "but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."[131] At one level the logic of this clause seems quite clear. Less by way of structural constraint is needed for appointments to less weighty positions. These inferior officers are thus bounded on two sides. Above them are the principal officers for whom Senate confirmation is a must. Below them are mere employees for whom any appointments process is acceptable.

The difficult theoretical question on appointments is: What, exactly, is gained by carving out this middle class? The answer to that challenge is generally given in functional and political terms. Perhaps the most influential

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125 35 U.S.C. § 6(a) (2012).

126 Lawson, *supra* note 123, at 54–56. The statutory set up reads as follows:

> Under Secretary and Director.— (1) In general.— The powers and duties of the United States Patent and Trademark Office shall be vested in an Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office (in this title referred to as the "Director"), who shall be a citizen of the United States and who shall be appointed by the President, by and with the advice and consent of the Senate. The Director shall be a person who has a professional background and experience in patent or trademark law.

35 U.S.C. § 3(a)(1).

127 U.S. CONST. art. II, § 2, cl. 2; Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443, 450 (2018).

128 424 U.S. 1 (1976) (per curiam).

129 Mascott, *supra* note 127, at 450.

130 *Id.*

131 U.S. CONST. art. II, § 2, cl. 2.

statement on the matter comes from Chief Justice Roberts in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*[132] ("PCAOB"), where he hammered on the theme of political accountability. At issue in *Free Enterprise* was an institutional structure in which the president was two layers removed from the members of the PCAOB.[133] He did have the power to appoint members of the SEC, but those appointees could only be removed for cause, narrowly defined.[134] The SEC had the power in turn to appoint members of the PCAOB, whom it too could only remove for cause—again narrowly defined.[135] In dealing with the notion of political responsibility, the Chief Justice noted, without objection, that in *Humphrey's Executor v. United States*,[136] the Supreme Court upheld the creation of independent agencies when it decided that a member of the Federal Trade Commission ("FTC") could not be fired by the president because of policy differences.[137] The president had to show cause within the meaning of the statute, which provided that "[a]ny Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office,"[138] but not otherwise. In *Humphrey's Executor*, Justice Sutherland noted: "The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative."[139] This claim of neutrality is undercut by Section 1 of the Federal Trade Commission Act, which provides: "Not more than three of the Commissioners shall be members of the same political party,"[140] which would seem to be an excess of caution if that body was intended to be nonpartisan.

Under *Humphrey's Executor*, the SEC, a parallel agency to the FTC, could also be insulated from direct presidential control. But the Chief Justice held that Congress went a bridge too far by creating two layers of "for cause" protection between the president and the members of the PCAOB.[141] To

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132 561 U.S. 477 (2010).

133 *Id.* at 483–84.

134 *Id.* at 487.

135 *Id.* at 486.

136 295 U.S. 602 (1935).

137 *Id.* at 629.

138 Federal Trade Commission Act, 15 U.S.C. § 41 (2012).

139 *Humphrey's Ex'r*, 295 U.S. at 624.

140 15 U.S.C. § 41.

141 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 508–09 (2010). Good cause for removal is shown if the member:

> (A) has willfully violated any provision of th[e] Act, the rules of the Board, or the securities laws;
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> (B) has willfully abused the authority of that member; or
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> (C) without reasonable justification or excuse, has failed to enforce compliance with any such provision or rule, or any professional standard by any registered public accounting firm or any associated person thereof.

