THE VACCINE ACT AFTER *OIL STATES ENERGY SERVICES, LLC V. GREENE'S ENERGY GROUP, LLC*: WHY SPECIAL MASTERS SHOULD NOT BE TREATED SO SPECIAL

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ABSTRACT

In April 2018, the Supreme Court handed down Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, a decision addressing whether adjudicative authority vested in the U.S. Patent and Trademark Office's Patent Trial and Appeal Board, an Article I tribunal established by the Leahy-Smith America Invents Act, violated either Article III or the Seventh Amendment of the U.S. Constitution. The Court held the establishment of that Article I tribunal did not violate Article III or the Seventh Amendment because the dispute at issue in* Oil States *involved public rights not existent at common law, all of which accorded Congress with authority to bypass Article III courts as the initial adjudicative forum.*

The Court's reasoning in Oil States *provides a vehicle by which the U.S. Court of Appeals for the Federal Circuit should reconsider its interpretation of the National Childhood Vaccine Injury Act of 1986 because the current interpretative regime forces petitioners to litigate claims in an Article I forum that has arrogated Article III authority over common law claims for vaccination injuries. In three Parts, this Article reviews the Vaccine Act, discusses how* Oil States *affects the constitutional analysis of the statute, and comments on why a deferential standard of review in favor of Article I tribunals creates a usurpation of Article III power. The conception of the Vaccine Act was to help injured children while alleviating exposure to vaccine manufacturers. However well intended, deferential review of a special master's findings of fact undermines judicial authority and hallows the promise that the people today and tomorrow*

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enjoy no fewer rights against governmental intrusion than those who came before. The Vaccine Act, as interpreted, commandeers a preexisting common law regime and replaces it with an edifice neither contemplated nor recognized by the Constitution. Once freed from the constraint of deferential review of factual findings, the Federal Circuit can restore constitutional order to a statute fraught with complications over how to address the effects of vaccinations in the United States. The Vaccine Act will only have a clean bill of health once it adheres to constitutional strictures.

TABLE OF CONTENTS

I. INTRODUCTION

Patent law is a stranger to the federal law governing vaccine-injury recovery. About the only thing they have in common on the surface is appellate review by the U.S. Court of Appeals for the Federal Circuit.[1] This supposition holds firm until the discussion goes below the superficial and

1. *See generally* 28 U.S.C. § 1295 (2012).

explores how non-Article III tribunals address certain rights and manage certain obligations.

In April 2018, the Supreme Court released *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, a decision addressing whether adjudicative authority vested in the U.S. Patent and Trademark Office's Patent Trial and Appeal Board, an Article I tribunal established by the Leahy-Smith America Invents Act, violated either Article III or the Seventh Amendment of the U.S. Constitution.[2] Justice Clarence Thomas, writing for seven Justices, explained that the congressional grant of authority for the Board "to reconsider and to cancel an issued patent claim in limited circumstances" did not violate either constitutional provision because patent rights are "public franchises" that "did not exist at common law."[3] Although it was a case about patents and the Board's authority over private litigants, *Oil States* has resonating effects casting doubt on the propriety of non-Article III adjudicative bodies receiving deference when they review common law claims.[4] Captured in the tension between Article I and Article III is the issue of how individuals seek relief for vaccine-related injuries.

Congress passed the National Childhood Vaccine Injury Act of 1986 to help parents seek compensation for vaccine-related injuries otherwise too costly and difficult to pursue.[5] To stabilize loss of confidence in the vaccine industry, an injured person (or guardian) may file a petition for compensation in the U.S. Court of Federal Claims, naming the Secretary of the Department of Health and Human Services as the respondent.[6] A special master makes an informal adjudication of the petition, which, as mandated by statute, the U.S. Court of Federal Claims reviews with deference to the special master's findings of fact.[7] The U.S. Court of Federal Claims enters the judgment,[8] and the petitioner has the option of appealing from the judgment to the Federal Circuit.[9] Although the statute makes no mention of the standard of review imposed on the Federal Circuit, that court has

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

3. *Id.* at 1368, 1374.

4. *See generally id.* at 1379–86 (Gorsuch, J., dissenting).

5. Bruesewitz v. Wyeth LLC, 562 U.S. 223, 226 (2011) (citation omitted).

6. *See id.* at 228; 42 U.S.C. § 300aa-11(a)(1) (2012).

7. *See* Griglock v. Sec'y of Health & Human Servs., 687 F.3d 1371, 1374 (Fed. Cir. 2012); *see also* 42 U.S.C. § 300aa-12(e)(2)(B).

8. *Bruesewitz*, 562 U.S. at 228.

9. *See Griglock*, 687 F.3d at 1374.

interpreted the statute to also bind the Federal Circuit to defer to the special master's factual findings.[10] Regardless of whether an appeal is filed, the petitioner is put to an election upon entry of judgment: (1) accept the judgment and forgo a traditional tort claim for damages or (2) reject the judgment and seek tort relief from the vaccine manufacturer.[11] To those ends, although the Vaccine Act provides a no-fault program for which children injured by a vaccination can be compensated, it also immunizes vaccine manufacturers from a variety of tort claims.[12] So does a law designed to help children in theory harm them in practice by shielding essential fact-finding from review? *Oil States* helps answer that question.

The Constitution vests judicial power in the federal courts,[13] which, as *Oil States* clarified, touches on the power to hear and decide cases about private rights.[14] Before *Oil States*, the settled expectation was that an Article I court could not enter final judgment on common law claims but, instead, could propose factual findings and legal conclusions reviewed de novo by an Article III court.[15] "[T]he distinction between public and private rights" was dipositive in *Oil States*.[16] And this dichotomy builds on settled expectations, which suggests that the Vaccine Act's imposition of deference to special masters is built on a foundation of sand.

The Vaccine Act subsumed private causes of action with no tether to the sovereign.[17] Claims originating from negligence and other common law claims against manufacturers are now adjudicated outside the Judicial Branch in Article I tribunals.[18] These claims are vestiges of private parties litigating under a patchwork of state law claims.[19] They neither depend on a

10. *See* Hines *ex rel.* Sevier v. Sec'y of the Dep't of Health & Human Servs., 940 F.2d 1518, 1523–24 (Fed. Cir. 1991) (applying 42 U.S.C. § 300aa-12(e)(2)(B)).

11. *See* 42 U.S.C. § 300aa-21(a).

12. *See Bruesewitz*, 562 U.S. at 228–30 (citation omitted).

13. U.S. CONST. art. III; *see* U.S. CONST. amend. VII.

14. *See* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1372–73 (2018).

15. *See, e.g.*, Stern v. Marshall, 564 U.S. 462, 471–72, 475 (2011).

16. *See Oil States*, 138 S. Ct. at 1373.

17. *See* Shalala v. Whitecotton, 514 U.S. 268, 269 (1995).

18. *See generally* Bruesewitz v. Wyetch LLC, 562 U.S. 223, 227–31 (2011).

19. *See id.* ("Much of the concern centered around vaccines against diphtheria, tetanus, and pertussis (DTP), which were blamed for children's disabilities and developmental delays. This led to a massive increase in vaccine-related tort litigation. Whereas between 1978 and 1981 only nine product-liability suits were filed against DTP manufacturers, by the mid-1980's the suits numbered more than 200 each year.").

regulatory scheme nor exist solely as a creature of statute.[20] Petitioners, all the while, are forced to litigate in a tribunal to which they have not consented.[21] That tribunal, to compound the point, suffers from want of any meaningful Article III oversight.[22] The Vaccine Act, as interpreted, takes power from one branch and gives it to another.

This Article argues that the Federal Circuit should reconsider its interpretation of the Vaccine Act in view of *Oil States* because the current regime violates Article III by forcing petitioners to litigate claims in an Article I forum that has arrogated judicial authority over common law claims for vaccination injuries. In three Parts, this Article reviews the Vaccine Act, discusses how *Oil States* affects the constitutional analysis of the statute, and comments on why a deferential standard of review in favor of Article I tribunals creates a usurpation of Article III power. The conception of the Vaccine Act was to help injured children while alleviating exposure to vaccine manufacturers.[23] However well intended, deferential review of a special master's findings of fact undermines judicial authority and hallows the promise that "the people today and tomorrow enjoy no fewer rights against governmental intrusion than those who came before."[24] The Vaccine Act, as interpreted, commandeers a preexisting common law regime and replaces it with an edifice neither contemplated nor recognized by the Constitution. Once freed from the constraint of deferential review of factual findings, the Federal Circuit can restore constitutional order to a statute fraught with complications over how to address the effects of vaccinations in the United States. The Vaccine Act will only have a clean bill of health once it adheres to constitutional strictures.

