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THE NOT-SO-STANDARD MODEL: RECONSIDERING AGENCY-HEAD REVIEW OF ADMINISTRATIVE ADJUDICATION DECISIONS

REBECCA S. EISENBERG & NINA A. MENDELSON*

*The Supreme Court has invalidated multiple legislative design choices for independent agency structures in recent years, citing Article II and the need for political accountability through presidential control of agencies. In *United States v. Arthrex, Inc.*, the Court turned to administrative adjudication, finding an Appointments Clause violation in the assignment of certain final patent adjudication decisions to appellate panels of unconfirmed administrative patent judges. As a remedy, a different majority declared unenforceable a statutory provision that had insulated Patent and Trademark Office (PTO) administrative adjudication decisions from political review for almost a century. The Court thereby enabled the politically appointed PTO Director to review and change individual decisions, reasoning that this would provide political accountability while conforming PTO practice to “the standard model” for agency adjudication.*

Descriptively, agency-head review of adjudication decisions is far from standard, either in current agency structures or in historical patent practice. Nor is it necessarily a panacea for achieving effective oversight. For many kinds of adjudication decisions political control can present dubious benefits and distinct risks. It may bring little accountability for highly

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technical, low salience decisions, while allowing political officials to reward friends and punish enemies, especially when agencies adjudicate high-value claims. It may compromise other long-valued adjudication features, including independence of adjudicators from enforcement officials. It may be a haphazard mechanism for achieving uniform decisions in high-volume adjudication regimes. Finally, it may tempt agencies to make policy through adjudication rather than through procedures that enable broader input and provide greater accountability such as rulemaking. In short, no single model is likely to be appropriate in all adjudication settings. The history of legislative design of administrative adjudication structures shows that the political branches are able to learn from experience, assess tradeoffs, and revise institutions to address public needs. When the Court redesigns agency structures, it intrudes on responsibilities traditionally and more appropriately exercised by the political branches.

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INTRODUCTION

Administrative law has long supported legislative flexibility in creating bureaucratic structures with expert staffs, while simultaneously assuring accountability through public input, judicial review, and political oversight.¹ In recent years, however, the Supreme Court has repeatedly stepped in to invalidate legislative design choices for administrative agencies, citing the need for political accountability.² In particular, the Court has found violations of Article II's Vesting and Take Care Clauses³ in independent agency structures that Congress has insulated to some degree from presidential control.⁴ This coincides with calls for greater review of agency decisions by independent, politically insulated courts, suggesting that it may reflect an anti-administrativist impulse to confine and check bureaucratic power as much as it reflects confidence in the benefits of political control.⁵

1. *E.g.*, JERRY L. MASHAW, ACCOUNTABILITY AND INSTITUTIONAL DESIGN: SOME THOUGHTS ON THE GRAMMAR OF GOVERNANCE, IN PUBLIC ACCOUNTABILITY: DILEMMAS, DESIGNS, AND EXPERIENCES 115 (Michael Dowdle ed., 2006).

2. *See* Nikolas Bowie & Daphna Renan, *The Separation-Of-Powers Counterrevolution*, 131 YALE L.J. 2020, 2028, 2077 (2022) (arguing the Court did not begin invalidating legislative constraints on presidential authority or the Executive Branch until 1926, in *Myers v. United States*, 272 U.S. 52 (1926)).

3. U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”); art. II, § 3, cl. 1 (“[H]e shall take Care that the Laws be faithfully executed . . .”). *E.g.*, *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 484 (2010) (finding violation in two layers of for-cause removal restrictions because “the President cannot ‘take Care’ . . . if he cannot oversee the faithfulness of the officers who execute [those offices].”).

4. *See infra* Part II; Christine Kexel Chabot, *Sheep in Wolves’ Clothing*, YALE J. ON REGUL.: NOTICE & COMMENT (May 23, 2022), <https://www.yalejreg.com/nc/sheep-in-wolves-clothing/> (arguing that the Supreme Court was not concerned with Article II prior to its decision in *Myers v. United States*).

5. *See generally* Gillian Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017). *E.g.*, *Sackett v. EPA*, 566 U.S. 120, 128 (2012) (refusing to find administrative orders insulated from pre-enforcement judicial review); *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 489 (2015) (reemphasizing presumption in favor of judicial review). Justice Gorsuch’s opinions in particular have captured this impulse, arguing that only an independent Article III court and not a politically accountable administrative tribunal may invalidate an issued patent. *See Oil States Energy Servs. v. Greene’s Energy Grp.*, 138 S. Ct. 1365, 1380–81 (2018) (Gorsuch, J., joined by Roberts, C.J., dissenting) (characterizing administrative adjudication of patent validity as an invitation to “retreat from the promise of judicial independence” and noting that “[p]owerful interests are capable of amassing armies of lobbyists and lawyers to influence (and even capture) politically accountable bureaucracies.”). *Cf.* Greg Reilly, *The PTAB’s Problem*, 27 TEX. INTELL PROP. L.J. 31, 35–36 (2019) (noting that the dissent in *Oil States* “is probably better explained by general anti-

The Court emphasized accountability through political control—as distinct from review by independent tribunals—when it turned its attention to agency adjudication structures in its 2021 ruling in *United States v. Arthrex, Inc.*⁶ A majority of the Court found an Appointments Clause⁷ violation in the assignment of final decision authority within the Patent and Trademark Office (PTO) to panels of unconfirmed administrative patent judges (APJs) serving on the Patent Trial and Appeal Board (PTAB). Although PTAB panels had final decision authority within the agency to resolve private challenges to the validity of previously issued patents, the statute gave the PTO Director unreviewable discretion to decide whether to institute proceedings in response to petitions, authority to designate the composition of panels for particular cases, and authority to prescribe regulations governing the proceedings.⁸ PTAB decisions could be reviewed by Article III courts, but not elsewhere in the agency.⁹ To remedy the Appointments Clause violation, a different majority effectively modified the statute to allow review of adjudicatory decisions by the politically appointed PTO Director, declaring unenforceable a legislative provision that had insulated administrative adjudication decisions in the PTO from political review for almost ninety-five years.¹⁰ Although *Arthrex* was formally an Appointments Clause case,¹¹ the Court reflexively applied to the agency adjudication structures before it much of the same analysis that guided its decisions in the

administrative attitudes than anything about the [Patent Trial and Appeal Board (PTAB)] specifically.”). Although one might think independent agency adjudication decisions would more closely resemble the independent, politically insulated judicial review process, Justice Gorsuch nonetheless has argued that politically accountable agency decisions are preferable to more independent ones because only if political appointees are responsible for Executive Branch decisions can the voters hold the President accountable for those decisions. *See United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1989–90 (2021) (Gorsuch, J., concurring in part, dissenting in part).

6. 141 S. Ct. 1970 (2021).

7. 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 . . . 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.”).

8. 35 U.S.C. §§ 311–318, 6(c).

9. § 319.

10. *See Arthrex*, 141 S. Ct. at 1986.

11. *Id.* In an earlier Appointments Clause challenge, *Edmond v. United States*, 520 U.S. 651 (1997), the Court had upheld an adjudication regime, finding that the adjudicators were “inferior officers” based on limited within-agency supervision, plus review by an executive branch tribunal outside the agency. *See infra* note 68 (discussing *Edmond*).

independent agency cases decided under the Take Care Clause and Vesting Clause of Article II.¹² In effect, the Court chose political control rather than political independence for PTAB decisions. Some commentators have also advocated for across-the-board agency-head review of adjudicatory decisions as a matter of “best practices” for agency adjudications. We disagree.

Commentators have argued that political accountability is important when agencies resolve policy issues, whether through rulemaking or through adjudication.¹³ This framing harkens back to older arguments that agency adjudication should be seen as in part “political” rather than strictly “judicial.”¹⁴ Characterizing agency adjudication as “political” recognizes that it sometimes addresses matters of policy. This picture of agency adjudication has implications for the appropriate mix of judicial review and political review of decisions, as well as for how far adjudicators should be walled off from enforcement staff. Commentators today take that older debate further. They champion agency-head control over adjudication not only because agency adjudication might implicate policy concerns, but also to bring about more consistent, error-free adjudication decisions.¹⁵

In our view, this one-size-fits-all position risks placing undue confidence in agency-head control to supply accountability and fails to acknowledge serious risks that political control over agency adjudication decisions can present. For some adjudications that resolve salient policy issues, political control of adjudication decisions may be an effective and accountable way for an administration to advance its policy preferences. But for many kinds of administrative adjudications—including the patent proceedings that the Court addressed in *Arthrex*—political control can present dubious benefits and distinct risks. Advocates of decisional independence and insulation of agency

12. At least one appellate court has taken this approach further, ruling that administrative law judges (ALJs) at the Securities and Exchange Commission (SEC) are unconstitutional because they are protected from presidential control by “two layers” of for-cause removal restrictions. See *Jarkesy v. SEC*, 34 F.4th 446, 465 (5th Cir. 2022), *en banc reh’g denied*, 51 F.4th 644 (2022). The focus on two layers of for-cause removal restrictions echoes the Supreme Court’s disapproval of the structure of the Public Company Accounting Oversight Board (PCAOB) in *Free Enterprise Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483–84 (2010).

13. *E.g.*, Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 175 (2019). See also *infra* text accompanying notes 80–89 (discussing Walker and Wasserman).

14. *E.g.*, RONALD A. CASS, AGENCY REVIEW OF ADMINISTRATIVE LAW JUDGES’ DECISIONS, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES REPORT 83-3, 166, 120–121 (1983); *infra* text accompanying notes 291–292.

15. *But see* CASS, *supra* note 14, at 128 (noting then-Judge Scalia’s advocacy for treating ALJs “like any other employee,” so that “all agency determinations ultimately must be governed by the political decisions of the agency head and other high-ranking policymakers”).

adjudicators have long identified the risk that adjudicators might otherwise unfairly favor agency enforcers,¹⁶ a risk that is aggravated by political control of adjudication decisions. Beyond this, political control of adjudication may be simply ineffective as a source of accountability for highly technical, low salience decisions, while providing an opportunity for political supervisors to reward friends and punish enemies.¹⁷ The option of political review of adjudication decisions may tempt agencies to use individual adjudications to establish new policies rather than engaging in more public-facing proceedings, such as rulemaking, that enable broader input into policy decisions and provide advance public notice of policy changes and new governing legal interpretations.¹⁸ And for high-volume adjudication regimes, review by a busy agency head may be a haphazard mechanism for achieving consistent and accurate adjudication decisions. These considerations point us to a more nuanced assessment of political accountability and structures of accountability in general.¹⁹

Courts are in a poor position to observe these tradeoffs, which vary across administrative contexts and may come to light only over time through unsatisfactory experience with prior structures. When the Court, as it did in *Arthrex*, chooses its own preferred designs for agency adjudication as a remedy for constitutional violations, it truncates the political branch processes of learning from experience, considering competing interests, and reforming institutions to better address public needs. In the setting of administrative adjudication in particular, Congress has considered and reconsidered adjudication structures and processes, settling on legislation that presidents have signed into law. The political branches make these design choices with better information, greater institutional competence, and greater political accountability than the courts, and adjust them over time as they learn from administrative experience. These advantages are consistent with the Constitution's authorization to Congress, not the courts, to make all laws necessary and proper for executing the powers the Constitution vests in the government.²⁰ History demonstrates that Congress and

16. See *infra* text accompanying notes 323–324 (discussing such criticisms of SEC and other agencies).

17. Indeed, Justice Gorsuch made essentially this point in his dissenting opinion in *Oil States*. See *Oil States Energy Servs. v. Greene's Energy Grp.*, 138 S. Ct. 1365, 1381 (2018) (Gorsuch, J., joined by Roberts, C.J., dissenting).

18. See *infra* text accompanying notes 350–357 (discussing incentives).

19. E.g., MASHAW, *supra* note 1, at 115.

20. U.S. CONST. art. I, § 8, cl. 18. Our arguments here in favor of political branch control over these institutional design questions focus on tradition, function, and institutional competence. Others have offered extensive textual arguments that congressional powers under the Necessary and Proper Clause include the power to regulate the structure of Executive Branch institutions. See Bowie & Renan, *supra* note 2, at 2109 (arguing for expansive reading of the Necessary and Proper Clause in light of selected constitutional clauses barring

the Executive Branch have made good use of their institutional competence in assessing and deliberating over these issues in the legislative process.

Although the Court has increasingly required greater executive control over agencies through its Article II Take Care Clause and Vesting Clause rulings,²¹ it has not decided how much political control over agency *adjudicators* these clauses require. Meanwhile, a divided Fifth Circuit panel recently held, in *Jarkesy v. Securities and Exchange Commission*,²² that the for-cause restriction on removal of Securities and Exchange Commission (SEC) administrative law judges (ALJs) violated the Take Care Clause.²³ At the time of writing, a certiorari petition seems likely; the issue is increasingly pressing.

We begin with a review of the growing popularity of political control of the administrative state in the Supreme Court and in scholarly literature. Part I traces the rise of the unitary executive theory in the courts in Article II decisions declining to enforce restrictions on the authority of the President to fire agency officials. Part II examines the Court's more recent use of a similar analysis in *Arthrex*, where it relied on the Appointments Clause in declining to enforce a statutory restriction on agency-head review of administrative adjudication decisions. In Part III, we challenge the *Arthrex* majority's assertion that agency-head review of adjudicatory decisions is a standard, "almost-universal" practice. Part III.A shows that Congress has provided a wide variety of structures for administrative review in different agencies, including many

Congress from acting); John Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2040 (2011) (arguing that absent particular constitutional prohibitions, "interpreters have no basis to displace judgments made by Congress pursuant to its [Necessary and Proper Clause power] to compose the government"); see also Cass Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83, 88–89 (2020) (summarizing "weakly unitary presidency" arguments under the Necessary and Proper Clause that although the President must have plenary removal authority with respect to some officials, "Congress has significant authority to limit the President's authority of removal (and also supervision)."); *id.* at 90 (explaining that on this view "Congress is permitted to carve out some important functions from presidential control."). Besides their textualist arguments, Professors Nikolas Bowie and Daphna Renan have also advocated for political branch—rather than judicial—control over separation of powers issues from an originalist and political process perspective. See Bowie & Renan, *supra* note 2, at 2030 (developing extended argument for "republican" (legislatively oriented) separation of powers rooted in political equality, rather than "juristocratic" (court-centered) separation of powers); *id.* at 2041–47 (presenting arguments based on early American debate and practices).

21. See *infra* Part I (discussing Supreme Court doctrine).

22. 34 F.4th 446 (5th Cir. 2022).

23. *Id.* The Fifth Circuit denied en banc rehearing in October 2022, on a 10–6 vote and over a vigorous dissent by Judge Haynes and several of the other judges who would have supported en banc rehearing. See *Jarkesy v. SEC*, 51 F.4th 644 (5th Cir. Oct. 2, 2022).

examples of restrictions on the authority of the agency-head to review adjudication decisions. Part III.B turns to historical practice. That section reviews the long but previously underexplored history of administrative adjudication in the patent system, contributing to the literature on the history of the administrative state. With respect to patent adjudication, we find that, for most of this history, Congress allocated final decision authority within the Executive Branch to administrative adjudicators rather than to the agency head, relying on the courts to provide further review.

Part III.C considers the normative case for agency-head review as well as its limitations and pitfalls. We argue that political control of agency adjudication may not promote political accountability for highly technical and low-salience decisions; that it can pose distinctive risks in some settings; and that other control mechanisms such as rulemaking may provide more political accountability for policy choices. Because adjudication structures vary greatly, we conclude that no single model is likely to be appropriate in all settings. In Part III.D, we argue that the political branches have a considerable advantage over the Court in assessing the relevant considerations, in designing appropriate structures for administrative adjudication in different agencies, and in modifying those structures over time. We conclude with a caution against ossification of constitutional constraints that arrest the ongoing political process of crafting a government that serves the needs of the public.

I. THE GROWING ENTHUSIASM FOR POLITICAL CONTROL IN VESTING CLAUSE AND APPOINTMENTS CLAUSE CASES

The unitary executive theory is, of course, the notion that the President must have control over Executive Branch officials.²⁴ Theorists have sometimes defended this notion on original intent grounds, and sometimes on the functional ground that presidential control provides electoral accountability for Executive Branch actions.²⁵ Opponents contest both positions.²⁶

24. See Sunstein & Vermeule, *supra* note 20, at 88–90 (overview of “weak” and “strong” variants of unitary executive theory).

25. See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 550, 596 (1994) (stating that the Constitution’s text and history support the unitary executive theory, such that “all inferior executive officers” act in the stead of the president; see also STEVEN G. CALABRESI & CHRISTOPHER YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 37–38 (2008) (arguing that the history of presidential support for the unitary executive theory over time supports it).

26. E.g., Lawrence Lessig & Cass Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2–3 (1994) (the notion that “the ‘framers constitutionalized anything like this vision of the executive is just plain myth’ though acknowledging that a unitary executive ‘can promote important

The Court has yet to endorse the theory in so many words in any majority opinion or to decide explicitly how far presidential control must extend.²⁷ Without naming it outright, a series of recent opinions by Chief Justice Roberts have nonetheless given teeth to the unitary executive theory by declining to enforce legislative provisions that the Court thinks leave the President with too little authority over the administrative state.²⁸

values of accountability, coordination, and uniformity in the execution of the laws”); Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963 (2001) (arguing that the President does not have unitary executive powers); Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L.REV. 69, 74–75 (1983); see also *Free Enterprise Fund v. Pub. Acct. Oversight Bd.*, 561 U.S. 477, 515–17 (2010) (Breyer, J., dissenting) (arguing that neither constitutional text nor history provides any clear answer on presidential removal power). On the Opinions Clause in particular, compare Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 979–80 (1997) (arguing that the Opinions Clause contemplates limited presidential involvement in agency decisionmaking), with Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 480 (1987) (arguing that the Opinions Clause represents, at most, a “paperwork requirement for presidential monitoring of bureaucratic thinking” and that Congress should limit presidential influence on rulemaking), and Peter Strauss, *Overseer or “The Decider”? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 703 (2007) (noting that some have concluded that the Opinions Clause suggests “constitutional obligations not only to oversee [agency officials] but also to respect their independent exercise of those duties.”). See also M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 651, 653 n.125 (2001) (describing power fragmentation as “our assurance against threatening concentrations of government power”).

27. Seven members of the Court in *Morrison v. Olson* agreed on the following:

The dissent says that the language of Article II vesting the executive power of the United States in the President requires that every officer of the United States exercising any part of that power must serve at the pleasure of the President and be removable by him at will. . . . This rigid demarcation—a demarcation incapable of being altered by law in the slightest degree, and applicable to tens of thousands of holders of offices neither known nor foreseen by the Framers—depends upon an extrapolation from general constitutional language which we think is more than the text will bear.

487 U.S. 654, 690 n. 29 (1988) (Rehnquist, C.J.). That dissent, by Justice Scalia, is understood to be the most concise judicial articulation of the unitary executive theory. See *id.* at 697–734; David Driesen, *The Unitary Executive Theory in Comparative Context*, 72 HASTINGS L.J. 1, 7 (2020); see also *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020) (“Under our Constitution, the ‘executive power’—all of it—is ‘vested in a President,’ who must ‘take Care that the Laws be faithfully executed.’” (quoting U.S. CONST. art. I, § 1, cl. 1)); *id.* at 2191 (“[A]s a general matter,” the Constitution gives the President “the authority to remove those who assist him in carrying out his duties” [because otherwise] “the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else” (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 513–14 (2010))).

28. See, e.g., *Free Enter. Fund*, 561 U.S. 477; *Seila Law*, 140 S. Ct. 2183; *Collins v. Yellen*, 141 S. Ct. 1761 (2021).

For now, these may seem like baby teeth, leaving minor dents in departments that continue to perform as before, but they point toward places where larger incisors may follow.

In each case, the challenged legislation has been controversial, although not necessarily on the grounds highlighted in the Court's constitutional analysis. The formal focus of the Justices who find a constitutional violation is on the allocation of authority and oversight within the Executive Branch. While they may also seem troubled by the regulatory reach of the legislation, the problem they address is not that the legislation expands regulation *per se*, but that it allocates powers to unaccountable bureaucrats rather than to the elected President in whom the Constitution vests the executive power of the United States—"all of it."²⁹

So far, a majority of Justices in each case has stopped short of invalidating the statutory scheme entirely. Instead, they have nibbled at the margins with a targeted remedy that severs an administrative design feature without directly invalidating the substantive extension of regulatory authority itself.³⁰ But some justices have flashed their incisors in dissent, ready to invalidate the statute and leave Congress to figure out how to fix it in new legislation.³¹

29. See *Seila Law*, 140 S. Ct. at 2191. Justice Kagan, among the liberals, has also advocated for greater executive supervision from a functional perspective. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246, 2248, 2383–85 (2001) (describing the history and development of presidential administration).

30. See generally Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. REV. 481, 487 (2014) (arguing that the remedial approach raises questions about the "meaningfulness and nature of the substantive limits that [courts] have imposed" on agency structures).

31. See, e.g., *Seila Law*, 140 S. Ct. at 2219 (2020) (Thomas, J., joined by Gorsuch, J., dissenting in part) ("While I think that the Court correctly resolves the merits of the constitutional question, I do not agree with its decision to sever the removal restriction To resolve this case, I would simply deny the Consumer Financial Protection Bureau (CFPB) petition to enforce the civil investigative demand."); *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1988, 1990 (2021) (Gorsuch, J., concurring in part and dissenting in part) ("Early American courts did not presume a power to 'sever' and excise portions of statutes in response to constitutional violations. Instead, when the application of a statute violated the Constitution, courts simply declined to enforce the statute in the case or controversy at hand . . . I would follow that course today."). Some of these decisions have required strange bedfellows alliances to cobble together different majorities for (1) the holding of unconstitutionality (relying on the votes of conservative Justices, some of whom dissent from the remedy of severance) and (2) the remedy of severing features of the statute that protect administrative actors from political control (relying on the votes of liberal Justices who dissent from the ruling on constitutionality but join the remedy holding to preserve as much as possible of the challenged legislation). E.g., *Seila Law*, 140 S. Ct. at 2211 (Thomas, J., joined by Gorsuch, J., concurring in part and dissenting in part); *id.* at 2224 (Kagan, J., joined by

In the 2010 decision in *Free Enterprise Fund v. Public Company Accounting Oversight Board*,³² the Court considered a challenge to provisions in the Sarbanes-Oxley Act of 2002³³ that created a new five-member Public Company Accounting Oversight Board (PCAOB) within the SEC and gave it “expansive powers to govern an entire industry”—the accounting industry.³⁴ A five-Justice majority of the Court left the PCAOB and its expansive powers in place. But the majority found the provision of “two layers” of removal restrictions protecting the PCAOB to violate Article II’s Vesting Clause and severed from the statute the “for good-cause” restrictions on the Commission’s ability to remove PCAOB members before the end of their terms.³⁵

A decade later in *Seila Law LLC v. Consumer Financial Protection Bureau*,³⁶ a more fractured majority took a similar approach to the legislative design of the controversial Consumer Financial Protection Bureau (CFPB) in the Dodd-Frank Wall Street Reform and Consumer Protection Act.³⁷ Congress created the CFPB in the wake of the 2008 financial crisis as an independent agency headed by a single director with a five-year term, providing for removal by the President only for “inefficiency, neglect of duty, or malfeasance.”³⁸ The Court had previously upheld identical statutory tenure protection for Federal Trade Commission (FTC) commissioners,³⁹ but the *Seila Law* majority distinguished the FTC from the CFPB, characterizing the former as multimember, balanced along party lines, and implementing duties that the Court characterized, somewhat disingenuously, as “neither political nor executive.”⁴⁰ Noting that the CFPB Director “wields vast rulemaking,

Ginsburg, J., Breyer, J., & Sotomayor, J., concurring in the judgment with respect to severability and dissenting in part); *Arthrex*, 141 S. Ct at 1988, 1994, 1997.

32. 561 U.S. 477, 484–85 (2010).

33. Sarbanes-Oxley Act of 2002, Pub. L. No 107-204, 116 Stat. 745.

34. 561 U.S. at 485; *see also* Sarbanes-Oxley Act § 101(a), (e)–(f) (codified at 15 U.S.C. § 7211(a), (e)–(f)).

35. 561 U.S. at 477 (2009) (finding that multilevel protection from removal violated Vesting Clause); *id.* at 508–09 (severing removal restrictions on Board).

36. 140 S. Ct. 2183 (2020).

37. Pub. L. 111-203, 124 Stat. 1376 (2010). For an account of the controversy over the Dodd-Frank Wall Street Reform and Consumer Protection Act, which is largely unremarked in the opinion, see Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 356–75 (2020).

38. Dodd-Frank Wall Street Reform and Consumer Protection Act § 1011(c)(3), 12 U.S.C. § 5491(c)(3).

39. *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 632 (1935).

40. 140 S. Ct. at 2199 (quoting *Humphrey’s Executor*, 295 U.S. at 624). *See generally* Daniel Crane, *Debunking Humphrey’s Executor*, 83 GEO. WASH. L. REV. 1835, 1838 (2015) (arguing

enforcement, and adjudicatory authority over a significant portion of the U.S. economy,” five Justices concluded that for-cause removal provisions, judicial review, and other checks on the CFPB Director’s authority were insufficient to satisfy the Constitution, and that the Constitution further requires that the President be free to remove the CFPB Director without cause.⁴¹ Two members of that majority were unwilling, however, to join the Chief Justice in limiting the remedy for the constitutional violation to severance of the tenure provision.⁴² To reach a majority for that remedy, the Chief Justice needed the votes of Justices who dissented on the analysis of constitutionality.⁴³ The bottom line in *Seila Law* was similar to that in *Free Enterprise Fund*: the Court found constitutional violations in statutory provisions limiting grounds for removing the heads of agencies, and severed the offending tenure provision while leaving the rest of the statute in place.⁴⁴

The Court made a similar ruling the following year in *Collins v. Yellen*.⁴⁵ Although the Federal Housing Finance Agency Director—who has the power to regulate and enforce the law against government-sponsored mortgage financing institutions, such as Fannie Mae—arguably exercised far less significant power than the CFPB Director, the Court nonetheless severed the for-cause restriction on the President’s power to remove the CFPB Director, stating that the Constitution prohibited even “modest restrictions” on the President’s power to remove such an agency head.⁴⁶ Again emphasizing its concern for political accountability, the majority reasoned that Presidential control was essential to “subject Executive Branch actions to a degree of electoral accountability.”⁴⁷

that the *Humphrey’s Executor* Court’s characterizations of the Federal Trade Commission (FTC) were “largely incorrect”).