15 U.S.C. § 7217(d)(3).

support that proposition, the Chief Justice again invoked the authority of James Madison:

> The diffusion of power carries with it a diffusion of accountability. The people do not vote for the "Officers of the United States." Art. II, § 2, cl. 2. They instead look to the president to guide the "assistants or deputies . . . subject to his superintendence." The Federalist No. 72, p. 487 (J. Cooke ed. 1961) (A. Hamilton). Without a clear and effective chain of command, the public cannot "determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall." *Id.,* No. 70, at 476 (same). That is why the Framers sought to ensure that "those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." 1 Annals of Cong., at 499 (J. Madison).
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> By granting the Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts. The Act's restrictions are incompatible with the Constitution's separation of powers.[142]

The Roberts argument is wholly unpersuasive. The first point is textual. The terms "quasi-legislative" and "quasi-judicial," which surfaced in *Humphrey's Executor*, appear nowhere in the Constitution's text and thus introduce a new hydra-headed monster that does not fit into either Article I or Article III of a constitutional scheme that contemplates only three separate branches. The natural place for these officials is under Article II, as a form of executive power. If political accountability enjoys pride of place, the president should have the power to remove SEC or FTC commissioners at will. But it was precisely because an administrative state in Woodrow Wilson's image stresses independence and expertise as the key institutional imperatives that *Humphrey's Executor* was decided as it was. De facto, the independence has proved total. I am not aware of any FTC or SEC Commissioner who has ever been dismissed for cause. So the next question is: Given that initial layer of insulation is well-nigh perfect, just what, if anything, does the second level of insulation do? Clearly, it has nothing to do with the president, who is already out of the picture no matter which way *Free Enterprise* was decided. The layer's *only* function is to protect the members of the PCAOB from the SEC. Yet ironically, that looks like a good thing if the SEC remains deeply divided along political lines. It is idle talk to assume that we have "a clear and effective chain of command," given the SEC's entrenched position of that middle level.

Here is another way to attack the problem: The "chain of command"—Madison's "chain of dependence"—is a military phrase, and no one, least of all Madison, would think that the president or some Five Star General controlled the chain of command if, outside the court martial context, he could only dismiss or reassign some random colonel, sergeant, or private for cause shown. Within the military the power to dismiss, discipline is nearly absolute. No one would think that in 1951, Congress could have passed some law that

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142 *Free Enter.*, 561 U.S. at 497–98.

prohibited Harry Truman from relieving General Douglas McArthur of his command in April 1951 at the height of the Korean war. The appeal to Madison is at best a weak apologia for the misuse of the chain of command metaphor.

Yet what about Roberts' rationale that presidential control leads to political accountability? The point is odd at best because nothing is easier today than for the president to distance himself from unpopular actions by the SEC or FTC on the simple ground that it is beyond his power to remove or reassign them. Once we introduce independent agency, the only debate that remains is whether, and if so how, to fix the system, and on that policy question the president has no monopoly. On that topic, anyone can participate.

So, at this juncture the key inquiry is whether we can identify any case in which the role of political accountability really mattered. In my view, the appointment of special prosecutors by federal judges, which was blessed by Chief Justice Rehnquist in *Morrison v. Olson*,[143] affords a real instance where the chain of command issue really mattered. The partial checks that the Attorney General had on Alexia Morrison were vanishingly thin, given the reluctant acknowledgment of Chief Justice Rehnquist that, for all matters that fell under the independent counsel's jurisdiction, the Act granted her "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice."[144] This is subject to a pro forma statement that the Attorney General retained "direction or control as to those matters that specifically required the Attorney General's personal action under section 2516 of title 18."[145] Splitting control is a constant difficulty in many areas of law,[146] but the best test looks to see where the predominant control lies. And by that standard, *Morrison* was easy, given the special prosecutor's complete insulation from control on all major and minor decisions associated with the prosecution. Considering this effective insulation of the special prosecutor, the political accountability rationale has been *sub silentio* turned on its head. The president could disclaim responsibility; the Attorney General could disclaim responsibility. So, who then had responsibility? The special prosecutor was appointed by a panel of judges. And she had all her eggs in one basket and never had to face an election or oversight—except perhaps by the parties that appointed her.

And now the tale gets worse, because the appointing parties were judges who are outside the normal political process given their lifetime tenure.

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143 487 U.S. 654 (1988).

144 28 U.S.C. § 594(a).