II. NATIONAL CHILDHOOD VACCINE INJURY ACT OF 1986

Justice Antonin Scalia once observed that vaccines have become "victims of their own success."[25] Yet, the documented success of vaccines in preventing the spread of disease through the 1970s and 1980s gave way

20. *See generally id.* at 228–30; *see also Stern*, 564 U.S. at 490.

21. *See* 42 U.S.C. § 300aa-11(a)(1) (2012).

22. *See* Griglock v. Sec'y of Health & Human Servs., 687 F.3d 1371, 1374 (Fed. Cir. 2012).

23. *Bruesewitz*, 562 U.S. at 227–28.

24. Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1386 (2018) (Gorsuch, J., dissenting).

25. *Bruesewitz*, 562 U.S. at 226.

to the public steering concerns away from the threat of those diseases toward the risk of injury associated with the vaccines themselves.[26] The increased popularity of vaccines had the ironic effect of increased blame against vaccines.[27] The shift in thinking from vaccines as beneficent to maleficent led to tort lawsuits against vaccine manufacturers and a series of shortages in the production of vaccines.[28] The collectively jaundiced view of recovering damages from manufacturers further exacerbated low vaccination rates as more parents withdrew their children from vaccination programs.[29] A vicious cycle seemed evitable, prompting the government to act.[30]

A. *The Mechanics of the Vaccine Act*

Congress passed the National Childhood Vaccine Injury Act of 1986 "[t]o stabilize the vaccine market and facilitate compensation."[31] The Vaccine Act created a no-fault adjudicative program "designed to work faster and with greater ease than the civil tort system."[32] An injured person (or guardian with whom trust and authority is provided) can file a petition for compensation in the U.S. Court of Federal Claims, an Article I tribunal,[33] naming the Secretary of Health and Human Services as the respondent.[34] The statute shunts the petition to a special master who performs an "informal adjudication" within 240 days (unless one of two exceptions applies).[35] The U.S. Court of Federal Claims must then review objections to the decision and enter final judgment under a similarly tight deadline.[36] The U.S. Court of Federal Claims, by statute, reviews the special master's factual findings with deference and overturns those findings if they are arbitrary or capricious.[37] The petitioner has the option of appealing from the judgment

26. *Id.* (citation omitted).
27. *See id.*
28. *Id.* at 227 (citation omitted).
29. *Id.* (citation omitted).
30. *See id.* (citation omitted).
31. *Id.* at 228.
32. Shalala v. Whitecotton, 514 U.S. 268, 269 (1995).
33. *See* Petro-Hunt, L.L.C. v. United States, 862 F.3d 1370, 1385 (Fed. Cir. 2017), *cert. denied*, 138 S. Ct. 1989 (2018) (recognizing the Court of Federal Claims as an Article I court).
34. 42 U.S.C. § 300aa-11(a)(1) (2012); *Bruesewitz*, 563 U.S. at 228.
35. *Bruesewitz*, 563 U.S. at 228 (citation omitted).
36. *Id.* (citation omitted).
37. *See* 42 U.S.C. § 300aa-12(e)(2)(B).

to the Federal Circuit, acting as the first instance of Article III review.[38] Although the Vaccine Act does not discuss the standard of review imposed on the Federal Circuit, that court has interpreted the statute as binding the Federal Circuit to review the special master's findings under the same deferential standard as the U.S. Court of Federal Claims.[39] The Federal Circuit's analysis on why deference is owed has been terse, aligning primarily with instances of deferential review for claims not at common law, such as lawsuits challenging antidumping duties or claims against the government.[40]

Though the Vaccine Act imposes no formal qualifications to become a special master,[41] in a job posting from 2017 on the website of the U.S. Court of Federal Claims, a U.S. citizen could apply to be a special master upon attaining 10 years of experience practicing law, "professional competence," "demonstrated familiarity with the federal court system," and a willingness to travel; preferential hiring was afforded to those with "[m]edical-related knowledge and experience."[42] The U.S. Court of Federal Claims makes all hiring decisions.[43]

Although the U.S. Court of Federal Claims—not the special master—enters the judgment, that judgment necessarily rests on findings derivative of a bygone tort claim.[44] If the petitioner does not appeal to the Federal Circuit, two options exist thereafter: (1) accept the judgment and forgo a traditional tort claim for damages or (2) reject the judgment and seek tort

38. *See id.*; *see also* Griglock v. Sec'y of Health & Human Servs., 687 F.3d 1371, 1374 (Fed. Cir. 2012).

39. *See* Hines *ex rel.* Sevier v. Sec'y of the Dep't of Health & Human Servs., 940 F.2d 1518, 1523–24 (Fed. Cir. 1991) (applying 42 U.S.C. § 300aa-12(e)(2)(B)).

40. *See id.*; *see also* Broekelschen v. Sec'y of Health & Human Servs., 618 F.3d 1339, 1345 (Fed. Cir. 2010) (citing Andreu v. Sec'y of Health & Human Servs., 569 F.3d 1367, 1373 (Fed. Cir. 2009)).

41. *See* 42 U.S.C. § 300aa-12(c)(1) ("There is established within the United States Court of Federal Claims an office of special masters which shall consist of not more than 8 special masters. The judges of the United States Court of Federal Claims shall appoint the special masters, 1 of whom, by designation of the judges of the United States Court of Federal Claims, shall serve as chief special master. The appointment and reappointment of the special masters shall be by the concurrence of a majority of the judges of the court.").

42. UNITED STATES COURT OF FEDERAL CLAIMS VACANCY ANNOUNCEMENT 2 (2017), https://www.uscfc.uscourts.gov/sites/default/files/2017-Special-Master-Announcement.pdf.

43. *See* 42 U.S.C. § 300aa-12(c).

44. *See id.* § 300aa-12(c), (e), (g).

relief from the vaccine manufacturer.[45] Those same options exist upon resolution of the optional appeal to the Federal Circuit.[46] But if no appeal is lodged, the entire process runs through Article I tribunals.

The speed with which a special master adjudicates turns on whether the vaccine at issue has been previously associated with an injury.[47] The Code of Federal Regulations contains a "Vaccine Injury Table," which lists the vaccines covered under the Vaccine Act, annotates each vaccine's compensable adverse side effects, and indicates how soon after vaccination those side effects should first manifest themselves.[48] Petitioners who show a listed injury manifested itself at the appropriate time are prima facie entitled to compensation, with the government bearing the burden of rebutting the presumption.[49] Petitioners also may recover for unlisted and unspecified side effects, but those petitioners must prove causation without the benefit of statutorily imposed presumptions.[50]

Successful claimants are entitled to various forms of compensation. They may seek recovery for medical, rehabilitation, counseling, special-education, and vocational-training expenses; diminished earning capacity; pain and suffering; and $250,000 for vaccine-related deaths.[51] The Vaccine Act also provides for attorney's fees—even for unsuccessful claims that are not frivolous.[52] These awards are paid out of a fund created by an excise tax on each vaccine dose.[53] So while the case proceeds through the U.S. Court of Federal Claims, it is not a lawsuit against the government but rather an indirect lawsuit against vaccine manufacturers through a trust fund into which they pay.[54]

B. *The Quid Pro Quo Promised by the Vaccine Act*

While the Vaccine Act provides a no-fault program for which injured children can be compensated, it also reduces the tortious exposure of vaccine

