Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
Library of Congress
Washington, D.C.

In re Modification and Amendment of Regulations to Conform to the Music Modernization Act (MMA)	[Docket No. 18–CRB–0012–RM]

GEORGE JOHNSON'S (GEO) REPLY TO NOTICE REGARDING MODIFICATION AND AMENDMENT OF REGULATIONS TO CONFORM TO THE MMA

Pursuant to the Notice regarding Modification and Amendment of Regulations to Conform to the Music Modernization Act ("MMA") published in the Federal Register on Monday, November 5, 2018, Vol. 83, No 214 (Pages 55334 and 55335), George Johnson ("GEO") d/b/a George Johnson Music Publishing ("GJMP"), a songwriter, publisher and *pro se* participant in *Phonorecords III*, respectfully submits the following Reply comments to the proposed questions. The following answers contain necessary and appropriate modifications and amendments to the MMA to correct certain past legal errors and unconstitutional practices found in C.F.R. 37 § 385 Subpart B & C that have gone on far too long — and should have never been allowed in the first place, *i.e.* the *limited download* which gives away the sale for free.

While I am not an attorney, I have been a full participant in 3 rate proceedings; *Web IV, SDARS* and *Phonorecords III* and as a layman, I still have legal recommendations that truly matter to us music copyright creators and pray the Judges and Register will address them. The issues that *should* and *must* be addressed in the MMA from the author's perspective are:

1. Eliminating copyright infringement and lost sales on streaming by immediately abolishing the *limited download* in C.F.R. 37 § 385 Subpart B & C.

2. Creating a Subpart B streaming rate in the MMA *now* that is transparent *and* profitable before any future CRB rate proceedings. The rate should be outside the current "zone of reasonableness" — which is not reasonable at all at $.00 per-performance.

3. Respecting and restoring authors' exclusive rights, natural rights, and private rights to §114 and §115 music copyrights in the digital age on streaming and in downloads.

801(b) requires weighing creator's business models and profits against the profits and business models of streaming licensees, yet throughout this process, it is the streamers that have made billions of dollars while creators' incomes have been decimated to literally nothing. Streams have "substituted for" sales using compulsory licenses and statutory rates of $.00 cents.

Specifically, but not exclusively, the Judges seek comments regarding the following questions.

4 QUESTIONS

(1) What regulations in chapter III, title 37 CFR, if any, *must* be changed and how?

The number one regulation that *must* change is to *simply abolish* the "limited download" found in C.F.R. 37 §385.10 and throughout Subparts B and C — including "limited offerings" and other "bundles" that gives away the sale of a both musical copyrights for free.

Most importantly, making customers buy the song *does not require a compulsory license for the sale* of §114 or §115 music copyrights. *The Copyright Office can simply abolish the limited download* found in C.F.R. 37 §385.10 with no new compulsory license or action by Congress required.

Congress never intended or mandated that the sale of sound recordings and underlying works *must be given away for free*, this was done by licensees, lobbyists and attorneys in *Phonorecords I* and *II.* The Copyright Office has the authority to abolish the *limited download* in C.F.R. 37 § 385.10, Subpart B & C and I pray will do so immediately.

Streamers can then simply stop allowing free downloads until the customer chooses to pay for the song on their platform as a regular download or in a bundle.

Giving away sales in lieu of free streaming is not only wrong, but short-sided and one of the main reasons for the decline in music industry the past 18 years. Music creators are lulled into a false sense of security when they register their copyright since they falsely believe registration protects their copyright under all circumstances. In reality, music creators register their individual song with the Copyright Office thinking it is now 100% fully protected, but through multiple "exceptions and limitations", their copyrights (but not painters, photographers, or authors) are sold out the back door to streaming licensees for $.00 cents per-song, *which defeats the entire registration process.* Most songwriters have no idea that a compulsory license even exists, or that a Copyright Royalty Board even exists, much less sets most royalty rates, yet we are expected to know all of this.

Streams have clearly "substituted for" or "cannibalized" sales which, in my opinion, was also not properly weighed by the Judges in *Phonorecords III* and never properly weighted in past proceedings. Unfortunately, the Copyright Office has systematically allowed streamers to abolish the sale of music copyrights in lieu of streaming at nano-rates of literally zero cents while moving the customer 1.) from paying for the sale of music 2.) to paying streaming companies $9.99 subscription fees — *transferring the entire value from music copyright creators to licensees* — all by manipulating C.F.R. 37 §385.10 and other code sections in Subparts B and C.

Subparts B and C were created out of thin air in 2008 and 2012, and while their many flaws have created the mess the MMA is supposed to now save us creators from, *these flaws can now be corrected in the MMA* by the Copyright Office if it choses.

Limited downloads may be technically "legal", but they should have been never allowed by the Copyright Office in 2008.

In my opinion, limited downloads and free offline listening is blatant copyright infringement since it violates my exclusive right in Art I, Sec. 8, Cl. 8 but also my exclusive right to reproduction and distribution in §106 of the Copyright Act.

