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*Article III — Judicial Power — Public Rights Doctrine — Oil States Energy Services, LLC v. Greene's Energy Group, LLC*

Article III protects “[t]he judicial Power of the United States” from political influence by guaranteeing lifetime salaries and tenure to judges who exercise that power,<sup>1</sup> but it does not specify which adjudications may be heard only in Article III courts.<sup>2</sup> Because nearly any determination of facts and application of law could be styled as “judicial,” requiring every federal adjudication to occur in court would impossibly constrain executive officials in conducting routine tasks.<sup>3</sup> At the same time, allowing federal adjudications outside of court risks rendering Article III’s protections irrelevant.<sup>4</sup> To navigate this tension, the Supreme Court distinguishes between “public” and “private” rights.<sup>5</sup> Without “definitively explain[ing]” the distinction between the two,<sup>6</sup> the Court has blessed non-Article III resolution of public rights, which historically “ar[o]se between the Government and persons subject to its authority,”<sup>7</sup> while insisting on varying levels of Article III involvement for “private” questions involving “the liability of one individual to another under the law.”<sup>8</sup> Last Term, in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*,<sup>9</sup> the Court approved as “squarely within the public-rights doctrine” an administrative scheme by which a federal agency may cancel previously issued patents following adversarial proceedings between patent holders and private challengers.<sup>10</sup> Its analysis, like the dissent’s, turned in significant part on its understanding of eighteenth-century

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<sup>1</sup> U.S. CONST. art. III, § 1; THE FEDERALIST NO. 78, at 463–64 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

<sup>2</sup> U.S. CONST. art. III, §§ 1–2.

<sup>3</sup> See RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 352–55 (7th ed. 2015); Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 264–65 (1990).

<sup>4</sup> See Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291, 292 (1990).

<sup>5</sup> See, e.g., Murray’s Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856). The Court has separately approved the use of non-Article III courts in the territories, American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828), the District of Columbia, Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 619 (1838), and the military, Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1858).

<sup>6</sup> N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69 (1982) (plurality opinion).

<sup>7</sup> *Crowell v. Benson*, 285 U.S. 22, 50–51 (1932).

<sup>8</sup> *Id.* at 51. For decades, the Court suggested that certain claims of private right may be settled outside an Article III court, subject to appellate review, *see Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 853–54 (1986); *Crowell*, 285 U.S. at 51, though, more recently, it has called that view into question, *see Stern v. Marshall*, 564 U.S. 462, 489–92 (2011). At the same time, it has broadened the “public rights” category from cases involving the government as a named party to cases where a claim is “integrally related to particular Federal Government action.” *Id.* at 490–91.

<sup>9</sup> 138 S. Ct. 1365 (2018).

<sup>10</sup> *Id.* at 1373.

English attitudes toward patent grants and revocations.<sup>11</sup> Though *Oil States* was, in some ways, a predictable outcome of the Court's prior formulations of the public rights inquiry, it failed to justify its increased historical granularity by reference to the interests actually at stake: individual fairness, separation of powers, and effective governance.

The United States Patent and Trademark Office (USPTO) is responsible for granting patents for novel claims.<sup>12</sup> Because of the vast number of patent applications<sup>13</sup> and limited information available to USPTO when it first reviews them, Congress in 2011 created "inter partes review"<sup>14</sup> (IPR), which allows USPTO to cancel a patent following a challenge to its validity.<sup>15</sup> Once a petitioner seeks IPR and a patent's owner responds, the USPTO Director decides whether "the petitioner would [likely] prevail with respect to at least 1 of the claims challenged."<sup>16</sup> If so, administrative patent judges sitting on the Patent Trial and Appeal Board<sup>17</sup> (PTAB) conduct a "trial," complete with discovery and on-the-record hearings.<sup>18</sup> PTAB then issues a final written decision upholding or cancelling the patent within one year.<sup>19</sup>

In 2001, Oil States Energy Services, LLC ("Oil States") patented a "lockdown mechanism" for drilling equipment.<sup>20</sup> In 2012, it sued Greene's Energy Group, LLC ("Greene's Energy") in the Eastern District of Texas for infringing the patent.<sup>21</sup> Greene's Energy petitioned USPTO to institute IPR,<sup>22</sup> arguing that the patent was invalid because two of its claims were not novel.<sup>23</sup> Though the district court denied Greene's

<sup>11</sup> See *id.* at 1377–78; *id.* at 1381–85 (Gorsuch, J., dissenting).