145 *Id.*

146 Consider, for example, the dispute over whether Uber drivers are employees or independent contractors, where the level of control issue often proves decisive. *See, e.g.*, Saleem v. Corp. Transp. Grp., Ltd., 854 F.3d 131 (2d Cir. 2017); Razak v. Uber Techs., Inc., No. CV 16-573, 2018 WL 1744467 (E.D. Pa. Apr. 11, 2018).

Under Chief Justice Roberts' position in *Free Enterprise*, these "interbranch appointments" should be Exhibit A on the list of proscribed practices.[147] But in dealing with this question, Chief Justice Rehnquist announced in *Morrison* that the text was not clear, so there could be at most a presumption against these appointments. But, without explanation, he rejected the claim that this novel procedure was so inherently "incongruous" that it should be struck down.[148] Without analysis, he concluded it was not.[149] Taking a closer look at the separation of powers issues latent in this decision, however, that answer should have been an emphatic *yes.*

The system of separation of powers rests on the view that judges are, once appointed, outside the orbit of both political branches. At no time should they ever be encouraged or allowed to wade into political disputes such as the appointment of a special prosecutor. The political branches of government should have to make those choices and take the heat at the time they are made. And heat there can be in this context because, unlike the PCAOB, there were no intermediate layers between the president or attorney general and the special prosecutor. Unlike the PCAOB, which decides a large set of unspecified issues down the road, the special prosecutor had one and only one mission.

Speaking more generally, political oversight is poisonous in the judicial context. We want judges to be independent of the executive and legislative branches, and that independence is badly compromised by forcing the courts to make political appointments. Indeed, the judges should have refused that statutory invitation on the ground that the task was outside the judicial power. The obvious uses for vesting the power in the courts of law is not that all federal courts act in unison, but that individual judges can appoint inferiors to assist them in the discharge of their job. That list of permissible appointments includes administrative officials, clerks, magistrate judges and the like.

The ultimate question is: Where between the two poles—*Free Enterprise* and the special prosecutor—do the ALJs in *Lucia* fit into the system? It seems clear that since they are making (in the manner of *Freytag*) intermediate decisions, they should be regarded as inferior officers, as was held. But the consequence of that decision is far different from what it is in cases of special prosecutors (think of Robert Mueller as a de facto special prosecutor) because these midlevel appointments are sufficiently anonymous that they sink below the political radar. Worse still, this second tier of control offers no real protection at all. The only change that has to be made to bring the current system into conformity with the requirements of the Appointments Clause is that a list of recommended names has to be passed upward to the Secretary of Commerce, who can rubber stamp the list of nominees. Indeed,

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147 *See Morrison*, 487 U.S. at 674.

148 *Id.* at 677.

149 *See id.* at 676 (saying only "[w]e thus disagree with the Court of Appeals' conclusion that there is an inherent incongruity").

that is exactly what has happened, as the SEC has vowed to retry many cases that were heard the first time before ALJs who had not received the correct appointment.[150] But once that is done, the same vices of special selection by people for all the wrong reasons is par for the course. Cameron Elliot can continue to work in his current fashion on any case that the SEC wants to give him. The real issue here is procedural due process, to which I briefly turn.

V. PROCEDURAL DUE PROCESS

Procedural due process represents the third and final layer on the list of constitutional fortifications.[151] Now that separation of powers is gone, and the Appointments Clause has been circumvented, can notions of procedural due process fill the void? Each is an indirect way to prevent the deprivation of substantive rights, and procedural due process fits this mold because the presence of bias, by stacking the deck, necessarily results in the loss of liberty or property.