45. *Id.* § 300aa-21(a).
46. *See id.*
47. *See* Bruesewitz v. Wyeth LLC, 562 U.S. 223, 228 (2011).
48. *See* 42 U.S.C. § 300aa-14(a); 42 C.F.R. § 100.3 (2017).
49. *Bruesewitz*, 562 U.S. at 228; *see also* 42 U.S.C. § 300aa-13(a)(1).
50. *See* 42 U.S.C. § 300aa-11(c)(1)(C)(ii).
51. *See id.* § 300aa-15(a).
52. *See id.* § 300aa-15(e).
53. *See id.* § 300aa-15(i)(2); 26 U.S.C. §§ 4131, 9510 (2012).
54. *See, e.g.*, Beck v. Sec'y of the Dep't of Health & Human Servs., 924 F.2d 1029, 1034–35 (Fed. Cir. 1991).

manufacturers.[55] Manufacturers are immune from liability for failure to warn of certain side effects if they show compliance with applicable regulations.[56] They also avoid paying punitive damages, absent fraudulent or intentionally misleading conduct.[57] The Vaccine Act also eliminates liability for "a vaccine's unavoidable, adverse side effects," which the Supreme Court has interpreted as preempting at least "all design-defect claims against vaccine manufacturers brought by plaintiffs who seek compensation for injury or death caused by vaccine side effects."[58] The lack of ready options to pursue relief in state court led Justice Sonia Sotomayor to comment in dissent, "Manufacturers, given the lack of robust competition in the vaccine market, will often have little or no incentive to improve the designs of vaccines that are already generating significant profit margins."[59]

Broad-scale immunity and preemption leaves, in effect, the adjudicative regime of the Vaccine Act as the only viable forum for vaccine-related relief.[60] While Congress's power to preempt state tort claims is unquestioned,[61] the Vaccine Act stands out because the first instance of Article III review occurs in an appeals court, which must uphold the special master's findings unless they are arbitrary or capricious.[62] This is unlike other areas in which the administrative record for claims otherwise permissible under common law are reviewed without deference by Article III trial

55. *See* Bruesewitz v. Wyeth LLC, 562 U.S. 223, 229–30 (2011).

56. *See* 42 U.S.C. § 300aa-22(b)–(c).

57. *Id.* § 300aa-23(d)(2).

58. *Bruesewitz*, 562 U.S. at 230, 243 (citing 42 U.S.C. § 300aa-22(b)(1)).

59. *Id.* at 276 (Sotomayor, J., dissenting).

60. Jeff Van Detta & Joanna Apolinsky, *Vaccine Torts and* Bruesewitz v. Wyeth, CORNELL J. L. & PUB. POL'Y (Aug. 22, 2011), http://jlpp.org/blogzine/vaccine-torts-and-bruesewitz-v-wyeth/ ("Because the Supreme Court has effectively found that the [Vaccine Act] preempts the field of compensating victims of vaccine injury, any future reforms in compensating those injured by vaccines will have to come from Congress.").

61. *See Bruesewitz*, 562 U.S. at 240 (majority opinion) ("Although we previously have expressed doubt that Congress would quietly preempt products-liability claims without providing a federal substitute, we have never suggested we would be skeptical of preemption unless the congressional substitute operated like the tort system. We decline to adopt that stance today." (citation omitted)).

62. *See* Griglock v. Sec'y of Health & Human Servs., 687 F.3d 1371, 1374 (Fed. Cir. 2012).

courts.[63] The Vaccine Act's compromise of efficiency alongside immunity has been labeled a "quid pro quo" between the interests of the injured and the manufacturers.[64] Yet how is the quid pro quo faring?

In *Althen v. Secretary of Health and Human Services*, an appeal from 2005, the Federal Circuit laid bare some of the problematic issues under a deferential standard of review for factual findings.[65] Detecting that the special master placed too onerous a burden on a petitioner, Circuit Judge Haldane Robert Mayer concluded the special master erred in applying a heightened burden of proof beyond that which was required by statute.[66] Judge Mayer, a graduate of the United States Military Academy at West Point,[67] observed, "The special master's role is to assist the courts by judging the merits of individual claims on a case-by-case basis."[68] Unable to discern anything arbitrary or capricious about any particular finding, the court relied on legal error, explaining that the petitioner had satisfied her burden as prescribed by statute and "that the government failed to prove that factors unrelated to the vaccine were principally responsible for [her] ailment."[69]

Over ten years later, in *Moriarty v. Secretary of Health and Human Services*, the Federal Circuit vacated and remanded a decision denying compensation because "the special master erred by failing to consider relevant medical and scientific evidence contained in the record."[70] Similar to the reasoning in *Althen*, Circuit Judge Kimberly A. Moore observed that the presumption of a special master having reviewed the entire record is rebutted when the special master makes explicit that this type of review did

63. *See, e.g.*, Tamosaitis v. URS Inc., 781 F.3d 468, 486, 488 (9th Cir. 2015) (observing that a whistleblower suit "is analogous to a wrongful discharge claim at common law" and that "Congress thereby gave an administrative agency a 'first crack' at resolving the dispute; after one year, jurisdiction is available in federal courts, at which point any findings made by the agency have no preclusive effect" (citation omitted)); *see also* 42 U.S.C. § 2000e-5(f)(1) (explaining the process to seek review of Article III courts, which review any record established without deference).

64. *Bruesewitz*, 562 U.S. at 223.

65. Althen v. Sec'y of Health & Human Servs., 418 F.3d 1274, 1281 (Fed. Cir. 2005).

66. *Id.* at 1277.

67. *Haldane Robert Mayer, Circuit Judge*, U.S. CT. APPEALS FED. CIR., http://www.cafc.uscourts.gov/judges/haldane-robert-mayer-circuit-judge (last visited Oct. 28, 2018).

68. *Althen*, 418 F.3d at 1281.

69. *Id.* at 1282.

70. Moriarty v. Sec'y of Health & Human Servs., 844 F.3d 1322, 1328 (Fed. Cir. 2016).

not occur.[71] The court rejected the government's argument that special masters need only consider some of the evidence presented, explaining "[a] special master is required to consider all relevant medical and scientific evidence of record," and "he is obligated to consider such evidence even if it is not explained by the testimony of an expert."[72] The refusal to consider certain evidence, Judge Moore stressed, "is particularly concerning" when the special master who entered the findings did not attend the hearing and instead relied on a transcript of the hearing conducted by a different special master.[73]

Althen and *Moriarty* are cases in which the Federal Circuit was able to detect fissures in the special masters' deferential redoubt to reach results consistent with the statute.[74] Certainly not every case on review is so probing, in part, because of the limited appellate role in resolving findings in this area.[75] *Althen* and *Moriarty* therefore are exceptional and confined to their facts. Congress, no doubt, enacted the Vaccine Act to make a fraught situation more amicable. Yet before addressing what conditions would be sufficient to fully realize the aims of the Vaccine Act, a necessary condition is that such a *détente* square with the Constitution.

III. *OIL STATES ENERGY SERVICES, LLC V. GREENE'S ENERGY GROUP, LLC*: AN ARTICULATION OF WHEN NON-ARTICLE III TRIBUNALS USURP THE AUTHORITY OF ARTICLE III COURTS

The Supreme Court long has viewed Article I tribunals with skepticism, especially when they encroach on the common law traditions superintended by Article III courts.[76] In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, the Supreme Court held unconstitutional a provision of the Bankruptcy Act of 1978, which purported to give non-Article III bankruptcy courts final-judgment authority over state-created

71. *See id.*

72. *Id.* at 1330.

73. *Id.* at 1333.

74. *See id.*; *Althen*, 418 F.3d at 1280–81.

75. Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. REV. 469, 471 (1988) (observing that the arbitrary and capricious standard ranks fourth among six standards of review, ranked from least deferential to most).

76. Ilan Wurman, *The Untold Story of* Lucia v. SEC*: The Constitutionality of Agency Adjudications*, YALE J. ON REG.: NOTICE & COMMENT (Apr. 6, 2018), http://yalejreg.com/nc/the-untold-story-of-lucia-v-sec-the-constitutionality-of-agency-adjudications-by-ilan-wurman/.

common law private rights to recover contract damages, because private-rights disputes "lie at the core of the historically recognized judicial power."[77] In the words of Justice William H. Rehnquist, "damages for breach of contract, misrepresentation, and other counts which are the stuff of the traditional actions at common law tried by the courts at Westminster in 1789" must be tried in an Article III court.[78] In *Commodity Futures Trading Commission v. Schor*, the Court backtracked, concluding that the Commodity Futures Trading Commission could hear a common law counterclaim that was a "necessary incident to the adjudication of [the] federal claims" and was "willingly submitted by the parties for initial agency adjudication."[79] Over 15 years later, *Stern v. Marshall* returned to the steady position from *Northern Pipeline Construction Co.*, concluding a bankruptcy court could not constitutionally adjudicate a defamation suit brought by a third party because the claim arose "under state common law between two private parties."[80] The Court distinguished *Commodity Futures Trading Commission*, explaining that case represented an exception involving a common law counterclaim and administrative claim rolled up as a "single dispute" in a "narrow class of common law claims" in a "particularized area of law" governed by a "specific and limited federal regulatory scheme" in which the agency has "obvious expertise" and whose orders could only be enforceable by a district court.[81] In other words, *Commodity Futures Trading Commission* was unique.