41. 140 S. Ct. at 2191–92. In addition to Chief Justice Roberts, who authored the opinion, Justices Thomas, Alito, Gorsuch, and Kavanaugh joined the holding that the statutory removal protections violated the Constitution. *Id.* at 2190.

42. *Id.* at 2211 (Thomas, J., joined by Gorsuch J., concurring in part and dissenting in part) (“The Court’s decision today takes a restrained approach on the merits by limiting *Humphrey’s Executor v. United States* rather than overruling it. At the same time, the [C]ourt takes an aggressive approach on severability by severing a provision when it is not necessary to do so. I would do the opposite.” (internal citation omitted)).

43. *See id.* at 2224 (Kagan, J., joined by Ginsburg, J., Breyer, J., and Sotomayor, J., concurring in the judgment with respect to severability and dissenting in part).

44. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2210–11 (2020); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 508–09 (2010).

45. 141 S. Ct. 1761 (2021).

46. *Id.* at 1770–71, 1787.

47. *Id.* at 1784.

II. THE POTENTIAL EXPANSION OF POLITICAL CONTROL TO ADMINISTRATIVE ADJUDICATION

In some respects, *Arthrex* followed the same playbook. Although dubiously framed as an Appointments Clause⁴⁸ case, it reads like the Vesting Clause cases that preceded it. Yet, strikingly unlike those cases, *Arthrex* is about an adjudicatory regime.⁴⁹ Once again, the Court considered a dispute controversial recent legislation—this time, provisions in the Leahy-Smith America Invents Act of 2011 (AIA)⁵⁰ that expanded available proceedings within the PTO for challenging the validity of previously issued patents before an administrative tribunal.⁵¹ The AIA had

48. Although the Court characterizes the Appointments Clause as a source of presidential power over the Executive Branch, the Appointments Clause constrains the President by requiring Senate confirmation for presidential appointments of principal officers. *See* Peter Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 980 (1997) (Appointments Clause confirmation requirement creates a “likelihood that those Officers will feel some political responsibility to Congress,” diluting presidential authority); *Edmond v. United States*, 520 U.S. 651, 659 (1997) (stating that vesting of appointment power in the President “prevents congressional encroachment” but that the confirmation requirement serves to “curb Executive abuses” and to encourage “a judicious choice” of officers) (quoting THE FEDERALIST No. 76 at, 386–87 (Alexander Hamilton) (M. Beloff ed., 1987)).

49. As discussed *infra* note 68, *Arthrex* is also a significant departure from Appointments Clause doctrine treatment of adjudicators.

50. Pub. L. 112-29, 125 Stat. 284.

51. One indication that the Court regards these proceedings (known as inter partes review proceedings or IPRs) as controversial is that this was the sixth decision of the Supreme Court in a case challenging aspects of IPRs, although it was the first in which a majority of the Court found a constitutional violation. *See* *Cuozzo Speed Techs. v. Lee*, 136 S. Ct. 2131 (2016) (interpreting statute to preclude judicial review of PTO decision to institute an IPR as to patent claims not explicitly challenged in petition for review); *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1370, 1373 (2018) (rejecting a challenge that IPR proceedings violate Article III of the Constitution, reasoning that patents are “public rights” that Congress need not assign for adjudication before an Article III court); *SAS Inst. v. Iancu*, 138 S. Ct. 1348 (2018) (interpreting the statute to require that the administrative tribunal issue a final written decision regarding each claim challenged in a petition once it decides to institute review, effectively ending PTO practice of instituting partial review only as to challenges and claims that the agency deems likely to succeed on the merits); *Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853 (2019) (interpreting the statute to exclude a federal agency from the category of a “person” who may petition for post-issuance review of patents); *Thryv, Inc. v. Click-to-Call Techs., LP*, 140 S. Ct. 1367 (2020) (interpreting statutory provision that makes a decision to institute review final and nonappealable as barring judicial review of the determination that IPR was not time-barred). For a critical review of the constitutional arguments in pre-*Arthrex* cases, see Greg Reilly, *The Constitutionality of Administrative Patent Cancellation*, 23 B.U.J. SCI. & TECH. L. 377 (2017).

made no change, however, to statutory provisions that, since 1927, had allowed final decisions of the tribunal to be appealed directly to an Article III Court without further review within the agency.⁵² A majority of the Court found a constitutional violation.⁵³ And once again, a different majority held that the appropriate remedy was to sever a statutory provision while leaving the rest of the law in effect.⁵⁴

This time the Court's objection was not to the independence of leadership in a new administrative department with a full range of functions,⁵⁵ but rather to the independence of expert adjudicators in a very old department with a long history of administrative adjudication. Specifically, the issue was the status of hundreds of APJs who adjudicate validity challenges within the PTO as members of an administrative tribunal, recently renamed the Patent Trial and Appeal Board (PTAB).⁵⁶ In earlier Article II Vesting Clause cases,

52. See *infra* Part III.B.5.

53. *Arthrex*, 141 S. Ct. at 1985.

54. A notable realignment across the three cases is Justice Thomas's shift from joining the majority on both the determination of a constitutional violation and the severance remedy in *Free Enterprise*, to joining the majority only on the constitutional violation while dissenting on the severance remedy in *Seila Law*, to dissenting on both parts of the opinion in *Arthrex*. 141 S. Ct. at 1997 (Thomas, J., dissenting). Justice Thomas is certainly not losing his zeal for the unitary executive theory. Quite the contrary—in his 2020 opinion in *Seila Law* he was ready to go further than the majority on the merits and overrule *Humphrey's Executor*, the landmark case upholding the FTC as an independent agency, although he disagreed with the majority's decision to sever the removal provision of the CFPB statute as an improper judicial revision of legislation. *Seila Law, LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2211–12, 2222–23 (Thomas, J., concurring in part and dissenting in part). But in *Arthrex*, Justice Thomas saw no Appointments Clause violation in the delegation of the appointment of administrative patent judges (APJs) to the Secretary of Commerce because he did not see APJs as principal officers under either Supreme Court precedent or historical evidence. 141 S. Ct. at 2000 (Thomas, J., dissenting). Instead, he saw the majority as improperly using the Appointments Clause to “police[] the dispersion of executive power among officers”—an issue that the Appointments Clause does not address. *Id.* at 2003. Justice Thomas, the author of more patent law decisions than any other member of the Court, also noted that Congress has repeatedly given to non-principal officers the power exercised by the APJs to render final decisions in patent disputes. *Id.* at 2004.

55. See Kevin Stack, *Agency Independence After PCAOB*, 32 CARDOZO L. REV. 2391, 2392 (2011) (explaining importance of “combination of functions” in Court's concern for presidential control).

56. See Leahy-Smith America Invents Act, Pub. L. 112–29, 125 Stat. 284, 313 (2011) (codified as amended in scattered sections of 35 U.S.C.) (establishing the Patent Trial and Appeal Board (PTAB), composed of the Director of the Patent and Trademark Office, the Deputy Director, the Commissioner for Patents, the Commissioner for Trademarks, and the administrative patent judges). PTAB took over the authorities of similar boards with different names. See U.S. PAT. & TRADEMARK OFF., MANUAL OF PATENT EXAMINING PROCEDURES §§ 1201, 2301 (9th ed., rev. 2020) (“Throughout this chapter, ‘Board’ is used to refer the Patent

the Court had explicitly distinguished administrative law judges as falling outside the scope of its decision.⁵⁷ Moreover, in its earliest major case on presidential control, *Myers v. United States*,⁵⁸ the Court identified adjudication as a distinct function not appropriate for political control.⁵⁹

In the lower court decision under review in *Arthrex*, the Court of Appeals for the Federal Circuit nonetheless concluded that the statutory rights and responsibilities of APJs made them “principal officers” for whom the Constitution required appointment by the President with the advice and consent of the Senate, rather than “inferior officers” whose appointment could be delegated to the Secretary of Commerce as provided in the statute.⁶⁰ Following the remedial approach in *Free Enterprise Fund*, the Federal Circuit modified the portion of the statute⁶¹ that restricts removal of the PTO’s officers and employees (but only as applied to APJs), allowing the PTO

Trial and Appeal Board and its predecessor organizations, the Board of Patent Appeals and Interferences and the separate Board of Appeals and Board of Interferences.”).

57. *E.g.*, *Free Enterprise Fund v. Pub. Acct. Oversight Bd.*, 561 U.S. 477, 507 n.10 (2010) (“[O]ur holding also does not address that subset of independent agency employees who serve as administrative law judges. Whether administrative law judges are necessarily ‘Officers of the United States’ is disputed. And unlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions, or possess purely recommendatory powers.” (internal citations omitted)). The Court subsequently held that administrative law judges are “officers” who must be appointed in a manner consistent with the Appointments Clause in *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018).

58. 272 U.S. 52 (1926).

59. *Id.* at 135 (“[T]here may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President [cannot] in a particular case properly influence or control.”). *See also* *Wiener v. United States*, 357 U.S. 349, 354–55 (1958) (inferring for-cause restriction upon president’s power to remove members of War Claims Commission, given that it was established as an “adjudicating body” with determinations not subject to review by other executive officials); *Butterworth v. United States ex rel. Hoe*, 112 U.S. 50, 67 (1884) (“It is not consistent with the idea of judicial action that it should be subject to the direction of a superior, in the sense in which that authority is conferred upon the head of an executive department in reference to his subordinates.”).

60. *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1334–35 (Fed. Cir. 2019) (citing U.S. CONST. art. II, § 2, cl. 2).

61. The severance analysis was a bit awkward because the statutory provisions that limit removal are not found in the Patent Act, but rather in a different title of the U.S. Code. *See* 5 U.S.C. § 7513(a) (protecting a broad range of federal employees from removal except “for such cause as will promote the efficiency of the service”). The Patent Act incorporates these protections by reference in a general provision that states, “Officers and employees of the Office shall be subject to the provisions of title 5, relating to Federal employees.” 35 U.S.C. § 3(c).

Director to fire them without cause.⁶² Without for-cause job protection, the Federal Circuit held that APJs would qualify as “inferior officers”⁶³ whose appointments Congress could delegate to the Secretary, thus fixing the constitutional violation with minimal disruption to the statutory scheme.

The Supreme Court ultimately chose a different remedy. In the merits portion of the decision, a majority led by Chief Justice Roberts⁶⁴ noted that “Congress provided that APJs would be appointed as inferior officers, by the Secretary of Commerce as head of a department,” and then asked “whether the nature of their responsibilities is consistent with their method of appointment.”⁶⁵ The majority thus took the legislative provisions on appointment and removal as fixed and shifted its focus to the design of the tribunal’s authorities to determine whether there was an Appointments Clause violation. Although the statute provided for significant administrative and substantive oversight by principal officers, authorizing the Director to control panel assignments of APJs and to make unreviewable decisions about whether to institute particular proceedings and authorizing the Secretary to remove APJs for cause,⁶⁶ the majority focused on the APJs’ “power to render a final decision on behalf of the United States” without review by any principal officer in the Executive Branch.⁶⁷ Statutory provision for *judicial* review of PTAB

62. *Arthrex v. Smith & Nephew*, 941 F.3d at 1335. The Federal Circuit reasoned that the responsibilities of APJs made them “principal officers” who had to be appointed by the President with advice and consent of the Senate under the Appointments Clause of the Constitution. *Id.* at 1335 (citing 35 U.S.C. § 6(a)). By invalidating their job tenure, the Federal Circuit aimed to turn them into “inferior officers” who would be effectively controlled by the politically accountable Director and Secretary, who in turn served at the pleasure of the President. The Appointments Clause permits Congress to authorize heads of departments to appoint inferior officers. *See* U.S. CONST. art. II, § 2, cl. 2.

63. Following the Supreme Court’s decision in *Edmond v. United States*, 520 U.S. 651, 662–63 (1997), the Federal Circuit considered three factors in distinguishing between principal and inferior officers: “(1) whether an appointed official has the power to review and reverse the officers’ decision; (2) the level of supervision and oversight an appointed official has over the officers; and (3) the appointed official’s power to remove the officers.” *Arthrex v. Smith & Nephew*, 941 F.3d at 1329. These factors indicate whether the level of control and supervision appointed officials have over the officers and their decision are sufficient to preserve political accountability for actions of the Executive Branch. *Id.* The statute gives the appointed PTO Director supervisory oversight of the work of APJs, but (prior to the Supreme Court’s *Arthrex* decision) not the power to review and reverse their decisions. *Id.*

64. Justices Alito, Gorsuch, Kavanaugh, and Barrett joined the Chief Justice in the merits portion of the decision. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1975 (2021).

65. *Id.* at 1979–80.

66. 35 U.S.C. § 6(c) (panel designations); §314 (institution decisions); §3(c) (removal authority).

67. *Arthrex*, 141 S. Ct. at 1981. *See id.* at 2000–01 (Thomas, J., dissenting) (summarizing other mechanisms of within-agency control).

decisions was irrelevant, because “review outside Article II—here an appeal to the Federal Circuit—cannot provide the necessary supervision . . . [of] the ‘executive Power’ for which the President is ultimately responsible.”⁶⁸

To remedy this violation, a different majority modified the statutory scheme to provide for review of PTAB decisions by the PTO Director. Key to this portion of Chief Justice Roberts’ opinion was the repeated assertion that agency-head review of adjudication, not present in the statutory regime under review, is “the standard way to maintain political accountability and effective oversight for adjudication”⁶⁹ and “the almost-universal model of adjudication in the Executive Branch.”⁷⁰

68. *Id.* at 1982. Even from the Appointments Clause perspective, *Arthrex* represents a significant step toward constitutionalizing political supervision of individual adjudication decisions. By contrast, in *Edmond v. United States*, 520 U.S. 651 (1997), a unanimous Court rejected an Appointments Clause challenge to the Secretary of Transportation’s appointment of civilian judges to serve on the Coast Guard Court of Criminal Appeals. The Court found them to be “inferior” officers who could be appointed by the Secretary, even though the Senate-confirmed Judge Advocate General (located within the Department of Transportation) who exercised administrative oversight over the court had “no power to reverse decisions of the court.” *Id.* at 664. This conclusion rested in part on the fact that the Judge Advocate General could remove a judge “from his judicial assignment without cause,” and in part on the review of the court’s convictions within the Executive Branch by the Court of Appeals for the Armed Forces, an Article I Court outside the Department of Transportation. *See id.* at 664 n.2. That court’s scope of review was limited to ensuring that each element of the crime was established by “some competent evidence in the record.” *Id.* at 665. This limited form of decisional review outside the supervising department seems like a slim reed on which to rest a distinction between *Edmond* and *Arthrex*. Moreover, members of the Court of Appeals for the Armed Forces serve a 15-year term and are removable by the President only for cause. *See Edmond*, 520 U.S. at 664 & n.2 (describing court); 10 U.S.C. § 942 (describing term appointment and for cause restrictions on removal). Thus, review by the Court of Appeals for the Armed Forces seems unlikely to enable meaningful political accountability of the sort sought by the *Arthrex* Court, with its focus on “lines of accountability to the President.” *E.g., Arthrex*, 141 S. Ct. at 1982.

69. *Arthrex*, 141 S. Ct. at 1984. Chief Justice Roberts expressed his concern for presidential control later in the majority opinion. *See id.* at 1983–84 (referencing agency decisions made at “the direction of the President . . . if not the President himself” (quoting *Barnard v. Ashley*, 59 U.S. (18 How.) 43, 45 (1856) (internal quotations omitted))).

70. *Id.* at 1987. We recognize potential quibbles over the meaning of “standard”—including whether it refers to quantitative dominance (two-thirds? more than half?) or perhaps to a default or “model” provision which legislators may choose to modify. The Court’s paired references to “standard” and “almost-universal” may indicate that it intended the former meaning. Our point is that the significant complexity and variation in adjudication schemes demonstrates that agency-head review is certainly not “almost-universal,” and at a minimum raises substantial questions about whether it is “standard” under any reasonable understanding.

The majority lost Justice Gorsuch's vote on its remedy for the violation,⁷¹ but Justices Breyer, Sotomayor, and Kagan, who dissented on the merits, concurred in the majority's remedial holding, perhaps figuring they could thereby limit its scope.⁷² The result was a majority decision to sever a statutory provision specifying that only PTAB itself could grant rehearings.⁷³ As the Court interpreted the statute, that change would allow the politically accountable, Senate-confirmed Director to set aside PTAB decisions in inter partes review proceedings (IPRs), allowing de novo review of adjudication decisions by a politically appointed official who was removable at will by the President.

Arthrex signals a significant expansion of separation of powers jurisprudence, both in the Court's new willingness to find Appointments Clause violations in Congress's choice of an appointments process for administrative judges, and in the Court's willingness to rewrite legislative structures for administrative adjudication to fix the problem. That said, the split decision and unusual circumstances, including that *Arthrex* was decided under the Appointments Clause, leave the Court some wiggle room in future cases. Senate confirmation of affected officials would immunize them from Appointments Clause challenges, of course, although it may be impractical for the large tribunals that are necessary for high-volume adjudication regimes. Principal officer review below the level of the agency head, including in an appellate tribunal, might be another option. Further, for what it may be worth, the Court specifically limited its holding to IPR proceedings, commenting neither on other patent adjudication proceedings nor on adjudication frameworks in other agencies.⁷⁴

That wiggle room could disappear with continued acquiescence in agency-head review of adjudicatory decisions as a remedy in future Appointments Clause cases. It could also disappear if the Court were to hold in a future case that Article II's Vesting or Take Care Clauses require agency-head control. The remedy settled on by a fractured majority in

71. Justice Gorsuch wrote separately to agree that the ability of executive officials to withdraw patents "while accountable to no one within the [E]xecutive [B]ranch" broke the "chain of dependence on the President." 141 S. Ct. at 1988–89. At the same time, he expressed his view that Article III courts, rather than the Executive Branch should decide patent validity claims. 141 S. Ct. at 1993. He characterized the remedy as a "policy choice" that is for Congress, not the Court, to make, noting that "venturing further down this remedial path risks undermining the very separation of powers its merits decision purports to vindicate." 141 S. Ct. at 1990–91.

72. See 141 S. Ct. at 1997 (Breyer, J., concurring in the judgment in part, dissenting in part).

73. 35 U.S.C. § 6(c). Although the provision by its terms applies to all PTAB proceedings, the Court noted that the case concerned this provision only as applied to IPRs. 141 S. Ct. at 1987 ("We add that this suit concerns only the Director's ability to supervise APJs in adjudicating petitions for inter partes review.").

74. 141 S. Ct. at 1987.

Arthrex to minimize the greater disruption of invalidating the statute could potentially become ossified as an apparent constitutional constraint—or at least a constitutional safe harbor—for permissible designs of administrative adjudication regimes.⁷⁵ That would represent a significant departure from current and historical practice.

Despite Chief Justice Roberts’ assertion in *Arthrex* that agency-head review is a “standard” means of providing political accountability and oversight and “the almost-universal model of adjudication in the Executive Branch,”⁷⁶ agency-head review is far from standard and by no means universal across the varied landscape of administrative adjudication, either today or in the past, as we explain below. Both the variety of current practice across the administrative state and the long history of congressional tinkering with adjudication structures argue strongly against judicial embrace of agency-head review as a uniform constitutional constraint. Even if it may offer a useful mechanism of political control of policy choices in some administrative contexts, it is not standard and should not be required.

III. EXAMINING THE VARIED ROLES OF AGENCY HEADS IN ADMINISTRATIVE ADJUDICATION

In Part III.A., we examine the role of agency heads in administrative adjudication regimes, both in current and historical practice. That Part takes on Chief Justice Roberts’ empirical claim that agency-head review of adjudication decisions is “standard” and “the almost-universal model” of adjudication today. In Part III.B., we then turn to historical practice, showing that agency-head review has been anything but standard in the long history of administrative adjudication in the patent system. In Part III.C., we consider the normative case for agency-head review of adjudication decisions as a mechanism for providing political control and accountability for Executive Branch policy choices, evaluating its limitations and pitfalls. We compare agency-head review of adjudication decisions to other mechanisms for providing political control and accountability that better serve those purposes, such as rulemaking and use of less formal agency guidance documents. Finally, in Part III.D., we consider the institutional advantages of the political branches over the courts in designing administrative structures for adjudication, and in learning from experience and reforming those structures over time.

75. Cf. Bowie & Renan, *supra* note 2, at 2103 (arguing that “[b]y permitting the Court to overrule the considered judgment of the representative branches” on how to structure government, the Court substitutes “a judicially imagined fixity” for more provisional legislative choices that might be revised in accordance with future political preferences).

76. 141 S. Ct. at 1984, 1987.

A. *Agency-Head Review of Individual Adjudication Decisions is Far From the Standard Model Today*

Chief Justice Roberts asserted in *Arthrex* that agency-head review of adjudication decisions is “standard” and “almost-universal.”⁷⁷ This type of descriptive claim sometimes takes on outsized legal implications in Supreme Court cases, making it important to assess its accuracy.⁷⁸ In addressing separation of powers claims, the Court has repeatedly invoked practices that it asserts are typical or widespread to distinguish the administrative designs under review as “novel,” and thus more vulnerable to challenge, than those that have previously avoided or survived constitutional scrutiny.⁷⁹

Chief Justice Roberts cited an influential and provocative law review article by Professors Christopher Walker and Melissa Wasserman for the

77. *Id.* at 1984 (“‘higher-level agency reconsideration’ by the agency head is the standard way to maintain political accountability and effective oversight for adjudication”); *id.* at 1987 (“review by the Director would follow the almost-universal model of adjudication in the Executive Branch”). In its answer to a question from Justice Kavanaugh, the government partially conceded this point during oral argument: “[I]t certainly is the norm” for principal officers to have the capacity to review decisions made by inferior adjudicative officers, though the government also cautioned that the review did not “have to be plenary.” See Transcript of Oral Argument at 23, *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021) (No. 19–1434). Walker and Wasserman had suggested, further, that agency heads may have “almost unfettered ability to review and reverse their adjudicatory boards.” Walker & Wasserman, *supra* note 13, at 144. Of course, agency-head review of adjudication decisions will never be completely unfettered, since it will be subject to the agency’s authorizing statute and other typical procedural and constitutional constraints.

78. The Court has sometimes taken traditional practice to imply some level of interbranch agreement that particular practices are constitutionally permissible, in contrast to novel arrangements that it is more ready to disapprove. While addressing this argument is beyond the scope of this Article, we note the significant debate over its legitimacy among commentators. *E.g.*, Bowie & Renan, *supra* note 2, at 2022 (arguing that even if historical practice might reveal an interbranch consensus at some point in time, legislation trying something new “openly and notoriously” alters any such agreement); Leah Litman, *Debunking Antinovelty*, 61 DUKE L.J. 1407, 1410 (2017). Compare William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 49 (2019) (suggesting that historical evidence may have value if interbranch constitutional deliberation and acquiescence amounts to “liquidation”), with Alison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75, 83 (2013) (critiquing approaches focused on congressional or presidential acquiescence by noting their neglect of potential judicial acquiescence to one or another branch), and Shalev Roisman, *Constitutional Acquiescence*, 84 GEO. WASH. L. REV. 668, 672–74 (2016) (expressing concern that acquiescence analysis generally will simply validate the action of the more active and powerful branch).

79. See, e.g., *Seila Law v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2192 (asserting that single-headed independent agency is unusual among agency structures).

characterization of agency-head review as “standard” and “almost-universal.”⁸⁰ But Walker and Wasserman are more cautious, placing quotation marks around the phrase “standard federal model” and attributing it to others.⁸¹ For their part, they recognize that agency-head final review has rarely been discussed in the administrative law literature, including in leading treatises,⁸² that it does not appear on a list of “core features” of formal adjudication governed by the Administrative Procedure Act (APA),⁸³ and that it was not available in three out of ten in-depth case studies of “Type B” agency adjudication (i.e., adjudications not covered by APA requirements for formal adjudication but sharing some features of formal adjudications, including hearings) done by Professor Michael Asimow for the Administrative Conference of the United States.⁸⁴ In arguing for embrace of agency-head review as a “best practice,”⁸⁵ they aimed to raise the profile⁸⁶ and tout the normative benefits of a practice that was common but by no means universal in the increasingly varied world of agency adjudication. Walker and Wasserman do assert that APA-governed formal adjudication incorporates agency-head final decisionmaking authority,⁸⁷ although Congress is free to legislate different procedures in other statutes.⁸⁸ Recognizing that the

80. See Walker and Wasserman, *supra* note 13.

81. Walker and Wasserman attribute the characterization as “the standard federal model” to Professor Ronald Levin. *Id.* at 144 n.7, 152 (citing Ronald M. Levin, *Administrative Judges and Agency Policy Development; the Koch Way*, 22 WM. & MARY BILL RTS. J. 407, 412 (2013) (attributing the characterization to the late Charles H. Koch, Jr.)). *But see* Levin, *supra* (describing the standard federal model as including review by the “agency head or another decisionmaking body that sets policy for the agency”).

82. Walker and Wasserman, *supra* note 13, at 152 (noting that agency-head final review is not mentioned in Pierce’s *Administrative Law Treatise* discussion of formal adjudication and rarely in the literature).

83. *Id.*

84. *Id.* at 157 (citing MICHAEL ASIMOW, ADMIN. CONF. OF U.S., EVIDENTIARY HEARINGS OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 33 (2016) [hereinafter ASIMOW REPORT]).

85. Walker & Wasserman, *supra* note 13 at 146–48, 174–78 (arguing that agency-head review of adjudication decisions offers considerable normative benefits and encouraging its adoption for PTAB proceedings as a “best practice”). We address the normative arguments for agency-head review in Part III.C below.

86. *Id.* at 149 (adding “final decision-making authority” in an agency head as a new eleventh factor to a list of ten key statutory requirements of Administrative Procedure Act-governed (APA) formal adjudication drawn from the Pierce *Administrative Law Treatise*).

87. Walker & Wasserman, *supra* note 13, at 143. The APA states, “[o]n appeal from or review of the initial decision [rendered by an Administrative Law Judge], the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.” Administrative Procedure Act, 5 U.S.C. § 557(b).