What then is the proper response to the challenge of bias? One possibility is to make detailed and individuated "facts and circumstances" inquiries, which block the formulation of any overarching rule. All sorts of facts are relevant, but none are dispositive. That ad hoc approach is the road to ruin. The PTAB and the SEC ALJs all deal with a large flow of cases. To be sure, individual challenges of bias based on a financial interest in the outcome or a personal connection to some litigant have to be made on an individual basis. But these cases have little or no structural importance because it is always easy to find a neutral judge who is not saddled by these obvious forms of baggage. But the institutional concern with both the PTAB and the SEC lies in their basic pattern of decision-making, and for that question, no one can articulate the principles that determine which ALJ is tainted or not. It cannot matter what the state of mind is of any given head of the PTAB or SEC. Nor can it matter what the track record of individual judges is in deciding cases. To look at these and countless other factors is to kill off the protections of due process, inch by inch, case by case.

Instead, what is needed is a general approach that looks at the basic pattern of selection under the classical standards of due process as applied to the modern administrative state. At this point, it is worth remembering the elements that have formed part of this process from the earliest time. The two Roman maxims on this issue were *audi alteram partem*, "hear the other side,"

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150 *See, e.g.*, *In re* Pending Administrative Proceedings, Securities Act of 1933 Release No. 10536, 2018 WL 4003609 (Aug. 22, 2018) (also available at https://www.sec.gov/litigation/opinions/2018/33-10536.pdf).

151 For my earlier discussion of due process concerns in inter partes review, see *OS I*, *supra* note 108, at 178.

and *nemo judex in causa sua*, "no one should be a judge in his own cause." Each of these requires a bit of explication to set the stage. What does it mean to hear a side? Surely not simply allowing a single sentence. Some requirement of adequacy is built into the process so that hearing of the other side is not satisfied by a pro forma right to speak before a decision is rendered. In the well-rehearsed phrase from *Mathews v. Eldridge*,[152] "some form of hearing is required before an individual is finally deprived of a property interest."[153] But what kind? The canonical answer to this question is:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[154]

In *Mathews*, the Supreme Court held that an evidentiary hearing was not required to terminate social security disability benefits.[155] But that sensible result will not do for serious sanctions, such as fines and loss of professional privileges, and which are materially different from government handouts. The accused suffers the loss of professional livelihood and serious financial burdens—not the loss of a government benefit. Yet we know that the standard safeguards of a judicial trial can be provided in this context because they had for a long time been so provided. It hardly seems appropriate in constitutional discourse to say that standard trial procedures constitute an undue burden inside an administrative forum that seeks to short-circuit the legal protections.

The dangers, moreover, are particularly salient given that neither *Oil States* nor *Lucia* were private disputes between two parties before some neutral arbitrator. Under the AIA, a private party may initiate inter partes review ("IPR"), but once the matter is brought before the PTAB it controls the litigation, so that a private settlement may not be able to terminate the proceedings.[156] The case is only ended when the PTAB decides to confirm or cancel the patent, after allowing in some but not all cases, the patent holder the opportunity to amend the patent in order to save it from invalidity.[157] That truncated procedure makes sense when, after the PTO makes it decisions, there

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152 424 U.S. 319 (1976).

153 *Id.* at 333.

154 *Id.* at 335.

155 *Id.* at 349.

156 35 U.S.C. § 317(a) (2012).

157 *See* 35 U.S.C. § 307(a):

> In a reexamination proceeding under this chapter, when the time for appeal has expired or any appeal proceeding has terminated, the Director will issue and publish a certificate canceling any claim of the patent finally determined to be unpatentable, confirming any claim of the patent determined to be patentable, and incorporating in the patent any proposed amended or new claim determined to be patentable.

remains the possibility of a subsequent challenge before an Article III court, as had previously been the situation with most cases of internal review.[158] But it does not make sense under the more robust form of inter partes review under the AIA, which displaces a final judgment previously entered by a federal district court. The threat of locking someone up in the PTAB (at the expense of the government) is itself a potent tool for forcing a favorable settlement unrelated to the merits prior to any request for IPR.