<sup>12</sup> See 35 U.S.C. §§ 1–2, 101–102 (2012); see also *General Information Concerning Patents*, U.S. PATENT & TRADEMARK OFF. (Oct. 2015), <https://www.uspto.gov/patents-getting-started/general-information-concerning-patents> [<https://perma.cc/26RQ-SR2Z>].

<sup>13</sup> In 2015, USPTO received about six hundred thousand applications and approved roughly half. U.S. PATENT & TRADEMARK OFFICE, U.S. PATENT STATISTICS CHART CALENDAR YEARS 1963–2015 (2016), [https://www.uspto.gov/web/offices/ac/ido/oeip/taf/data/us\\_stat.htm](https://www.uspto.gov/web/offices/ac/ido/oeip/taf/data/us_stat.htm) [<https://perma.cc/HR4C-CNRV>].

<sup>14</sup> Leahy-Smith America Invents Act, Pub. L. No. 112–29, 125 Stat. 284 (2011) (codified as amended in scattered sections of 35 U.S.C.); *Oil States*, 138 S. Ct. at 1371.

<sup>15</sup> IPR is USPTO's latest tool for post-issuance patent cancellation. Since 1980, Congress has authorized various mechanisms for cancelling patents, though none made as great a use of adversarial proceedings as IPR. *Oil States*, 138 S. Ct. at 1370–71.

<sup>16</sup> 35 U.S.C. § 314(a).

<sup>17</sup> *Id.* § 6(c).

<sup>18</sup> *Id.* § 316(a)(5)–(10); Trial Practice Before the Patent Trial and Appeal Board, 37 C.F.R. pt. 42 (2012).

<sup>19</sup> 35 U.S.C. § 316(a)(11). PTAB has the option but not the obligation to drop the proceedings if the patent holder and the challenger settle. *Id.* § 317(a).

<sup>20</sup> U.S. Patent No. 6,179,053 (filed Aug. 12, 1999).

<sup>21</sup> *Oil States*, 138 S. Ct. at 1372.

<sup>22</sup> Greene's Energy Grp., LLC v. Oil States Energy Servs., LLC, No. IPR2014-00216, 2015 WL 2089371, at \*1 (P.T.A.B. May 1, 2015).

<sup>23</sup> *Id.* at \*6–7.

Energy's motion for summary judgment,<sup>24</sup> PTAB determined the claims were unpatentable and cancelled Oil States' patent.<sup>25</sup>

Oil States sought review in the United States Court of Appeals for the Federal Circuit, arguing that its patent was valid and that IPR violated Article III and the Seventh Amendment.<sup>26</sup> The Court of Appeals summarily affirmed, bound by another Federal Circuit case decided while *Oil States* was pending.<sup>27</sup> That case rejected similar challenges to IPR and reasoned that a patent's origin in a federal regulatory scheme made it a matter of public right.<sup>28</sup>

The Supreme Court affirmed. Writing for the Court, Justice Thomas<sup>29</sup> argued that IPR fell "squarely within" the public rights doctrine's historical core of "matters 'arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it.'"<sup>30</sup> Patents are, Justice Thomas reasoned, "public franchises,"<sup>31</sup> which the government creates by "tak[ing] from the public rights of immense value, and bestow[ing] them upon the patentee."<sup>32</sup> They are therefore "creature[s] of statute law," not historically private, common law creations.<sup>33</sup> Congress's Article I patent power and long history of delegating that power to the Executive confirmed that patent issuance requires no Article III involvement.<sup>34</sup>

Since patent rights are Congress's to grant, the majority reasoned, Congress may attach conditions to that grant.<sup>35</sup> Analogizing to Congress's power to "grant a franchise that permits a company to erect a toll bridge, but qualify the grant by reserving its authority to revoke or amend the

<sup>24</sup> *Oil States Energy Servs., L.L.C. v. Trojan Wellhead Prot., Inc.*, No. 12-cv-611, 2014 WL 12360946, at \*11 (E.D. Tex. June 23, 2014).