88. See 5 U.S.C. § 559 (post-APA legislation may vary its requirements if it does so “expressly”). The APA also permits agencies to vary the scope of agency-head review of

overwhelming bulk of adjudication in the administrative state is not formal adjudication governed by the APA, Walker and Wasserman suggest further that “in the vast majority of Type B adjudication models, the agency head has some degree of decisionmaking authority.”⁸⁹

In fact, across the administrative state, including in important and high-volume adjudication regimes, the picture of agency-head control—or even principal officer control—over adjudication decisions is far more complex, varied, and nuanced than the *Arthrex* Court recognized. Adjudication frameworks vary widely, as well-documented recent analyses by Professors Michael Asimow and Emily Bremer demonstrate.⁹⁰

Congress has not stuck to a single model for internal review of agency adjudication decisions, but instead has provided different schemes reflecting wide-ranging considerations that impact the validity and integrity of adjudication in different settings. Those design choices sometimes include specific *restrictions* on agency-head review.

Within the Department of Labor, for example, the Secretary designates five “especially qualified” individuals as the Benefits Review Board (BRB).⁹¹ The BRB reviews compensation and benefits claims initially decided by ALJs in formal adjudication hearings under the Longshoreman and Harbor Workers’ Act, the Black Lung Benefits Act, and several other statutes.⁹² The BRB can set aside the ALJ’s findings

adjudication decisions by regulation. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision *except as it may limit the issues on notice or by rule.*”) (emphasis added). See, e.g., *Vineland Fireworks Co., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 544 F.3d 509, 514 (3d Cir. 2008) (acknowledging that agency possessed the ability to “limit its own review using its regulation-promulgating powers,” but concluding that agency had not done so).

89. Walker & Wasserman, *supra* note 13, at 157; see also *id.* at 144 (asserting that agency heads may have “almost unfettered ability to review and reverse their adjudicatory boards”).

90. See ASIMOW REPORT, *supra* note 84, at 33 (noting that so-called Type B adjudication, with evidentiary hearings, is “vastly more diverse” than formal adjudication and “vast and formless,” and Type C adjudication, “vastly more numerous than Type B, lack[ing] any unifying procedural element”); Emily Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 2019 WIS. L. REV. 1351, 1353 (describing the “proliferation of non-uniform adjudicatory procedures” in light of Congress and individual agencies’ “preferring . . . to create unique adjudicatory proceedings designed to meet individual [programmatic] needs”). See also Walker & Wasserman, *supra* note 13, at 153 (“as much as 90 percent of all agency adjudication occurs outside of APA formal adjudication proceedings”).

91. 33 U.S.C. § 921(b).

92. 20 C.F.R. § 801.102. See Stanford-ACUS database, <https://acus.law.stanford.edu/schem/labroalj0002> (classifying these proceedings as “Type A,” or formal adjudication under the APA). See generally 33 U.S.C. §§ 901–50 (Longshoreman and Harbor Workers’ Act);

and conclusions only if they are not supported by substantial evidence.⁹³ By statute, decisions of the BRB may be appealed directly to federal court; the statute gives the Secretary of Labor no further review authority.⁹⁴

The Contract Disputes Act⁹⁵ formally authorizes four boards of government contract appeals—the Armed Services Board of Contract Appeals, in existence in some form since 1970,⁹⁶ the Civilian Board of Contract Appeals, the Postal Service Board of Contract Appeals, and the Tennessee Valley Authority Board of Contract Appeals—each with jurisdiction to decide appeals from government contracting officer determinations.⁹⁷ Government contracts can include lucrative and often sophisticated arrangements to supply goods, services, security, and even policy analyses. Disputes impact the contractor’s obligation to perform and right to be paid. These appeals boards are to be staffed “in the same manner as [ALJs],” from a register by the hiring agency, with the additional requirement that a member must have had at least five years of experience in public contract law.⁹⁸ An interested party may appeal board decisions

30 U.S.C. §§ 901–04, 921–25, 931–45 (Black Lung Benefits Act).

93. 33 U.S.C. § 921(b)(3) (“findings of fact in decision under review . . . shall be conclusive if supported by substantial evidence”); 20 C.F.R. § 802.301(a) (same).

94. 33 U.S.C. § 921(c) (“any person” affected by a Benefits Review Board (BRB) order may seek judicial review in the Courts of Appeals); *see also* United States v. Arthrex, Inc., 141 S. Ct. 1970, 1984 (2021) (noting that the BRB members “appear to serve” at the Labor Secretary’s pleasure).

95. Contract Disputes Act of 1978, Pub. L. 95-563, 92 Stat. 2383 (codified as amended at 41 U.S.C. §§ 7101–09).

96. Armed Services Board of Contract Appeals, <https://www.asbca.mil/> (last visited Feb. 7, 2023) (“The [Armed Services Board of Contract Appeals] is a neutral, independent forum which has been in existence for over fifty years.”).

97. *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, sec. 847a, § 42(a)–(d), 119 Stat. 3136, 3391–3394 (2006) (codified as amended at 41 U.S.C. § 7105(b), (d)) (creating Civilian and Postal Service Boards of Contract Appeals); *cf.* Contracts Dispute Act of 1978, § 8(a)(1) (codified as amended at 41 U.S.C. § 7105) (authorizing but not requiring such boards). In 2006 legislation, Congress consolidated the functions of eight previously existing contract appeals boards into the Civilian Board of Contract Appeals. *See* About the Board, United States Civilian Board of Contract Appeals, <https://www.cbca.gov/board/index.html>, (last visited Feb. 7, 2023). The National Aeronautics and Space Administration and the Postal Regulatory Commission have their own boards of contract appeals. *Id.*

98. *E.g.*, 41 U.S.C. § 7105(a)(2) (including typical “in the same manner as [ALJs]” appointment requirement for Armed Services Board, as well as five years of experience in public contract law); *see* Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643, 1648 n. 21 (2016). Members of the Civilian Board of Contract Appeals are also expressly entitled to for-cause removal protections like those of ALJs. *See* 41 U.S.C. § 7105(b)(3). *See* Barnett, *supra*, at 1648 n.21 (noting that statutes do not specify for-cause removal protections for other Board of Contracts Appeals Judges). Absent special statutory provisions, agencies

directly to federal court, subject to a deferential standard of review on the facts, but the statute does not provide for agency-head review.⁹⁹ These provisions have been in the law for over forty years—at least since 1978.¹⁰⁰

The anti-discrimination provision of the Immigration and Nationality Act has barred, for at least thirty-five years, “unfair immigration-related employment practice[s]” based on (legal) immigration status or national origin.¹⁰¹ By statute, an ALJ’s determination of these claims is final—not subject to further agency review—and directly appealable to the courts.¹⁰² Decisions of the Department of Agriculture’s Judicial Officer are likewise not further reviewable by the agency head.¹⁰³

The Environmental Appeals Board at the Environmental Protection Agency has a similar review structure, with Board decisions appealable directly to federal court. In contrast to the preceding examples, in this particular case the statute reserves the possibility of agency-head review, but that possibility is merely a formality and reportedly never used.¹⁰⁴

Finally, in two of the largest federal adjudication schemes in the country, agency heads have no review of final decisions on either veterans’ benefits claims or Social Security claims. Lay adjudicators at the Department of Veterans Affairs (VA) handle over one million newly filed claims each year, which is only a portion of the agency’s overall claims load.¹⁰⁵ The VA’s

are required to use administrative law judges when the APA’s formal adjudication provisions apply. *See* 5 U.S.C. § 556(b)(3); 5 U.S.C. § 3105 (ALJ appointment); 5 U.S.C. § 7521(a) (removal provisions for ALJs).

99. 41 U.S.C. § 7107(b) (“[D]ecision of the agency board on a question of law is not final or conclusive” on review, but fact decision is “final and conclusive” and a court may set aside the decision on a question of fact only if it is “fraudulent, arbitrary, or capricious, [likely the result of] bad faith, . . . or not supported by substantial evidence”).

100. *See* Contract Disputes Act, 41 U.S.C. § Code §§ 7101–7109.

101. 8 U.S.C. § 1342b(a). *See generally* *Immigrant and Employee Rights Section*, U.S. DEP’T OF JUST., <https://www.justice.gov/crt/immigrant-and-employee-rights-section> (last visited Feb. 7, 2023) (describing process for enforcing these provisions).

102. *See* 8 U.S.C. § 1342b(g), (i).

103. *See* CHRISTOPHER J. WALKER & MATTHEW LEE WIENER, ADMIN. CONF. OF U.S., AGENCY APPELLATE SYSTEMS 9 (2020).

104. *See* WALKER & WIENER, *supra* note 103, at 8 n.38 (noting that EPA regulations also reserve the Administrator’s authority to modify an Environmental Appeals Board (EAB) decision in some instances but the “authority has not been exercised”).

105. ASIMOW REPORT, *supra* note 84, at 84 (“many such claims seek several different benefits”); *id.* at 86 (describing lay adjudicators); KENT BARNETT, MALIA REDDICK, LOGAN CORNETT, AND RUSSELL WHEELER, ADMIN. CONF. OF U.S., NON-ALJ ADJUDICATORS IN FEDERAL AGENCIES 3 (2018) (reporting 630 Department of Veterans Affairs (VA) adjudicators). Unlike Barnett, Asimow would not consider officials making front-line veterans’ benefits

Board of Veterans' Appeals is staffed by sixty-one Veterans Law Judges; its caseload exceeds 50,000 appeals per year.¹⁰⁶ Meanwhile, of the roughly 2,000 ALJs in the federal system, over 1,600 are assigned to handle the massive workload of the Social Security Administration (SSA), with 110 non-ALJ administrative appeals judges responsible for hearing appeals.¹⁰⁷

In both of these high-volume adjudication schemes, an appellate panel has the final word within the agency on adjudicated claims. Congress has provided by statute that Board of Veterans' Appeals decisions on veterans' benefits are not further reviewable within the VA itself, although judicial review is available in an Article I court.¹⁰⁸

And since 1940, the SSA (consistent with the practice of its predecessor, the Social Security Board¹⁰⁹) has structured its retirement, survivors, and disability benefits adjudication system to give final authority over benefits decisions to its Appeals Council, staffed with administrative appeals judges (AAJs), rather than to the Social Security Commissioner.¹¹⁰ The SSA

determinations to be non-ALJ adjudicators. See Michael Asimow, *Best Practices for Evidentiary Hearings Outside the Administrative Procedure Act*, 26 GEO. MASON L. REV. 923, 933 (2019) [hereinafter Asimow, *Best Practices*] ("this Article does not treat [such officials] as [Administrative Judges]").

106. See Stanford-ACUS Adjudication Research: Number of Adjudicators, STANFORD L. SCH., <https://acus.law.stanford.edu/reports/number-of-adjudicators> (last visited Feb. 7, 2023) [hereinafter Number of Adjudicators] (reporting sixty-one adjudicators at Board of Veterans' Appeals); Asimow, *Best Practices*, *supra* note 105, at 935–36 (noting 2016 Board of Veterans Appeals caseload of 56,000 appeals and pending cases of over 67,000).

107. See *ALJs by Agency*, OFF. OF PERS. MGMT., <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=By-Agency> (last visited Feb. 7, 2023); Number of Adjudicators, *supra* note 106 (reporting 110 appellate Social Security adjudicators); *Information About Social Security's Hearing and Appeals Process*, SOC. SEC. ADMIN., www.ssa.gov/appeals (last visited Feb. 7, 2023) ("[The Social Security Administration (SSA)] issues more than a half a million hearing and appeal dispositions each year"). Administrative appeals judges are non-ALJ administrative judges. *E.g.*, 5 U.S.C. § 7521(a) (discussing requirements for ALJs).

108. See WALKER & WIENER, *supra* note 103, at 9; see also *Arthrex*, 141 S. Ct. at 1984 (2021) (noting the finality of Board of Veterans' Appeals within the VA, but pointing out reviewability in the Court of Appeals for Veterans Claims). The President appoints and the Senate confirms a judge serving on the Court of Appeals for Veterans Claims to a fifteen-year term, removable by the President only on limited grounds. See 38 U.S.C. § 7523(b), (f). Given its location outside the VA and the combination of term appointments and restricted grounds for removal, it would seem unlikely to supply substantial political accountability.

109. The Social Security Board was abolished and replaced by a single Commissioner in 1946. See *Social Security Commissioners*, SOC. SEC. ADMIN., <https://ssa.gov/history/commissioners.html> (last visited Feb. 7, 2023); Social Security Act Amendments of 1946, Pub. L. 719-951 § 702, 60 Stat. 978 (codified as amended at 42 U.S.C. § 902) (establishing Commissioner's office).

110. See CHARLES KOCH & DAVID KOPLOW, ADMIN. CONF. OF U.S., THE FOURTH BITE AT THE APPLE: A STUDY OF THE OPERATION AND UTILITY OF THE SOCIAL SECURITY

presents the Appeals Council to the public as the “last administrative decisional level.”¹¹¹ By regulation, its decisions are final within the agency, appealable only to federal court.¹¹² In 2020, when the SSA revised its regulations in light of caseload concerns to authorize the (non-ALJ) AAJs, in addition to its ALJs, to decide front-line cases,¹¹³ a central concern expressed

ADMINISTRATION’S APPEALS COUNCIL 687 (Jan. 28, 1988) (noting that although statutory authorization is to the “Secretary,” the Appeals Council “was created by rulemaking procedures”). *E.g.*, Social Security Administration, Hearings Held By Administrative Appeals Judges of the Appeals Council, 85 Fed. Reg. 73,138, 73,139, 78,139 n.16 (Nov. 16, 2020) (to be codified at 20 C.F.R. pts. 404, 408, 411, 416, 422) (“From the beginning of our hearings process, the head of our agency has delegated the authority to conduct hearings and issue decisions [including authorizing] the Appeals Council . . . to hold hearings.”); 20 C.F.R. § 404.972 (1986) (“The dismissal of a request for Appeals Council review is binding and not subject to further review.”); 20 C.F.R. 404.981 (1986) (stating that Appeals Council decisions are subject only to federal court review); Statement of Organization, Functions, and Delegations of Authority, 47 Fed. Reg. 39,250 (Sep. 7, 1982) (indicating that Associate Commissioner for Hearings and Appeals or Deputy Associate Commissioner for Hearings and Appeals may serve as Appeals Council member). *See generally* 20 C.F.R. 404.2 (b)(2) (2020) (defining Appeals Council as the members that may be designated by the Chair of the Appeals Council); Social Security Benefits and Supplemental Security Income, 51 Fed. Reg. 11,717, 11,718 (Apr. 7, 1986) (to be codified as 20 C.F.R. pts. 404, 416) (previous regulations to similar effect); 20 C.F.R. § 404.951 (1975) (Appeals Council decision is “final and binding” unless civil action is filed).

111. *Brief History and Current Information about the Appeals Council*, SOC. SEC. ADMIN., https://www.ssa.gov/appeals/about_ac.html (last visited Feb. 7, 2023).

112. 20 C.F.R. § 422.210 (2022). A version of this provision has been in federal regulations since at least 1976. *See* Procedures of the Bureau of Hearings and Appeals, 41 Fed. Reg. 53,788, 53,792 (Dec. 9, 1976) (to be codified at 20 CFR pt. 422.210); *see also* 42 U.S.C. § 405(g) (authorizing judicial review).

113. This proposal was consistent with the SSA’s position that it was not legally required to use ALJs. *See* Hearings Held by Administrative Appeals Judges of the Appeals Council, 85 Fed. Reg. at 73,139 (Nov. 16, 2020) (“[T]he head of our agency . . . has had the discretion to decide . . . who may preside over a hearing.”). In some tension with this position, the SSA, in previous years, had apparently sought to ensure that disability insurance claims and Supplemental Security Income (“SSI”) claims were decided by ALJs in the first instance rather than by non-ALJ adjudicators. *See* MATTHEW WIENER, GRETCHEN JACOBS & EMILY BREMER, ADMIN. CONF. OF THE U.S., EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: EVALUATING THE STATUS AND PLACEMENT OF ADJUDICATORS IN THE FEDERAL SECTOR HEARING PROGRAM 11–12, 11 n.73 (2014) (noting the sketchiness of the historical details but nonetheless reporting that the SSA had utilized ALJs for disability claims and had requested approval to hire additional ALJs to staff the SSI program). As Professor Kent Barnett has explained at length, non-ALJ administrative judges typically “lack the statutory protection from removal, professional discipline, and performance reviews that ALJs have under the APA.” Barnett, *supra* note 98, at 1647.

in rulemaking comments was ensuring the “independence and integrity of our existing administrative review process.”¹¹⁴ Social Security disability decisions are heavily factual and medical in nature.¹¹⁵ Although the Social Security Commissioner possessed no further review authority, commenters still worried that AAJs, closer to the Social Security Commissioner than ALJs and eligible for potential bonuses, might be insufficiently neutral and impartial to properly carry out their factfinding duties.¹¹⁶

The SSA’s adjudication framework may look like an example of agency-head control, since the statute formally delegates authority to the Social Security Commissioner, who in turn has structured adjudication to insulate adjudicators.¹¹⁷ But the Commissioner and the predecessor Board have, by regulation, consistently declined *any* formal role whatsoever in reviewing individual adjudication decisions. The Attorney General’s Committee on Administrative Procedure reported the finality of Social Security Appeals Council decisions within the agency to Congress—and, further, that the agency head had “completely divested itself” of review authority—when Congress enacted the APA in 1946.¹¹⁸ And even as it showed its awareness of this agency review feature in legislative history, Congress has left it alone as it has repeatedly amended statutory provisions relating to both agency and judicial review.¹¹⁹

114. See Hearings Held by Administrative Appeals Judges of the Appeals Council, 85 Fed. Reg. at 73,141.

115. See 20 C.F.R. § 404.1594 (2016) (outlining the factors considered for social security decisions).

116. 85 Fed. Reg. at 73,145.

117. Cf. Walker & Wasserman, *supra* note 13, at 175–76 (noting that authority for agency-head review may be important even when rarely exercised or delegated to subordinates).

118. OFF. OF ATT’Y GEN., U.S. DEP’T OF JUST., FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE 51 n.20 (1941) [hereinafter ATTORNEY GENERAL’S FINAL COMMITTEE REPORT]. See generally ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES: MONOGRAPH OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 77-10, at 33–59 (1941); *id.* at 34–35, 38 (discussing delegation of appellate authority from Social Security Board to “Appeals Council which will make final decisions in the cases which it reviews,” though subject to “ultimate administrative control” at the Board’s hands and noting that Appeals Council will be chosen to combine a variety of forms of expertise).

119. See, e.g., S. REP. NO. 96-408, at 58 (1979) (discussing legislative modification of federal court review, including limit on remands, stating, “[r]eview of a case by the Appeals Council . . . is the final recourse a claimant has . . .”). Congress legislated at that time to limit federal court remands at agency request only for good cause, leaving the agency appellate structure otherwise untouched. See Social Security Disability Amendments of 1980, Pub. L. No. 96-265, § 307, 94 Stat. 441, 458 (amending 42 U.S.C. § 405); see also, e.g., H.R. REP. NO.

For this major adjudication regime—as well as for the VA—perhaps the political branches view agency-head review as unnecessary, infeasible, inefficient, or unhelpful given the factual and technical nature of the questions the ALJs must resolve. They might also view a firm limitation on agency-head review as a valid means of responding to concerns about separating enforcement and adjudication.¹²⁰ Together with the other statutory examples given, the longstanding absence of actual agency-head review in these and other high-volume—and politically salient—adjudicating agencies shows that agency-head review is by no means “almost-universal,” and calls into question just how standard that model actually is.

One particular context in which review of agency adjudications *does* seem to be typical (and perhaps the *Arthrex* Court mistakenly took this context to be prototypical) is adjudication in the independent multimember commissions, including the SEC, FTC, Federal Communications Commission (FCC), and National Labor Relations Board (NLRB).¹²¹ These multimember commissions are indeed open, as a matter of course, to party requests to review frontline adjudicator decisions, though their caseloads are typically much smaller than those of

101-379, at 3 (1989) (considering interim disability benefits extensions pending appeal and noting the final agency review by “a member of SSA’s Appeals Council”). Congress did act to extend benefits pending appeal but left the appellate structure intact. *See* Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 10101, 103 Stat. 2106, 2471; S. REP. NO. 98-466, at 15 (1984) (discussing application of new standard to individuals who have exhausted their administrative remedies, noting, “[g]overning regulations . . . provide that the Secretary’s ‘final decision’ subject to judicial review is rendered only after the individual has pressed his claim for benefits through all levels of the existing administrative appeals process, including seeking review by the Appeals Council”). *See generally* Griffin Schoenbaum, *Predetermined? The Prospect of Social Determinant-Based Section 1115 Waivers After Stewart v. Azar*, 124 DICK. L. REV. 533, 540 (2020) (“Congress has amended the Social Security Act many times.”). We acknowledge the general difficulties with acquiescence arguments, *see supra* note 78, especially when issues receive little direct attention from the branch alleged to have acquiesced. On the other hand, review of Social Security benefits decisions has certainly received focused and significant congressional attention.

120. *Cf.* Kent Barnett, *Regulating Impartiality in Agency Adjudication*, 69 DUKE L.J. 1695, 1740–43 (2020) (discussing internal self-regulation to accomplish greater separation of functions and reduce bias).

121. Although agency-head review is typical in multimember commissions, we certainly do not mean to suggest that it should be required in those settings. Indeed, legislative structuring of the multimember commissions with for cause restrictions and staggered terms may in part reflect recognition of the *pitfalls* of unfettered political control. Consistent with our overall approach, we believe that the benefits and risks of agency-head review can vary in multimember commissions as in other agency settings, and the design of these institutions should also generally be left to the political branches to resolve in the legislative process.

the SSA or the VA.¹²² And in these particular agencies, adjudication can be a vehicle for major (and highly visible) policy announcements.¹²³

But even for the multimember commissions, where agency heads regularly review frontline adjudication decisions, *courts* have limited the scope of agency-head control in longstanding judicial review doctrine. For example, courts applying the substantial evidence review standard have long prioritized deference to frontline adjudicator findings over maximizing agency-head control.¹²⁴ In the leading case of *Universal Camera Corp. v. NLRB*,¹²⁵ the Supreme Court declared that substantial evidence review included ensuring that the agency heads had taken proper account of—and, indeed, deferred appropriately to—the findings of the hearing examiner.¹²⁶

Chief Justice Roberts also cited APA § 557 as embodying a “model of principal officer review” in asserting that agency-head review was “standard.”¹²⁷ By its own terms, that section applies only to the rather small proportion of agency hearings that are governed by the APA’s formal adjudication provisions.¹²⁸ With respect to those hearings, § 557 states that on appeal from an initial decision, “the agency has all the powers which it would have in making

122. Providing a rough proxy for caseload, the National Labor Relations Board (NLRB) employs roughly thirty-five ALJs, but the other multimember commissions each employ a handful at most. *See ALJs by Agency*, *supra* note 107.

123. *See* Nina A. Mendelson, *The Uncertain Effects of Senate Confirmation Delays in the Agencies*, 64 DUKE L.J. 1571, 1582 (2015).

124. Despite this, Walker and Wasserman do suggest at one point that an agency head typically retains “complete freedom, as though she had heard the initial evidence herself.” Walker & Wasserman, *supra* note 13, at 175. They do, however, cite *FCC v. Allentown Broad. Corp.*, 349 U.S. 358, 364–65 (1955). *See* Walker & Wasserman, *supra* note 13, at 175 n.183 (citing case). That case that endorsed the notion that agency heads must be deferential to their hearing examiners’ findings (although it held that the Court of Appeals had applied the incorrect deference standard). *Allentown Broad. Corp.*, 349 U.S. at 364–65 (1955).

125. 340 U.S. 474 (1951).

126. *Id.* at 490–91; *Allentown Broad. Corp.*, 349 U.S. at 364–65. Similarly, in *Brennan v. Occupational Safety & Health Rev. Comm’n*, the Second Circuit, in an opinion by Judge Henry Friendly, reversed the Occupational Safety and Health Review Commission’s overruling of an ALJ’s determination on a factual matter. 492 F.2d 1027, 1032 (2d Cir. 1974).

127. *See* *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1974, 1984 (2021).

128. Administrative Procedure Act, 5 U.S.C. § 554(a) (requiring the applications of sections 554, 556, and 557 to adjudications “required by statute to be determined on the record after . . . an agency hearing.”). In Professor Michael Asimow’s framework, agency hearings governed by APA formal adjudication provisions constitute “Type A.” adjudication. Type A is dwarfed by the far larger category of “Type B” adjudications, in which agencies also hold hearings to resolve disputes, but to which the APA’s formal adjudication provisions do not apply. *See supra* text accompanying notes 80–90 (describing Asimow’s categorization); Walker & Wasserman, *supra* note 13, at 153 (“as much as 90 percent of all agency adjudication occurs outside of APA formal adjudication proceedings.”).

the initial decision[.]”¹²⁹ While this language could be read to imply an expectation of high-level agency review in formal adjudication, on its face the text merely specifies what happens when agencies do conduct such review, rather than expressly requiring that review be available.¹³⁰

Historical context further clarifies that the APA formal adjudication provision’s reference to review by the “agency” does not necessarily mean what we now think of as the “agency head.” The 1941 Final Report of the Attorney General’s Committee on Administrative Procedure (the Report), widely agreed to be an “authoritative discussion” and the “intellectual foundation” of the APA,¹³¹ addressed the issue explicitly. In its adjudication chapter, after generally recommending an agency adjudication structure in which a hearing officer’s decision “will serve as the initial adjudication of most cases, and the final adjudication in many,” it stated that “agency heads . . . might take up any decision for review [from a hearing officer] upon their own motion,” to “preserve uniformity of decision and effective supervision.”¹³²

The Report then clarified, however, that “in this context . . . the term ‘agency heads’ connotes the highest adjudicatory body . . . even though the members of that body *may not be the agency heads* themselves.”¹³³ The Report gave, as one example, the appellate framework for Social Security benefits decisions, noting that the then-called Social Security Board had “completely divested itself of jurisdiction to consider individual claims . . . [D]elegat[ing] [final authority] to an Appeals Council.”¹³⁴ The

129. § 557(b).

130. Other APA sections generally support this reading. Section 704 of the statute notes that “final agency action” is subject to judicial review, but specifically contemplates (subject to a limited exception) that agency actions may be final in this way notwithstanding the possibility of an “appeal to superior agency authority.” In other words, this implies that “final agency action” is not the same as agency-head review. § 704. We are indebted to Professor Barnett for this point. Moreover, § 552 requires disclosure of “agency” records, surely including more than just records in the possession of the agency head. Meanwhile, § 554(d), which prohibits employees engaged in enforcement from being involved in adjudication, contains an exception for “agency or members of the body comprising the agency.” In this setting, “agency” could indeed refer to a single agency head—but it also could be read to refer to a high-level adjudicating body as contemplated by the 1941 *Final Report of the Attorney General’s Committee on Administrative Procedure*. See ATTORNEY GENERAL’S FINAL COMMITTEE REPORT, *supra* note 118, at 51.