But w*hile copyright may be a statutory "public right" and a privilege given by Congress*, (that Congress has repeatedly taken away from music creators), copyright is still lawfully a "private right" as explained below by Professor of Law Adam Mossoff[1] (See attached Exhibit A). In addition, the "private right" aspect currently contained in the property right part of copyright is not recognized by the Copyright Office and as Professor Mossoff clearly demonstrates there is a long, legal history of precedent that is *completely ignored by the courts* concerning this issue, as in the recent *Oil* patent case.

Professor Mossoff's recent legal paper "Statutes, Common-Law Rights, and the Mistaken Classification of Patents as Public Rights" *also applies to copyrights* and is one of the most important analysis about the true nature of copyright as a private right, not just a statutory public right. If current courts do not recognize the private right in copyright, then it makes it tough for the Copyright Office to recognize this long held legal precedent that protects copyright creators.

However, if the Copyright Office and Congress would finally legally recognize *copyright as a private right as policy*, which it lawfully still is, courts may begin to change their position that copyright is just a "public right" to be "doled out stingily, riddled with *exceptions and limitations*,

[1] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3289338 November 9, 2018 "Statutes, Common-Law Rights, and the Mistaken Classification of Patents as Public Rights" by Adam Mossoff, Professor of Law at the Antonin Scalia Law School at George Mason University.

to be given away free-of-charge" as former Register of Copyright Ralph Oman expertly describes[2] C.F.R. 37 §385 Subparts A, B and C.

Moreover, if the Copyright Office also recognized the private right of *the property right* contained in copyright as just as important as the statutory public right in copyright, NMPA or Congress could not pass bills like the MMA which simply ignores the private right in copyright as well as the private right in property rights. Songwriters then might finally get paid an actual "reasonable rate".

Copyright is an exclusive right, a property right, a public right, a private right and a natural right all in one.

As I've said before, would it be reasonable to pay attorneys in this proceeding $.00 cents per billable hour for their expertise, time and labor? Of course not, so why is $.00 "reasonable" to pay songwriters $.00 for their expertise, time, labor and property?

(2) What regulations in chapter III, title 37 CFR, if any, *should* be changed and how?

[2] "Finally, two talented authors add intellectual heft to the ongoing debate about the true nature of copyright—as an exclusive private property right, or as a limited right to be doled out stingily, riddled with exceptions and limitations, to be given away free-of-charge. It has become fashionable in some academic circles to treat copyright exclusivity as a quaint but outmoded notion, and its advocates as hopeless naïfs. But Mr. May and Mr. Cooper, by going back to first principles and natural rights, show us that an exclusive property right is at the heart of copyright protection. Their learned analysis should be widely read, especially by Members of Congress and judges, to help them understand the true nature of the debate and the deep roots of the copyright pedigree as a natural private property right—historically unique, socially revolutionary, and worth fighting for. Three cheers for Messrs. May and Cooper!" — *Ralph Oman, Register of Copyrights of the United States, 1985-1993*. The Constitutional Foundations of Intellectual Property, A Natural Rights Perspective by Randolph J. May and Seth L. Cooper.

Same as above: primarily abolishing the "limited download" found in C.F.R. 37 §385.10 and throughout Subparts B and C with "limited offerings" and other "bundles" that give away the sale of a both musical copyrights for free. Bundles are fine *as long as the sale is paid for.*

The limited download *must* and *should* be abolished immediately and let customers pay for downloads and offline listening on each streaming platform - *simply strike it from the regulations*.

(3) What effect, if any, does the new language in subparagraph 8 of section 801(b) have on the Judges' ability to make necessary procedural or evidentiary rulings under sections 801, 803, 804, and/or 805 [1] of the Copyright Act, and, in particular, does the new language have the effect that the Judges are now required to adopt new regulations, notwithstanding their general authority under section 801(c)?

Well, if the new language has the effect of requiring the Judges to adopt new regulations *i.e.* abolishing the limited download, then yes, the new 801(b) language is sufficient.

However, if the new language continues to put licensees over music creators, 801(b) will have no practical effect on music creators profitability or the Judges' new authority to rule for practically higher rates. *Our rate will now always be $.00 cents per-performance/mechanical* and any minor legal changes in the new 801(b) regulations will probably have zero significance on music copyright creators' income or livelihoods for decades to come.

The primary problem I have always had with all four criterion under 801(b) is that the rate proceeding process never seems to fully take into consideration the music copyright creators' property rights, profits and business models, *only the business models and profits of billion-dollar streaming licensees* — this is why 90% of the songwriters and publishers have disappeared from Music Row the past 20 years. From my experience, the 801(b) standard and the "willing buyer, willing seller" standard both seem hollow when weighing the rights and profits of music creators vs. streamers' "business models".

While the Copyright Judges may equally and earnestly weigh these 4 separate 801(b) criterion for music creators vs licensees alike, $.00 cents per-performance is such a tiny amount, the weighing process had no practical real world effect on creators' incomes and livelihoods. It just seems like there is no hope of statutory rates ever climbing to even a mere $.01 cents per stream in my lifetime, much less actual dollars — *so the practical effect is like there is no weighing at all.* We're back to "nothing from nothing leaves nothing" similar to NMPA claiming victory with a 45% increase in streaming rates in *Phonorecords III.*

$.0005 per-stream *times* 45% is still literally $.00 cents and also has no practical effect on music creators — it only makes our creative lives worse by creating false hopes combined with zero profits. There is *no incentive* to write songs at $.0005 per-stream or $.0006 per-stream.