As a case about the appropriate judicial channels to resolve patent invalidity, *Oil States* adds to these precedents and animates how to view Article I tribunals when they resolve disputes between private parties.[82]

77. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 (1982) (plurality opinion), *superseded by statute as to bankruptcy matters*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, *as recognized in* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015).

78. *See id.* at 90 (Rehnquist, J., concurring).

79. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 856–57 (1986).

80. Stern v. Marshall, 564 U.S. 462, 493 (2011).

81. *Id.* at 491 (quoting *Commodity Futures Trading Comm'n*, 478 U.S. at 844, 852–855).

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

A. *How a Case About Reconsidering a Patent's Validity Became a Constitutional Challenge to the Propriety of the Administrative State*

In 2013, Oil States Energy Services, LLC sued Greene's Energy Group, LLC and others, asserting infringement of certain claims of a patent that Oil States held on technology useful for preserving wellhead equipment in the oil and gas industry.[83] In 2014, Greene's responded to the asserted claims by seeking inter partes review, an administrative process created by the Leahy-Smith America Invents Act in which parties engage in an adversarial judicial process to test the validity of challenged patent claims.[84] As prescribed by statute, the petitioner first requests that the director of the Patent and Trademark Office institute a review proceeding.[85] After giving the patent holder an opportunity to respond to the petition, a panel of administrative patent judges from the agency's Patent Trial and Appeal Board must decide within three months whether to institute a review proceeding.[86] Upon a showing that the Patent and Trademark Office erred in issuing the patent, the Board has the authority to invalidate the patent, subject to review by the Federal Circuit.[87]

After the Board concluded the challenged patent claims were invalid,[88] Oil States appealed to the Federal Circuit, asserting that Congress violated Article III and the Seventh Amendment when it authorized an administrative agency to invalidate the challenged patent claims without affording an opportunity for sufficient Article III review and control.[89] In 2016, the Federal Circuit affirmed the Board's decision without a written

83. Ronald Mann, *Argument Preview: Justices to Consider Constitutional Limits on Adjudicatory Authority of Patent and Trademark Office*, SCOTUSBLOG (Nov. 20, 2017, 10:49 AM) [hereinafter Mann, *Argument Preview*], http://www.scotusblog.com/2017/11/argument-preview-justices-consider-constitutional-limits-adjudicatory-authority-patent-trademark-office.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. Greene's Energy Grp., LLC v. Oil States Energy Servs., LLC, No. IPR2014-00216, 2015 Pat. App. LEXIS 5328, at *2–3 (P.T.A.B. May 1, 2015) ("For the reasons that follow, Petitioner has shown by a preponderance of the evidence that claims 1 and 22 of the '053 patent are unpatentable, and Patent Owner's Motion to Amend is denied.").

89. Mann, *Argument Preview*, *supra* note 83.

decision on the merits.[90] Oil States filed a petition for a writ of certiorari to the Federal Circuit, which the Supreme Court granted as to "[w]hether *inter partes* review—an adversarial process used by the Patent and Trademark Office (PTO) to analyze the validity of existing patents—violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury."[91]

The merits-stage briefing offered opposing views about what the Board is and what the Board does. Oil States asserted the administrative process for inter partes review departs from the longstanding British tradition of judicial adjudication of disputes about the invalidity and infringement of patents.[92] Breaking from that tradition, said Oil States, is an improper intrusion on the Constitution's regime of Article III courts addressing claims at common law.[93] The Office of the Solicitor General, in defense of the statute and in support of Greene's Energy, rejoined that patent rights exist as the by-product of administrative action through an executive grant with no common law analogue.[94] The Solicitor General added that it is a steadfast practice of administrative offices to reassess the decision to issue a patent.[95]

The case drew 57 amicus briefs on the merits, which Professor Ronald Mann described as "a remarkable level of attention for what is at bottom a commercial dispute between competing businesses."[96] To some, the case represented a threat to a tool used to stave off abusive litigation against businesses contributing to the economy; to others, the case represented a salvo to reclaim upended property rights from the caprice of administrative decisionmakers.[97]

90. Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 639 F. App'x 639, 640 (Fed. Cir. 2016) (mem.) (per curiam) (citing FED. CIR. R. 36).

91. Petition for a Writ of Certiorari at i, Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 137 S. Ct. 2239 (2017) (No. 16-712); *see* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 137 S. Ct. 2239 (2017) (mem.) ("Petition for writ of certiorari to the United States Court of Appeals for the Federal Circuit granted limited to Question 1 presented by the petition."); Amy Howe, *Today's Orders*, SCOTUSBLOG (June 12, 2017, 9:37 PM), http://www.scotusblog.com/2017/06/todays-orders-67/.

92. *See* Mann, *Argument Preview*, *supra* note 83.

93. *Id.*

94. *Id.*; *see also* Jeff John Roberts, *The Supreme Court's Blockbuster Patent Case: What You Need to Know*, FORTUNE (Nov. 27, 2017), http://fortune.com/2017/11/27/supreme-court-patents/.

95. *See* Mann, *Argument Preview*, *supra* note 83.

96. *Id.*

97. *See id.*

Days before oral argument, an editorial in the the *New York Times* asserted, "Striking down a bad patent is less about confiscating property than about discovering that the property right should not have been awarded in the first place."[98] The editorial described a study in which pharmaceutical companies often patent a drug and then obtain a new patent based on a "tweaked formulation before the initial patent runs out," thereby extending the exclusivity period by transitioning doctors and patients to essentially the same drug.[99] The inter partes review administrative process, the editorial contended, "is helping to push patent law in a much-needed direction: to relax its stifling effects on the economy."[100]

In contrast to the views expressed in *The New York Times*, an editorial in the *Wall Street Journal* just one day before oral argument maintained that "inter partes review offers the potential for legal and government abuses," which are not "worth the constitutional damage."[101] The editorial noted, among other things, that removing private-property disputes from the courts deputizes "government bureaucrats [to] vitiate private property rights without a jury trial and fair compensation."[102] Accepting the premise that patents are private rights, the following analogy drove home what was at stake: "Imagine if an Administration official could adjudicate a fraud case between Jeff Bezos and Ivanka Trump."[103]

Professor Mann suggested ahead of oral argument that the case presents issues with unpredictable results.[104] He assessed that "a casual observer" might assume it was obvious that the government should win: "Who could take seriously the idea that the Supreme Court would announce that the Constitution does not give Congress the authority to do something so obviously practical as update the administrative process for patent review?"[105] Yet Professor Mann noted how Supreme Court decisions on the allocation of power between bankruptcy judges (Article I) and district

98. Eduardo Porter, *Patent 'Trolls' Recede as Threat to Innovation. Will Justices Change That?*, N.Y. TIMES (Nov. 21, 2017), https://www.nytimes.com/2017/11/21/business/economy/patents-trolls-supreme-court.html.

99. *Id.*

100. *Id.*

101. Editorial, *Patents and Property at the Supremes*, WALL ST. J. (Nov. 26, 2017), https://www.wsj.com/articles/patents-and-property-at-the-supremes-1511730198.

102. *Id.*

103. *Id.*

104. *See* Mann, *Argument Preview*, *supra* note 83.