<sup>25</sup> *Greene's Energy Grp.*, No. IPR2014-00216, 2015 WL 2089371, at \*2.

<sup>26</sup> *Oil States*, 138 S. Ct. at 1372. The Seventh Amendment guarantees that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

<sup>27</sup> *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 639 F. App'x 639 (Fed. Cir. 2016) (mem.).

<sup>28</sup> *MCM Portfolio LLC v. Hewlett-Packard Co.*, 812 F.3d 1284, 1291 (Fed. Cir. 2015).

<sup>29</sup> Justice Thomas was joined by Justices Kennedy, Ginsburg, Breyer, Alito, Sotomayor, and Kagan.

<sup>30</sup> *Oil States*, 138 S. Ct. at 1373 (quoting *Cowell v. Benson*, 285 U.S. 22, 50 (1932)).

<sup>31</sup> *Id.* (quoting *Seymour v. Osborne*, 78 U.S. (11 Wall.) 516, 533 (1870)).

<sup>32</sup> *Id.* (quoting *United States v. Am. Bell Tel. Co.*, 128 U.S. 315, 370 (1888)).

<sup>33</sup> *Id.* at 1374 (quoting *Crown Die & Tool Co. v. Nye Tool & Mach. Works*, 261 U.S. 24, 40 (1923)).

<sup>34</sup> See *id.* Article I vests Congress with the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

<sup>35</sup> See *Oil States*, 138 S. Ct. at 1374–75.

franchise,”<sup>36</sup> Justice Thomas held that Congress could similarly condition patent rights on USPTO’s “authority to reexamine — and perhaps cancel” such rights through IPR.<sup>37</sup>

Justice Thomas rejected Oil States’ historical argument that PTAB’s cancellation of its patent violated “the ‘general’ principle that ‘Congress may not withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.’”<sup>38</sup> He acknowledged that patent disputes were often decided in eighteenth-century English courts — either when a defendant of an infringement action challenged the patent’s validity, or when a challenger filed a writ of *scire facias*.<sup>39</sup> But there also existed “another means of canceling a patent in eighteenth-century England, which more closely resembles IPR: a petition to the Privy Council to vacate a patent.”<sup>40</sup> Because this council, “composed of the Crown’s advisers,” could cancel patents, “it was well understood at the founding that a patent system could include a practice of granting patents subject to potential cancellation.”<sup>41</sup> As “nothing in the text or history of the Patent Clause or Article III” suggested the Framers’ intent to abrogate that understanding, neither provision barred IPR.<sup>42</sup> Finally, for the same reasons that Article III adjudication was unnecessary, Justice Thomas concluded that Oil States had no Seventh Amendment right to a jury trial.<sup>43</sup>

Justice Breyer concurred.<sup>44</sup> His one-paragraph opinion agreed that IPR adjudicates public rights and therefore passes muster under Article III and the Seventh Amendment,<sup>45</sup> but also argued that neither the

<sup>36</sup> *Id.* at 1375 (citing *Louisville Bridge Co. v. United States*, 242 U.S. 409, 421 (1917)).

<sup>37</sup> *Id.* at 1374 (quoting *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2137 (2016)). Oil States’ patent was granted some ten years before Congress established IPR, but, as the majority emphasized, “Oil States [did] not challenge the retroactive application of inter partes review.” *Id.* at 1379.

<sup>38</sup> *Id.* at 1376 (quoting *Stern v. Marshall*, 564 U.S. 462, 484 (2011)). Justice Thomas also dismissed several nineteenth-century precedents on the grounds that they interpreted a prior statute, not Article III. *See id.* n.3.