The other problem is the mindset that $.00 per-performance is "reasonable" in the first place and that anything outside of $.0005 to $.0023, or the-so called "zone of reasonableness" is somehow unreasonable and even laughable. What *is* unreasonable is Apple offering a mere $.00091 per-performance in *Phonorecords III.* From what I understand, even the phrase "zone of reasonableness" is just a legal term of art created by licensees' counsel and not required in the code or statutes.

So, any 801(b) changes will have no practical effect on profits for songwriters, yet this was supposed to be the whole purpose of the MMA, to help songwriters actually make money from streaming.

But 801(b) changes aside, *The Copyright Office should immediately abolish the limited download* first and foremost, to protect music copyright owners and stop giving away copyrights for free.

(4) If the new language in subparagraph 8 of section 801(b) affects the Judges' authority under other subsections of section 801, how does it change that authority or the procedures to exercise that authority?

The Judges solicit proposed new or modified regulatory language that may be necessary to fully implement the MMA. Commenting persons and entities must support each legal conclusion and each proposed regulatory change with appropriate legal analysis and citation to authority. After considering the proposals, if the Judges determine that rulemaking is required, the Judges will publish a formal notice of proposed rulemaking in accordance with the provisions of the Administrative Procedures Act.

As mentioned above, the new language in 801(b) will have no practical effect on the income of songwriters since it will still be $.00.

Since I'm not an attorney it is difficult for me to support each of my legal conclusions and proposed regulatory changes with appropriate legal analysis and citation to authority, but I will say to properly implement the MMA, the Judges must modify the regulatory language to practically weigh and protect exclusive rights to distribution and reproduction under §106, let songwriters' actually profit and protect our business models under 801(b) — as well as *striking limited downloads* under §385 from the current regulations based on violating my private rights and property rights in Art. 1, Sec. 8, Cl. 8's "copyright clause".

ARGUMENT

All American songwriters and music publishers are "subject to"[3] the 1909 compulsory license to give away their musical copyrights to anybody who would like to license them and they have no say in the matter. Then, to make matters worse, 109 years of statutory rates from $.02 cents to $.091 cents, now contained in C.F.R. 37 § 385 Subpart A[4], have always been unreasonable, below-market and were originally erroneously set.

For some strange reason, *painters, photographers, illustrators, animators, and authors, a.k.a. other American copyright creators, escaped compulsory licenses in 1909, but songwriters did not*. Why is there no compulsory Painting Modernization Act or statutory royalty rate of $.000 imposed on every American painting?

Why aren't painters, photographers, illustrations, animators and authors subject to a government imposed compulsory license, yet songwriters (and now singers since 1998) are unfairly singled out by the Copyright Office — controlling our labor, art, income, profits, and reproduction of our copyrights. What did singers and songwriters ever do to the Copyright Office to warrant such control over everything we do? :)

To any reasonable person, this control seems odd, discriminatory, and fundamentally unfair to *all* American music creators, and this is one of the main flaws in the MMA — it perpetuates this control by *permanently price-fixing all American streaming royalty rates at $.00 cents per-stream indefinitely*. No "willing buyer, willing seller", 801(b) changes, or any other statute will ever cause the $.00 rate to rise above $.00 — the rate will always remain at $.00 cents in the alleged "zone of reasonableness".

[3] September 29, 2016 — SDARS III — Order Denying Services' Motion to Dismiss George D. Johnson d/b/a Geo Music Group. "Unlike the party in *PSS II*, GEO *is* subject to the license at issue. Regardless of the Services' past programming practices and present intentions, they are free to use GEO's works at any time and GEO would have no say in the matter—that is the essence of a statutory license."
[4] https://ecfr.io/Title-37/pt37.1.385#se37.1.385_110

Perpetuating Subpart B streaming rates of $.00 in the MMA aside, the fact that the MMA will perpetuate the $.091 cent royalty rate for downloads/sales (which has never been properly adjusted in 109 years) is just one more way the MMA will continue to hurt songwriters and music publishers instead of actually helping them — and in *Phonorecords III* this was no exception. It is amazing and unconscionable that the mechanical rate for sales sat at $.02 cents for 69 years, and for songwriters to simply break even, the *sale rate must be adjusted to around $.50 cents minimum here in 2018 according to government inflation calculators*. If the government can arbitrarily set a transparent rate of 2 cents in 1909, it has the authority to reset the rate to 50 cents in 2018, as well as eliminate limited downloads.

In *Phonorecords III*, National Music Publishers Association ("NMPA") and Nashville Songwriters Association International ("NSAI") had a chance to raise this mechanical rate, but instead *they fought as hard as they could to keep the $.091 cent rate per sale at $.091 cents for all American songwriters and music publishers.* In fact, Mr. David Israelite of NMPA said in a 2017 meeting that "downloads are irrelevant", but who is he to decide the relevance of formats or royalty rates, especially at $.00 cents for *all* American songwriters and music publishers subject to the compulsory license?

Why would our advocates, NMPA and NSAI want to keep our rate at $.091 cents instead of $.50 cents?