105. *Id.*

judges (Article III) demonstrated that Congress can still undermine judicial authority, "despite the Constitution's explicit grant to Congress of authority to manage the bankruptcy process (parallel to the clause giving Congress authority over the patent system)."[106]

The Court heard the case in November 2017, with Professor Mann predicting "it most unlikely that this case will lead the court to take as bold a step as invalidating a major congressional initiative like the inter partes review process."[107] Challenging Allyson Ho, who argued on behalf of Oil States, Justice Stephen G. Breyer saw the case through the broader perspective of its implications on the administrative state:

> I thought it's the most common thing in the world that agencies decide all kinds of matters through adjudicatory-type procedures often involving private parties. So what's special about this one, or do you want to say it isn't special and all the agency proceedings are unlawful? Because a lot of them would fit the definition, I think, that you propose.[108]

Ho pointed to a tradition of common law adjudication of cases involving patent infringement, but Justice Sotomayor disputed that historical account:

> [I]s your position that somehow at the founding in 1789, given the replete English history of the crown and the Privy Council . . . sidestepping any judicial adjudication of validity, that in 1789 the founders intended to change that system as radically as to say, no, we're not going to permit . . . the legislature to change the terms of a patent grant?[109]

Christopher Kise, arguing on behalf of Greene's Energy Group, LLC, faced resistance from the bench as well.[110] After Kise's representation that Congress had plenary power to expand and contract patent rights, Chief

106. *Id.*

107. Ronald Mann, *Argument Analysis: Justices Hesitant to Invalidate Congressional Scheme for Re-Examination of Patents by Patent and Trademark Office (Corrected)*, SCOTUSBLOG (Nov. 28, 2017, 12:48 PM) [hereinafter Mann, *Argument Analysis*], http://www.scotusblog.com/2017/11/argument-analysis-justices-hesitant-invalidate-congressional-scheme-re-examination-patents-patent-trademark-office/.

108. *Id.*

109. *Id.*

110. *Id.*

Justice John G. Roberts Jr. asserted that the government should not be able to shift positions so readily:

> [Y]our position, it strikes me, is simply that you've got to take the bitter with the sweet. If you want the sweet of having a patent, you've got to take the bitter that the government might reevaluate it at some subsequent point. . . . [H]aven't our cases rejected that . . . proposition? We've said you . . . cannot put someone in that position. You cannot say, if you take public employment, we can terminate you in a way that's inconsistent with due process.[111]

Justice Neal M. Gorsuch expressed the most strident criticism of the inter partes review process, suggesting "that the Constitution might prohibit administrative adjudication altogether in any case in which the decisionmaker is not an 'adjunct' to an Article III Court" in absence of "some arrangement 'like a magistrate judge or a bankruptcy judge.'"[112] Justice Gorsuch noted that inter partes review does not operate like "magistrate judges or anything like that" in which "the district judge has to put its imprimatur on [a decision] before it has [full force and effect.]"[113] No discussion immerged over the Seventh Amendment implications of inter partes review.[114] Given the disparate views on the issues presented, Professor Mann reflected that "it would be astonishing if the justices found a ready consensus here."[115] Professor Mann was right on all fronts.[116]

B. *An Administrative Forum Does Not Violate Article III or the Seventh Amendment When It Hears Claims Asserting Public Rights Not Available at Common Law*

In April 2018, the Court handed down an opinion concluding that inter partes review did not violate Article III or the Seventh Amendment.[117] Justice Thomas, writing for a seven-Justice majority, explained that a proceeding is not "an exercise of Article III judicial power" if it involves the

111. *Id.*

112. *Id.*

113. *Id.*

114. *See generally* Transcript of Oral Argument at 36, Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 137 S. Ct. 2239 (2017) (No. 16-712).

115. Mann, *Argument Analysis*, *supra* note 107.

116. *See supra* Part III.A.

117. Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1370 (2018) ("In this case, we address whether inter partes review violates Article III or the Seventh Amendment of the Constitution. We hold that it violates neither.").

"adjudication of public rights."[118] "[T]he decision to *grant* a patent is a matter involving public rights—specifically, the grant of a public franchise," which according to the Court, enables the Patent and Trademark Office and its Board to reconsider patent grants "without violating Article III."[119] In contrast to rights at common law, Justice Thomas explained, the grant of a patent *ad initio* "aris[es] between the government and others" by operation of statute alone.[120] The granting of a patent also stands as "one of 'the constitutional functions' that can be carried out by 'the executive or legislative departments' without 'judicial determination.'"[121]

Although the Court acknowledged that Congress cannot "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law,"[122] the majority made plain that "history does not establish that patent validity is a matter that, from its nature, must be decided by a court."[123] Justice Thomas also observed that just because "an agency uses court-like procedures," that quality "does not necessarily mean it is exercising the judicial power."[124] He concluded by noting that when Congress exercises proper power to assign adjudication to Article I tribunals, that exercise does not offend an individual's Seventh Amendment rights.[125] The Court left unresolved a bevy of issues, including whether an Article I forum can hear infringement claims, operate without judicial review, adjudicate patents issued before the effective date of inter partes review, or invalidate patents with impunity from due process or takings remedies.[126] The majority also observed *en passant* that when reviewing an adjudication of public rights, "the Federal Circuit assesses 'the Board's compliance with governing legal standards de novo and its underlying factual determinations for substantial evidence.'"[127]

Justice Stephen G. Breyer, joined by Justices Ruth Bader Ginsburg and Sonia Sotomayor, concurred with a single paragraph, which noted that "the Court's opinion should not be read to say that matters involving private

118. *Id.* at 1373.
119. *Id.*
120. *Id.* (quoting Crowell v. Benson, 285 U.S. 22, 50 (1932)).
121. *Id.* at 1374 (quoting *Crowell*, 285 U.S. at 50–51).
122. *Id.* at 1376 (quoting Stern v. Marshall, 564 U.S. 462, 484 (2011)).
123. *Id.*
124. *Id.* at 1378.
125. *Id.* at 1379.
126. *Id.*
127. *Id.* at 1372 (quoting Randall Mfg. v. Rea, 733 F.3d 1355, 1362 (Fed. Cir. 2013)).

rights may never be adjudicated other than by Article III courts, say, sometimes by agencies."[128] To those Justices, the case was resolved solely on the basis of a determination that patent rights are public rights.[129]

Justice Gorsuch, joined by Chief Justice Roberts, offered a provocative dissent.[130] He argued that the "efficient scheme" designed by Congress, however "well intended," is an unacceptable "retreat from the promise of judicial independence."[131] Much of the dissent focused on English history, acknowledging, for example, that the "last time an executive body (the King's Privy Council) invalidated an invention patent on an ordinary application was in 1746."[132] Justice Gorsuch explained that patents evolved from "feudal favors," which included "the exclusive right to do very ordinary things, like operate a toll bridge or run a tavern," to the modern understanding of "invention patents . . . as a procompetitive means to secure to individuals the fruits of their labors and ingenuity."[133] "Until recently," the dissent suggested, "most everyone considered an issued patent a personal right—no less than a home or farm—that the federal government could revoke only with the concurrence of independent judges."[134]

Drawing on the characterization of patent ownership as a private right, Justice Gorsuch explained that often the "unpopular and vulnerable" will lose in a system in which "an independent Judiciary gives ground to bureaucrats in the adjudication of cases."[135] The transition from a traditional system of judicial adjudication to executive adjudication, according to Justice Gorsuch, creates a system destined for manipulation: "Powerful interests are capable of amassing armies of lobbyists and lawyers to influence (and even capture) politically accountable bureaucracies. But what about everyone else?"[136] He edified that enforcing Article III "ensur[es] the people today and tomorrow enjoy no fewer rights against governmental intrusion than those who came before."[137] And he closed with an encomium to *The Federalist No. 78*: "[T]he loss of the right to an independent judge is never a

128. *Id.* at 1380 (Breyer, J., concurring).
129. *See id.*
130. *Id.* at 1380–85 (Gorsuch, J., dissenting).
131. *Id.* at 1380–81.
132. *Id.* at 1382.
133. *Id.*
134. *Id.* 1380.
135. *Id.* at 1381.
136. *Id.*
137. *Id.* at 1386.

small thing. It's for that reason Hamilton warned the judiciary to take 'all possible care . . . to defend itself against' intrusions by the other branches."[138] In another case handed down one week earlier, Justice Gorsuch wrote about another separation-of-powers variant: when Article III courts and Article II agents encroach on Article I prerogatives by interpreting vague laws for their own purposes.[139]