<sup>39</sup> *Id.* at 1376. Writs of *scire facias* date to the thirteenth century and allowed any citizen to demand, in the Crown’s name and with the Attorney General’s approval, that a patent holder appear before a court to defend his patent’s validity. Mark A. Lemley, *Why Do Juries Decide if Patents Are Valid?*, 99 VA. L. REV. 1673, 1683 (2013). Though these writs were filed in the Court of Chancery, the court would “sit as a law court when adjudicating the writ.” *Oil States*, 138 S. Ct. at 1376 (citing Lemley, *supra*, at 1683–85).

<sup>40</sup> *Oil States*, 138 S. Ct. at 1377 (citing Lemley, *supra* note 39, at 1681–82).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* Justice Thomas also rejected Oil States’ “‘looks like’ test” for evaluating administrative adjudications, reasoning that the right adjudicated, rather than the word “trial” or reliance on “some of the features of adversarial litigation,” determines whether an Article III court is necessary. *Id.* at 1378.

<sup>43</sup> *Id.* at 1379.

<sup>44</sup> Justice Breyer was joined by Justices Ginsburg and Sotomayor.

<sup>45</sup> *Oil States*, 138 S. Ct. at 1379 (Breyer, J., concurring).

Court's opinion nor its precedent should be read to preclude adjudication of private rights by non-Article III bodies.<sup>46</sup>

Justice Gorsuch dissented.<sup>47</sup> Invoking the specter of the patent applicant who invests significant resources in getting her patent approved to see it revoked when "someone later emerges from the woodwork, arguing that it was all a mistake,"<sup>48</sup> Justice Gorsuch argued that IPR's very efficiency ran counter to the Constitution's "often vitally inefficient []protections."<sup>49</sup> Comparing the USPTO Director's authority over PTAB to the Crown's power over colonial judges,<sup>50</sup> Justice Gorsuch postulated that "when an independent Judiciary gives ground to bureaucrats in the adjudication of cases, the losers will often prove the unpopular and vulnerable."<sup>51</sup>

To determine "which cases independent judges must hear,"<sup>52</sup> Justice Gorsuch articulated much the same test as the majority, arguing that "'[w]hen a suit is made of the stuff of the traditional actions at common law tried by the courts at Westminster in 1789 . . . and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with' Article III judges."<sup>53</sup> But whereas the majority pointed to the Privy Council's powers as evidence that patents could be challenged outside court circa 1789, the dissent argued that this authority had been displaced by the Founding.<sup>54</sup> This "shift to courts paralleled a shift in thinking" about patents: from royal favors to private property, which did not "endow[] accidental and anticompetitive monopolies on the fortunate few but [acted instead] as a procompetitive means to secure to individuals the fruits of their labor and ingenuity."<sup>55</sup>

Similarly, the dissent argued, American patents were challenged exclusively in court from the Founding until 1980.<sup>56</sup> The Patent Clause made clear the Framers' embrace of patents as private property designed to advance innovation, rather than favors to be given and taken

<sup>46</sup> *Id.* at 1379–80.

<sup>47</sup> Justice Gorsuch was joined by Chief Justice Roberts.

<sup>48</sup> *Id.* at 1380 (Gorsuch, J., dissenting).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1380–81 ("The Director of the Patent Office . . . supervises and pays the Board members responsible for deciding patent disputes[, and may] . . . select which of these members, and how many of them, will hear any particular patent challenge. If they (somehow) reach a result he does not like, the Director can add more members to the panel — including himself — and order the case reheard." (internal citations omitted)).

<sup>51</sup> *Id.* at 1381.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* (alteration and omission in original) (quoting *Stern v. Marshall*, 564 U.S. 462, 484 (2011)).

<sup>54</sup> See *id.* at 1382–83.