This is troubling and a problem that could have been fixed in *Phonorecords III*, but was not. Re-setting a transparent Subpart A sale rate of around $.50 cents to reflect basic inflation is an error I hope the Copyright Office and/or the Register has the ability to rectify in the new MMA regulations.

As we learned in *Phonorecords III* hearing testimony, in 2008 our own lobbyist NMPA, sponsor of the MMA and Music Licensing Collective ("MLC"), partnered with Digital Media Association ("DiMA"), a lobbying arm of Google, to erroneously set the per-play mechanical streaming rate for *all* American songwriters and music publishers at $.000 cents in the 2008 *Phonorecords I* proceeding. This naked cronyism is the reason why 10 years later *all* American songwriters are still suffering at $.00 per stream. $.00 is not a "reasonable rate" whatsoever and while it may be technically "legal" for NMPA and Google to set our royalty rate at $.00 cents per-stream for their own self-interests, it is wrong, unconstitutional and has clearly been devastating to all American songwriters and music publishers.

In fact, one might argue that the NMPA created the idea for the MLC as a "Harry Fox 2.0" after selling HFA to SESAC — since "downloads are irrelevant".

But, for the record, what is most amazing about the MMA is, according to Mr. Israelite and Senator Lamar Alexander's office, the *MMA started out* as a bill to:

1.) *abolish* the 1909 *compulsory license* on songwriters and music publishers.

2.) *abolish* the Department of Justice ("DOJ") 1941 *consent decrees* on songwriters.

We were first told this fact by Mr. David Israelite at the same 2017 NMPA meeting in Nashville, TN where Mr. Israelite said that "downloads are irrelevant". Mr. Israelite also stated at this same meeting that the royalty "*rate is the most important thing*" yet when asked "*what will the rate be*" in the new MMA, Mr. Israelite replied, "*there is no rate*".[5]

So, how is the royalty rate "the most important thing" if there is no transparent, upfront, reasonable royalty rate even contained in the MMA?

[5] This is why the Judges should establish a transparent Subpart B streaming rate before any future CRB hearing. The 2 cent mechanical for sales was transparent for 69 years as was the 9.1 cents, so why not a transparent rate for streaming?

Then, for a second time, in 2018 I was then told by an attorney in Senator Lamar Alexander's office *that the original MMA 1.) abolished the compulsory license and 2.) abolished the consent decrees* — but then it drastically changed into its current form.

So, *why* did the MMA drastically change 180% from abolishing the 1.) compulsory license and 2.) abolishing the consent decrees *to* keeping $.00 cents per-stream forever, with no more copyright infringement, lawsuits, or statutory damages of $150,000 per infringement?

One word: Google.

It is clear from the record and hearing testimony in *Phonorecords III* that NMPA partnered with Google/DiMA lobbyists in 2008 to set the rate at $.00 cents per mechanical then give away our sales in the form of limited downloads. NMPA then partnered again with Google/DiMA in 2017 to keep our royalty rate at $.00 cents in the MMA — that is why they are now filing joint motions together which is extremely troubling. NMPA nor Google has the right to set our income at $.00 cents since my copyright is my private right, my property right and my exclusive right — not theirs.

$.000 per stream is unreasonable, below-market, erroneously set, and is a clear error that has never been rectified — now considered "rate court precedent" and in my layman legal opinion, this clearly violates my exclusive rights, private rights and property rights in my underlying work.

So, the 3 main problems with the MMA I hope the Copyright Office and Register can fix are:

1.) adjust the Subpart A rates in the MMA to reflect basic inflation at $.50 cents per sale.

2.) Just like the 1909 mechanical rate of 2 cents and 9.1 cents *was transparent for 109 years,* set *a new transparent Subpart B streaming rate in the MMA other than $.00 per copyright*

that reflects the true value of our §115 underlying work before any new Copyright Royalty Board rate proceedings take place regarding the MMA.

3.) plug the "limited download" hole that allows streams to "substitute for" or "cannibalizes" sales — which is a huge problem for songwriters and publishers that can be easily fixed. Songwriters should not have to continually suffer from flawed decisions in 2008 and 2012 by NMPA and DiMA who *erroneously agreed to give away the sale of downloads* in the form of "limited downloads" in C.F.R. 37 § 385.10. This is what *must* be corrected by the Copyright Office and in my layman legal opinion was unconstitutional, copyright infringement, and a blatant violation of my exclusive rights in Art I and §106 — as well as my property rights.

I beg the Copyright Office to please stop giving away sales of our copyrights through C.F.R. 37 § 385 Subpart B & C.

Finally, the Supreme Court ruled in *Duquesne Light Co. v. Barasch* that Article I administrative panels are not allowed to set labor rates so low that they are effectively "confiscatory" and $.000 per-stream is clearly confiscatory. I hope the Copyright Office will consider and properly weigh *Duquesne Light Co. v. Barasch* when implementing the MMA.

One last note I would like to put in the record about the MMA, as far as I know, if it wasn't for me thinking of the *idea* of doing a "songwriter's bill" in 2013, *there might not have ever been a* Music Modernization Act. Let me explain.