Reporting of and rapid reactions to the decision were fierce.[140] Richard Wolf of *USA Today* suggested that the victors included "the nation's largest tech companies, including Apple, Google, Facebook and Twitter," some asserting that the Board "remained the best way to quash suspect patents, including those obtained by so-called patent 'trolls' as a way to extract royalties."[141] The losers, according to Wolf, "were major pharmaceutical companies and others seeking to return to a system under which only courts, not regulators, decided such disputes."[142] United for Patent Reform—a group representing retailers, automakers, and tech companies—praised the decision as helping to "ensure that American inventors and businesses can focus on building products and creating jobs rather than paying to fend off abusive litigation."[143] Others were dubious about how the decision will help small businesses and start-ups.[144] Some labeled the decision a complete "disgrace." One commentator stated, "Now if a big corporation wants your patents or your land, they only need to convince their friends in the administrative tribunal or city council to do the job. No judge, no jury, no America."[145] Another asked an existential question about the whole

138. *Id.* (quoting THE FEDERALIST No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

139. *See* Sessions v. Dimaya, 138 S. Ct. 1204, 1227–28 (2018) (Gorsuch, J., concurring) ("Nor is the worry only that vague laws risk allowing judges to assume legislative power. Vague laws also threaten to transfer legislative power to police and prosecutors, leaving to them the job of shaping a vague statute's contours through their enforcement decisions.").

140. *See, e.g.*, Greg Stohr & Susan Decker, *Patent 'Death Squad' System Upheld by U.S. Supreme Court*, BLOOMBERG (Apr. 24, 2018), https://www.bloomberg.com/news/articles/2018-04-24/patent-death-squad-system-upheld-by-u-s-supreme-court; Richard Wolf, *Supreme Court Upholds Patent Review Process in Victory for Tech Companies*, USA TODAY (Apr. 24, 2018), https://www.usatoday.com/story/news/politics/2018/04/24/supreme-court-upholds-patent-review-process-victory-tech-companies/439387002/.

141. Wolf, *supra* note 140.

142. *Id.*

143. Stohr & Decker, *supra* note 140.

144. *Id.*

145. *Id.*

system: "Why in the world do we need a new group of experts to re-examine the work of the patent office's 8,147 examiners? Why aren't the patent examiners getting it right in the first place?"[146] For a case about patent judges, the reactions were emotive.

Professor Mann was less tempestuous. He expressed surprise that Justice Thomas was able to secure the votes of six other Justices, noting "[s]harp divisions marked previous cases in the area, several of which were decided without any single majority opinion."[147] But he also suggested that one clue to "delineating areas plainly within congressional control" was all of the Justices' willingness to engage in the public right–private right distinction to resolve the case.[148] That same distinction resolves whether special masters under the Vaccine Act can enter factual findings that bind Article III courts to deferential review.

IV. THE VACCINE ACT VIOLATES THE CONSTITUTION WHEN IT EXTINGUISHES PRIVATE RIGHTS THROUGH A NON-ARTICLE III FORUM OPERATING UNDER A DEFERENTIAL STANDARD OF REVIEW

By wresting nearly all tort lawsuits against vaccine manufacturers from the courts and entrusting administrative agency employees to perform an informal adjudication under a deferential standard of review, the Vaccine Act bestows on special masters authority that Article III reserves for federal courts.[149] Congress certainly has the power to field preempt common law claims, and it has the authority to reorganize them under a federal scheme.[150] Additionally, the Vaccine Act permits prosecution of those state law claims (if any) not subject to manufacturer immunity after proceedings before the special master terminate.[151] But the upshot is a scheme of common law displacement through a nonexpert, Article I tribunal whose fact-finding is

146. Joe Nocera, *Thanks for Nothing, Supreme Court. You Left Patents a Mess.*, BLOOMBERG (Apr. 25, 2018), https://www.bloomberg.com/view/articles/2018-04-25/supreme-court-leaves-patent-system-a-mess.

147. Ronald Mann, *Opinion Analysis: Justices Rebuff Constitutional Attack on Administrative Re-Examination of Patents*, SCOTUSBLOG (Apr. 24, 2018, 4:47 PM), http://www.scotusblog.com/2018/04/opinion-analysis-justices-rebuff-constitutional-attack-on-administrative-re-examination-of-patents/.

148. *Id.*

149. *See* Hines *ex rel.* Sevier v. Sec'y of the Dep't of Health & Human Servs., 940 F.2d 1518, 1523–24 (Fed. Cir. 1991) (applying 42 U.S.C. § 300aa-12(e)(2)(B) (2012)).

150. *See generally* Bruesewitz v. Wyeth LLC, 562 U.S. 223, 230, 240–43 (2011) (citation omitted).

151. Van Detta & Apolinsky, *supra* note 60.

insulated by deferential review.[152] Consistent with *Oil States*, Article III does not allow Congress to circumvent the courts by protecting the fact-finding of special masters. The current interpretation of the Vaccine Act should be revisited and recalibrated so the Federal Circuit is unrestricted in reviewing the record de novo.

A. *Special Masters Adjudicate Matters that Were the Subject of Lawsuits at Common Law Involving Private Rights*

The Supreme Court has made plain that the Vaccine Act preempts and immunizes vaccine manufacturers from a variety of private-party, common law claims, including alleged design defects of vaccines.[153] The edifice replacing these claims is the process by which petitioners seek recovery under the Vaccine Act.[154] A petition initiated through the Vaccine Act therefore embodies a private right at common law.[155] *Oil States* clarified that public rights—unlike private rights—cover matters "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."[156] Worded differently, public rights are "between the government and others, which from their nature do not require judicial determination and yet are susceptible of it."[157] It would be strained and agonistic to suggest torts involving vaccine manufacturers and children are related to governmental functions. Even the establishment of an excise tax to compensate the injured does not change the fundamental nature of the claim or make the lawsuit directed against the government because tort claims against manufacturers are inapposite to public-rights claims "that historically could have been determined exclusively by" the Executive

152. *See* Stern v. Marshall, 564 U.S. 462, 484 (2011).

153. *See Bruesewitz*, 562 U.S. at 231 ("Their complaint alleged (as relevant here) that defective design of Lederle's DTP vaccine caused Hannah's disabilities, and that Lederle was subject to strict liability, and liability for negligent design, under Pennsylvania common law.").

154. *See id.* at 228–31.

155. *See id.*

156. Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1373 (2018) (quoting Crowell v. Benson, 285 U.S. 22, 50 (1932)).

157. *Id.* (quoting *Crowell*, 285 U.S. at 50).

or Legislative Branches.[158] That the Vaccine Act bears on common law, private-right tort claims makes all the difference.[159]

Only "Article III judges in Article III courts" may exercise judicial power to decide the "subject of a suit at the common law, or in equity, or admiralty"[160] with some minor exceptions for litigants who consent to a non-Article III forum under meaningful supervision by an Article III court.[161] The exceptions prove the rule. Claimants under the Vaccine Act cannot consent to adjudication by an Article I tribunal because they must follow the Vaccine Act's prescriptions as a condition precedent to filing a tort action.[162] The Vaccine Act has the pragmatic consequence of removing the ability to file most (if not all) torts claims against manufacturers at the conclusion of the special-master process,[163] and it deputizes special masters to wield judicial power within the ken of Article III without any justification countenanced by the Supreme Court.[164] These "informal adjudication[s]" are reviewed by the U.S. Court of Federal Claims, another non-Article III forum.[165] Upon the petitioner's election, the process could end before an Article III court ever touches the matter.[166] That special masters provide mere informal adjudication does not mask or justify the imposition of deferential review on the Federal Circuit—assuming the appeals court has an opportunity to review the case.[167]

Among the attributes deemed "essential" and endemic to the exercise of Article III power is the capacity to enter factual findings subject to a "more deferential" standard of review.[168] The abundance of deference

158. Stern v. Marshall, 564 U.S. 462, 485 (2011); *see also* 26 U.S.C. §§ 4131, 9510 (2012); 42 U.S.C. § 300aa-15(i)(2) (2012).

159. *See* 26 U.S.C. § 9510.