<sup>55</sup> *Id.* at 1382. Justice Gorsuch distinguished isolated instances where the Privy Council continued to hear patent challenges in the late eighteenth and early nineteenth centuries as reflecting wartime necessity rather than British legal norms. See *id.* at 1383.

<sup>56</sup> See *id.* at 1383–84.

by the executive,<sup>57</sup> and the Court's precedents confirmed that understanding.<sup>58</sup> Allowing USPTO to cancel patents "signal[ed] a retreat from," if not "a rout" of, "Article III's guarantees."<sup>59</sup>

The *Oil States* majority and dissenting opinions are notable not just for their extensive historical detail, but also for the near-conclusive weight they attach to the narrow fact of how patents were challenged in eighteenth-century England. Though rooted in a literal application of the Court's most recent attempts to shore up Article III's protections, this laser-like historical focus marks a break from the Court's previous, more holistic inquiries. Those inquiries, like the older public and private rights distinction they modified, turned largely on a particular scheme's implications for adjudicatory fairness, judicial independence, and effective governance. By contrast, neither the *Oil States* majority nor the dissent explained how its increased historical granularity relates to the interests protected by Article III or advanced by IPR. The upshot, according to opinions joined by nine Justices, is that Congress's ability to address a new and important economic challenge turns on the Court's assessment of how the Framers perceived the power of the English Privy Council circa 1789, rather than the effect of the scheme Congress actually designed on the interests Article III aims to protect.

The groundwork for *Oil States* was laid by the Court's recent attempts to wall off a core set of issues for Article III courts without greatly disturbing its previous accommodations to modern government.<sup>60</sup> As government grew throughout the nineteenth and twentieth centuries, the Court approved non-Article III adjudications of an increasing variety of "public rights" disputes between the government and private parties with a series of evolving and not fully consistent rationales.<sup>61</sup> In the 1930s, the Court even seemed to approve administrative adjudication of *private* rights (subject to *de novo* legal and deferential

<sup>57</sup> See *id.* at 1383.

<sup>58</sup> See *id.* at 1384–85. Specifically, Justice Gorsuch pointed to the Court's decision in *McCormick Harvesting Machine Co. v. Aultman*, 169 U.S. 606 (1898), which held that the "only authority competent to set a patent aside . . . is vested in the courts of the United States, and not in the department which issued the patent." *Id.* at 609. The majority dismissed *McCormick* as grounded in a prior patent statute. *Oil States*, 138 S. Ct. at 1376 n.3.

<sup>59</sup> *Oil States*, 138 S. Ct. at 1386 (Gorsuch, J., dissenting). Justice Gorsuch also called himself "skeptical" of the concurrence's assertion that some private rights could be adjudicated outside Article III courts. *Id.* at 1381 n.1.

<sup>60</sup> See *Stern v. Marshall*, 564 U.S. 462, 493–94 (2011) (holding unconstitutional bankruptcy courts' exercise of jurisdiction over certain state common law claims, while distinguishing the Court's prior approval of administrative adjudications); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 70–72 (1982) (plurality opinion) (same).

<sup>61</sup> See Gordon G. Young, *Public Rights and the Federal Judicial Power: From Murray's Lessee through Crowell to Schor*, 35 BUFF. L. REV. 765, 789–840 (1986). Justifications range from sovereign immunity, see *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856), to the political branches' plenary power over certain questions, see *Ex Parte Bakelite Corp.*, 279 U.S. 438, 458–59 (1929).

factual review), at least in technical areas requiring administrative expertise.<sup>62</sup> More recently, however, the Court doubled down on the public/private rights distinction,<sup>63</sup> while avoiding much upset to the administrative state by broadening the “public” rights category to include seemingly “private” disputes that are sufficiently intertwined with a federal regulatory regime.<sup>64</sup> But the result — that “what makes a right ‘public’ rather than private is that the right is integrally related to particular Federal Government action”<sup>65</sup> — limits Article III’s protections in precisely those cases where independence from other federal actors might be most needed.<sup>66</sup>