On April 18, 2013, as a Grammy member I was invited by the Grammys to my first Grammy on the Hill. While we had scheduled Grammy meetings to "advocate", *there was no songwriter's bill* that the Grammys or any of our lobbyists had thought of to help songwriters — and there was certainly no Songwriter's Equity Act, since the idea didn't exist yet.

On the morning of April 18, 2013, I met with counsel from Senator Jay Rockefeller's office to discuss my idea for a "songwriter bill", since Senator Rockefeller was my representative from my home state of West Virginia. My bill would have eliminated the compulsory license and consent decrees on songwriters as well as scaling back safe harbors in the DMCA that allow copyright infringement as well as other improvements.

Right after my meeting I met up with our Grammy group leader, a lobbyist who represented the Grammys.

When I told him that I had just met with Senator Rockefeller's office about doing a "songwriter bill", his eyes got wide and he said verbatim, *"George, what a great idea, I can't believe we never thought of that."*

He then ran down the hall and told the Grammy advocacy officer that I had just met with Senator Rockefeller's office about a "songwriter bill" and within 15 minutes, the advocacy officer got *right in my face and started screaming at me at the top of his lungs for simply meeting with my Congressman* on my own time. He actually forbid me to meet with *any* Congressmen. In my opinion, what he was really mad about was that neither *he nor his lobbyist nor the Grammys had ever even thought of doing a bill to help songwriters* — because *his own lobbyist had just told me so*.

Of course, nobody deserves to be bullied and screamed at for simply meeting with their own Congressman, especially about issues that effect their livelihood. Shortly thereafter, the Songwriter's Equity Act ("SEA") was created which eventually turned into the MMA. So, ideas matter but instead of a bill that would deregulate songwriters after almost 110 years, lobbyists turn it into another central planning of songwriters, price-fixed at $.00 cents per-copyright, instead of 9.1 cents.

I do think it amazing and noteworthy the fact that the MMA started out *abolishing the compulsory license* and *consent decrees*, then turned into the current MMA bill which does the exact opposite of that.

Lastly, please find attached a copy of the above mentioned and recently published November 9, 2018 legal paper by Professor Adam Mossoff titled "Statutes, Common-Law Rights, and the Mistaken Classification of Patents as Public Rights" as Exhibit A.

Professor Mossoff is Professor of Law at the Antonin Scalia Law School at George Mason University and his paper definitively proves that courts have ruled that *copyright is a private right* in addition to a public right.

I pray that the Copyright Office will recognize and begin to adopt this important legal position as policy since his legal paper demonstrates a long history of precedent and citations supporting his claims that copyright is also a private right just as much as it is a statutory public right, if not more so.

And while it may seem controversial, as a matter of public policy I pray the Copyright Office will also begin looking at *phasing out the compulsory license on all American songwriters, music publishers, singers and §114 sound recording creators*. If there is no compulsory license on painters, photographers, authors, illustrators, etc. then it is only fair to abolish the compulsory license on singers, songwriters and music publishers. Streamers can negotiate blanket licenses with PRO's in a free-market once and for all.

Painter David Hockney just sold *one copyright* for $80 million dollars.

Monday, December 10, 2018

Respectfully submitted,

By: */s/ George D. Johnson*

George D. Johnson, Pro Se
d/b/a/ George Johnson Music Publishing
P.O. Box 22091
Nashville, TN 37202
E-mail: **george@georgejohnson.com**
Telephone: (615) 242-9999

George D. Johnson (GEO), an individual songwriter and music publisher

d.b.a. George Johnson Music Publishing (GJMP)

(formerly BMI)

Exhibit A

Statutes, Common-Law Rights, and the Mistaken Classification of Patents as Public Rights

Adam Mossoff*

The relationship between property rights and the regulatory authority of the federal or state governments has long been fraught with tension.[1] This is as true for property rights in inventions as it is for property rights in land or other tangible assets. Even in the nineteenth century, patent owners challenged the reach of state police power regulations over their property rights.[2]

Although legal and constitutional analysis is often framed today in consequentialist terms, courts define the scope of constitutional protection of legal rights under the Constitution by a formal classification between public rights and private rights.[3] In the context of legal rights in property, public rights are privileges such as monopolies granted by the political branches, and thus there is greater discretionary authority to both define them and adjudicate them according to political processes in Congress or in administrative agencies in the Executive branch.[4] Private rights are classic individual rights, such as the rights to life, liberty, and property, which are secured by courts and are the core rights that set the limits of authority of the government.[5] This distinction has longstanding roots in Anglo-American law, but as the administrative state grew in both size and power in the twentieth century, it has been put under tremendous stress. Commentators now

* Professor of Law, Antonin Scalia Law School, George Mason University. Thank you to Eric Claeys, Adam McLeod, Thomas Merrill, Joseph Singer, Hanoch Dagan, and Thomas Mitchell for comments on drafts. Thank you to the participants at the "Administering Patent Law" Symposium at the Iowa College of Law and the Property Works in Progress conference at Boston University School of Law for their feedback. Research assistance was provided by Dylan Campbell, Jae Woo Chung, Timothy Frank, Olivia Gomez, and Stephanie Neville.