160. *See Stern*, 564 U.S. at 484 (quoting Den *ex dem.* Murray v. Hoboken Land & Improvement Co., 59 U.S. 272, 284 (1855)).

161. *Id.* at 517; Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1944 (2015).

162. 42 U.S.C. § 300aa-21(a).

163. Bruesewitz v. Wyeth LLC, 562 U.S. 223, 230, 243 (2011).

164. *See id.* at 228.

165. *Id.*

166. *See id.*

167. Griglock v. Sec'y of Health & Human Servs., 687 F.3d 1371, 1374 (Fed. Cir. 2012).

168. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 85 (1982) (plurality opinion), *superseded by statute as to bankruptcy matters*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, *as recognized in* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015).

afforded to bankruptcy courts through the 1980s proved fatal in *Northern Pipeline Construction Co.*[169] In contrast to *Northern Pipeline Construction Co.*, the agency at issue in *Commodity Futures Trading Commission* did not exercise Article III authority, in part, because its findings were not subject to "the more deferential standard" of review found unconstitutional in *Northern Pipeline Construction Co.*[170] Citing both *Northern Pipeline Construction Co.* and *Commodity Futures Trading Commission*, *Stern* parsed the difference between the reconstituted standards of review for core bankruptcy proceedings and those involving common law claims, observing that—as to noncore claims—bankruptcy courts can submit no more than proposed findings subject to de novo review.[171] That those findings are entitled to little or no deference makes those tribunals proper "adjunct[s]" of Article III courts and not unconstitutional, stand-alone adjudicative bodies.[172] The opposite is true for special masters.

Article III judicial power consummates when a tribunal can "hear and determine a cause,"[173] "subject to review only by superior courts in the Article III hierarchy."[174] The Vaccine Act, as a coincidence, involves the exercise of the "judicial Power of the United States" by an administrative actor reviewed with deference by Article III courts.[175] No doubt special masters exercise raw judicial power to adjudicate erstwhile matters that were once the subject of lawsuits at common law. As borne out by the cases, they can perform functions as adjuncts—but not as superintendents.[176]

B. *No Basis Exists to Excuse Special Masters from De Novo Review by an Article III Court*

The Supreme Court has taken a pragmatic approach when determining whether decision-making by a non-Article III tribunal would "usurp the constitutional prerogatives of Article III courts."[177] The Court has, at times, approved the exercise of judicial power by non-Article III tribunals

169. *See id.* at 85–87.
170. Commodity Futures Trading Comn'n v. Schor, 478 U.S. 833, 853 (1986).
171. Stern v. Marshall, 564 U.S. 462, 475, 487 (2011) (citation omitted).
172. *See id.* at 500.
173. United States v. O'Grady, 89 U.S. 641, 647 (1874).
174. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219 (1995).
175. U.S. CONST. art. III.
176. *See Stern*, 564 U.S. at 500.
177. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1944–45 (2015).

when they are subject to substantial supervision by Article III courts.[178] Special masters under the Vaccine Act, however, operate divorced from the aegis of Article III supervision: proceedings begin and run their course to judgment without an Article III court's involvement at any point.[179]

A special master, employed without particular expertise in the medical field or vaccinations in general,[180] proffers an informal adjudication on which the U.S. Court of Federal Claims—exercising another layer of Article I control—bases the entry of judgment.[181] The process is wholly self-executing and appealable as of right only to the Federal Circuit, the first incursion of Article III supervision.[182] So once a claimant files a petition under the Vaccine Act, that party has no option other than to try the case in a non-Article III tribunal independent of any Article III connection. An Article III court becomes involved in a Vaccine Act case only if a party appeals to the Federal Circuit.[183] But, as *Stern* demonstrates, appellate review is neither supervision nor control.[184] There, an Article III court did not control an Article I tribunal, in part, because the tribunal could issue a self-executing judgment on noncore bankruptcy claims.[185] In contrast to the process invalidated in *Stern*, Article III courts exercise significant control over magistrates, including their selection as an initial matter.[186] Article III courts also review de novo findings and recommendations submitted

178. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 853 (1986) (noting agency orders were "enforceable only by order of the district court"); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 85–86 (1982) (plurality opinion) ("[T]he agency in [Crowell v. Benson, 285 U.S. 20 (1932)] was required by law to seek enforcement of its compensation orders in the district court."), *superseded by statute as to bankruptcy matters*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, *as recognized in* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015)..

179. *See* 42 U.S.C. § 300aa-12 (2012).

180. UNITED STATES COURT OF FEDERAL CLAIMS VACANCY ANNOUNCEMENT, *supra* note 42, at 2.

181. Bruesewitz v. Wyeth LLC, 562 U.S. 223, 228 (2011); Petro-Hunt, L.L.C. v. United States, 862 F.3d 1370, 1385 (Fed. Cir. 2017), *cert. denied*, 138 S. Ct. 1989 (2018) (recognizing the Court of Federal Claims as an Article I court).

182. *See generally* 28 U.S.C. § 1295 (2012).

183. *See, e.g.*, Stern v. Marshall, 564 U.S. 462, 504 (2011).

184. *See id.* at 515.

185. *Id.* at 475, 486–87 (citation omitted).

186. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1945 (2015).

by magistrates.[187] Thus, special masters operate within the unconstitutional valence of *Stern*, and they play by different rules than magistrates.

In the context of the Supreme Court's original jurisdiction, the Justices have not hesitated in underscoring how much control and supervision is required when it appoints special masters to submit recommendations for water disputes between states: "Though the Master's findings on these issues deserve respect and a tacit presumption of correctness, the ultimate responsibility for deciding what are correct findings of fact remains with us."[188] Vaccine Act petitioners, unlike original jurisdiction litigants, are put to an election: appeal a decision to which the Federal Circuit is bound to defer or seek indeterminate relief for ill-defined claims in an uncertain state court.[189] The Supreme Court has never suggested that this type of situation is sufficient control or supervision. Vaccine Act special masters, then, are treated more special than others.

In contrast to the Supreme Court's original jurisdiction cases, the Federal Circuit will "uphold the Special Master's findings of fact unless they are arbitrary or capricious."[190] The arbitrary or capricious standard, by a measure of degree, receives more deference than review for substantial evidence or clear error.[191] In fact, the only standards given more deference are abuse of discretion and those decisions in which no review is available.[192] The Supreme Court has equated substantial evidence review to overturning a jury's verdict.[193] Additionally, *Northern Pipeline Construction Co.* deemed insufficient, in the bankruptcy context, the less deferential "clearly erroneous" standard.[194]

187. 28 U.S.C. § 636(b)(1)(C) (requiring a district court to "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made").

188. Colorado v. New Mexico, 467 U.S. 310, 317 (1984).

189. *See* 42 U.S.C. § 300aa-21(a) (2012).

190. Griglock v. Sec'y of Health & Human Servs., 687 F.3d 1371, 1374 (Fed. Cir. 2012).

191. Davis, *supra* note 75, at 471 (observing that the arbitrary and capricious standard ranks fourth among six standards of review, ranked from least deferential to most).

192. *Id.*

193. N.L.R.B. v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939).

194. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 853 (1986) ("CFTC orders are also reviewed under the same 'weight of the evidence' standard sustained in *Crowell*, rather than the more deferential [clearly erroneous] standard found lacking in *Northern Pipeline*.").

When reviewing vaccine claims, the special master is not a fact-finding adjunct of an Article III court.[195] The special master instead adjudicates cases bereft of the Article III supervision deemed essential in other contexts. For example, in allowing parties to waive their right to an Article III forum and permit adjudications of particular matters in bankruptcy courts, the Court noted, "Bankruptcy judges, like magistrate judges, 'are appointed and subject to removal by Article III judges.'"[196] The entire process of adjudication by bankruptcy judges and magistrates thus "takes place under the district court's total control and jurisdiction"[197]—not so for special masters.

The locus of control over special masters resides in Article I. The U.S. Court of Federal Claims hires special masters, sets their compensation, and can remove them "for incompetency, misconduct, or neglect of duty or for physical or mental disability or for other good cause shown."[198] Congress's decision to impose deferential review on the U.S. Court of Federal Claims thus is negligible because that court controls the entire process, from hiring and compensating to reviewing performance and firing.[199] Article III does not enter the equation until a petitioner performs the volitional act of appealing to the Federal Circuit. Yet the lodge of an appeal does no more than ask an Article III court, for the first time, to review the merits of a particular case with the facts already weighed and decided.