Yet as the right to be heard becomes more urgent, the protections afforded under the AIA become weaker. Thus, in IPR, the patent holder is denied, obviously, the right to an independent judge and a jury trial. Furthermore, as the Federal Circuit stated in *In re Swanson*[159]:

> In PTO examinations and reexaminations, the standard of proof—a preponderance of evidence—is substantially lower than in a civil case; there is no presumption of validity, and the examiner is not attacking the validity of the patent but is conducting a subjective examination of the claims in light of prior art[.] And unlike in district courts, in reexamination proceedings [c]laims are given their broadest reasonable interpretation, consistent with the specification.[160]

There are, however, no offsetting adjustment in favor of the accused party to offset these added burdens. The party is heard, but not as clearly or as well as they ought to be. The due process implications seem obvious.

The situation is similar in *Lucia*, which involved civil sanctions sought by the SEC against an investment advisor. The SEC, an oft-partisan agency, takes the role of both prosecutor and judge, and again, should be especially careful that it does not abuse its overall authority. But in spite of the home court advantage, it chose a procedure in which the accused had no right to a jury trial, only limited rights of discovery, and none of the protection associated with the Federal Rules of Civil Procedure. Once again it is hard to claim that the standard Article III proceedings offer an undue level of protection from such serious consequences. The right to be heard is again below what is comfortable for a due process analysis.

Standing alone, it is not clear that the shortfall in one's right to be heard will be sufficient to upend these two proceedings. But the element of bias is so pronounced that in-and-of-itself it should stop what is going on. John

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158 That need not have been the case with the much more truncated procedures under the 1981 and 1999 reforms. In my view, these were also unconstitutional on separation of powers grounds, for once any patent issued it can only be revoked in an Article III court. *See* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1384 (2018) (Gorsuch, J., dissenting); *OS III*, *supra* note 51, at 195.

159 540 F.3d 1368 (Fed. Cir. 2008).

160 *Id.* at 1377–78 (internal citations and quotation marks omitted). In *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131 (2016), Justice Breyer upheld that determination with a healthy dose of *Chevron* deference. *Id.* at 2144. For my criticism of *Cuozzo*, see Richard A. Epstein, *The Supreme Court Tackles Patent Reform: Further Reflections on the* Oil States *Case After Oral Argument Before the Supreme Court*, 19 FEDERALIST SOC'Y REV. 180, 186 (2018).

Locke in the Second Treatise warned: "I easily grant, that *civil government* is the proper remedy for the inconveniences of the state of nature . . . since it is easy to be imagined, that he who was so unjust as to do his brother an injury, will scarce be so just as to condemn himself for it."[161] For these purposes, there is no need to trace the many steps whereby the historic prohibition against bias was incorporated into the law. Today it is beyond dispute that the purpose of that clause is to ensure that, in the words of Justice Thurgood Marshall in *Marshall v. Jerrico, Inc*.,[162] "no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him."[163] That one sentence should end this discussion, in light of the willingness of the key administrators of both the PTAB and the SEC to stack panels or staff trials by picking ALJs who announce their predispositions in advance.

What is needed now is the right institutional response. Concurring in *Nidec*, Judge Dyk wrote: "[W]e question whether the practice of expanding panels where the PTO is dissatisfied with a panel's earlier decision is the appropriate mechanism of achieving the desired uniformity."[164] But his statement is far too kind to the current practice. The objection to Director Ruschke was not to uniformity as such, but to a uniformity that reflected the will of a single judge who could choose an initial panel to suit his case and then add to it if he did not like how the case was progressing. The correct method to resolve the want of uniformity inside the PTAB is the same as it is everywhere else. Let the different decisions be made until a consensus occurs either within the PTO or within the judicial system. That uniformity is the result of a reflective equilibrium in which many different voices are heard—not the diktat of a single person. Just imagine if the Chief Judge of a District or Circuit could exercise the same prerogative. The movement into the PTO offers no excuse to depart from the standard rules that use random selection or rotation to assign judges to particular cases. It has long been my view that due process does not tolerate the formation of commissions like the SEC, whose members are defined exclusively by their party affiliation on one set of issues.[165] But at least that Commission has permanent membership that cannot be expanded or contracted for each case at the whim of one individual. The key insight is that it is unwise to handle due process objections on a retail basis. A prophylactic rule that bars the process ends the abuse, without compromising agency operations. The law of bias has long recognized public confidence in the legal system can only be preserved by avoiding, not only

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161 JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 105 (Ian Shapiro ed., Yale Univ. Press 2003) (1690) (emphasis added).