[1] *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978) (holding a historical preservation statute is not an unconstitutional taking of property without just compensation); In re Jacobs, 98 N.Y. 98 (1885) (holding a statute prohibiting manufacturing cigars in residences in New York City and Brooklyn to be unconstitutional taking of property without compensation); Wynehamer v. People, 13 N.Y. 378 (1856) (holding a statute prohibiting sale of alcohol to not violate due process rights but still unconstitutional because it effects a taking of property without payment of just compensation).

[2] *See, e.g.*, Patterson v. Kentucky, 97 U.S. 501 (1878) (affirming constitutionality of a state's regulatory authority under its police power to limit or restrict the sale of a patented petroleum product).

[3] *See* United States v. Jicarilla Apache Nation, 564 U.S. 162 (2011) (noting that "the distinction between 'public rights' against the Government and 'private rights' between private parties is well established," citing Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 283 (1856)).

[4] *See* Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity,* 94 Geo. L. J. 1015, 1020 (2006) ("In the latter part of the twentieth century, public rights took on a broad connotation of constitutional or statutory claims asserted in the perceived public interest against government or regulated parties. The nineteenth century, however, conceived of public rights in a narrower sense, to mean claims that were owned by the government—the sovereign people as a whole—rather than in persons' individual capacities.").

[5] Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 567 (2007) ("The counterparts of 'public rights' were 'private rights.' . . . [Early American lawyers] distinguished what I will call 'core' private rights (which Lockean tradition associated with the natural rights that individuals would enjoy even in the absence of political society) from mere 'privileges' or 'franchises' . . . ."); Woolhandler, *supra* note 4, at 1020 ("Private rights typically included an individual's common law rights in property and bodily integrity, as well as in the enforcement of contracts. . . . [T]he American legal tradition has given them special stature.").

allege it is "a grab bag of miscellaneous results that have some historical roots but no underlying logic."[6] Courts today agree that it is less than clear.[7]

Yet, this hoary distinction between private rights and public rights is important. It was the basis for the Supreme Court's decision in May 2018 in *Oil States v. Greene's Energy* upholding the constitutional legitimacy of the Patent Trial and Appeal Board (PTAB), an administrative tribunal created by Congress in 2011 to review and cancel issued patents.[8] The Court concluded that the constitutional question was resolved entirely in favor of the PTAB in holding that patents are public rights, not private rights.[9]

Foundations matter. *Oil States* proves this. A venerable and fundamental classification of legal rights—public rights or private rights—determined the result in a significant case at the intersection of administrative law, constitutional law, and patent law.

Unfortunately, the public-private right distinction is misunderstood and misapplied today.[10] *Oil States* again proves this; in his opinion for the Court, Justice Clarence Thomas argues that patents are public rights solely because they are statutory rights created by Congress, not common-law rights created by courts.[11] This is a common assertion today—statutory rights are public rights and common-law rights are private rights. It has become conventional wisdom in both patent law and copyright law, in which the "privileges" set forth in the patent or copyright statutes are regularly contrasted against the private property "rights" secured in real estate and other tangible assets by common-law courts.[12] This reduction of the distinction between public rights and private rights to a distinction between statutes and judge-made doctrines is deeply mistaken, both on historical and legal grounds.

In three parts, this article will explain why the longstanding classification between public rights and private rights matters in patent law, and how courts and commentators have erred in reducing this fundamental dichotomy to merely identifying whether a legal right is based in either statutes or judicial decisions. First, it briefly explains the public right and private right distinction and the import of this classification for property rights in the modern administrative state. Second, it identifies the conventional wisdom today among commentators and courts, who believe that the distinction between public rights and private rights is reducible solely to a distinction between statutory rights and common-law rights. Third, it describes why it is a

[6] Nelson, *supra* note 5, at 564 (recounting this widespread criticism but disagreeing with it on both historical and logical grounds).

[7] *See, e.g.*, Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69 (1982) (plurality opinion) ("The distinction between public rights and private rights has not been definitively explained in our precedents.").

[8] 138 S. Ct. 1365 (2018).

[9] The specific legal issue raised by the petition was whether the PTAB violated its Seventh Amendment right to a jury trial in canceling its vested property right via an administrative tribunal. *See Oil States*, 138 S. Ct. at 1379 ("Thus, our rejection of Oil States' Article III challenge [in concluding that patents are public rights] also resolves its Seventh Amendment challenge.").

[10] *See* Nelson, *supra* note 5, at 563 ("Time, however, has obscured the meaning of these categories.").

[11] *See Oil States*, 138 S. Ct. at 1373-74 (claiming that a patent is a public right because it is a "creature of statute law" and "did not exist at common law") (quotations and citations omitted).

[12] *See infra* notes 42-53, and accompanying text.

mistake to assert that patents are solely statutory rights and that property rights in land are solely common-law rights, as these legal regimes were born of both statutes and court decisions. Conflating the provenance of a legal right with its status as a public right or private right threatens to create more incoherence in a fundamental doctrine that courts and commentators already allege is increasingly senseless. *Oil States* is just the latest contribution to this increasing doctrinal incoherency at the intersection of patent law and administrative law.