Perhaps sensing this weakness, the Court in *Stern v. Marshall*<sup>67</sup> inverted the usual formulation, demarcating not just where the public rights doctrine ends (a line that shifts with Congress’s decisions about how to structure a federal regulatory scheme), but also where Article III protections for private rights kick in. Transforming a pithy phrase from a prior Justice Rehnquist concurrence<sup>68</sup> into its holding, the *Stern* Court made clear: “When a suit is made of ‘the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,’ and is brought within the bounds of federal jurisdiction, the responsibility for deciding that suit rests with Article III judges in Article III courts.”<sup>69</sup> While *Stern* continued to cite more flexible balancing tests for evaluating whether a right was public,<sup>70</sup> this language suggested that a historical pedigree stretching to Founding-era England sufficed to make it private.

The narrowness of that inquiry stands in contrast to the Court’s earlier, more nuanced attempts to protect Article III values while acknowledging the exigencies of modern government. The Court’s pre-*Stern* tests coupled historical inquiries with consideration of the aims of a particular administrative scheme, the scope of a non–Article III body’s jurisdiction, the parties’ consent to that jurisdiction, and the presence of

<sup>62</sup> *Crowell v. Benson*, 285 U.S. 22, 51–54 (1932); *Young*, *supra* note 61, at 787–89.

<sup>63</sup> See *Stern*, 564 U.S. at 488–91; *N. Pipeline*, 458 U.S. at 70 (plurality opinion) (insisting that “only [public rights] . . . may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination”).

<sup>64</sup> See *Stern*, 564 U.S. at 488–91.

<sup>65</sup> *Id.* at 490–91.

<sup>66</sup> For the criticism that the Court’s public rights jurisprudence gets Article III backward, affording the greatest constitutional protection to claims most marginal to the federal constitutional scheme, see Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 208–11.

<sup>67</sup> 564 U.S. 462.

<sup>68</sup> See *N. Pipeline*, 458 U.S. at 90 (Rehnquist, J., concurring in the judgment).

<sup>69</sup> *Stern*, 564 U.S. at 484 (internal citation omitted) (quoting *N. Pipeline*, 458 U.S. at 90 (Rehnquist, J., concurring in the judgment)).

<sup>70</sup> See *id.* at 491 (first citing *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 571–75 (1985); then citing *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 836 (1986)).

Article III review.<sup>71</sup> In balancing these factors, the Court did not treat a claim's historically "private" pedigree as dispositive, but rather as one indicator of whether Congress "improperly ha[d] encroached on the federal judiciary" by stripping from it "the types of matters [historically] subject to resolution by Article III courts."<sup>72</sup> And though the Court occasionally emphasized Founding-era history as a guide to "Congress" and this Court's understanding of what power was reserved to the Judiciary by the Constitution as a matter of historical fact,<sup>73</sup> it also considered post-ratification history and its own precedents,<sup>74</sup> not to mention "logic . . . or the Constitution."<sup>75</sup> The Court's resulting balancing tests may have been "open-ended,"<sup>76</sup> "amorphous,"<sup>77</sup> or divorced from the Constitution's written text,<sup>78</sup> but they nonetheless centered on the actual interests at stake: interests in "impartial and independent federal adjudication"<sup>79</sup> of individuals' claims and an independent judiciary as "an inseparable element of the constitutional system of checks and balances,"<sup>80</sup> balanced against society's competing need for efficient, technically expert administration and congressional flexibility.<sup>81</sup>

Of course, the Court's chosen vocabulary of "public" and "private" rights, derived from nineteenth-century cases embracing formalist distinctions, might seem poorly tailored toward navigating these values<sup>82</sup> — a point the Court has itself acknowledged in articulating more flexible balancing tests.<sup>83</sup> But even in its traditional form, the public/private rights distinction still aims to protect impartial adjudication of important individual interests, while preserving political freedom of action when those interests are not implicated<sup>84</sup> — in other words, to advance

<sup>71</sup> See *Schor*, 478 U.S. at 853–56.