131. Emily Bremer, *Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377, 401–02 (2021).

132. See ATTORNEY GENERAL’S FINAL COMMITTEE REPORT, *supra* note 118, at 51; see also *id.* at 43 (alluding to “agency head” review).

133. *Id.* at 51 n.10 (emphasis added).

134. *Id.*

Report stated that for Social Security adjudication, “[I]t is the Appeals Council rather than the Social Security Board which is the ‘agency head.’”¹³⁵ The Report went on to explain more generally that:

In single headed departments and agencies, like the . . . Departments of Commerce and Agriculture, the Committee recommends that all pretense of consideration of each case by the agency head be abandoned and that there be created either boards of review, as in immigration procedure, or chief deciding officers who shall exercise the *final power* of decision. . . . [because systematic individual secretarial consideration is] obviously impossible.¹³⁶

Apart from providing these examples, the Report did not discuss further whether review boards were to be created by Congress or instead by the agency under a general delegation of statutory authority. But since the Report’s “general recommendations” were aimed at Congress, it is reasonable to think the Report contemplated that Congress might create such agency review boards and give them the final say within the agency through legislation.¹³⁷

House and Senate Committee Reports on the APA add little on the question, though one House Report stated that agency heads should confine their review of front-line adjudications to “important issues,” casting doubt on an expectation that agency-head review would be the default mechanism.¹³⁸

135. *Id.*

136. *Id.* at 53 (emphasis added); *see also id.* at 43 (“The heads of the agency cannot, through press of duties, sit to hear all the cases which must be decided. Their function is to supervise and direct and to hear protests of alleged error.”). With respect to agencies “headed by a board, commission, or authority,” the Report commented that the members might find it necessary, owing to time constraints, generally to “sit in divisions” or make other adjustments to effectuate a “division of labor.” *Id.* at 52–53.

137. *E.g.*, ATTORNEY GENERAL’S FINAL COMMITTEE REPORT, *supra* note 118, at iii (Attorney General’s letter of transmittal to Senate) (noting that report contains “recommendations for specific improvements in procedure to be made administratively . . . [and] many general recommendations which it suggests could appropriately be the subject of legislation”). Indeed, if the reference to agency review of the initial decision in 5 U.S.C. § 557 really did establish a “standard model” of agency-head review, it would be odd to assume agency authority to readily subdelegate or forgo that agency-head review. Such implicit agency authority would be in tension with § 559, which states that other statutes do not modify the APA unless they do so “expressly.” § 559. However, if the text of § 557 is read more naturally not to require agency-head review, but to apply *when* there is such review, the statute fits more comfortably both with the long history of administrative subdelegation of high-level review authority and with statutory vesting of final review authority elsewhere than the agency head.

138. H.R. Rep. NO. 79-1980, at 263 (1946) (commenting on what is now § 554, stating, “Agencies, such as heads of bureaus or departments . . . should delegate to examiners or boards . . . at least the initial decision of cases and should confine their own review to important issues of law or policy.”); *see also* S. JUDICIARY COMM., 79TH CONG., ADMIN. PROC. 33 (Comm. Print 1945) (“This subsection, however, leaves it to the agency to choose either in the individual

In short, it is by no means clear that the APA sought to standardize a “model” of agency-head review, even for the small proportion of agency adjudications its formal adjudication provisions govern by their own terms. The APA, of course, does not preclude Congress from adopting other structures.¹³⁹ As described above, Congress has frequently limited agency-head review in favor of other review structures, such as judicial review. Congress has extended these limits to bodies conducting formal adjudication that would otherwise be governed by the APA, such as the Department of Labor’s BRB.¹⁴⁰

Although the Court in *Arthrex* termed agency-head review “standard” and “almost-universal,” the reality is far more varied, complex, and nuanced. For the Court now to embrace agency-head review of adjudication decisions as a constitutional requirement would disrupt structures that have long governed administrative adjudications in important contexts and override the considered judgments of the political branches as expressed in legislation.

B. Agency-Head Review Has Not Been Available for Most of the Long History of Patent Adjudications

We now turn to the history of administrative adjudication in the patent system. We review this history at some length for two reasons. First, as one of our oldest adjudication regimes, patent adjudication sheds light on historical understandings of permissible administrative adjudication structures, as well as on the successes and failures that led Congress and the Executive Branch to reform some structural features while leaving others in place over the years. Second, in *Arthrex* the majority incorrectly characterized the historical practice in the patent system when it stated that beginning in 1836 “for nearly the next hundred years” the Commissioner of Patents, as head of the Patent Office,¹⁴¹

case or in all cases whether the officer or officers who heard the evidence shall actually decide the case or merely make a recommended decision for the further consideration of the agency.”).

139. *E.g.*, § 559 (explaining that subsequent statutes are not to “supersede or modify” the APA unless they do so “expressly”).

140. *See also* ATTORNEY GENERAL’S FINAL COMMITTEE REPORT, *supra* note 118, at 54 (noting that its recommendations do not apply to the “deputy commissioners of the United States Employees’ Compensation Commission, who . . . finally decide [industrial accident cases], subject only to a direct appeal to the courts.”).

141. The name of the agency responsible for administering the patent system, the title of the agency head, and the names of the administrative boards exercising adjudication authority within the agency have changed repeatedly over the more than two centuries of administrative practice that we review in this section, as have their legal authorities. In the interest of historical accuracy, in this section we conform our use of these names and titles in text to the terms in effect at the relevant time, while describing statutory changes more fully in footnotes. We thus use the term “Patent Office” to refer to the agency until 1975, when Congress changed the name to

heard appeals from adjudicatory decisions of “the forebears of today’s APJs.”¹⁴² The *Arthrex* majority characterized agency-head review as both standard practice and historical practice in justifying its choice of a remedy for the Appointments Clause violation it found.¹⁴³ Perhaps, then, correcting this misapprehension of the historical record will make a difference when the Court looks to history for guidance in future cases.

The history of the patent system shows use of a wide range of administrative adjudication structures at different points in time. Since the Founding, Congress and the Executive Branch have repeatedly designed, modified, and abandoned systems for administering patent rights in an ongoing process of learning and adaptation. Sometimes Congress has codified bureaucratic innovations that the Patent Office pioneered to address legislative gaps and emerging needs, and sometimes it has addressed complaints from outside the Patent Office. Although patent scholars have examined portions of this history,¹⁴⁴ it remains an underexplored resource for understanding the history of the administrative state.

1. *Early Experimentation in the Founding Era (1790–1802)*

In addition to its broad powers to make all laws which are necessary and proper for carrying into execution the powers of the government,¹⁴⁵ Congress has an explicit constitutional grant of power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to . . . Inventors the exclusive Right to their . . . Discoveries.”¹⁴⁶ Congress might have exercised this power on its own by granting private petitions to issue patents, leaving

“Patent and Trademark Office.” See *infra* note 175. We use the term “Commissioner” (or occasionally “Commissioner of Patents”) to refer to the agency head until 1999, when Congress created a new position of “Undersecretary of Commerce and Director of the Patent and Trademark Office” with supervisory authority over the separate positions of Commissioner of Patents and Commissioner of Trademarks. See *infra* notes 175, 244. The names and authorities of administrative adjudication boards changed more frequently. For the most part we refer to each of these boards by the name assigned to it in the governing statute at the time, but occasionally we follow the current practice of the PTO and use the term “board” to encompass a variety of predecessors to the current version known as PTAB. See U.S. PAT. & TRADEMARK OFF., MANUAL OF PATENT EXAMINING PROCEDURES §§ 1201, 2301, *supra* note 56.

142. United States v. Arthrex, Inc., 141 S. Ct. 1970, 1984–86 (2021).

143. *Id.* at 1984 (“‘higher level agency reconsideration’ by the agency head is the standard way”).

144. See, e.g., Kara W. Swanson, *Making Patents: Patent Administration, 1790–1860*, 71 CASE W. L. REV. 777 (2020); Robert P. Merges, *The Hamiltonian Origins of the U.S. Patent System, and Why They Matter Today*, 104 IOWA L. REV. 2559 (2019); John F. Duffy, *The FCC and the Patent System: Progressive Ideals, Jacksonian Realism, and the Technology of Regulation*, 71 U. COLO. L. REV. 1071 (2000).

145. U.S. CONST. art. I, § 8, cl. 18.

146. *Id.* cl. 8.

the Executive Branch out of the process entirely.¹⁴⁷ Instead, the first Congress turned to the nascent administrative state, making the history of patent administration an important reference point for discerning early understandings of the Constitution.

In 1790, Congress chose to delegate to Executive Branch officers the jobs of determining case-by-case which inventions merited a patent and for how long a term.¹⁴⁸ Congress assigned these determinations to a three-member board consisting of the Secretary of State, Secretary of War, and Attorney General, any two of whom could decide to issue a patent.¹⁴⁹ There was no provision for administrative or judicial review of decisions to deny patents, and only a limited one-year opportunity to challenge issued patents in court.¹⁵⁰

The 1790 patent board was the first of many three-member administrative tribunals that Congress authorized to make decisions about patents, a design that disperses authority and promotes deliberation while avoiding tie votes. Although the members of the first patent board were all principal officers, delegation of the challenging task of reviewing patent applications to such high-ranking officers with other pressing duties soon proved to be a poor design choice for managing the growing volume of patent applications.¹⁵¹

After just three years, Congress radically redesigned the patent system in 1793.¹⁵² Abandoning its initial experiment with principal officer review and evaluation of patent applications prior to issuance, Congress authorized the Secretary of State to issue patents on *all* applications that complied with

147. This was the practice in colonial and state legislatures. See *Proceedings in Congress During the Years 1789 and 1790, Relating to the First Patent and Copyright Laws*, 22 J. PAT. OFF. SOC'Y 243 (1940); EDWARD C. WALTERSCHEID, *TO PROMOTE THE PROGRESS OF USEFUL ARTS: AMERICAN PATENT LAW AND ADMINISTRATION 1798–1836*, at 81–87 (1998); OREN BRACHA, *OWNING IDEAS: THE INTELLECTUAL ORIGINS OF AMERICAN INTELLECTUAL PROPERTY 1790–1909*, at 25–31 (2016).

148. Act of April 10, 1790 (Patent Act of 1790), ch. 7, § 1, 1 Stat. 109.

149. *Id.*

150. § 5.

151. P.J. Federico, *Operation of the Patent Act of 1790*, 22 J. PAT. & TRADEMARK OFF. SOC'Y 373, 384–85 (1990, reprinted from 18 J. PAT. OFF. SOC'Y 237 (1936)). Inventors also complained of delays in issuance and demands from the patent board for more information. WALTERSCHEID, *supra* note 147, at 195; cf. Swanson, *supra* note 144, at 794 (arguing that there is little evidence that many inventors pushed for a change, rather “[i]t was the bureaucrats who complained.”).

152. Act of Feb. 21, 1793 (Patent Act of 1793), ch. 11, 1 Stat. 318. See WALTERSCHEID, *supra* note 147, at 195 (“[I]t was the dawning recognition by the members of the patent board, and particularly by Jefferson, that they simply had insufficient time to properly carry out the tasks assigned to them under the Act, that more than anything else soon produced an understanding in the Congress that the Act of 1790 had to be amended or in some manner changed to avoid having high government officials responsible for the issuance of patents.”).

statutory formalities.¹⁵³ The Patent Act of 1793 left the courts to adjudicate challenges to patent validity in litigation,¹⁵⁴ a parsimonious design choice that allowed Congress to avoid the expense of a patent office for a few decades more. But the legislation recognized a need for an Executive Branch role in adjudicating inter partes priority disputes between “interfering applications”—i.e., multiple patent applications on the same invention from different inventors—a problem that vexed the 1790 patent board.¹⁵⁵ The 1793 Act directed the Secretary of State to submit interfering applications to a three-member arbitration panel, with one member selected by each of the applicants and the third selected by the Secretary of State.¹⁵⁶ The decision of any two of the arbitrators “shall be final, as far as respects the granting of the patent,” with no provision for further review in the Executive Branch.¹⁵⁷

Both the 1790 and 1793 Patent Acts gave final Executive Branch decision authority to a three-member panel. But the arbitration panels under the 1793 Act were not composed of principal officers¹⁵⁸ and—much like PTAB panels today—they were tasked with adjudicating inter partes disputes rather than ex parte applications. Since 1793, patent law has continuously provided for inter partes Executive Branch adjudications of interference proceedings, although the statutory details have evolved over time.¹⁵⁹

153. Patent Act of 1793 § 1 (authorizing issuance); § 3 (requiring an inventor’s oath, written description of the invention, drawings, specimens, and models if necessary). The statute further required inventors to pay fees before submitting their petitions to the Secretary of State. § 11.

154. For the first three years after issuance, anyone could bring an action in district court to invalidate a patent by showing that it had been obtained surreptitiously or on false suggestion. § 10. A defendant charged with infringement could defend the action and get the patent declared void by showing defects in the patent specification for the purpose of deceiving the public or by showing that the invention “was not originally discovered by the patentee, but had been in use, or had been described in some public work anterior to the supposed discovery of the patentee, or that he had surreptitiously obtained a patent for the discovery of another person.” § 6.

155. WALTERSCHEID, *supra* note 147, at 184–94; Federico, *supra* note 151 at 382–84.

156. § 9.

157. *Id.*

158. Chief Justice Roberts said in *Arthrex* that these ad hoc positions may not have been officers at all, and in any event their temporary status distinguished them from the APJs of the PTAB. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1985 (2021) (citing *United States v. Eaton*, 169 U.S. 331, 343 (1898)). But this was no stop-gap arrangement to fill in for a missing principal officer on a temporary basis. It was the only method provided by statute for resolving interferences—proceedings that are now assigned to PTAB panels—for forty-three years. Throughout this period, Congress made no provision for further review of these decisions within the Executive Branch.

159. Congress changed the rules for determining patent priority in the America Invents Act of 2011 (AIA) to award priority to the first inventor to file a patent application rather than the first to make the invention, which will eventually eliminate interferences, but the old rules still apply to applications filed prior to March 16, 2013, leaving some

2. *Bureaucratic Innovation and Legislative Neglect (1802–1836)*

The Patent Act of 1793 remained in force for forty-three years, although its longevity may reflect congressional neglect more than satisfaction with the status quo.¹⁶⁰

As the volume of patent applications grew, in 1802 the Secretary of State used funds from patent fees to fill a clerk position in the State Department with a full-time employee dedicated to processing patent applications. The first occupant of this position, William Thornton, claimed the title “Superintendent of Patents” and served from 1802 until his death in 1828 without presidential appointment or Senate confirmation. Although he was ostensibly overseen by an illustrious series of Secretaries of State and Presidents from the founding generation that included James Madison, Thomas Jefferson, Robert Smith, James Monroe, John Quincy Adams, and Henry Clay,¹⁶¹ these politically accountable officers largely held back from exercising supervisory powers¹⁶² as Thornton reached beyond the statute to make important decisions about the design of the patent system.

Thornton used his role in reviewing applications for compliance with formal requirements to avoid issuing patents that he thought were invalid, despite repeated admonitions from the Attorney General that he lacked statutory authority to reject patent applications.¹⁶³ Thornton wrote and distributed a booklet on the form and content of applications¹⁶⁴ and advised applicants not to waste their money on patents that he thought lacked novelty, in effect creating an advisory patent examination system after Congress had deliberately eliminated pre-issuance examination of patent applications.¹⁶⁵ When forced to issue patents that he had no authority to

interferences still pending before PTAB. *See* Leahy-Smith America Invents Act, Pub. L. 112–29, § (3)(n)(1), 125 Stat. 284, 293 (2011) (codified at 35 U.S.C. 100 note).

160. WALTERSCHEID, *supra* note 147, at 243–44; Daniel Preston, *The Administration and Reform of the U.S. Patent Office, 1790–1836*, 5 J. EARLY REPUBLIC 331, 346–48 (1985).

161. *See* WALTERSCHEID, *supra* note 147, at 253–57; Swanson, *supra* note 144, at 796–803.

162. We note in particular that then-Secretary of State Madison, whose writings loom large in recent Supreme Court arguments about the Constitution requiring presidential control behind all exercises of executive power, appointed Thornton and did little to constrain Thornton’s asserted authority during the fifteen years that he might have done so either as Secretary of State or as President. *Cf.* *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492, 498, 500–01 (2010); *Seila Law, LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197, 2203, 2205 (2020); *Collins v. Yellen*, 141 S. Ct. 1761, 1784 (2020); *Arthrex*, 141 S. Ct. at 1979, 1982.

163. Swanson, *supra* note 144, at 800–01.

164. *See Patents*, 6 J. PAT. OFF. SOC’Y 97 (1923) (reprint of 1811 version of pamphlet).

165. WALTERSCHEID, *supra* note 147 at 262–64.

reject, Thornton shared his views of their invalidity publicly and privately.¹⁶⁶ He also repeatedly improvised new administrative proceedings beyond those provided by statute, some of which Congress eventually codified.¹⁶⁷

Not all of Thornton's moves carried the day. Most notably, Thornton lost a long battle against public access to issued patents during the patent term without the consent of the patentee.¹⁶⁸ Some inventors complained that Thornton used his position to claim rights in inventions for himself, sometimes as a joint inventor with an applicant and sometimes as a rival in an interference.¹⁶⁹ Congress—not the Executive Branch principal officers from the founding generation who might have exercised political oversight—eventually disapproved and put an end to this practice in 1836.¹⁷⁰

166. *Id.* at 265.

167. WALTERSCHEID, *supra* note 147, at 253–80. For example, Thornton introduced an informal “caveat” mechanism (loosely modeled after English practice) as early as 1802 that allowed an inventor to submit a confidential disclosure of an invention, without making a full application or paying a filing fee. *Id.* at 275. Thornton would alert the caveator if another inventor later filed an application on the same invention, providing an opportunity to complete the application and pursue an interference to establish priority. *Id.* at 275–78. Decades later, Congress provided statutory authority for the use of caveats in 1836. Act of July 4, 1836 (Patent Act of 1836), ch. 357, § 12, 5 Stat. 117. Thornton also made liberal use of “reissue” proceedings to allow inventors to surrender supposedly defective patents in exchange for corrected versions that could withstand a validity challenge and provide effective protection. WALTERSCHEID, *supra* note 147, at 265–68. Congress provided statutory authority for reissue of patents in 1832, at least 16 years after Thornton began the practice. Act of July 3, 1832 (Patent Act of 1832), ch. 357, § 3, 4 Stat. 559).

168. WALTERSCHEID, *supra* note 147 at 281–304; Preston, *supra* note 160, at 339–342. Because the Patent Act of 1793 did not permit rejection of patent applications for lack of novelty, Thornton worried that public access to issued patents would permit copyists to appropriate the work of true inventors and obtain fraudulent patents on the same inventions. Thornton resisted providing copies of patents (except as necessary for litigation) for decades, even though his legal position was repeatedly rejected by the Attorney General and in a circuit court opinion. WALTERSCHEID, *supra* note 147, at 282–302. See *Odiorne v. Winkley*, 18 F. Cas. 581, 582–83 (C.C.D. Mass. 1814). When he was finally overruled by Secretary of State Henry Clay, Thornton appealed to the President and Congress to change the rule, but without success. WALTERSCHEID, *supra* note 147, at 299–304.

169. WALTERSCHEID, *supra* note 147, at 276, 286; KENNETH W. DOBYNS, *THE PATENT OFFICE PONY: A HISTORY OF THE EARLY PATENT OFFICE* 64, 67–76, 97 (1st ed. 1994).

170. Patent Act of 1836 § 2 (“And said Commissioner, clerks, and every other person appointed and employed in said office, shall be disqualified and interdicted from acquiring or taking, except by inheritance, during the period for which they shall hold their appointments, respectively, any right or interest, directly or indirectly, in any patent for an invention or discovery which has been, or may hereafter be, granted.”).

More striking than the rare instances when this strong-willed bureaucrat was overruled were the many in which he was not. Thornton's extra-statutory moves provoked repeated complaints to his Executive Branch superiors and to the courts,¹⁷¹ although never on the ground that such important decisions could only be made by a principal officer with a presidential appointment and Senate confirmation. In the early decades of the republic, political accountability seems to have provided little motivation for the Executive Branch to ensure faithful execution of the patent laws, because the patent system was not a salient political issue.¹⁷² But bureaucratic experience during this period nonetheless highlighted deficiencies in the 1793 design and needs for legislative change.

3. *Designing and Overseeing a Real Patent Office (1836–1861)*

Eventually Congress responded to calls for reform with a major revision of the patent statute in 1836.¹⁷³ The Patent Act of 1836 provided for a patent office with professional staff to examine applications for patentability prior to issuance and to reject those that did not meet statutory standards.¹⁷⁴ It authorized presidential appointment, with advice and consent of the Senate, of a Commissioner of Patents¹⁷⁵ who in turn could appoint an “examining clerk” and various other office personnel with approval of the Secretary of State.¹⁷⁶

The 1836 Act did not give the Commissioner of Patents final review authority over Patent Office decisions. Instead, it provided for appeal of both rejections of applications and decisions of the Commissioner in interferences—*inter partes*

171. Swanson, *supra* note 144, at 800–03.

172. Walterscheid asserts that “[t]he simple fact of the matter is that during the early part of the nineteenth century the great majority of the populace gave very little thought to the patent system, if indeed they even knew it existed.” WALTERSCHEID, *supra* note 147, at 307; *see also* Preston, *supra* note 160, at, 334–35 (1985) (“Thornton was left largely to his own devices. The secretaries of state did not have the time to supervise him closely, and apparently the business of the Patent Office was not important to Congress.”).

173. *See generally* Act of July 4, 1836 (Patent Act of 1836), ch. 357, 5 Stat. 117.

174. §§ 1, 2, 7.

175. § 1. This is the earliest statutory reference to “Commissioner of Patents” as the title of the agency head. In 1975, Congress changed the name of the office to “Patent and Trademark Office” and the name of the agency head to “Commissioner of Patents and Trademarks.” Pub. L. 93-596 § 3, 88 Stat. 1949 (1975). In 1999, Congress created the distinct positions of “Commissioner of Patents” and “Commissioner of Trademarks” and made each subordinate to an “Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office” in whom it vested the powers and duties of the office. Patent and Trademark Office Efficiency Act, Pub. L. No. 106-113, §§ 4711, 4713, 113 Stat. 1501A (1999) (codified at 35 U.S.C. § 1(a)); *see infra* notes 244–246 and accompanying text.

176. Patent Act of 1836 § 2.

administrative adjudications to resolve priority disputes between competing inventors—to a three-member “board of examiners” appointed by the Secretary of State, “one of whom, at least, to be selected, if practicable and convenient, for his knowledge and skill in the particular art, manufacture, or branch of science to which the alleged invention appertains.”¹⁷⁷ Any two members of the board of examiners could reverse a decision of the Commissioner with binding effect on further proceedings in the Patent Office.¹⁷⁸ Congress placed the Commissioner in charge of initial decisions to grant or deny patents or to resolve priority, while providing for prompt expert review before an independent board of examiners to correct errors of the Commissioner.¹⁷⁹ An accompanying Senate Report explains:

In nineteen cases out of twenty, probably the opinion of the Commissioner, accompanied by the information on which his decision is founded, will be acquiesced in. *When unsatisfactory, the rights of the applicant will find ample protection in an appeal to a board of examiners, selected for their particular knowledge of the subject-matter of the invention in each case.*¹⁸⁰

In short, after forty-three years of unhappy experience with reliance on “endless litigation” in court as the only check on invalid patents,¹⁸¹ Congress sought to limit the need for resort to the courts by providing more expert administrative determinations at the outset, including administrative appeals to a board with pertinent expertise. The legislation notably did not give the Commissioner of Patents authority to review decisions of the board of examiners, but instead authorized the board of examiners to reverse decisions of the Commissioner, specifying that the Commissioner would be governed by board decisions in further proceedings within the Patent Office.

The Commissioner asked Congress to modify the administrative review process in his Annual Report to Congress for 1838, in part because of the

177. *Id.* §§ 7–8.

178. *Id.* § 7 (“And on an examination and consideration of the matter by such board, it shall be in their power, or of a majority of them, to reverse the decision of the Commissioner, either in whole or in part, and their opinion being certified to the Commissioner, he shall be governed thereby in the further proceedings to be had on such application[.]”). In other words, the board could review and reverse decisions of the Commissioner in a decision that was final within the Executive Branch. This is a significant qualification to the apparent misunderstanding of Chief Justice Roberts, who incorrectly stated in *United States v. Arthrex, Inc.* that when Congress gave the Executive Branch authority to reject patent application in 1836, “it was the Commissioner of Patents—appointed by the President with the advice and consent of the Senate—who exercised control over the issuance of a patent.” *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1984 (2021).

179. For interference proceedings, the statute further provided applicants with a form of judicial review through a “bill in equity.” Patent Act of 1836 § 16.

180. S. DOC. NO. 338 (1836), reprinted in *1836 Senate Committee Report*, 18 J. PAT. OFF. SOC’Y 853, 861 (1936) [hereinafter Ruggles Report](emphasis added).

181. *Id.* at 857, 861.

inadequacy of the statutory compensation to persuade persons “of requisite qualifications” to serve on the board of examiners.¹⁸² In 1839 legislation,¹⁸³ Congress transferred the authority of the board of examiners to review and reverse the Commissioner to “the chief justice of the district court of the United States for the District of Columbia,” acting in his individual capacity.¹⁸⁴ This was not judicial review by a court, but an outsourcing of administrative appeals to an individual judge, who would be compensated for the service by a fixed annual payment out of “the patent fund.”¹⁸⁵ As Commissioner Charles Mason later explained to Congress in his Annual Report for 1855, “That judge is only (for the occasion) a part and parcel of the Patent Office.”¹⁸⁶ The decisions of the chief justice, like those of the board of examiners under the 1836 Act, were binding on the Commissioner but could be modified by a court in a bill in equity proceeding.¹⁸⁷

This system for administrative appeals became unstable when the aging chief justice was no longer able to handle the patent appeals on top of his regular caseload, yet remained on the bench.¹⁸⁸ In 1852 Congress amended the statute to permit applicants to appeal to other judges on the same court, directing the Patent Office to compensate the judge for each appeal with a fee that the applicant paid to the Patent Office.¹⁸⁹ But some parties exploited this odd statutory design to prolong delays by continuing to appeal to the infirm chief justice rather than to the others, with the result that no appeals were heard for several years.¹⁹⁰

182. U.S. PAT. OFF., REP. OF THE COMM’R OF PATENTS FOR 1838, H.R. DOC. NO. 25-80, at 2 (1839).

183. Act of Mar. 3, 1839 (Patent Act of 1839), ch. 88, 5 Stat. 353. See P.J. Federico, *The Patent Office in 1839*, 21 J. PAT. OFF. SOC’Y 786, 791–92 (1939); P.J. Federico, *Evolution of Patent Office Appeals* (pt. 1), 22 J. PAT. OFF. SOC’Y 838, 842–44 (1940) [hereinafter Federico, *Appeals* Part I].