162 446 U.S. 238 (1980).

163 *Id.* at 242.

164 *See* Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co., 868 F.3d 1013, 1020 (Fed. Cir. 2017) (Dyk, J., concurring).

165 *See, e.g.*, EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION, *supra* note 121, at 278–84.

actual bias, but also the appearance of bias. Even if concerns with separation of powers are unstated and those with appointments are too weak to matter, the commands of procedural due process should require these simple standard precautions. At root, the wise words of Professors Nathan Chapman and Michael McConnell apply: "[D]ue process has from the beginning been bound up with the division of the authority to deprive subjects of life, liberty, or property between independent political institutions."[166]

CONCLUSION

The theme of this Article is simple enough: where there is smoke, there is usually fire. That applies with great force to the modes of adjudication inside the administrative state. The twin decisions in *Oil States* and *Lucia* reveal that a Supreme Court that is far too enamored of the administrative state often ignores the everyday threats to liberty that system creates. The progressive vision has as its dominant tropes expertise and political accountability. In articulating that vision, it undercuts separation of powers, which functions as a prophylactic rule against major forms of abuse. The intellectual transformation dates back to the initial writings of then-Professor Woodrow Wilson on congressional government. Wilson, a progressive, was frustrated with how the judicial system could slow down the march to progress in an enlightened administrative state. But he hardly anticipated the shabby procedures used in both *Oil States* and *Lucia*, precisely because there was no independent check overlooking their activities. But once the blinkers on administrative deference are removed, standard trials under Article III are a vital safeguard against systematic abuse. That position allows for administrative agencies to make initial decisions in many cases. Indeed, the nineteenth-century cases were often ideal laboratories for just that approach. Whether dealing with land grants, employment classifications, or retirement disputes, the government had to deal with multiple applications raising similar issues; a deference to a consistent pattern and practice is likely to secure, at low cost, both accuracy and uniformity among like cases. The case law shows the dominance of these customary patterns.

But the structural protections afforded by the Constitution are often sensitive to scale.[167] What works in a small environment will not work in a more complex one having higher stakes and more political activities, which typically deal not with issues such as contract interpretation, but with direct enforcement of government directives in such hot-button areas as environmental or labor law. In these contexts, the judicial willingness under *Chevron* to let administrators take the lead role of statutory construction should be stoutly

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166 Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1681 (2012).

167 *See* Richard A. Epstein, *Executive Power in Political and Corporate Contexts*, 12 J. CONST. L. 277, 292–311 (2010).

resisted. The modern *Chevron* pattern is thus inconsistent with its nineteenth-century antecedents, for it ignores the need for prophylactic safeguards against official abuse.

Unfortunately, little relief against official misconduct can be found in the Appointments Clause, which allows Congress in its discretion to let inferior officers be appointed by the president, the courts, or department heads. The definitional elements allow for much play in the joints. But even if courts give a broad definition to inferior officers, the countermove within any government agency is for lower level officials to make batch recommendations to the appropriate department head to overcome this minimal constitutional constraint. The one-time abuse in *Lucia* can be replicated unilaterally by massaging the appointment process.

In the end, only two lines of attack can push back against the abuse of the administrative state. The first is that of internal political reform, of which there were signs in *Oil States* and *Lucia.* But most critically, if push comes to shove, the procedural due process objections to court stacking and skewed ALJ selections have to be respected. These practices should be blocked on a per se basis to clamp down on the set of institutional abuses to which the Supreme Court this past term has turned a blind eye. The next chapter of this battle will soon begin.