<sup>72</sup> *Id.* at 854.

<sup>73</sup> *N. Pipeline*, 458 U.S. at 68 n.20 (plurality opinion).

<sup>74</sup> E.g., *id.* at 64–75.

<sup>75</sup> *Id.* at 76.

<sup>76</sup> Bator, *supra* note 3, at 257.

<sup>77</sup> Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 917 (1988).

<sup>78</sup> John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1953–55 (2011) (criticizing the Court's reliance on free-standing "separation of powers" principles not grounded in specific constitutional provisions, *id.* at 1955).

<sup>79</sup> Commodity Futures Trading Comm'n v. *Schor*, 478 U.S. 833, 848 (1986).

<sup>80</sup> *Id.* at 850 (quoting *N. Pipeline*, 458 U.S. at 58).

<sup>81</sup> *Id.* at 848–50, 856; see also *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 589–90 (1985); Fallon, *supra* note 77, at 935–43 (canvassing these values).

<sup>82</sup> See Bator, *supra* note 3, at 250 (claiming that the concept of public rights admits of "no intelligent" explanation); Fallon, *supra* note 77, at 951–54; Redish, *supra* note 66, at 203–04.

<sup>83</sup> See *Thomas*, 473 U.S. at 585–86, 593–94.

<sup>84</sup> See Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 566–73 (2007) (arguing that the public rights doctrine historically served to protect both individuals' interests in "core" private rights, *id.* at 567, and the "respective roles of the political branches and the judiciary in the constitutional separation of powers," *id.* at 568); *id.* at 613–24 (arguing for its continued relevance today).

individual fairness, separation of powers, and effective governance. Conceived thus, the doctrine's lodestar is whether "the legal rules in place at a particular time have caused legal interests to vest in a single private individual," requiring judicial protection as a matter of fairness and settled expectations,<sup>85</sup> not whether the legal rules in place in eighteenth-century England would have done so. This framing might lead to different results from the Court's balancing tests or academics' preferred alternatives,<sup>86</sup> but it would still plausibly relate to the same set of interests generally thought relevant to Article III.

By contrast, in applying *Stern*'s test, neither *Oil States*' majority nor minority opinion makes more than a rhetorical effort to connect the powers of the Privy Council to the individual or institutional interests implicated by IPR. While Justices Thomas and Gorsuch both analyze English patent cases exactingly,<sup>87</sup> both revert to much more generalized burden-shifting when arguing that the Constitution incorporated their particular understandings of those cases.<sup>88</sup> Neither opinion explains whether Congress, in fashioning new administrative schemes, needs to engage in a historical analysis similar to the Court's, nor seriously grapples with the concerns about individual rights or adjudicatory independence that figured in the parties' briefs<sup>89</sup> and at oral argument.<sup>90</sup> Nor

<sup>85</sup> *Id.* at 573.

<sup>86</sup> See generally Fallon, *supra* note 77 (advancing an appellate review theory that would accord Congress significant discretion in assigning initial adjudications to non-Article III bodies but require varying degrees of judicial review); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643 (2004) (arguing that Congress has broad power to place certain adjudications in non-Article III tribunals, so long as such tribunals remain inferior and subject to the Supreme Court).

<sup>87</sup> See *Oil States*, 138 S. Ct. at 1377 (first citing *Darby v. Betton*, PC2/99, pp. 358–59 (P.C. 1745–1746); and then citing *Baker v. James*, PC2/103, pp. 320–21, 346–47 (P.C. 1752)); *id.* at 1383 (Gorsuch, J., dissenting) (first citing *Bd. of Ordnance v. Wilkinson*, PC2/123 (P.C. 1779); then citing *Grill [Grice] v. Waters*, PC2/127 (P.C. 1782); and then citing *Bd. of Ordnance v. Parr*, PC1/3919 (P.C. 1810)).