184. Patent Act of 1839 § 11.

185. *Id.* § 13.

186. U.S. PAT. OFF., REP. OF THE COMM’R OF PATENTS FOR THE YEAR 1855, VOL. 1, S. EXEC. DOC. NO. 34-20, at 6 (1856), <https://ia802904.us.archive.org/34/items/s607id13664130/s607id13664130.pdf>.

187. Section 16 of the Patent Act of 1836 had already provided the bill in equity proceeding for review of decisions in interferences. See *supra* note 179. The Patent Act of 1839 extended it to include “all cases where patents are refused for any reason whatever, either by the Commissioner of Patents or by the chief justice of the District of Columbia, upon appeals from the decision of said Commissioner, as well as where the same shall have been refused on account of, or by reason of, interference with a previously existing patent” Patent Act of 1839 § 10.

188. Federico, *Appeals* Part I, *supra* note 183, at 850.

189. Act of Aug. 30, 1852, ch. 107, 10 Stat. 75.

190. Federico, *Appeals* Part I, *supra* note 183, at 851.

4. *Designing, Codifying and Revising Administrative Appeals (1861–1927)*

Faced with a dysfunctional statutory appeals process, the Commissioners innovated. They created ad hoc boards of examiners within the Patent Office to hear appeals from examiner decisions.¹⁹¹ Meanwhile, they asked Congress to authorize a permanent board of examiners-in-chief in order to achieve uniformity in decisions without relying on the Commissioner to hear all the appeals, which was “not practicable.”¹⁹² Congress finally authorized appeals to an expert three-member administrative tribunal of principal officers in 1861.¹⁹³ The “examiners-in-chief” were to review decisions of examiners rejecting patent applications, decisions in interferences, and applications for the extension of patents “when required by the Commissioner.”¹⁹⁴

The 1861 Act provided for appeal to the Commissioner of Patents from decisions of the examiners-in-chief, beginning a sixty-six-year period of agency-head review of administrative adjudication decisions in the Patent Office.¹⁹⁵ In codifying these new appeals, the Act did not repeal previous provisions for appeal from decisions of the Commissioner to individual judges in the District of Columbia,¹⁹⁶ nor for review by bill in equity of decisions of the Commissioner or of the judges.¹⁹⁷ The result was a long appellate pathway that was an ongoing source of delays and grievances.¹⁹⁸

191. Federico notes that Judge Cranch, chief justice of the District of Columbia, made a reference to such a board in an 1850 decision when he was still hearing appeals under the mechanism of the 1839 Act. Federico, *Appeals* Part I, *supra* note 183, at 854–55. The Commissioner also mentioned the board and explained its necessity in the annual Patent Office Report for 1857. U.S. PAT. OFF., REP. OF THE COMM’R OF PATENTS FOR THE YEAR 1857, VOL. 1, H.R. EXEC. DOC. NO. 35-32, at 7–8 (1858), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015024298583&view=1up&seq=10&skin=2021>.

192. H.R. EXEC. DOC. NO. 35-32, at 8 (1858).

193. Act of Mar. 2, 1861 (1861 Act), ch. 88, § 2, 12 Stat. 246 (“for the purpose of securing greater uniformity of action in the grant and refusal of letters-patent, there shall be appointed, by the President, by and with the advice and consent of the Senate, three examiners-in-chief . . . to be composed of persons of competent legal knowledge and scientific ability.”). For a summary of administrative practice preceding the 1861 Act, see Federico, *Appeals* Part I, *supra* note 183, at 852–57.

194. *Id.* at 852–53. The period of agency-head review that began in 1861 came to an end in 1927. See *infra* notes 226–230 and accompanying text.

195. See Federico, *Appeals* Part I, *supra* note 183, at 852–53.

196. See discussion accompanying *supra* notes 184–190.

197. See *supra* note 187 and accompanying text.

198. See Federico, *Appeals* Part I, *supra* note 183, at 858–64 (summarizing the arguments of the Commissioners to Congress for reform, including that the individual judges decided cases inconsistently, that the statutory fee arrangement gave the judges an incentive to reverse in order to encourage more applicants to submit appeals to them personally, and that the Commissioner is

Congress addressed some of these complaints in 1870 legislation.¹⁹⁹ The Patent Act of 1870 left the internal administrative appeals to the examiners-in-chief and to the Commissioner of Patents intact,²⁰⁰ but replaced the appeal from the Commissioner to individual judges with an appeal to the Supreme Court of the District of Columbia sitting “in banc.”²⁰¹ The Act explicitly excluded from this appeal to the Supreme Court of the District of Columbia decisions in inter partes interference proceedings.²⁰² As under prior law, an applicant refused a patent could still pursue a judicial remedy by bill in equity.²⁰³ But under an 1886 decision, a bill in equity suit could not be filed until after exhausting the appeal from the Commissioner to the Supreme Court of the District of Columbia, further lengthening the appellate pathway.²⁰⁴

Disappointed patent applicants and losing parties in interferences tried one other non-statutory Executive Branch pathway to overturn Commissioner of Patents decisions: appeal to the Secretary of the Interior.²⁰⁵ At first, the Secretaries rejected these appeals on the ground that they lacked jurisdiction to review decisions of the Commissioner.²⁰⁶ Then, after an 1881 Attorney General opinion declared that final discretion in all matters relating to the granting of patents resided in the Secretary, the Secretary briefly considered appeals from Commissioner decisions.²⁰⁷ The Supreme Court ultimately rejected this approach in *Butterworth v. United States ex rel. Hoe*.²⁰⁸

In contrast to the *Arthrex* Court’s hierarchical view of Executive Branch authority nearly 140 years later,²⁰⁹ the 1884 Supreme Court *ended* the practice of

more likely to decide cases correctly than a judge with no expertise in technology or patent law).

199. Act of July 8, 1870 (Patent Act of 1870), ch. 230, 16 Stat. 198.

200. §§ 46–47.

201. § 48.

202. *Id.* Prior experience had suggested that a losing party in an interference might be particularly motivated to use appeals strategically to delay issuance of a patent to the winning party. See Federico, *Appeals* Part I, *supra* note 183, at 851–52 (appealing an interference to the infirm Chief Judge Cranch “was an excellent method . . . of obstructing and delaying the winning party”). Congress restored the appeal to the court from Commissioner decisions in interferences in 1893. Act of Feb. 9, 1893, ch. 74, § 9, 27 Stat. 434, 434–36.

203. Patent Act of 1870 § 52.

204. *Kirk v. Comm’r of Patents*, 5 D.C. 229, 230 (1886); see P.J. Federico, *Evolution of Patent Office Appeals* (pt. 2), 22 J. PAT. OFF. SOC’Y 920, 939–40 (1940) [hereinafter Federico, *Appeals* Part II].

205. The Patent Office was moved from the Secretary of State to the Secretary of the Interior in 1849. Act of Mar. 3, 1849, ch. 108 § 2, 9 Stat. 395.

206. *Edison & Harrington v. Edison & Prescott*, 1876 Dec. Comm’r Pat. 251; *Ex parte Hunt*, 1878 Dec. Comm’r Pat. 148; *Workman v. McNaught*, 1879 Dec. Comm’r Pat. 139.

207. *Butterworth v. United States ex rel. Hoe*, 112 U.S. 50, 53 (1884).

208. 112 U.S. 50 (1884).

209. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1979 (2021) (“Today thousands of

Cabinet Secretary review in *Butterworth*, holding that the Secretary's supervisory authority did not extend to the judicial acts of the Commissioner of Patents.²¹⁰ Rejecting a uniform rule across the Executive Branch that would give the Secretary, as head of the executive department within which the Patent Office is a bureau, the power to reverse the Commissioner, the *Butterworth* Court took direction from the governing statute: "Each case must be governed by its own text, upon a full view of all the statutory provisions intended to express the meaning of the legislature."²¹¹ The Court figured that since the statute provided explicitly for review of patent office decisions by a court "in aid of the patent office,"²¹² it necessarily excluded another appeal to the Secretary on the same matter.²¹³ Nor did the Secretary's general authority of direction and superintendence permit appeals to the Secretary from "quasi-judicial" actions of the Commissioner of Patents "in cases in which he is by law required to exercise his judgment on disputed questions of law and fact, and in which no appeal is allowed to the courts."²¹⁴ The Court concluded that the Secretary's powers of "supervision and direction . . . do not extend to a review of the action of the Commissioner of Patents in those cases in which, by law, he is appointed to exercise his discretion judicially," explaining:

It is not consistent with the idea of judicial action that it should be subject to the direction of a superior, in the sense in which that authority is conferred upon the head of an executive department in reference to his subordinates. Such a subjection takes from it the quality of a judicial act. That it was intended that the Commissioner of Patents, in issuing or withholding patents, in reissues, interferences and extensions, should exercise quasi-judicial functions, is apparent from the nature of the examinations and decisions he is required to make, and the modes provided by law, according to which, exclusively, they may be reviewed.²¹⁵

With this strong affirmation from the Court that the relevant rules for review of administrative adjudication decisions are set by legislation rather than inherent in the lines of authority within the executive department, it fell to Congress and the Executive Branch to address complaints about the many layers of administrative and judicial review that delayed finality in patent adjudications through statutory reform.²¹⁶

officers wield executive power on behalf of the President in the name of the United States. That power acquires its legitimacy and accountability to the public through 'a clear and effective chain of command' down from the President, on whom all the people vote.").

210. *Butterworth*, 112 U.S. at 63.

211. *Id.* at 56–57.

212. *Id.* at 60.

213. *Id.* at 63.

214. *Id.* at 63–64.

215. *Id.* at 67.

216. See Federico, *Appeals Part II*, *supra* note 204, at 941–44.

5. *Elimination of Commissioner Review (1927–2021)*

Following years of complaints, President Taft's Commission on Economy and Efficiency made an investigation of the Patent Office and issued a report in 1912 recommending that Congress eliminate the appeal from the board of examiners-in-chief to the Commissioner of Patents.²¹⁷ The Report emphasized the many other demands on the Commissioner's time, the growing volume of appeals that made it impossible to achieve uniformity in decisions through appeals to the Commissioner in person, the need to streamline patent appeals to reduce delays and expense, the superior technical expertise among the board members relative to that of any individual Commissioner, and the similar recommendations of many former Commissioners over the years.²¹⁸ Rather than embracing political accountability as a justification for Commissioner review, the Report cited the status of Commissioners as political appointees as a reason why Commissioner "overthrow" of board decisions is "unreasonable" and "unwise."²¹⁹

Following a long process of negotiations between the Patent Office and the bar, Congress eliminated Commissioner review of board decisions in 1927 legislation.²²⁰ The Patent Act of 1927 consolidated the previously separate appeals—first to the board and then to the Commissioner—into a single administrative appeal to an expanded board of appeals that included the Commissioner, first assistant commissioner, assistant commissioner, and examiners-in-chief as members.²²¹ It further streamlined judicial proceedings by giving applicants a choice of either direct appeal to a court or a bill in equity

217. PRESIDENT'S COMM. ON ECON. & EFFICIENCY, REP. OF THE INVESTIGATION OF THE U.S. PAT. OFF. 13 (1912), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015033197834&view=1up&seq=2&skin=2021>.

218. *Id.* at 25–32.

219. *Id.* at 33 ("Commissioners of Patents are always likely to be appointed for political reasons rather than because of any technical knowledge. On the other hand, members of the board of examiners in chief are appointed to their places for the very reason that they do have, and are required by law to have, the special knowledge necessary to enable them to decide wisely where matters pertaining to patent rights are in dispute. It is unreasonable, therefore, and unwise as a matter of public policy, that the organization of the office should permit the overthrow of their decisions by one not necessarily qualified to pass judgment in the matter."). Other committees appointed by the Secretary of the Interior and the Secretary of Commerce to suggest ways to simplify Patent Office appeals recommended eliminating appeals to the court and abolishing appeals from the board to the Commissioner in interference cases. For a more detailed account of these and other proposals, see Federico, *Appeals Part II*, *supra* note 204, at 942–943. The Patent Office was transferred from the Department of the Interior to the Commerce Department in 1925 by Exec. Order No. 4175 (1925).

220. Act of Mar. 2, 1927 (1927 Patent Act), Pub. L. No. 690, ch.74, § 1, 44 Stat. 1335.

221. *Id.* § 3.

proceeding, but not both.²²² The result was to eliminate one layer of administrative appeal and one judicial review proceeding, sparing applicants from “delay, expense, and great uncertainty.”²²³

After decades of redesigning the administrative appeals structure,²²⁴ the 1927 Act established a remarkably stable structure for administrative adjudications that lasted until the 2021 *Arthrex* decision. The statutory language enacted in 1927 with respect to the relationship of the board to the agency head was essentially unchanged in the version of the Patent Act before the Court in *Arthrex*, despite changes over time in the board’s name, the agency head’s title, and the procedures assigned to the board for adjudication. This structure was in its ninety-fifth year when the *Arthrex* majority declared a key statutory provision unenforceable.²²⁵

The *Arthrex* majority attributed the problem with the statute to “the America Invents Act,”²²⁶ the 2011 legislation that created the IPR proceedings before it.²²⁷ But although by then the Senate-confirmed head of the relevant office had been redesignated as the “PTO Director” rather than the “Commissioner of Patents,” the AIA changed nothing about agency-head review of decisions. Instead, it left in place a venerable 1927 restriction on agency-head review, a structure that intervening Congresses had left undisturbed through repeated additions of new proceedings to the board’s assignments.²²⁸

222. *Id.* § 8.

223. See H.R. REP. NO. 1889, at 1–2 (1927).

224. See text accompanying *supra* notes 148–192; see also text accompanying *infra* notes 229–235.

225. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1987 (2021) (“[W]e hold that 35 U.S.C. § 6(c) is unenforceable as applied to the Director insofar as it prevents the Director from reviewing the decisions of the PTAB on his own.”).

226. See Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified in scattered sections of 35 U.S.C.).

227. “The America Invents Act insulates APJs [the successors to “examiners in chief” on the board] from supervision through two mechanisms. The statute provides that “each . . . inter partes review shall be heard by at least 3 members of the [PTAB]” and that “only the [PTAB] may grant rehearings.” Leahy-Smith America Invents Act § 6(c). “The upshot is that the Director cannot rehear and reverse a final decision issued by APJs.” *Arthrex*, 141 S. Ct. at 1986–87.

228. *E.g.*, Patent and Trademark Law Amendments Act, Pub. L. No. 96-517 §302, 94 Stat. 3015, 3015 (1980) (codified as amended at 35 U.S.C. § 302) (authorizing ex parte reexamination proceedings to determine patentability in view of newly submitted prior art raising a substantial new question of patentability, with appeal to Board of Appeals); American Inventor’s Protection Act of 1999, Pub. L. No. 106-113, § 4604, 113 Stat. 1501A1 (authorizing inter partes reexamination proceedings with a larger role for third parties in the reexamination process). Congress did not change procedures for board review with the introduction of these proceedings but left the 1927 structure in place.

In legislative hearings held shortly before passage of the 1927 Act,²²⁹ congressional committees explicitly considered and rejected a proposal to eliminate the original version of the same sentence that the *Arthrex* majority decided to sever from the statute ninety-four years later: “The board of appeals shall have sole power to grant rehearings.”²³⁰ When a witness proposed deleting this sentence to maintain the Commissioner’s supervisory authority, legislators questioned whether this was necessary, distinguishing between the need for political control of the President’s cabinet and the need for decisional independence of agency adjudicators.²³¹ The chairman of the Patent and Trademark Association of the American Bar Association noted the judicial character of the proceedings and warned that expanding rehearings would defeat the purpose of streamlining appeals:

Those questions [decided by the board] are essentially judicial and they ought to be. Mr. Fenning’s suggestion that the commissioner ought to grant rehearings also, in effect, goes back to the present system where appeals go up there, and there will be just as many petitions for rehearing as there are now direct appeals to him.²³²

Another witness on behalf of the American Bar Association emphasized the need for an independent board with final decision authority.²³³ The same witnesses appeared before both the House and Senate Committees and made similar remarks.²³⁴

229. *Procedure in the Patent Office: Hearings on H.R. 7563 and H.R. 13487 Before the H. Comm. on Patents*, 69th Cong. (Dec. 20, 1926) [hereinafter House Hearing]; *Procedure in the Patent Office: Hearings on S. 4812 Before the S. Comm. on Patents*, 69th Cong. (Dec. 21, 1926) [hereinafter Senate Hearing]. On incentives to use appeals to prolong adjudication, see House Hearing, *supra*, at 9–10 (testimony of Commissioner Robertson in response to questions of Representative Lanham) and Senate Hearing, *supra*, at 4–7 (statement and testimony of Commissioner Robertson). On the process of negotiating the bill, see Senate Hearing, *supra*, at 3 (statement of A.C. Paul, Chairman of the Patent Section of the American Bar Association), and at 4–5 (statement of Thomas E. Roberts, Commissioner of Patents).

230. See House Hearing, *supra* note 229, at 22 (testimony of Karl Fenning); see Senate Hearing, *supra* note 229, at 19 (testimony of Karl Fenning).

231. See House Hearing, *supra* note 229, at 25 (remarks of Mr. Hammer) (asking whether “these examiners sustain the same relation to the commissioner that the President’s Cabinet does to the President,” or whether “these three men sitting at the hearing are an independent court and should not be restrained and no sword should hang over their heads, and that appeals to me very much.”).

232. *Id.* at 26 (remarks of Edward Rogers).

233. *Id.* at 27 (remarks of Mr. Paul) (“We want this board [to be] an independent board, and want them to feel they are independent. If they have been designated by the commissioner to hear that case, let them decide it. If there is to be a rehearing, let them determine it, and if there is not to be a rehearing the party has a right to appeal. If you put in a provision that they may apply for a rehearing to the whole board . . . you will have an endless number of petitions, because everybody who has had a case decided by three men will petition the whole board for a rehearing.”).

234. See Senate Hearing, *supra* note 229, at 19–21 (remarks of Mr. Fenning and Mr. Paul).

With the issue thus fully aired in both houses of Congress, the bill passed and was signed into law, following decades of consideration within the Executive and Legislative Branches of how best to streamline patent adjudication proceedings.²³⁵

Subsequent legislation has made substantial further changes to *judicial* appeals from final decisions of what is now the PTO, including creating specialized courts to hear patent appeals.²³⁶ Congress has also repeatedly modified procedures for appointing board members. But it never saw fit to restore the authority of the agency head to review board decisions in almost a full century between the Patent Act of 1927 and the *Arthrex* decision. That aspect of the administrative structure proved stable and did not generate calls for reform—even when Congress turned its attention to the constitutional requirements for appointments to the board.²³⁷

235. See *supra* notes 223–224 and accompanying text.

236. See Act of Mar. 2, 1929, ch. 488, Pub. L. No. 914 (creating the U.S. Court of Customs and Patent Appeals (CCPA) with jurisdiction over appeals from the Patent Office); Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified at 28 U.S.C. § 1295) (creating the Court of Appeals for the Federal Circuit with consolidated jurisdiction over patent appeals from both the PTO and the District Courts). See *supra* notes 141, 175.

237. The *Arthrex* majority touched briefly (and inaccurately) on the history of judicial appeals from final decisions of the Patent Office in an effort to bat away an argument that the 1927 Patent Act gave final decision authority to the Board of Appeals without appeal to a politically accountable agency head. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021). The majority incorrectly asserted that the Patent Act of 1927 made decisions of the examiners-in-chief reviewable by “the Court of Customs and Patent Appeals, an entity within the Executive Branch until 1958.” See *id.* at 1985. In fact, the Patent Act of 1927 did not provide for appeal of Board decisions to the Court of Customs and Patent Appeals, which did not yet exist, but rather to the Court of Appeals of the District of Columbia. Act of Mar. 2, 1927 (1927 Patent Act), ch. 74, § 8, 44 Stat. 1335, 1336. The Court of Appeals of the District of Columbia was created as an Article III court in 1893. Act of February 9, 1893, ch. 74, §§ 1, 7, 27 Stat. 434, 434–35. The Act of 1893 gave that court jurisdiction over appeals from decisions of the Commissioner of Patents. § 9. The Supreme Court held that the Court of Appeals of the District of Columbia was an Article III court in *O’Donoghue v. United States*, 289 U.S. 516, 534, 551 (1933) (“We hold that the Court of Appeals of the District of Columbia [is a] constitutional court[] of the United States, ordained and established under Art. III of the Constitution . . .”). In 1929, two years after passage of the Patent Act of 1927, Congress created the U.S. Court of Customs and Patent Appeals (CCPA) with jurisdiction over appeals from the Patent Office as well as the jurisdiction previously exercised by the Court of Customs Appeals. Act of Mar. 2, 1929, ch. 488, §§ 1, 2(a), 45 Stat. 1475, 1475–76. Shortly thereafter, the U.S. Supreme Court held that the CCPA was created under Article I rather than Article III. *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929). But the Court later overturned the *Bakelite* decision in a case squarely holding that the Court of Customs and Patent Appeals was and had always been created under Article III. *Glidden v. Zdanok*, 370 U.S. 530, 572–84 (1962).

6. *Revising the Appointments Process (1975–2008)*

A better argument for distinguishing the structure of administrative appeals under the 1927 Act from that in the regime before the *Arthrex* Court would have been that, in 1927, board members were appointed by the President and confirmed by the Senate. Indeed, that was the appointment process for board members beginning with the 1861 Act (which codified the administrative innovation of submitting appeals to a board of examiners-in-chief)²³⁸ until 1975, when Congress modified the statute to provide for their appointment by the Secretary of Commerce upon the nomination of the Commissioner.²³⁹ An accompanying House Report emphasized the legal and technical nature of the duties performed by the examiners-in-chief and the burden of the prior method of appointment in justifying the change.²⁴⁰ Congress evidently did not consider reinstating Commissioner review of board decisions when it changed the appointments process for examiners-in-chief,²⁴¹ suggesting that, at the time, they did not see the relevance of Commissioner review to the appointments process for patent office adjudicators. It is striking that the *Arthrex* Court paid so little attention to this history in an opinion that is nominally about an Appointments Clause violation. Perhaps the majority was more interested in diminishing the responsibility of agency adjudicators than in correcting the manner of their appointments.²⁴²

Even more remarkable is the *Arthrex* Court's inattention to later 2008 legislation—passed for the purpose of correcting a possible Appointments Clause violation—that again changed the method of appointment of board members.²⁴³ In 1999 legislation, Congress had vested the powers and duties

238. Act of Mar. 2, 1861 (Patent Act of 1861), ch. 88, § 2, 12 Stat. 246, 246–47; *see also* Act of July. 8, 1870 (Patent Act of 1870), ch. 230, § 2, 16 Stat. 198, 198–99; Act of July 19, 1952 (Patent Act of 1952), Pub. L. No. 82-593 § 3, 66 Stat. 792, 792–93.

239. Act of Jan. 2, 1975, Pub. L. No. 93-601, sec. 1, §3(a), 88 Stat. 1956, 1956.

240. H.R. REP. NO. 93-856, at 2 (1974) (“The Department of Commerce supports this change, asserting that the examiners-in-chief who perform duties requiring legal and technical qualifications and experience should be appointed without the burden of the present procedures.”).

241. As the Supreme Court recognized in *Brenner v. Manson*, 383 U.S. 519, 523 n.6 (1966), the Commissioner was bound by board decisions and had no right to judicial appeal of adverse decisions. The Federal Circuit nonetheless held in a 1994 decision that the PTO Director has the power to refuse to issue a patent if “he believes that [issuance] would be contrary to law.” *In re Alappat*, 33 F.3d 1526, 1535 (Fed. Cir. 1994).

242. *Cf. Arthrex*, 141 S. Ct. at 1997, 2003 (Thomas, J., dissenting) (“[The] majority . . . never expressly tells us whether [AP]s are inferior officers or principal. And the Court never tells us whether the appointment process complies with the Constitution . . . The majority’s new Appointments Clause doctrine . . . has nothing to do with the validity of an officer’s appointment. Instead, it polices the dispersion of executive power among officers.”).

243. Act of Aug. 12, 2008, Pub. L. No. 110-313, sec. 1, §1(a)(1)(A)–(C), 122 Stat. 3014,

of a reorganized U.S. Patent and Trademark Office in the newly created position of “Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office” (known as the Director), to be appointed by the President with the advice and consent of the Senate.²⁴⁴ The “Commissioner for Patents,” who was to serve as chief operating officer with respect to patents, was to be appointed by the Secretary of Commerce.²⁴⁵ Congress gave the Director authority to appoint other officers and employees, including the APJs who served on the Board of Patent Appeals and Interferences (BPAI), without involving the Secretary.²⁴⁶

Professor John Duffy questioned whether this arrangement for the appointment of APJs violated the Appointments Clause in an influential blog post that anticipated much of the *Arthrex* Court’s analysis years before that decision.²⁴⁷ But Professor Duffy did not conclude that APJs were “principal officers” who required Presidential appointments and Senate confirmations. His concern was that the “Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office” did not qualify as a “Head of Department” within the meaning of the Appointments Clause, and was thus constitutionally ineligible to appoint “inferior officers.”²⁴⁸ If appointments of APJs by the Director (after 1999) rather than by the Secretary (between 1975 and 1999) were unconstitutional, a significant number of previous decisions of the BPAI might be invalid.²⁴⁹ Congress promptly addressed this concern in 2008 by restoring the 1975 system that assigned the appointment of APJs to the Secretary of Commerce in consultation with the Director.²⁵⁰

3014 (codified as amended at 35 U.S.C. § 6(a), (c), (d)).