These are the dangers against which Article III supervision is designed to guard: the possibility that Congress could "transfer jurisdiction [to non-Article III tribunals]," thus "aggrandiz[ing] . . . one branch at the expense of the other."[200] As interpreted, Congress has done just that by supplanting judicial power from a politically independent judicial tribunal and transferring it to an Article I tribunal entitled by statute to deference.[201]

195. Stern v. Marshall, 564 U.S. 462, 487–88 (2011) (citations omitted).

196. Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1945 (2015) (citation omitted).

197. *Id.*

198. *See* 42 U.S.C. § 300aa-12(c) (2012).

199. *See* Hines *ex rel.* Sevier v. Sec'y of the Dep't of Health & Human Servs., 940 F.2d 1518, 1523–24 (Fed. Cir. 1991) (applying 42 U.S.C. § 300aa-12(e)(2)(B)).

200. *Wellness Int'l Network, Ltd.*, 135 S. Ct. at 1944 (quoting Commodity Futures Trading Comm'n v. Schor, 378 U.S. 833, 850 (1986)).

201. *See, e.g.*, *Hines ex rel. Sevier*, 940 F.2d at 1523–24 (applying 42 U.S.C. § 300aa-12(e)(2)(B)).

Article III's structural purposes forbid this.[202] When placed in a position in which two plausible interpretations exist—one constitutional and the other unconstitutional—precedent approbates construing a statute "so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."[203]

The "concerns that drove Congress to depart from the requirements of Article III" in establishing the procedures under the Vaccine Act confirm the Article III violation.[204] The Supreme Court stated, "The quid pro quo for [no-fault compensation] designed to stabilize the vaccine market, was the provision of significant tort-liability protections for vaccine manufacturers."[205] But the bargained-for ability to achieve efficient compensation for a vaccine-related injury is a promise not kept when the statute is inconsistent with the guarantees of Article III. In the face of preempting "liability for a vaccine's unavoidable, adverse side effects,"[206] while leaving scant, if any, remaining relief in civil litigation, the Vaccine Act stymies any ability for an Article III court to address the special master's informal adjudication, unless an appeal is filed in the Federal Circuit.[207] The Federal Circuit, at that point, is bound to uphold the special master's findings under a highly deferential standard of review.[208] No similar-in-effect statute has survived constitutional scrutiny. Nor should it.

After *Oil States*, a serious question also remains about whether the Vaccine Act might violate the Seventh Amendment. The Court's decision in *Oil States* had little to say or add about the Seventh Amendment implications of a private-right claim adjudicated in an Article I tribunal without the availability of a jury.[209] *Northern Pipeline Construction Co.*, *Commodity*

202. *See generally* U.S. CONST. art. III.

203. United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916).

204. *See Commodity Futures Trading Comm'n*, 478 U.S. at 851.

205. Bruesewitz v. Wyeth LLC, 562 U.S. 223, 229 (2011).

206. *See id.*

207. *See id.* at 228.

208. *See* Griglock v. Sec'y of Health & Human Servs., 687 F.3d 1371, 1374 (Fed. Cir. 2012).

209. Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1379 (2018) (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 53–54 (1989)) ("This Court's precedents establish that, when Congress properly assigns a matter to adjudication in a non-Article III tribunal, 'the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.'").

Futures Trading Commission, and *Stern*, at a minimum, make plain that Article III courts should not be bound by a deferential standard of review when entering judgment on claims at common law.[210] Yet, those cases did not pass on the Seventh Amendment either. Whether an individual right to a jury trial is a basis to jettison claims under the Vaccine Act from the purview of the U.S. Court of Federal Claims, a court unable to empanel a jury,[211] is an open question about which *Oil States* is reticent.

The Supreme Court, in the end, has admonished that "Congress may not withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law."[212] Tort claims against vaccine manufacturers are touchstones of "traditional actions at common law," which cohere "with Article III judges in Article III courts" deciding those issues.[213] The "exercise of judicial power" in these cases therefore cannot be abandoned through a mandate of deference to findings of fact.[214] Ignoring this imperfection "may not represent a rout but it at least signals a retreat from Article III's guarantees."[215] By upending traditional common law claims and engrafting a deferential standard of review alongside broad vaccine-manufacturer immunity from the prospect of civil litigation, a retreat is just what has occurred. Restoring constitutional order requires reconsidering a statutory interpretation that grants special masters status on par with Article III courts. The Federal Circuit should unfetter itself from a process to which it is an observer bound by deference.

V. CONCLUSION

The Vaccine Act substitutes private tort causes of action for an efficient administrative process, but it does so at peril of displacing judicial authority. The by-product, as interpreted, swaps claims at common law with

210. *See* Stern v. Marshall, 564 U.S. 462, 484 (2011); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 838–39 (1986); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 100 (1982) (plurality opinion), *superseded by statute as to bankruptcy matters*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, *as recognized in* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932 (2015).

211. *See* FED. R. CIV. P. 38.

212. *Stern*, 564 U.S. at 484 (internal quotation marks and citation omitted).

213. *See id.*

214. *See id.* at 494–95.

215. *See* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1386 (2018) (Gorsuch, J., dissenting).

an edifice unmoored from the constitutional promise of certain allocations of power among governmental branches.[216] Justice Gorsuch's dissent in *Oil States* reminded that "[c]eding to the political branches ground they wish to take in the name of efficient government may seem like an act of judicial restraint," but "enforcing Article III" is about ensuring people enjoy no fewer rights than those guaranteed at the outset of the Constitution.[217] That is one lesson, among many, in *Oil States*.

Petitioners at the end of the Vaccine Act process are stuck, in the typical case, with non-Article III results because of deferential fact-finding and scant hope of securing an alternative result through a traditional lawsuit. Of course, Congress can preempt certain types of state claims; but if it chooses to provide a replacement remedy, that remedy must comport with the Constitution.[218] After *Oil States*, the current interpretation of the Vaccine Act circumscribes the prerogatives of Article III courts, and it robs the injured of the chance to present their claims in a forum promised to them by the Constitution.

The Hippocratic Oath admonishes, "First, do no harm."[219] Part of doing no harm involves embracing the notion that the strength of our Constitution lies in the solutions it offers to the People.[220] If vaccines are harming people, the Vaccine Act should be able to salve the injured through compensation without propounding additional harm to the independence of

216. *See id.* at 1376 (majority opinion).

217. *Id.* at 1386 (Gorsuch, J., dissenting).

218. *See* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 532–33 (1992).

219. Robert H. Shmerling, *First, Do No Harm*, HARVARD MED. SCH.: HEALTH BLOG (Oct. 13, 2015, 8:31 AM), https://www.health.harvard.edu/blog/first-do-no-harm-201510138421.

220. Eric Segall, *The Reliable Justice*, SLATE (Nov. 29, 2017), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/11/anthony_kennedy_s_equal_rights_rulings_prior_to_cakeshop_should_have_been.html ("In further response to questions from both sides of the aisle about the proper role for judges in constitutional cases, Kennedy continued to foreshadow his activist style of judicial review. Even where fundamental rights are not specifically addressed in the constitutional text, 'the Constitution is not weak because we do not know the answer to a difficult problem,' he told the committee. 'It is strong because we can find that answer.' ").

the Judiciary.[221] When faced with an Article III challenge to the Vaccine Act, the Federal Circuit should mend the wound by freeing itself from the constraint of deferential review.[222] The Vaccine Act's potential and promise can be realized only after the infection is cured.

221. *See Oil States*, 138 S. Ct. at 1380 (Gorsuch, J., dissenting) ("We sometimes take it for granted today that independent judges will hear our cases and controversies. But it wasn't always so. Before the Revolution, colonial judges depended on the crown for their tenure and salary and often enough their decisions followed their interests.").

222. *See* Perry v. Merit Sys. Prot. Bd., 137 S. Ct. 1975, 1990 (2017) (Gorsuch, J., dissenting) ("If a statute needs repair, there's a constitutionally prescribed way to do it. It's called legislation.").