<sup>88</sup> See *Oil States*, 138 S. Ct. at 1377 (majority opinion) ("The parties have cited nothing in the text or history of the Patent Clause or Article III to suggest that the Framers were not aware [of the Privy Council's patent cancellation powers]."); *id.* at 1383 (Gorsuch, J., dissenting) ("While the Court is correct that the Constitution's Patent Clause 'was written against the backdrop' of English practice, it's also true that the Clause sought to *reject* some of early English practice . . . . [T]he framers wrote the Clause to protect only procompetitive invention patents that are the product of hard work and insight and 'add to the sum of useful knowledge.'") (citation omitted) (first quoting *Oil States*, 138 S. Ct. at 1372–73 (majority opinion); and then quoting *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 6 (1966))).

<sup>89</sup> See Brief for Petitioner at 45–47, *Oil States*, 138 S. Ct. 1365, (No. 16-712) (arguing that PTAB's dependence on the USPTO Director has led to unfair decisions); *id.* at 47–50 (arguing that Congress impermissibly shifted cases from courts to a more subservient body, "a purpose . . . flatly inconsistent with the separation-of-powers principles inherent in Article III," *id.* at 49); Brief for Respondent Greene's Energy Group, LLC at 38–39, *Oil States*, 138 S. Ct. 1365, (No. 16-712) (arguing that IPR is fair to patent holders and does not "threaten the institutional integrity of the judicial branch," *id.* at 38).

<sup>90</sup> See Transcript of Oral Argument at 29, *Oil States*, 138 S. Ct. 1365, (No. 16-712), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2017/16-712\\_879d.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-712_879d.pdf) [https://perma.cc/

does either opinion focus on the comparative competencies that might have led Congress to delegate authority to PTAB, rather than to Article III courts.

To be sure, Justice Gorsuch invokes some of these concerns — dwelling at length on PTAB’s inferiority to the USPTO Director and its potential unfairness to patent holders.<sup>91</sup> But he fails to explain how the merit of these complaints relates to his and the majority’s shared historical emphasis. It seems doubtful, for instance, that Oil States’ reliance on its patent turned on its view of whether the Framers believed writs of *scire facias* had fully or only partially eclipsed petitions to the Privy Council by 1789. And assuming Justice Gorsuch is correct, for instance, that patents evolved from public favors to private entitlements meant to reward innovation,<sup>92</sup> he does not explain why their cancellation at the hands of “a political appointee . . . instead of an independent judge”<sup>93</sup> is any fairer to patent holders if that evolution occurred after, not before, the Founding.

Opinions joined by nine Justices in *Oil States* demonstrate a doctrine unmoored from the values that underlie it. Allowing adjudications outside Article III implicates a host of complex concerns: (un)fairness to individuals, a potential erosion of separation of powers, and possible gains in effective administration. None of these turns on eighteenth-century English practice. Though a perfect calibration of these interests may remain out of reach, they demand something more than *Oil States’* historical myopia.

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<sup>22</sup>AR-VDNV] (Breyer, J.) (“[S]uppose that the patent has been in existence without anybody reexamining it for 10 years and, moreover, the company’s invested \$40 billion in developing it. And then suddenly somebody comes in and says . . . we want it reexamined, not in court but by the Patent Office. Now, that seems perhaps that it would be a problem.”); *id.* at 36–37 (Gorsuch, J.) (referring to concerns that panels would be “pack[ed] by a director who’s unhappy with the results”).

<sup>91</sup> *Oil States*, 138 S. Ct. at 1380–81 (Gorsuch, J., dissenting).

<sup>92</sup> One animating purpose behind IPR was the concern that the patent system, instead of rewarding innovation, was allowing “patent trolls” to demand innovators either “pay ransom” or defend costly infringement actions based on “bogus” patents. Eduardo Porter, *Patent Trolls’ Recede as Threat to Innovation. Will Justices Change That?*, N.Y. TIMES (Nov. 29, 2017), <https://nyti.ms/2hRKqta> [<https://perma.cc/CT9S-DJFG>].

<sup>93</sup> *Oil States*, 138 S. Ct. at 1380 (Gorsuch, J., dissenting).