244. Patent and Trademark Office Efficiency Act, Pub. L. No. 106-113, sec. 4713, § 3(a)(1), 113 Stat. 1501A-572, 1501A-575 (1999) (codified at 35 U.S.C. § 3(a)(1)). The legislation further provided board members with civil service protections. Patent and Trademark Office Efficiency Act, sec. 4713, § 1(c) 113 Stat. 1501A-572, 1501A-577 (codified at 35 U.S.C. § 3(c) (“Officers and employees of the Office shall be subject to the provisions of title 5, relating to Federal employees.”)).

245. Patent and Trademark Office Efficiency Act, sec. 4713, § 3(b)(2), 113 Stat. 1501A-572, 1501A-580–81 (codified at 35 U.S.C. § 3(b)). The legislation provided the same appointments process for a “Commissioner for Trademarks” to serve as chief operating officer with respect to trademarks. *Id.*

246. Patent and Trademark Office Efficiency Act, sec. 4717, § 6(a), 113 Stat. 1501A-572, 1501A-576. § 4713 (codified at 35 U.S.C. §§ 3(b) and 3(c)).

247. John F. Duffy, *Are Administrative Patent Judges Unconstitutional?*, 2007 PATENTLY-O PAT. L.J. 21, <https://cdn.patentlyo.com/media/docs/2007/07/Duffy.BPAI.pdf>, *reprinted and updated in* 77 GEO. WASH. L. REV. 904 (2009).

248. Duffy, *supra* note 247, at 910–11.

249. *Id.* at 911–12.

250. Act of Aug. 12, 2008, Pub. L. No. 110-313, § 1, 122 Stat. 3014 (codified as amended

Notably, in 2008 legislation for the sole purpose of bringing the appointments process for APJs in line with the Court's Appointments Clause jurisprudence, *nobody proposed amending the statute to provide for review of board decisions by the Director*. Even Professor Duffy, who praised the Appointments Clause requirements as ensuring responsibility for Executive Branch decisions in the President and department heads, worried that de novo re-adjudication of issues decided in BPAI proceedings by the Director would, "at least with respect to individual factual issues, raise difficult issues of due process."²⁵¹ In other words, the more salient concern at the time was not that the Director had too little power over the BPAI, but rather too much.²⁵²

Perhaps the Court missed this legislative history because it wanted to focus on the passage of the AIA in 2011 as the moment when Congress crossed a

at 35 U.S.C. § 6(a)). The legislation further authorized the Secretary to make retroactive appointments of existing judges take effect at the time of their earlier appointments by the Director and provided a "de facto officer" defense to a challenge to the appointment of APJs by the Director. *Id.* § 6(d)).

251. Duffy, *supra* note 247, at 908. Any such proposal would surely have been controversial, as in then-recent memory efforts by Commissioners of Patents (then the agency heads) to control policy by manipulating board panels on rehearing had provoked criticism and protest by APJs. A number of examples are recounted in Scott E. Baxendale, *Growing Pains for the Board of Patent Appeals and Interferences: A Plan for Restoring Judicial Independence*, 29 J. MARSHALL L. REV. 171 (1995). In *Ex parte Akamatsu*, No. 91-3230 (B.P.A.I. Mar. 20, 1992), after the original Board panel overturned the examiner's rejection of claims, the Commissioner formed a new panel consisting of himself and three others who overturned the panel decision and affirmed the examiner. Baxendale, *supra*, at 187-89. Thirty-three of the forty-four examiners-in-chief signed a memorandum to the Commissioner expressing concern about "an increasing number of instances in which the composition of panels of the Board . . . has been manipulated in a manner which interferes with the decisional independence of the Board . . ." *Correspondence Between Board Members and PTO Commissioner on Board Independence*, 44 PAT. TRADEMARK & COPYRIGHT J. (BNA) No. 1081, at 33 (May 14, 1992). The Commissioner replied that he had statutory authority to stack Board panels on rehearing to establish his desired policy. In *Ex parte Alappat*, 23 U.S.P.Q.2d 1340 (B.P.A.I. 1992), the Board panel again reversed the examiner's rejection, and the Commissioner granted the examiner's request for reconsideration with an expanded panel selected to reverse the original panel's determination. Baxendale, *supra*, at 189-90. Alappat appealed the reconsideration decision to the Court of Appeals for the Federal Circuit, which held that the Commissioner may not personally grant a rehearing under the language of the statute, but the Commissioner had the authority to form expanded Board panels and to designate Board members to serve on such panels. *In re Alappat*, 33 F.3d 1526, 1531-32, 1534 (Fed. Cir. 1994) (en banc).

252. See *In re Alappat*, 33 F.3d at 1536, in which the Federal Circuit en banc "acknowledge[d] the considerable debate and concern among the patent bar and certain Board members regarding the Commissioner's limited ability to control Board decisions through his authority to designate Board panels," but concluded it was for the legislature "to determine whether any restrictions should be placed on the Commissioner's authority in this regard."

constitutional line.²⁵³ This framing harmonizes *Arthrex* with other recent decisions that set aside purportedly novel statutory designs of administrative structures as outside constitutional boundaries.²⁵⁴ To be sure, the AIA introduced new administrative proceedings²⁵⁵ for challenging patent validity that differed from previously available proceedings in significant ways. Challengers have used the new proceedings more extensively and more effectively than previously available *ex parte* and *inter partes* reexamination proceedings, as Congress hoped they would.²⁵⁶ But none of the features of these proceedings that the *Arthrex* Court sees as inverting the proper chain of command within the Executive Branch²⁵⁷ represents a break with precedent in the history of administrative adjudication in the patent system.

The *Arthrex* majority recognizes that that history is “more winding and varied than recounted here,” but nonetheless concludes—incorrectly—that history “has little to say about the present provision expressly ordering the Director to undo his prior patentability determination when a PTAB panel of unaccountable APJs later disagrees with it.”²⁵⁸ Indeed, if one takes the Court’s constitutional analysis seriously, history shows that nothing of any significance changed in 2011. If the relevant constitutional constraint prohibits board panels of APJs from undoing a prior

253. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1977 (2021) (“This suit centers on the . . . PTAB, an executive adjudicatory body within the PTO established by the Leahy-Smith America Invents Act of 2011.”).

254. *See supra* Part I.

255. These include post-grant review (PGR) proceedings that permit adjudication of any available ground of invalidity during the first nine months after a patent issues, as well as IPR proceedings after the nine-month PGR period has expired, which are limited to adjudication of challenges that the invention lacks novelty or is obvious based on prior art consisting of patents or printed publications. *See Leahy-Smith America Invents Act*, Pub. L. No. 112-29, § 6(d), 125 Stat. 284 (2011) (codified at 35 U.S.C. §§ 321–329) (PGR); *id.* at § 6(a), (codified at 35 U.S.C. §§ 311–319) (IPR). In addition, a transitional program that has now expired permitted review of the validity of covered business method patents. *See* § 18.

256. Rochelle Cooper Dreyfuss, *Giving the Federal Circuit a Run for Its Money: Challenging Patents in the PTAB*, 91 NOTRE DAME L. REV. 235, 249–50 (2015). For a history of less successful earlier efforts to provide mechanisms for administrative reexamination of patent validity, see Mark D. Janis, *Rethinking Reexamination: Toward a Viable Administrative Revocation System for U.S. Patent Law*, 11 HARV. J. L. & TECH. 1 (1997).

257. The metaphor of a topsy-turvy chain of command is a recurring motif in the *Arthrex* majority opinion. *See, e.g.*, 141 S. Ct. at 1980 (“The Director . . . is the boss—except when it comes to the one thing that makes the APJs officers exercising “significant authority” in the first place—their power to issue decisions on patentability.”); *id.* at 1982 (“In all the ways that matter to the parties that appear before the PTAB, the buck stops with the APJs, not with the Secretary or Director.”).

258. *Id.* at 1985.

patentability determination, Congress crossed that line at least by 1952, sixty-nine years before *Arthrex*, when it authorized a board of patent interferences to cancel patent claims following an adverse judgment in an interference.²⁵⁹ Interferences, like IPRs, are inter partes administrative adjudications that since 1939 have been finally decided within the Patent Office by three-member board panels,²⁶⁰ subject only to judicial review.²⁶¹ If the relevant constraint is that agency adjudicators with authority to bind the Executive Branch in such decisions must be appointed by the President with Senate approval, Congress crossed that line at least by 1975,²⁶² forty-five years before *Arthrex*, and arguably as early as 1836 when

259. Act of July 19, 1952 (Patent Act of 1952), Pub. L. No. 593, § 135, 66 Stat. 792 (“The question of priority of invention shall be determined by a board of patent interferences (consisting of three examiners of interferences) A final judgment adverse to a patentee from which no appeal or other review has been or can be taken or had shall constitute cancellation of the claims involved from the patent, and notice thereof shall be endorsed on copies of the patent thereafter distributed by the Patent Office.”). In 1984 Congress combined the Board of Appeals and the Board of Patent Interferences into a single consolidated board called the Board of Patent Appeals and Interferences (BPAI) that handled adjudication of both inter partes interference proceedings and ex parte appeals from examiner rejections. Patent Law Amendments Act of 1984, Pub. L. No. 98-622, sec. 201, § 7, 98 Stat. 3383, 3386.

260. Act of Aug. 5, 1939 (Patent Act of 1939), ch. 451 § 1, 53 Stat. 1212, 1212 (authorizing adjudication of interferences by “a board of three examiners of interference”). Prior to that time, under the Patent Act of 1927 interferences were resolved by a single examiner of interferences whose decision could be appealed to an administrative board of appeals, but not to the Commissioner. *See supra* text accompanying notes 227–230.

261. The AIA changed the name of the board that currently resolves interferences (as well as IPRs and other adjudicatory proceedings) from the Board of Patent Appeals and Interferences to the PTAB. *See* U.S. PAT. & TRADEMARK OFF., MANUAL OF PATENT EXAMINING PROCEDURES § 2301 (9th ed., rev. 2020).

Interference adjudications were a significant part of the workload of the Board until recently. Archival statistics on the PTO website indicate that 448 interferences were declared in 1997, the earliest year for which those data are provided on the website. U.S. PAT. & TRADEMARK OFF., PROCESS PRODUCTION REPORT FY1998, <https://www.uspto.gov/sites/default/files/ip/boards/bpai/stats/process/fy1998.pdf> (last visited Feb. 7, 2023). Annual Reports from Commissioners of Patents in the years leading up to the elimination of Commissioner review sometimes included data on numbers of interferences. *See, e.g.*, Ann. Rep. of the Comm. of Pat. to the Sec’y of the Interior for the fiscal year ended June 30, 1924, 329 Off. Gazette of the U.S. Pat. Off. 1001, 1004 (1,797 interferences declared that year, including 428 in trademark cases); Report of the Comm. of Pat. to the Sec’y of Interior for the fiscal year ended June 30, 1920, 278 Off. Gazette of the U.S. Pat. Off. 543, 543–44 (1,443 interferences declared that year); Report of the Comm. of Pat. to Congress for the year ended Dec. 31, 1911, 175 Off. Gazette of the U.S. Pat. Off. 541, 549 (1,523 interferences declared that year).

262. *See supra* notes 239–241 and accompanying text.

it authorized unconfirmed boards of examiners appointed by the Secretary to review decisions of the Commissioner with binding effect.²⁶³ If the relevant constraint requires agency-head authority to review final adjudication decisions, Congress crossed that line ninety-five years before *Arthrex*, in 1927.²⁶⁴ Indeed, *as late as 2008*, with its attention explicitly focused on ensuring that Board members were properly appointed, Congress saw no need to redesign the role of the agency head in the PTO's adjudications, a clear sign that observers did not foresee how the Court would soon redraw the relevant constitutional lines.²⁶⁵ Perhaps the hasty innovator setting aside long-settled law was not Congress in 2011, but the Court in 2021.

The history of administrative adjudication in the patent system is indeed “winding and varied.”²⁶⁶ For more than 200 years, the patent system has challenged the political branches to adopt different administrative structures to manage a growing volume of patents, and to revise them in light of experience. For most of this time, legislation gave final decision authority within the Executive Branch over administrative adjudications to an administrative tribunal, while relying on the courts—not the agency head—for additional review. And during that period, the Court deferred to legislative allocations of review authority, refusing to find implicit review authority higher in the executive chain of command than where Congress placed it. Congress put agency-head review of administrative adjudication decisions to the test for a sixty-six-year period and then, after long review and deliberation, eliminated it in 1927. This history of informed legislative reconsideration of prior designs presents a striking contrast to the *Arthrex* Court's abrupt decision to slash away longstanding statutory restrictions on agency-head review from the appellate bench.

The current mechanisms that Congress and the Executive Branch have chosen for the patent system may leave room for improvement, and they may not be optimal for other agencies or adjudication regimes. They are not cast in stone, but rather a work in progress that includes both old and new features. But the Court's restrictions on constitutionally permissible administrative designs may prove harder to modify. To the extent that these restrictions rest on beliefs about prior legislative and administrative practice, the Court would do well to pay closer attention to the work done by the political branches in over two centuries of designing U.S. patent institutions.

263. *See supra* notes 177–180 and accompanying text.

264. *See supra* notes 220–221 and accompanying text.

265. *See supra* notes 250–251 and accompanying text.

266. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1985 (2021).

C. *The Normative Case for Agency Head Control of Adjudication Decisions Has Important Limits*

We have shown that agency-head review is hardly standard and certainly neither universal nor “almost-universal” across agency adjudication regimes, which vary widely in design. Nor are restrictions on agency-head review novel, as shown by the history of patent adjudication, one of our earliest adjudication regimes. Nonetheless some scholars, including Professors Walker and Wasserman, argue that agency-head review *should* be standard, even if it presently is not. This Part considers those normative arguments.

The normative argument for political supervision of adjudication decisions that mattered most to the Court in *Arthrex* is that it supplies political accountability by giving elected Presidents and their appointees control over Executive Branch decisions. Chief Justice Roberts expressly focused on the link with the electoral process in *Arthrex*: “That [executive] power acquires its legitimacy and accountability to the public through ‘a clear and effective chain of command’ down from the President, on whom all the people vote.”²⁶⁷

Because agency adjudication decisions may not be entirely case-specific and technical but may also involve policy choices, Walker and Wasserman further argue that agency heads are well-equipped to “set the agency’s policy preferences” and exercise control over “policy development.”²⁶⁸ Political appointees, with their indirect electoral ties through presidential supervision, face more incentives to align policy choices with the policy preferences of the administration that won the last election, so the argument goes, than career professionals who typically remain with the agency through changes in administration. Walker and Wasserman further claim that political supervisors may have greater “access to experts and staff that provide inputs and partake in the deliberative process” than front-line adjudicators, as well as more control over their time.²⁶⁹ In turn, review of adjudication decisions can support the agency head in learning what “adjustments to the regulatory scheme” may be necessary,²⁷⁰ even

267. *Arthrex*, 141 S. Ct. at 1979 (quoting *Free Enter. Fund v. Pub. Comp. Acct. Oversight Bd.*, 561 U.S. 477, 498 (2015)).

268. Walker & Wasserman, *supra* note 13, at 175.

269. *Id.* Congress made a notably different assessment when it eliminated agency-head review over patent adjudications in 1927, concluding that the Commissioner’s other duties left too little time to hear appeals from adjudications. See *supra* Part III.B.5. The *Final Attorney General’s Committee Report* did as well, commenting that such a prospect was “obviously impossible” in many agency settings. See ATTORNEY GENERAL’S FINAL COMMITTEE REPORT, *supra* note 118, at 53.

270. Walker & Wasserman, *supra* note 13, at 177. Walker and Wasserman acknowledge that agency heads likely will not review all decisions but nonetheless assert that the threat of agency-head control may be sufficient, presumably to deter a front-line adjudicator from making decisions that

prompting an agency head to ask regulatory staff to initiate rulemaking.²⁷¹ Defenders of agency-head review further argue that it can correct errors and bring greater consistency and transparency to adjudication decisions.

This normative case for agency-head control of individual adjudication decisions has traction in some contexts, but it also has important limits considered in Part III.C.2 below. Depending on the subject matter, adjudication structures, and saliency of the agency decision, agency-head review may offer significantly fewer benefits than advocates claim. Moreover, it can present distinctive pitfalls, particularly in certain types of garden-variety individual adjudication; these complexities underscore the need for deference to legislative judgments on the structure of adjudication. But first, we consider other mechanisms available to agency heads for controlling agency policy, providing a broader context for understanding the role of agency-head review of adjudication decisions.

1. *Agency-Head Review of Adjudication Decisions in the Context of Other Policymaking Tools*

Agencies have numerous means for supervision and policymaking beyond the review of individual adjudication decisions. At the time the APA was enacted, rulemaking was viewed as the procedural vehicle for making policy decisions, while adjudication was more narrowly “concerned with the determination of past and present rights and liabilities.”²⁷² The APA specifically defines a “rule” as an agency statement of “general . . . applicability and future effect . . . designed to implement, interpret, or prescribe law or policy . . .”²⁷³ Rulemaking followed a legislative rather than judicial model.²⁷⁴ Since that time, longstanding administrative law doctrine has clarified that agencies are not *limited* to using rulemaking to make policy. Under the *Chenery II* doctrine, they may also use adjudication to make policy decisions,²⁷⁵ and agencies have indeed developed

track only the adjudicator’s policy preferences rather than those of the agency. *Id.* at 175–76.

271. WALKER & WIENER, *supra* note 103, at 15.

272. U.S. Dep’t of Just., Att’y Gen.’s Manual on the Admin. Proc. Act, 14–15 (1947); *see also* Asimow, *Best Practices*, *supra* note 105, at 3–4 (agency adjudication “resolve[s] a claim or dispute between a private party and the government or between two private parties”).

273. Administrative Procedure Act, 5 U.S.C. § 551(4). Rulemaking also does include statements that describe the agency’s organization, procedure, or practice requirements, but these process rules are a small fraction of rules overall.

274. *E.g.*, Edward Rubin, *It’s Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 109 (2003) (noting, though critiquing, rulemaking’s immediate analogue of legislation and formal adjudication’s analogue of the judicial process).

275. SEC v. *Chenery Corp.* (*Chenery II*), 332 U.S. 194, 203 (1947) (noting that choice among methods is within the agency’s “informed discretion”); *see* Bremer, *supra* note 90.

policy through adjudication, as students of administrative law learn from leading cases involving the NLRB and the SEC.²⁷⁶ Nonetheless, policy matters are overall more central to rulemaking—including so-called “exempt” rules such as agency guidance documents—than they are to adjudication decisions.

In addition to relying on the responsiveness of political appointees who oversee rulemaking,²⁷⁷ the Executive Branch fortifies political control of rulemaking, including policy judgments, through centralized White House Office of Information and Regulatory Analysis (OIRA) review of significant Executive Branch notice-and-comment rulemaking decisions.²⁷⁸ This reflects the close connection of rulemaking to policy development and enforces political accountability for agency decisions.²⁷⁹ OIRA also reviews significant guidance documents, or so-called “exempt” rules, that agencies sometimes use to avoid more cumbersome notice-and-comment rulemaking and that may have similar effects.²⁸⁰ By contrast, the White House traditionally exercises no review authority over Executive Branch adjudication decisions.²⁸¹ This is in part to avoid public concern over improper political interference, as discussed in greater detail below,²⁸² but it also reflects that adjudication raises policy issues less frequently than rulemaking, and is therefore a less important focus of political oversight.

Magill has criticized the lack of any agency obligation to explain its choice of procedure. *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004). Nielson has argued that *Chenery II* takes a wrong turn by effectively empowering agencies to “create law [through hints about the future] . . . without any formal procedures.” Aaron L. Nielson, *Three Wrong Turns in Agency Adjudication*, 28 GEO. MASON L. REV. 657, 670 (2021).

276. *E.g.*, *Chenery II*; NLRB v. Bell Aerospace Co., 416 U.S. 267, 294–95 (1974) (approving agency’s use of adjudication to decide whether aerospace buyers were “managerial employees” outside the protection of labor statutes).

277. *E.g.*, David Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Politicization*, 76 GEO. WASH. L. REV. 1095 (2008) (discussing presidential use of appointments and loyalty to accomplish policy goals).

278. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Oct. 4, 1993).

279. We acknowledge—indeed, one of us has written—that political supervision can be a vehicle for inappropriate political influence in the rulemaking setting as well for adjudication. *See* Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127 (2010) (arguing for disclosure of content of regulatory review to deter inappropriate executive influence, including political interference with scientific or technical decisions). Our point here is simply that the extensive political oversight over agency rules confirms our perspective that policy issues dominate rulemaking more than in adjudication.

280. Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263 (2018); *see infra* notes 371–372 and accompanying text.

281. Exec. Order No. 12,866, 58 Fed. Reg. at 51,735 (applying only to rulemaking).

282. *See infra* text accompanying notes 330–332.

Rulemaking—especially significant rulemaking—is also much less frequent than adjudication and generally more far-reaching. The Executive Branch agencies issue several hundred significant notice-and-comment rules per year, and roughly three thousand rules overall (including hundreds of annual fish catch requirements and plane-model-specific airworthiness directives), all of which must be published in the Federal Register.²⁸³ One or two hundred are economically significant.²⁸⁴ This is an order of magnitude fewer than the typical number of adjudication decisions in the same time period, whether made by agency heads in agencies that have such review or by frontline adjudicators.²⁸⁵

Finally, the “public-facing deliberative process”²⁸⁶ of notice-and-comment rulemaking is specifically aimed at broader public engagement. The public is entitled to file “data, views or arguments” in response to a notice of proposed rulemaking.²⁸⁷ Although the APA does not formally require notice-and-comment for “exempt rules,” such as guidance documents,²⁸⁸

283. Administrative Procedure Act, 5 U.S.C. § 552(a)(1) (imposing publication requirement). The aggregate data is drawn from the Federal Register website. *See Document Search*, FED. REG., https://www.federalregister.gov/documents/search?conditions%5Bpublication_date%5D%5Byear%5D=2021&conditions%5Btype%5D%5B%5D=RULE (last visited Feb. 7, 2023) (reporting 3,257 rules published by all agencies in 2021). The White House Office of Information and Regulatory Affairs (OIRA) reports “significant rule” data, but it excludes independent agency rulemaking data, since it is not subject to OIRA review. *See, e.g.*, OFFICE OF INFORMATION AND REGULATORY AFFAIRS (OIRA) EXECUTIVE ORDER REVIEWS COMPLETED BETWEEN JANUARY 1, 2021 TO DECEMBER 31, 2021, REGINFO.GOV, <https://www.reginfo.gov/public/do/eoHistReviewSearch> (last visited Feb. 7, 2023) [hereinafter OIRA EXEC. ORDER REVIEWS 2021] (reporting 502 Executive Branch rules reviewed by OIRA in 2021).

284. OIRA EXEC. ORDER REVIEWS 2021, *supra* note 283 (reporting 171 economically significant rules reviewed by OIRA in 2021).

285. As one small example, the Occupational Safety and Health Administration issued four rules in 2021, only two of which were deemed economically significant. OIRA EXEC. ORDER REVIEWS 2021, *supra* note 283. During that same time period, the Occupational Safety and Health Review Commission issued twenty-eight decisions and frontline administrative law judges issued an additional roughly twenty decisions. *See* FINAL COMMISSION DECISIONS, OCCUPATIONAL SAFETY & HEALTH REV. COMM’N, <https://www.oshrc.gov/documentlisting/?CategoryId=ALL&UDate=12/31/2021&LDate=1/1/2021> (last visited Feb. 7, 2023).

286. *See* Shoba Wadhia & Christopher Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1202 (2021) (arguing that eliminating *Chevron* deference would encourage greater use of rulemaking).

287. Administrative Procedure Act, 5 U.S.C. § 553(c).

288. § 553(b)(3)(A) (excepting “interpretative rules [and] statements of policy” from notice-and-comment requirements). One of us criticized the guidance document process several years ago as less inclusive and less accountable than notice-and-comment rulemaking, though broader recent use of good guidance practices, as discussed below, may have improved

agencies now typically offer similar public comment opportunities for significant guidance documents.²⁸⁹

For all these reasons, individual agency rules are far more likely than adjudication to engage the public and to draw its attention. As a consequence, and because rules typically afford the public greater advance notice of their rights and obligations, agencies have long been encouraged to—and typically do—use rulemaking to resolve significant policy issues on a broad basis rather than relying on the narrower resolution of a particular case in adjudication.²⁹⁰

By contrast, adjudications of the sort that concern agency-head review advocates—formal adjudications under the APA (“Type A” adjudication in the framework of Professor Asimow) or other adjudications in which the agency conducts a hearing (“Type B” adjudication in the Asimow framework)—are primarily about resolving individual controversies,²⁹¹ following a “judicial” model of deciding individual cases by resolving disputed issues of fact and applying settled legal principles.²⁹² To be sure, in the course of resolving individual controversies agency adjudicators can and sometimes do address unresolved policy matters, perhaps by interpreting statutes, regulations, or guidance.²⁹³ But individual adjudication decisions are unlikely to focus on policy decisions to the same extent as rulemaking. Sometimes, an agency with enforcement authority might choose to bring an enforcement proceeding before

matters. See Nina Mendelson, *Regulatory Beneficiaries and Informal Agency Policy Making*, 92 CORNELL L. REV. 397 (2007) (arguing that regulatory beneficiaries are distinctively disadvantaged when agencies use guidance documents instead of rules).

289. A 2019 Executive Order, continuing earlier practices, sets process requirements for guidance documents, including a public comment process and OIRA review for significant guidance documents. See *Promoting the Rule of Law Through Improved Agency Guidance Documents*, Exec. Order 13891, 84 Fed. Reg. 55,235 (Oct. 9, 2019); OFF. OF MGMT. AND BUDGET, GUIDANCE IMPLEMENTING EXEC. ORDER 13891, M-20-02 (Oct. 31, 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/10/M-20-02-Guidance-Memo.pdf>.

290. See Magill, *supra* note 275, at 1403–04, 1403 n.69 (noting relative consensus in literature that “agencies should use rulemaking more often than they did”); see Todd Phillips, *A Change of Policy: Promoting Policymaking by Adjudication*, 73 ADMIN. L. REV. 495, 497 (2021) (acknowledging that adjudications are “not as commonly used to make policy as rulemakings”). But see *id.* at 498 (arguing generally that “[i]nformal rulemaking has become so onerous and ossified” that agencies should “give adjudication its due consideration as a policymaking option”).

291. Barnett, *supra* note 98, at 1652–53. See generally Bremer, *supra* note 90. Cf. *Butterworth v. United States ex rel. Hoe*, 112 U.S. 50, 67 (1884) (“It is not consistent with the idea of judicial action that it should be subject to the direction of a superior in the sense in which that authority is conferred upon the head of an executive department in reference to his subordinates.”).