A Potted Review of the Public Right-Private Right Dichotomy (and Why It Matters)

We first need to explain briefly the public right versus private right distinction before we can address how it is mistakenly applied to patents. This is necessary because commentators and courts today conflate a statute with a public right and a judge-made, common-law doctrine with a private right. Before we can address the legal history of the symbiotic relationship between statutes and judge-made doctrines in the creation and application of property rights in both land and inventions, we need to first explain what is this distinction between public rights and private rights, and how this distinction was mistakenly applied by the Supreme Court in classifying patents as public rights in *Oil States.*

The distinction between public rights versus private rights predates the modern administrative state.[13] It has roots at common law, and ultimately finds its origins in the Roman Law.[14] Since the American legal system grew out of the English common law and was influenced by the civilian theorists and Roman Law jurists, it is unsurprising it became a foundational category of legal rights in the nineteenth century.[15] Its ongoing relevance today, however, is not mere fealty to an antiquated legal formalism. This classification between categories of legal rights—public rights and private rights—is important because it ultimately determines the constitutional protections afforded to legal rights.[16]

The distinction is fairly commonsensical, at least at a high level of generality. It is essentially the difference between a *right* and a *privilege* as these terms are popularly understood, especially by

[13] *See* United States v. Jicarilla Apache Nation, 564 U.S. 162 (2011) (noting that "the distinction between 'public rights' against the Government and 'private rights' between private parties is well established," citing Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 283 (1856)).

[14] *See* Louis L. Jaffe, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 413 (1958) (observing that in the seventeenth century, English judges became sensitive to the distinction between "private relationships and the King's business," and that this "was a herald of an important development in modern legal thinking: the courts became identified with the enforcement of private right, and administrative agencies with the execution of public policy"); BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 2 (1962) ("The Romans themselves made a distinction between public law and private law. The former concerned with the functioning of the state, and . . . the latter was concerned with relations between individuals.").

[15] *See* Caleb Nelson, *Adjudication in the Political Branches*, 107 Columbia L. Rev. 559 (2007); Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 Geo. L.J. 1015 (2006) (detailing this history). *See also* Pierson v. Post (citing English and Roman Law authorities, as well as natural law and philosophers and civilian legal theorists, as authority); Adam Mossoff, *What is Property?* (citing historical cases doing the same).

[16] *See* Charles A. Reich, *The New Property*, 73 Yale L.J. 733, 740 (1964) ("The early law is marked by courts' attempts to distinguish which forms of [governmental] largess were 'rights' and which were 'privileges.' Legal protection of the former was by far the greater.").

children when parents revoke their privileges in playing videogames or watching television.[17] Alas, the law complicates matters. As a legal term of art, a "privilege" has distinct meanings based on the context in which it used.[18] This contextual definition of "privilege" is not unique in the law. For example, "principle" has two distinct senses in patent law[19] and "franchise" has several senses in the law more generally.[20] These are just a few examples of subtle linguistic distinctions that jurists and lawyers are wont to make.

The different senses of privilege can easily cause confusion, and so they must be expressly distinguished from each other. One sense of privilege is a fundamental civil right, as it is used in the hoary phrase "privileges and immunities" in the federal Constitution.[21] As this term is applied to patents, this is not the meaning of a privilege comprising a public right: this sense of privilege refers to a benefit conferred by one of the political branches of the government—the executive or legislative—who are empowered to dispense benefits or create obligations solely on the basis of policy. As the Supreme Court has stated, a public right is a privilege granted to or created in a citizen "in connection with the performance of the constitutional functions of the executive or legislative departments."[22] Thus, a privilege in a public right represents the conventional understanding of this term—a grant of special favor by the government.[23] Classic examples include monopoly privileges granted to operate bridges or public utility services.[24]

---

[17] *See* Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent "Privilege" in Historical Context*, 92 Cornell L. Rev. 953, 970 (2007) ("It is not surprising then that 'privilege' is a legal term of art whose meaning diverges from the layperson's understanding of a special benefit without a rightful claim.").

[18] *See id. at* 969-76 (detailing difference in the law between special grants (privilege) and fundamental civil rights secured by the Constitution or by statutes (privilege)).

[19] *See, e.g.*, Barrett v. Hall, 2 F. Cas. 914, 923 (C.C.D. Mass. 1818) (No. 1,047) (Story, Circuit Justice) ("In the minds of some men, a principle means an elementary truth, or power; . . . . No one, however, in the least acquainted with law, would for a moment contend, that a principle in this sense is the subject of a patent . . . . The true legal meaning of the principle of a machine, with reference to the patent act, is the peculiar structure or constituent parts of such machine."); Whittemore v. Cutter, 29 F. Cas. 1123, 1124 (C.C.D. Mass. 1813) (No. 17,601) (Story, Circuit Justice) ("By the principles of a machine, (as these words are used in the statute) is not meant the original elementary principles of motion, which philosophy and science have discovered, but the modus operandi, the peculiar device or manner of producing any given effect.").