292. CASS, *supra* note 14, at 120–21.

293. See Barnett, *supra* note 98, at 1652–53; Charles Koch, Jr., *Administrative Judges’ Role in Developing Social Policy*, 68 LA. L. REV. 1095, 1100–01 (2008).

agency adjudicators to address a particular policy issue. But in other adjudication regimes aimed at resolving disputes among private parties, the agency's ability under *Chenery II* to choose its policymaking method may be largely theoretical; the agency may lack authority to initiate an action before an adjudicator on its own to raise an unsettled legal or policy issue.²⁹⁴

A narrow focus on agency-head control over individual adjudication decisions, as in the *Arthrex* decision, ignores the numerous other tools an agency head may have to make policy. These other tools may offer far more effective ways to constrain outcomes and to ensure accountability for lower-level decisions that implicate policy matters. Agency heads can issue rules that bind adjudicators or guidance documents that inform adjudication decisions.²⁹⁵ Even an agency like the PTO with only limited rulemaking authority²⁹⁶ may use rulemaking to resolve important procedural questions,²⁹⁷ or use guidance

294. Indeed, in the IPR proceedings at issue in *Arthrex*, the agency has no authority to bring a proceeding on its own initiative in order to address a policy issue, but can only act in response to a petition filed by a private party that happens to raise that issue. 35 U.S.C. §§ 311, 314. Although the Director may decline to institute an IPR, the scope of those proceedings that the Director institutes are governed by the terms of the petition, not by the PTO's policy agenda. *SAS v. Iancu*, 138 S. Ct. 1348, 1355 (2018) ("Congress chose to structure a process in which it's the petitioner, not the Director, who gets to define the contours of the proceeding.").

295. Tejas Narechania has recently argued that patent adjudication can raise policy issues, but none of the three examples he identifies involved or required director review of individual adjudication decisions. Tejas Narechania, *Arthrex and the Politics of Patents*, 12 CAL. L. REV. ONLINE 65 (2022). The first example was issuance of guidance on patentable subject matter, the second was promulgation of a new rule of claim interpretation for PTAB proceedings, and the third was deciding to refrain from instituting IPR proceedings pending ongoing litigation. The Director was able to implement each of these policy choices using moves that Congress had clearly authorized by statute and did not require overriding Congress's clear choice to deny agency-head review for PTO adjudications. *Id.* at 72.

296. The PTO has statutory authority to "establish regulations, not inconsistent with law," that "shall govern the conduct of proceedings in the Office." 35 U.S.C. § 2(b)(2)(A). The Federal Circuit interpreted this authority to permit the PTO to engage in rulemaking with respect to procedural matters only. *Merck & Co. v. Kessler*, 80 F.3d 1543, 1549–50 (Fed. Cir. 1996); *Animal Legal Def. Fund v. Quigg*, 932 F.2d 920, 930 (Fed. Cir. 1991). With passage of the AIA in 2011, the PTO gained additional authority to prescribe regulations governing the conduct of IPR and PGR proceedings. 35 U.S.C. § 316 (IPRs); § 326 (PGRs). In *Cuozzo Speed Techs. v. Lee*, the Supreme Court held that the AIA permitted the PTO to promulgate an important rule governing claim interpretation in IPR proceedings. 579 U.S. 261 (2016). The PTO subsequently modified this rule through further rulemaking. *See infra* note 297.

297. For example, the PTO used its statutory authority to prescribe regulations for the conduct of inter partes review and post-grant review to make the very consequential policy choice to modify its own prior rule to conform the approach to claim interpretation in PTAB proceedings to that followed by District Courts. Changes to the Claim

to announce policies and legal interpretations on important new questions.²⁹⁸

Nor is agency-head review necessary when an adjudicator errs—or misbehaves. Errors in individual cases most often can be checked by appeals to an agency board or by judicial review, while the agency head can address recurring errors or departures from administration policy by removing a poorly performing adjudicator for cause or by announcing a different policy choice by regulation or guidance.

Another way that agency heads may control policymaking in the adjudication setting is by selecting which decisions become “precedential opinions.”²⁹⁹ For example, the SSA Appeals Council has issued a manual, the Hearings, Appeals, and Litigation Law Manual (HALLEX), to guide Social Security adjudication. The HALLEX manual includes authoritative interpretations of SSA law as well as procedural policies.³⁰⁰ The PTO now operates a Precedential Opinion Panel “to decide issues of exceptional importance,” with panel membership typically including the PTO Director.³⁰¹ The U.S. Citizenship and Immigration Service also designates

Construction Standard for Interpreting Claims in Trial Proceedings Before the Patent Trial and Appeal Board, 83 Fed. Reg. 51,340 (Oct. 11, 2018). The relevant statutory authorities are codified at 35 U.S.C. §§ 316, 326.

298. The PTO has used guidance documents to bring clarity to some of the most uncertain questions of patent law for the benefit of examiners and applicants, including patent law standards for utility, written description, and patentable subject matter eligibility. *See* 2019 Revised Patent Subject Matter Eligibility Guidance, 84 Fed. Reg. 50 (Jan. 7, 2019); Utility Examination Guidelines, 66 Fed. Reg. 1,092 (Jan. 5, 2001); Guidelines for Examination of Patent Applications Under the 35 U.S.C. 112, ¶ 1 “Written Description” Requirement, 66 Fed. Reg. 1,099 (Jan. 5, 2001). Although the courts are not bound by these interpretations, they take judicial notice of them and announce their agreement with the PTO. *See, e.g., In re Fisher*, 421 F.3d 1365, 1379 (Fed. Cir. 2005) (affirming rejection based on guidelines, while noting that they do not have the force of law). *See also* STATEMENT OF CANDICE WRIGHT, GOV’T ACCOUNTABILITY OFF., GAO-22-106121, PATENT TRIAL AND APPEAL BOARD 8–9 (2022) [hereinafter GAO TESTIMONY OF CANDICE WRIGHT] (describing the PTO’s use of volunteer peer review mechanisms and management review of select APJ decisions to assure policy consistency and quality).

299. The Administrative Conference of the United States has recommended the use of precedent decisions in so-called Type B adjudication. Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 1 Fed. Reg. 94,314 (Dec. 23, 2016).

300. Social Security Hearings, Appeals, and Litigation Law Manual, section I-1-0-1, https://www.ssa.gov/OP_Home/hallex/I-01/I-1-0-1.html (last visited Feb. 7, 2023) (describing purpose of HALLEX as providing “procedural guidance” and “policy statements” in connection with claims adjudication).

301. *See Precedential Opinion Panel*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/patents/ptab/decisions/precedential-opinion-panel> (last visited Feb. 7, 2023); *see also* GAO TESTIMONY OF CANDICE WRIGHT, *supra* note 298, at 12 (“some decisions issued at PTAB are

“precedent decisions” by the joint approval of the Secretary of Homeland Security, the Board of Immigration Appeals, and the Attorney General.³⁰² The VA General Counsel issues written precedential legal opinions that are conclusive within the agency,³⁰³ and the Merit Systems Protection Board also identifies precedential decisions and non-precedential decisions.³⁰⁴

Viewing adjudication in the context of these other tools has two critical implications for analysis of agency-head review. First, when the political branches, through legislation, have already settled on other mechanisms to enable control over and accountability for adjudication decisions, courts should give considerable deference to that legislative judgment and hesitate before overriding it. Second, recognizing that individual adjudications resolve case-specific issues even when they also address policy issues, lawmakers ought to consider whether review of these non-policy determinations by a politically appointed agency head is necessary or even appropriate. These questions require consideration of the limits and pitfalls of agency-head control of adjudication decisions, to which we now turn.

2. *The Limits and Pitfalls of Agency Head Control*

Adjudication regimes vary widely, and it would be inappropriate either to endorse any one model of agency adjudication or to oppose agency-head review across the board. Designing appropriate accountability mechanisms for the many varied adjudication regimes across the administrative state is a complex task that requires nuanced attention to context. Congress may have good reason to limit agency-head review of decisions in particular agency adjudication regimes. To begin with the political accountability on which agency-head review advocates focus, the benefits of agency-head review of individual adjudication decisions seem most plausible when two conditions are satisfied. First, agency-head review is most likely to be useful for advancing an administration’s policy goals, but only when a policy issue with implications beyond the immediate dispute dominates the questions an adjudicator must resolve. Agency-head review is less likely to supply useful accountability when

designated as precedential or informative with the approval of the USPTO Director”). That process builds on an earlier one in which PTAB opinions had to be designated as precedential by both the Director and by the majority of APJs. Wasserman and Walker criticized this previous process as too restrictive. See Walker & Wasserman, *supra* note 13, at 192.

302. See *AAO Decisions*, U.S. CITIZENSHIP & IMMIGR. SERV., <https://www.uscis.gov/administrative-appeals/aao-decisions> (last visited Feb. 7, 2023).

303. *Office of General Counsel*, U.S. DEP’T OF VETERANS AFF., <https://www.va.gov/ogc> (last updated Feb. 7, 2023) (“General Counsel’s interpretations on legal matters . . . are conclusive as to all VA officials . . . also in future adjudications and appeals. . .”).

304. 5 C.F.R. § 1201.117(c).

adjudicators resolve more technical, case-specific matters. Second, agency-head review is most likely to provide political accountability for policy issues when the policy issues at stake in an adjudication are politically salient.

When adjudication is not primarily aimed at resolving policy matters, perhaps because the legal and policy questions at stake are settled and the remaining issues are essentially technical and case-specific, political review of the individual decision may do little to promote political accountability for policy choices.

As its advocates note, agency appellate review of adjudication serves wide-ranging functions in addition to policymaking. It may provide error correction, decisional consistency, and an alternative to court litigation.³⁰⁵ Error correction may be the main function of internal agency review in many adjudication schemes. But for agencies that handle a high volume of adjudications, such as the PTO and the SSA, review of decisions by a busy agency head (in contrast, say, to an agency's appellate panel) may be haphazard at best, inadequate to assure accuracy, and a potential obstacle to uniformity and consistency. Moreover, an agency head's status as a political appointee may confer no particular advantage in correcting errors consistently or well, especially for highly technical decisions. Politically appointed agency heads vary widely in their pertinent technical expertise and experience.³⁰⁶ Indeed, some commentators have noted that agency-head review of front-line adjudicators may serve to educate the agency head, rather than the other way around.³⁰⁷ When the agency head lacks relevant expertise, review of individual decisions by an expert appellate body within the agency may be a more effective mechanism for achieving error correction and consistency.

If the appointments process produces a politically responsive agency head with both some relevant expertise and an appreciation of the greater expertise necessary to make high quality adjudication decisions, perhaps agency-head review will provide useful oversight of decisions for accuracy and consistency.³⁰⁸ But this potential advantage is by no means assured.

305. See generally WALKER & WIENER, *supra* note 103, at 13–15.

306. DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE 142 (2008) (based on extensive data analysis, stating: “Career executives are more likely [than political appointees] to have subject area expertise [and] public management skills. . . .”); see also CHARLES GOODSSELL, THE CASE FOR BUREAUCRACY 104 (2004) (summarizing studies suggesting that ““an image of bureaucrats as lazy and inefficient . . . is wholly inaccurate”” (quoting JOHN BREHM & SCOTT GATES, WORKING, SHIRKING, AND SABOTAGE 108 (1999))).

307. *E.g.*, Walker & Wasserman, *supra* note 13, at 177.

308. For example, consider the decision of Food and Drug Administration (FDA) Administrator Margaret Hamburg to uphold the recommendation of FDA staff regarding the over-the-counter availability of Plan B; Hamburg was a doctor and public health professional who backed the decisions of FDA experts. See *infra* text accompanying notes 310–311.

Political control may instead lead agencies to depart from applicable law and undermine confidence in Executive Branch decisions when political officials fail to respect the technical expertise of career officials within the agency. Both the Bush and Obama Administrations discovered this when they sought to modify decisions of Food and Drug Administration (FDA) experts that would have made the emergency contraceptive Plan B more readily available over the counter.³⁰⁹ In the Obama Administration Plan B controversy, FDA Commissioner Margaret Hamburg, a doctor and public health professional, stood behind the decisions of FDA experts to make the emergency contraceptive Plan B available over the counter. Controversy erupted when Health and Human Services Secretary Kathleen Sebelius overturned the FDA decision. As Professor Adrian Vermeule explained, because the “FDA had developed a reputation for impartial expertise, supported in part by its extensive network of expert advisory committees,” Sebelius’s decision was widely condemned as “the politicization of science.”³¹⁰ In the earlier Bush Administration Plan B controversy, the Administration did not wait to overturn a decision made by professional staff. White House staff got involved earlier by directing the Commissioner to install new members on an Advisory Committee who could be counted on to vote against approval

309. The same judge, in decisions four years apart, excoriated both administrations for “unjustified political interference” after FDA staff had determined that the product was safe for over-the-counter sales. *See* *Tummino v. Torti*, 603 F. Supp. 2d 519, 523–24 (E.D.N.Y. 2009) (expressing scathing criticism of decisions of Bush Administration FDA Commissioners Mark McClellan, Lester Crawford, and Andrew von Eschenbach not to approve Plan B for over-the-counter sales without a doctor’s prescription, contrary to advice of staff and advisory committees, as arbitrary and capricious in that they departed from the agency’s normal procedures, “wrested control over the decision-making on Plan B from staff that normally would issue the final decision on an over-the-counter switch application,” “went against the recommendation of a committee of experts it had empaneled to advise it on Plan B” and “— at the behest of political actors—decided to deny non-prescription access to women 16 and younger before FDA scientific review staff had completed their reviews.”). Far from approving political oversight as ensuring political accountability, the court reproached the agency for “improper political influence” that caused its action “to be influenced by factors not relevant under the controlling statute.” *Id.* at 544 (citing *Town of Orangetown v. Ruckelshaus*, 740 F.2d 185, 188 (2d Cir. 1984)); *cf.* *Tummino v. Hamburg*, 936 F. Supp. 2d 198, 201 (E.D.N.Y. 2013) (accusing Obama Administration Secretary of Health and Human Services Kathleen Sebelius of “flagrantly violat[ing]” the “salutary principle” of deference to scientific expertise of FDA staff who make drug approval decisions, noting that she “completely lacks the ‘necessary information and scientific expertise to assess the data and information required to make a determination that a drug is safe and effective.’”).

310. Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1207–08 (2013) (internal quotation marks omitted).

of over-the-counter sales of Plan B.³¹¹ The White House also let the Commissioner know that “there were a lot of constituents who would be very unhappy with [approval of] over-the-counter Plan B.”³¹² A reviewing court concluded that FDA lacked good faith in its actions on the Plan B applications based on evidence of “improper political influence.”³¹³ In both episodes, far from celebrating political control as a source of accountability, critics lamented political interference in decisions that they believed should have followed the expert views of agency scientists.

In the patent setting, technological expertise can be critical to error correction on many questions of patentability. This is especially so for the IPR proceedings at issue in *Arthrex*. The statute limits these proceedings to technical questions of whether an invention meets statutory standards for novelty and nonobviousness in light of documentary prior art such as prior patents or publications in the field of the invention.³¹⁴ Comparing pertinent prior art references to patent claims is in the wheelhouse of the APJs who serve on PTAB, who by law must be “persons of competent legal knowledge and scientific ability.”³¹⁵ PTAB’s Standard Operating Procedures drill down further to match the technology discipline preferences of APJs assigned to a case to the technology discipline at issue in that case.³¹⁶ While a PTO director might happen to have expertise in the field of the invention, ordinarily they will not.

Similarly, when the issues in an adjudication are essentially factual—as they often are, for example, in Social Security disability cases—agency-head review may offer few distinctive benefits compared to other modes of review, including so-called “quality assurance” approaches.³¹⁷

311. *Tummino v. Torti*, 603 F. Supp. 2d at 527.

312. *Id.* at 529.

313. *Id.* at 544.

314. 35 U.S.C. § 311(b) (“A petitioner in an inter partes review may request to cancel as unpatentable 1 or more claims of a patent only on a ground that could be raised under section 102 [novelty] or 103 [nonobviousness] and only on the basis of prior art consisting of patents or printed publications.”).

315. 35 U.S.C. § 6(a).

316. *See* U.S. PAT. & TRADEMARK OFF., PAT. TRIAL & APP. BD., STANDARD OPERATING PROC. 1 (REVISION 15) ASSIGNMENT OF JUDGES TO CASES 6–7 (2018) <https://www.uspto.gov/sites/default/files/documents/SOP%201%20R15%20FINAL.pdf>.

317. *E.g.*, JERRY MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 15, 149 (1983) (arguing for a “quality assurance system” rather than individual process rights to address decisional quality). *But see* David Ames, Cassandra Handan-Nader, Daniel Ho, and David Marcus, *Due Process and Mass Adjudication*, 72 STAN. L. REV. 1, 7 (2020) (arguing that VA quality review program “generated an all-but-meaningless measure of decisional quality” and “failed to identify errors in decisionmaking in any rigorous way”).

Even when individual adjudication decisions *do* raise policy issues, agency-head review is likely to promote electoral accountability only when the decision is transparent, and the issues are at least somewhat salient politically. Political accountability may be a powerful force if the electorate is anticipating a particular policy or set of policies, if interest groups are monitoring agency performance, or if news media are covering the issue. The more visible the issue, the more likely it is that political control will improve democratic responsiveness. Examples of highly visible policy choices embedded in administrative adjudication decisions include the FCC's order imposing liability on television stations for broadcasting spoken expletives during the Billboard Music Awards,³¹⁸ the FTC's order holding Facebook liable for privacy violations involving deceptive claims about consumer control of personal data,³¹⁹ and FDA's orders directing Juul Labs, Inc. to stop selling and distributing their electronic nicotine products and delivery systems.³²⁰ Whatever the legal merits of these decisions, it is plausible that members of the public, news media, and interest groups will take note of them, and alert the electorate to hold the presidential administration accountable at the ballot box—although even these highly visible administrative decisions are unlikely to play more than a small role in public assessments of the president.³²¹

But it is utterly unrealistic to imagine that individual adjudicatory decisions on patent validity, immigration, or social security disability will have the kind of salience that facilitates politically accountable control over policy. For example, a decision on patent validity—and especially the basis for such a decision—is likely opaque to voters and unlikely to make it onto their list of concerns at the ballot box.³²² Even with the guidance of interest groups, voters may be in no position to second guess administrative decisions about whether an invention meets patent law standards, or whether a drug is safe and effective.

At the same time, political control of these decisions can present distinct dangers to the faithful execution of the law. One long-recognized risk is that political supervision may threaten adjudicator impartiality, especially when

318. *FCC v. Fox Television Stations*, 556 U.S. 502, 529–30 (2009).

319. *In the Matter of Facebook*, C04365, 2012 FTC LEXIS 135 (F.T.C. July 12, 2012).

320. News Release, U.S. Food & Drug Admin., FDA Denies Authorization to Market JUUL Products (June 23, 2002), <https://www.fda.gov/news-events/press-announcements/fda-denies-authorization-market-juul-products>.

321. *See Kagan, supra* note 29, at 2335–36.

322. Of course, some patent infringement actions make the news. *See, e.g.*, Amanda Sealy & Brenda Goodman, *Moderna Files Patent Infringement Lawsuits Against Pfizer and Biontech over mRNA Covid-19 Vaccines*, CNN (Aug. 26, 2022, 3:46 PM), <https://www.cnn.com/2022/08/26/health/moderna-pfizer-mrna-patent-lawsuit/index.html>. But an IPR determination of whether a patent is invalid relative to the prior art is typically pretty wonky stuff.

one of the parties to the adjudication is the agency itself. The worry is that agency-head control may tempt the adjudicator to side with the enforcement officials in a case involving the agency. The SEC and the FCC have long faced criticism for the perception that they, including their insulated ALJs, too often side with their own enforcement divisions when violations are resolved administratively.³²³ When the agency is a party, this risk to impartiality has prompted calls for more, not less, independence and insulation of adjudicators from political control. For example, commentators have called for insulation of non-ALJ administrative judges that parallels the insulation currently required for administrative law judges.³²⁴

More broadly, political control over individual decisions may make some adjudications vulnerable to inappropriate political influence in which “partisan politics undermin[es] the rule of law.”³²⁵ Professor Kate Andrias described President Nixon’s legendary efforts to deploy law enforcement for partisan ends, seeking Internal Revenue Service (IRS) audits of his political enemies’ taxes and directing the Attorney General to drop the government’s antitrust appeal against a Republican party donor, the International Telephone and Telegraph Corporation.³²⁶ More recently, President Trump was widely criticized for publicly condemning indictments of his political allies while urging the prosecution of political opponents.³²⁷

323. See Barnett, *supra* note 98, at 1646, 1645 n.4 (discussing this concern); *cf. id.* at 1660 (noting that “Bush [A]dministration came under fire for appointing Immigration Judges . . . based on political criteria”); Jean Eaglesham, *SEC Wins with In-House Judges*, WALL. ST. J. (May 6, 2015, 10:30 PM), <http://www.wsj.com/articles/sec-wins-with-in-house-judges-1430965803>; Gretchen Morgenson, *At the S.E.C., a Question of Home-Court Edge*, N.Y. TIMES (Oct. 5, 2013), <https://www.nytimes.com/2013/10/06/business/at-the-sec-a-question-of-home-court-edge.html> (contrasting SEC’s 88% win rate in ALJ hearings to its 63% win rate in district courts). For instance, the SEC prevailed in all agency proceedings in 2012, and in more than 75% in 2011, 2013, and 2014. In comparison, it prevailed in less than 75% of similar judicial proceedings. See *id.* See generally Andrew N. Vollmer, *Accusers as Adjudicators in Agency Enforcement Proceedings*, 52 U. MICH. J. L. REFORM 103 (2018).

324. While ALJs are prohibited by statute “from communicating ex parte with agency officials during and about their hearings,” administrative judges (AJs) are not. Barnett, *supra* note 98, at 1647. “The adjudicator’s employing agency is often a party and controls the adjudicator’s budget and perhaps salary . . . [and] may even present expert witnesses who are the adjudicator’s own co-workers.” *Id.* at 1648. Barnett argues that if ALJ use is problematic for its lack of neutrality, “the use of less independent AJs in less litigant-protective proceedings is even more troubling . . . [and could create] an unconstitutional appearance of partiality.” See generally *id.* at 1647–50.

325. Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1071 (2013).

326. *Id.* at 1071–72.

327. See Benjamin Weiser, *Trump Pushed Officials to Prosecute His Critics, Ex-U.S. Attorney Says*, N.Y. TIMES (Sep. 8, 2022), <https://www.nytimes.com/2022/09/08/nyregion/geoffrey->

Although political interference in enforcement proceedings may be particularly unseemly, political interference in adjudications of valuable rights such as patents or drug approvals presents similar risks of unfairness, lawlessness, and corruption.³²⁸ Now-Justice Kagan, in an otherwise strong defense of a muscular presidential role in administration, nonetheless acknowledged that adjudications call for a “fundamentally different” analysis because “[i]n this context, presidential participation in administration, of whatever form, would contravene procedural norms and inject an inappropriate influence into the resolution of controversies.”³²⁹

The White House has adopted the general practice of refraining from contacting agencies either about specific enforcement actions or specific agency adjudications.³³⁰ Professor Vermeule has observed that a “network of tacit unwritten conventions” enforces this norm.³³¹ Professor Andrias’s work favoring more direct presidential control of enforcement has similarly focused not on control of individual decisions, but rather on a transparent, coordinated effort to oversee overall Executive Branch enforcement *direction*, recognizing that control of individual decisions could prompt “unproductive” political involvement.³³² In short, despite the formal presidential responsibility for enforcement actions, settled norms require

berman-trump-book.html (summarizing allegations of former U.S. Attorney for Southern District of New York); Adam Liptak, *Conservative Lawyers Say Trump Has Undermined the Rule of Law*, N.Y. TIMES (Nov. 14, 2018), <https://www.nytimes.com/2018/11/14/us/politics/conservative-lawyers-trump.html> (quoting former acting Bush Attorney General Peter Keisler, stating that President Trump had “attacked the Justice Department for [Republican congressmen indictments for fear they] would hurt Republican chances in the midterm elections” and “urged that the Justice Department [to] investigate his political opponents”); Quint Forgey & Carla Marinucci, *Trump Asks Sessions to Consider Prosecuting Oakland Mayor Over ICE Raid*, POLITICO, <https://www.politico.com/story/2018/05/16/trump-sessions-oakland-mayor-prosecution-sanctuary-cities-594470> (May 16, 2018, 5:52 PM). *See generally* David M. Driesen, *The Unitary Executive Theory in Comparative Context*, 72 HASTINGS L.J. 1, 43–44, 44 n.314 (2020) (giving examples); Lawrence J. Trautman, *Presidential Impeachment: A Contemporary Analysis*, 44 U. DAYTON L. REV. 529, 572 (2019) (same).

328. *See supra* text accompanying notes 310–313 (discussing political interference by the Bush and Obama Administrations in FDA decisions about approval of Plan B for OTC sales).

329. Kagan, *supra* note 29, at 2362–63 (citing *Myers v. United States*, 272 U.S. 52, 135 (1925)).

330. *See, e.g.*, Nina A. Mendelson & Jonathan B. Wiener, *Responding to Agency Avoidance of OIRA*, 37 HARV. J. L. PUB. POL. 447, 499, 499 n.191 (2014); Andrias, *supra* note 325, at 1072 n.191.

331. Vermeule, *supra* note 310, at 1211–13 (though noting that the legal basis for the norm is not well-developed and may be nonexistent).

332. Andrias, *supra* note 325, at 1103–07 (arguing for White House involvement in “major enforcement policies” but *not* a “reactive system . . . whereby all significant individual enforcement actions require White House clearance,” in part because it could prompt “unnecessary and unproductive political involvement”).

political “hands off” individual enforcement decisions to reduce the potential for pernicious political influence. While advocates for agency-head control over adjudication have stopped short of arguing for presidential resolution of adjudication, review by Cabinet secretaries or agency heads close to the White House could pose many of the same risks.³³³

As with the benefits of political control over adjudication decisions that raise broad policy concerns, the risks of inappropriate political influence are likely to vary. While public backlash may sometimes check inappropriate political intervention in high-visibility decisions, as with the Obama-era Plan B decision discussed above, the risks may be quite high when decisions are less visible.

Risks may be especially pronounced for low-visibility decisions with high financial stakes for well-funded and politically-connected interests. Political oversight of such decisions may give elected officials opportunities to help their friends or punish their enemies with little risk of exposure. This risk cautions against unbridled political control of adjudications concerning, for example, patents, government contracts, financial violations, or natural resource leases. Imagine a wealthy corporate patent holder facing a validity challenge (or bringing one) who finds it advantageous to bundle campaign contributions, or to fund a super PAC or lavish inaugural ball.³³⁴ The combination of technical complexity, low public visibility, and high financial stakes to the parties may make political control of these decisions distinctively vulnerable to inappropriate political interference or outright corruption.³³⁵ The same characteristics of low visibility and technical complexity undercut the potential for meaningful electoral accountability.

333. Of course, an agency head’s power to remove an adjudicator at will could also present significant risks of the sort we discuss around agency-head review of individual decisions. We take no position on which risks are more significant; assessing them and balancing against their potential benefits requires complex and nuanced judgments. Instead, just as with institutional design choices over how much to insulate individual decisions from within-agency review, courts should be deferential to legislative judgments on the extent of one official’s power to remove another.

334. Inaugural balls are immune from the usual campaign contribution limits. *E.g.*, Edward Epstein, *Donors Lavish \$18 Million on Inauguration – So Far/Campaign Finance Loophole Enables \$40 Million Target*, SF GATE (Jan. 11, 2005), <https://www.sfgate.com/politics/article/Donors-lavish-18-million-on-inauguration-so-2739482.php>.

335. We recognize, of course, that such payments might be legal and that political officials might exercise oversight of an agency decision for legitimate reasons, not simply in response to a large payment. Our point is that political control can create vulnerability to inappropriate influence that may be difficult to observe or check. *Cf.*, *Oil States Energy Servs. v. Greene’s Energy Grp.*, 138 S. Ct. 1365, 1380–81 (2018) (Gorsuch, J., joined by Roberts, C.J., dissenting) (with respect to patent validity adjudication, noting that “[p]owerful interests are capable of amassing armies of lobbyists and lawyers to influence (and even capture) politically accountable bureaucracies.”).

Political control might raise similar concerns for decisions of the Civilian Board of Contract Appeals within the General Services Administration, authorized to resolve individual government contract disputes with major corporations such as Dell, McKesson, and Xerox, or of adjudication processes for mineral leasing on public lands within the Department of the Interior. Consider, for example, the Department of the Interior's treatment, in the 1980s, of the Navajo Nation's coal leasing arrangement with Peabody Coal, a subsidiary of Peabody Group, then the largest coal mining company in the country.³³⁶ Tribal leasing arrangements are subject to federal approval, with an internal appeals process.³³⁷ Peabody had long paid what amounted to a 2% royalty rate, well below prevailing market rates.³³⁸ The Tribe invoked the internal adjudication processes in the Department of the Interior to set a fair market rate for the royalty. Three officials within the Department agreed, after considering multiple independent studies, that the Tribe should receive a royalty rate of 20% to bring it in line with market rates.³³⁹ The most senior official to review the decision was the Deputy Assistant Secretary for Indian Affairs, acting as the Commissioner of Indian Affairs.³⁴⁰ After Peabody officials learned of the decision, they hired lobbyists who made "numerous contacts" with Interior officials, including Interior Secretary Donald Hodel.³⁴¹ Hodel ordered the Deputy not to inform the Tribe of his decision and instead to encourage the Tribe to continue negotiating.³⁴² The economically strapped Tribe ultimately agreed to a far lower 12.5% royalty rate.³⁴³

Agency heads may also face political pressure from outside the Executive Branch. For example, four New Jersey members of Congress brought enormous political pressure to bear on the 2008 decision of the FDA to approve a patch for injured knees called the Menaflex. The

336. Barry Meier, *Navajo Lawsuits Contend U.S. Government Failed the Tribe in Mining Royalty Deals*, N.Y. TIMES (Jul. 18, 1999), <https://www.nytimes.com/1999/07/18/us/navajo-lawsuits-contend-us-government-failed-the-tribe-in-mining-royalty-deals.html>.

337. 25 U.S.C. § 396(a).

338. *Navajo Nation v. United States*, 263 F.3d 1325, 1327 (Fed. Cir. 2001), *rev'd*, 537 U.S. 488 (2003).

339. The facts of this example are drawn from opinions in later (unsuccessful) litigation brought by the Tribe alleging that Interior Secretary Donald Hodel had violated his trust responsibility to the Tribe; much of the story did not emerge until discovery in the litigation. *See United States v. Navajo Nation*, 537 U.S. 488, 519, 519 n.3 (2003) (Souter, J., dissenting); *see also* Meier, *supra* note 336 (noting the 1985 "high-stakes [Peabody] lobbying effort" aimed at Hodel).

340. 263 F.3d at 1328.

341. *Id.*

342. *See id.*

343. *See id.*

members of Congress had received significant campaign contributions from the manufacturer.³⁴⁴ In an extensive internal report, the Director of the FDA's Office of Legislation described the "pressure from the Hill as the most extreme he had seen . . . and the agency's acquiescence to the [applicant] Company's demands for access to the Commissioner . . . as unprecedented."³⁴⁵ In response to the pressure, the FDA Commissioner demanded an "expedited process [and] outcome in favor" of the manufacturer.³⁴⁶ The FDA's scientific reviewers had already decided that the patch was unsafe because it often failed, requiring additional surgery, but the agency managers "overruled the scientists and approved the device for sale."³⁴⁷ Political pressure to advance the interests of campaign donors is particularly worrisome when the public relies on an agency to make informed decisions affecting their health and safety that they are in no position to second-guess.

Requiring agency heads to announce such decisions publicly, and to explain their reasons, could improve transparency and provide a limited check on improper political influence.³⁴⁸ The Menaflex story did end up being publicly reported, and the FDA extensively analyzed and revisited both its process and the particular decision. More broadly, however, disclosure can only promote political accountability when it is thorough—which may sometimes be hampered by commercial or privacy interests in data or secrecy—and when the issue has enough salience to attract the attention of public monitors and voters. Requiring agency heads to disclose all of their meetings or other contacts with interested parties

344. See Gardiner Harris & David Halbfinger, *FDA Reveals It Fell to a Push by Lawmakers*, N.Y. TIMES (Sep. 25, 2009), <https://www.nytimes.com/2009/09/25/health/policy/25knee.html?searchResultPosition=3> (describing pressure from two Democratic New Jersey Senators and two Democratic members of Congress "within a few months of receiving significant campaign contributions" totaling \$26,000). See also Alice Mundy, *Political Lobbying Drove FDA Process*, WALL ST. J. (Mar. 6, 2009, 12:01 AM) <https://www.wsj.com/articles/SB123629954783946701>, reprinted at National Whistleblower Center, <https://www.whistleblowers.org/news/political-lobbying-drove-fda-process/>. We acknowledge that it is often hard to distinguish problematic political influence from legitimate political influence that is meant to represent constituent interests.

345. U.S. FOOD & DRUG ADMIN., REVIEW OF THE REGEN MENAFLEX®: DEPARTURES FROM PROCESSES, PROCEDURES, AND PRACTICES LEAVE THE BASIS FOR A REVIEW DECISION IN QUESTION 8 (Sep. 2009), <https://www.nytimes.com/interactive/projects/documents/f-d-a-review-of-the-regen-menaflex-device>.

346. Harris & Halbfinger, *supra* note 344 (quoting a "report written by top agency officials").

347. Harris & Halbfinger, *supra* note 344.

348. *But see* GAO TESTIMONY OF CANDICE WRIGHT, *supra* note 298, at 20 (noting that after *Arthrex*, APJs interviewed indicated that management influence upon a PTAB decision would not be reported to the relevant parties).

might be helpful, but it also might reduce the salience of problematic contacts by burying them in too much information, thus undermining rather than advancing accountability.³⁴⁹

One final point: advocating across-the-board agency-head review of adjudication decisions may perversely discourage use of *more* politically accountable modes of agency policymaking.³⁵⁰ As discussed above, rulemaking provides advance public notice and broader public participation, and it is subject to more systematic White House supervision than adjudication. Thus, rulemaking generally resolves policy issues in a more transparent and accountable manner,³⁵¹ in contrast to individual adjudications, where outside parties rarely participate. Guidance documents may also be superior to agency-head review of adjudication decisions because they are more visible and more participatory in their development.³⁵² While agencies can elect adjudication as a flexible, low-cost means of developing policy in response to evolving conditions,³⁵³ normalizing agency-head control of individual adjudication decisions may undercut the agency's incentive to use rulemaking, with the effect of diminishing overall political accountability for agency policy decisions.³⁵⁴

In sum, Congress may have sound reasons for restricting agency-head review of individual adjudication decisions. Such restrictions should not be categorically prohibited, especially when agency heads may supervise adjudication in other ways, such as by issuing rules or guidance or by choosing which adjudication decisions to designate as precedential.³⁵⁵ Legislative choices might implicitly limit an agency's discretion to select adjudication to make policy

349. Cf. Wendy Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321 (2010) (explaining that disclosure and participation requirements can inadvertently enable participants to overwhelm the system with excessive information).

350. See Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95 (2003); cf. Wadhia & Walker, *supra* note 286, at 1202 (arguing that eliminating *Chevron* deference for adjudication would helpfully encourage greater use of rulemaking).

351. See *supra* text accompanying notes 284–290.

352. See *supra* text accompanying notes 277–282.

353. E.g., Cass, *supra* note 14, at 129.

354. The NLRB has long been criticized for doing just this. E.g., Jeffrey Lubbers, *The Potential of Rulemaking By the NLRB*, 5 FIU L. REV. 411, 414–15 (2010) (noting “the Board’s consistent history of shrugging off criticism by commentators” and discussing rulemaking’s general superiority).

355. Moreover, a statute’s formal reference to agency-head review authority does not necessarily equate to an agency-head review regime, as illustrated by the examples of the SSA and the EAB considered above. See *supra* Part III.A. Even the choice to give an agency head the flexibility to choose to establish systematic, haphazard, or no agency-head review is itself a design decision that is more appropriate for the legislative process than the judicial one.

under the current administrative common law of *Chenery II*. But this doctrine has never been viewed as constitutionally compelled, and the burden is not substantial in any event.³⁵⁶ A legislative choice to restrict agency-head review of individual adjudication decisions is well within the range of discretion already exercised by the political branches in legislation that authorizes particular agencies to use only rulemaking or only adjudication.³⁵⁷

D. Congressional Control Over Institutional Design: Who Decides?

This Article has argued that political control of agency adjudication decisions does not necessarily improve electoral accountability for those decisions. Especially for individual adjudications of highly technical, low-salience issues, the prospect that voters will hold the president accountable is frankly chimerical. Indeed, political control may be just as likely to open the back door to inappropriate favoritism or outright corruption while tempting the agency to close the front door to public input and transparency in policy decisions. It all depends on the statutory scheme, the issues that dominate a particular adjudication regime, the identity and power of involved parties, and the salience of the issues in public debate. Choosing how best to promote accountability for agency decisions requires thoughtful assessment of a wide range of considerations, including not only the need for political supervision of policy choices, but also the need for expertise, flexibility, efficiency, fairness, and neutrality in agency adjudication.³⁵⁸ One size does not fit all.

Who, then, should decide these critical questions of institutional design to promote political accountability?³⁵⁹ The politically insulated Court, which

356. Indeed, *Chenery II* has recently come in for significant criticism. See Nielson, *supra* note 275, at 668–70 (describing *Chenery II* as a “wrong turn in agency adjudication”).

357. E.g., Melissa Wasserman, *The Changing Guard of Patent Law: Chevron Deference for the PTO*, 54 WM. & MARY L. REV. 1959, 1973 (2013) (“Unlike most notable agencies, the PTO lacks significant substantive rule-making authority.”); *Atchison, Topeka and Santa Fe Ry. Co. v. Pena*, 44 F.3d 437, 445 (7th Cir. 1994) (en banc) (noting that the “Federal Railway Administration lacks both rulemaking and adjudicative power over the subject of hours of service”) (Easterbrook, J., concurring).

358. Cf. Barnett, *supra* note 98, at 1649 (defenders might suggest that non-AIJ administrative judges, rather than AIJs, can provide “more subject-matter and policy expertise . . . because they come from within the agency”).

359. Cf. *Nat’l Fed’n of Indep. Bus. v. Dep’t of Labor*, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring) (“Who decides? . . . [This Court] is charged with resolving disputes about which authorities possess the power to make the laws”); *id.* (Breyer, J., dissenting) (“Who decides how much protection . . . American workers need from COVID-19? An agency with expertise . . . acting as Congress and the President authorized? Or a court, lacking any knowledge . . . and insulated from responsibility . . . ?”).

lacks the experience and the means for wide-ranging information-gathering, seems ill-suited to the task. We are particularly concerned that the Court might lock in institutional design choices that please its current members, such as agency-head review of individual adjudication decisions, as durable constitutional requirements immune from future legislative modification in light of experience. It seems incongruous and unwise for the unelected Court, in the name of political accountability, to substitute its own institutional design choices for those deliberated upon and selected by the far more politically accountable institutions of Congress and the President.

It has long been Congress and the President, through the interbranch legislative process and administrative innovations, that have designed administrative institutions and provided them with legal authority and funding. The Constitution is largely silent about particular design choices but gives Congress broad authority (subject to presidential veto) to make “all Laws which shall be necessary and proper for carrying into Execution . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”³⁶⁰ This language encompasses broad power to create and design agencies to carry out the tasks of government.³⁶¹

We have already noted other commentators’ textual and historical arguments for a broad interpretation of the Necessary and Proper Clause.³⁶² Congress, as the primary crafter of legislation, also has important institutional advantages over the courts, including its own political accountability, its information-gathering resources, and its deliberative capacity.³⁶³ Unlike the judiciary, Congress can and does hold legislative hearings, conduct wide-ranging oversight of the administrative state, give or withhold its approval through Senate confirmation of high-ranking Executive Branch officers, and review the scope of agency programs and needs in the course of appropriations decisions.³⁶⁴ And importantly, as

360. U.S. CONST. art. I, § 8.18.

361. See Manning, *supra* note 20, at 2040 (2011) (explaining that absent particular prohibitions, “interpreters have no basis to displace judgments made by Congress pursuant to [Necessary and Proper Clause power] to compose the government”); *supra* note 20 and accompanying text (discussing varying positions on the breadth of Congress’s authority under the Necessary and Proper Clause).

362. See Bowie & Renan, *supra* note 2.

363. See *id.* at 2094 (remarking on the interbranch legislative process as “open to data-informed experimentation, interinstitutional accommodation, and political negotiation involving many conflicting interests and goals”).

364. See generally Gillian Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1085 (2021) (“lawmaking is an ongoing and iterative process” including appropriations, oversight, and other processes).

Justice Kagan observed in her separate opinion in *Collins v. Yellen*,³⁶⁵ the political branches, unlike the Court, remain politically accountable for their design choices in the interbranch legislative process.³⁶⁶

Congress has never taken a cookie-cutter approach to agency design. Agencies vary in their structures, authorities, and processes.³⁶⁷ Over time the political branches have continued to gather information and innovate, modifying agency structures and procedures to improve them in light of experience, as we saw in Part III.B. in the history of legislative modifications to the patent system.

Beyond the patent system, Congress has been debating and experimenting with a range of adjudication procedures in light of agency experience for many decades, considering proposals for special administrative courts beginning in 1933 and a variety of proposals to improve administrative procedure beginning in the late 1930s.³⁶⁸

Consider, for example, Congress's treatment of separation of functions—whether and how much to insulate adjudicators from enforcement officials. In the APA's formal adjudication provisions, Congress restricted supervision of administrative law judges by agency officials engaged in investigative or prosecutorial functions.³⁶⁹ But shortly after passage of the APA, Congress chose adjudication structures in specific settings that were different from the APA's constraints on formal adjudication. As Kenneth Culp Davis explained in his leading treatise in 1958, Congress found that the separation between adjudication and enforcement of the APA's formal adjudication provisions is “not high enough for the NLRB and the FCC but that the same standards are too high for the Immigration Service . . . reflect[ing] pressures as well as inquiries

365. 141 S. Ct. 1761 (2021).

366. *Id.* at 1800 (Kagan, J. for three Justices, concurring in part and concurring in the judgement) (“The right way to ensure that government operates with ‘electoral accountability’ is to lodge decisions about its structure with, well, ‘the branches accountable to the people.’” (quoting *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2245 (2020) (Kagan, J., dissenting))).

367. *See generally* JENNIFER SELIN & DAVID LEWIS, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES (2d ed. 2018), <https://www.acus.gov/sites/default/files/documents/ACUS%20Sourcebook%20of%20Executive%20Agenices%202d%20ed.%20508%20Compliant.pdf>; Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 U. PENN. L. REV. 841 (2014) (describing agencies with mixed public and private characteristics).

368. *See, e.g.*, E. Barrett Prettyman, *Trial by Agency* 43–45 (1959) (noting that Congress considered multiple proposals for “creation of a special court,” followed by proposed legislation addressing “improvement of the processes of the agencies themselves”).

369. *See* Administrative Procedure Act, 5 U.S.C. § 554(d)(2). The section does not apply “to the agency or a member or members of the body comprising the agency.” § 554(d)(2)(C).

into the merits.”³⁷⁰ With respect to the FCC in particular, Davis noted the “painstaking inquiry into the problem of separation of functions” in the Communication Act Amendments of 1952.³⁷¹ Congress instituted additional restrictions beyond those imposed by the APA, but then repealed them in 1961 to permit the Commission “full use of its staff in adjudicatory cases where that staff had not been engaged in the investigation or prosecution of the case or a factually related one.”³⁷² The Court recognized Congress’s varying approaches to these adjudication structures in the leading case of *Withrow v. Larkin*,³⁷³ observing that Congress had “provid[ed] for varying degrees of separation from complete separation of functions to virtually none at all.”³⁷⁴

In other adjudication contexts Congress has aimed for procedural efficiency and simplicity while protecting the rights of entities appearing before the agency. Consider Congress’s revision of the government contracts dispute resolution structure in the Contract Disputes Act of 1978 (CDA), including creating the statutory boards of contract appeals discussed above.³⁷⁵ The CDA reformed a patchwork dispute resolution system for government contracts that had been a “mess” for decades.³⁷⁶ “The procedural safeguards . . . and the quality and independence of the board members [were found to be] uneven,” and despite purported independence, “the board members are appointed by the agencies and must depend on them for career advancement.”³⁷⁷ Further aggravating

370. KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 194 (1958) (commenting that the differences were also “curiously inconsistent”). To enhance adjudicator expertise, Davis favored loosening restrictions on an adjudicator’s ability to consult with enforcement officials.

371. *Id.* at 200. Davis also explains that in the immigration setting, Congress eased the APA’s restrictions in part for reasons of cost. *Id.* Again, however, our point is not to defend every single congressional choice on policy grounds, but simply to highlight Congress’s longstanding engagement over time with the design of adjudication regimes.

372. KENNETH CULP DAVIS, 1970 SUPPLEMENT TO ADMINISTRATIVE LAW TREATISE 430 (1970).

373. 421 U.S. 35 (1975).

374. *Id.* at 51–52.

375. *See supra* text accompanying notes 85–92 (noting that Boards of Contract Appeals are not subject to agency-head review).

376. Clarence Kipps, Tom Kindness & Cameron Hamrick, *The Contract Disputes Act: Solid Foundations, Magnificent System*, 28 PUB. CONT. L.J. 585, 585–86 (1999) (describing twentieth century antecedents to CDA and noting that “[p]rior to the CDA, the ‘system’ for resolving federal contracts disputes can best be described as a mess”).

377. *See* UNITED STATES COMMISSION ON GOVERNMENT PROCUREMENT, REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT, Vol. 4, at 3 (1972) [hereinafter COMMISSION ON PROCUREMENT REPORT]; *id.* at 18 (contractors view “members of some boards [as] not sufficiently separated from agency contracting and legal functions to possess the objectivity and independence

the mess, the Supreme Court in 1951 interpreted a standard federal government contract clause to make the contracting agency head's decision on a number of issues final, barring further judicial review.³⁷⁸ Congress attempted to reestablish access to the courts for contractors in 1954,³⁷⁹ but under further judicial interpretations of the 1954 statute, contractors complained they were caught in a "patchwork system" that unduly limited their access to courts, deprived them of due process protections, and resulted in "substantial delays."³⁸⁰ The government also faced difficulty in appealing adverse decisions.³⁸¹ Congress appointed a blue-ribbon Commission on Government Procurement that, after years of study, produced a multi-volume report in 1972. Congress held hearings, and multiple committees considered proposed legislation.³⁸² The chair of one of the Senate subcommittees summarized a key criticism of the pre-CDA arrangements: "[T]he Commission questioned whether an agency, which is a party to a dispute, can function as an objective factfinder and judge in the same dispute."³⁸³

Indeed, the Commission had specifically considered the option of an agency board acting as an "alter ego of the head of the procuring agency," but instead recommended that the agency boards function as "quasi-judicial forums and [be] strengthened by adding additional safeguards [for] objectivity and independence."³⁸⁴ As enacted, the CDA enabled contractors to choose between taking contract disputes to court or using more expeditious procedures offered by a statutorily-authorized agency board of contract appeals. But the members of that board would now be appointed in the same manner as ALJs, and their decisions would be final within the agency, subject only to judicial review.³⁸⁵

expected."); S. REP. NO. 95-1118, at 2 (1978) (noting that "[pre-CDA] agency boards of contract appeals are appointed by, report to, and are paid by the agency involved in the dispute").

378. See *United States v. Wunderlich*, 342 U.S. 98 (1951).

379. The House Report accompanying the so-called Wunderlich Act expressed concern about "repos[ing] in Government officials such unbridled power of finally determining disputed questions . . . under Government contracts." H.R. REP. NO. 1380, at 4 (1954).

380. Kipps et al., *supra* note 376, at 587.

381. See S. REP. NO. 95-1118, at 2-4 (1978).

382. See Kipps et al., *supra* note 376, at 585-86; S. REP. NO. 95-1118, at 3 ("Commission on Government Procurement recommendations guided the drafting and deliberations of the CDA."). See generally COMMISSION ON PROCUREMENT REPORT, *supra* note 377.

383. See *Contract Disputes Act of 1978: Joint Hearings before the Subcomm. On Federal Spending Practices and Open Government of the Senate Committee on Governmental Affairs and the Subcommittee on Citizens and Shareholders Rights and Remedies of the Senate Committee on the Judiciary*, 95th Cong. 4 (1978) (Statement of Senator Howard Metzenbaum).

384. COMMISSION ON PROCUREMENT REPORT, *supra* note 377, at 19-20.

385. Kipps et al., *supra* note 376, at 59; 41 U.S.C. § 7104(a)-(b); Pub. L. 111-350, § 2(b)

Once again, Congress balanced numerous complex considerations, studied the issue for years, and gathered information from all the stakeholders in enacting the CDA, including the restriction on agency-head review. Congress explicitly sought to provide a “fair, balanced, and comprehensive statutory system” to resolve government contract disputes using boards staffed to assure [their] “independence and impartiality.”³⁸⁶

Congress’s authorities, political accountability, and long history of responding to the realities of administrative experience to adapt and improve agency structure and procedures make it a clear choice over the courts to design administrative institutions. The political branches can assess and adapt adjudication regimes as they learn from successes and failures of prior designs in ensuring accurate, fair dispute resolution and democratic accountability for policy choices. Congress might, for example, seek to reconcile the need to maintain political accountability for policy choices with a goal of avoiding adjudicator bias towards the agency position. It might then decide to insulate adjudicators across the board from at-will removal by political officials, while still authorizing political officials to issue rules. Or, in settings where adjudicator bias towards agency enforcement officials or agency bias towards politically powerful parties is less of a concern, Congress might make individual adjudication decisions subject to unfettered review by political officials. These complex, nuanced choices depend not only on knowledge of an adjudication regime’s particulars, but on administrative experience over time, requiring the expertise and competence of the political branches.

CONCLUSION

As the Court continues to move towards centralizing presidential control over the administrative state, it is stepping into territory that earlier lawgivers have sought to insulate from political control. In *United States v. Arthrex, Inc.*, the Court recrafted the design of a longstanding statutory adjudication structure for the patent system by placing individual adjudication decisions under the de novo review authority of the politically appointed agency head. The Court apparently thought, incorrectly, that this was a small move that merely brought a relatively new adjudication regime in line with the nearly universal practice across the administrative state and with historical practice in the patent system. But as this Article has shown, administrative adjudication structures are far more varied, both in modern practice across the government

(explaining 2011 reenactment of public contracts laws as meant to “conform to the understood policy, intent, and purpose of Congress in the original enactments”); *see also* H. REPT. NO. 95-1556, at 6 (1978) (“The decisions of boards are to be final unless the contractor appeals [to court]; [t]he Government is accorded a right of appeal [in certain instances.]”).

386. S. REP. NO. 95-1118, at 1–2 (1978).

and in the long history of the patent system. In many contexts, the political branches have deliberately sought to protect agency adjudicators from political pressures and to preserve their decisional independence—a long-valued procedural safeguard for agency adjudicators as well as for courts.³⁸⁷

While some adjudication schemes provide for review of decisions by the agency head, such control is by no means universal or even standard. Agency-head control may be normatively desirable in some instances, particularly where an agency adjudication decision primarily involves policy and is likely to be visible and salient to the electorate or to public monitors. But it may be an unwise choice for other adjudication schemes, especially when decisions are low-visibility or very technical, or when they implicate substantial economic or political interests that make the process especially vulnerable to inappropriate pressures.

The varying significance of these concerns in different administrative contexts should raise alarm bells about reflexive judicial approaches to entrench specific design choices that may look good from the bench, but that the political branches have rejected. For over two centuries the legislative process has provided a forum for deliberating over design decisions, including choices of administrative appeals processes to promote integrity, accountability, and prompt resolution of claims. Congress has repeatedly revised agency structures through legislation in light of the experiences of agencies and stakeholders. The Court is both less politically accountable and less institutionally competent to perform this function than Congress. A wise approach to separation of powers issues should take that into account. Courts should not constitutionalize a one-size-fits-all approach to institutional structure that ossifies current judicial preferences and blocks the political branches from the ongoing process of crafting a functioning government that best serves the public.

387. *E.g.*, *Myers v. United States*, 272 U.S. at 135 (1926); *see, e.g., supra* text accompanying notes 90–122; *see also* GAO TESTIMONY OF CANDICE WRIGHT, *supra* note 298, at 16 (noting that APJs reported that management review affected their decisions and that the PTO directors or PTAB management tended to “intercede in cases with high visibility or cases in which a director has issued guidance or policy”).