[20] *Compare* Spring Valley Water Works v. Schottler, 62 Cal. 69, 79 (1882) ("The term 'franchise,' in its broad sense, means 'exemption from constraint or oppression; liberty; freedom' (Webster). In this sense the right to vote is termed a 'franchise;' so also the right of trial by jury, freedom of speech, and freedom of the press are termed 'franchises.'") *with* Oil States Energy Serv. v. Greene's Energy Group, LLC, 138 S. Ct. 1365, 1373-74 (2018) (stating that "patents are 'public franchises' that the Government grants" and as such are "public rights").

[21] U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); Mossoff, *supra* note 17, at 970-73 (detailing how this sense of "privilege" refers to fundamental civil rights, as defined by John Locke, William Blackstone, and Founding Era commentators, lawyers, and judges).

[22] Crowell v. Benson, 285 U.S. 22, 50 (1932).

[23] *See, e.g.*, Barsky v. Bd. of Regents, 347 U.S. 442, 451 (1954) ("The practice of medicine . . . is a privilege granted by the State under its substantially plenary power to fix the terms of admission."); Lee v. State, 358 P.2d 765, 769 (Kan. 1961) ("It is an elementary rule of law that the right to operate a motor vehicle . . . is not a natural or unrestrained right, but a *privilege* which is subject to reasonable regulation under the police power of the state . . . .").

[24] *See, e.g.*, Spring Valley Water Works v. Schottler, 62 Cal. 69, 107 (1882) (stating that water utility franchises accorded by the state "do not pertain to the citizens of the State by common right" and are simply "special privileges conferred by Government upon individuals"); Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.)

The classic adage applies to these and other privileges conferred as public rights: "As Congress giveth, Congress [can] taketh away" without legal or constitutional complaint.[25] In addition to the discretionary power to grant or revoke a public right, if a legal entitlement is classified as a public right, this means that it is properly the subject of substantive decision-making by agencies in the administrative state, which are "part of the political branches of Government and which make decisions 'not by fixed rules of law, but by the application of governmental discretion or policy.'"[26] Thus, for example, the procedural and substantive protections provided to a legal right by Article III courts under the separation of powers doctrine do not apply to a public right.[27]

In contrast to a public right, a private right arises between individuals, and thus it typically entails rights and duties defined, secured, and adjudicated by courts in classic common-law doctrines like contract, tort, and property.[28] As a result, private rights in contract, property, and bodily integrity receive the full substantive and structural protections of the constitutional order created by the Framers and embedded in the practice of legal institutions that developed in the ensuing two centuries, such as adjudication of legal rights by Article III courts under the separation of powers doctrine.[29] As the Illinois Supreme Court explained in 1857, "The legislative power . . . cannot directly reach the property or vested rights of the citizen, by providing for their forfeiture or transfer to another, without trial and judgement in the courts."[30]

Implicit in this distinction between rights that may be revoked by the "legislature power" and rights that can only be revoked by "courts,"[31] the Illinois Supreme Court in 1857 was referencing a longstanding heuristic to distinguish between public rights and private rights. This heuristic is captured in a basic question: Was the right created and defined by either statute or a court decision? The California Supreme Court, for example, once framed this question as follows:

---

420 (1837) (construing grant narrowly in favor of the public and denying constitutional protections for the grantee given further actions by state authorities that restricted or harmed the grantee). *See also* Crowell v. Benson, 285 U.S. 22, 51 (1932) (stating that public rights arise in "the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions, and payments to veterans") (citing cases).

[25] NGS American, Inc. v. Barnes, 998 F.2d 296, 298 (9th Cir. 1993) (construing Congress' regulation of employee benefit plans by ERISA); *see also* Mirabal v. General Motors Acceptance Corp., 537 F.2d 871, 876 (7th Cir. 1976) ("Rights under the Fair Labor Standards Act came into existence only by virtue of an act of Congress. These rights did not exist at common law, nor were they established by the Constitution. Therefore, since these rights were created by the Congress, they may be taken away in whole or in part, or altered, by Congress . . . ."), *overruled on other grounds*, Brown v. Marquette Sav. & Loan Ass'n, 686 F.2d 608, 615 (7th Cir. 1982).

[26] B&B Hardware, Inc. v. Hargis Indus., Inc., 135 S. Ct. 1293, 1316 (2015) (quoting 2 J. DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW 35-36 (1927)).

[27] *See generally* Oil States Energy Servs., LLC v. Greene's Energy Group, LLC, 138 S. Ct. 1365 (2018).

[28] *See* Crowell v. Benson, 285 U.S. 22, 51 (1932) ("The present case . . . is one of private right, that is, of the liability of one individual to another under the law as defined.").

[29] B&B Hardware, Inc. v. Hargis Indus., Inc., 135 S. Ct. 1293, 1316 (2015) (observing that "some historical evidence suggests that the adjudication of core private rights is a function that can be performed only by Article III courts, at least absent the consent of the parties to adjudication in another forum").

[30] Newland v. Marsh, 19 Ill. 376, 383 (1857).

[31] *Id.*

> It is true that the privileges so granted by the Government do not pertain to the citizens of the State by common right. But what is the *"common right"* here referred to? Is it not a right which pertains to citizens by the *common law*, the investiture of which is not to be looked for in any special law, whether established by a Constitution or an Act of the Legislature?[32]

The provenance of a legal right in either a statute or a court decision is, to turn a phrase from a recent patent law decision by the Supreme Court, "a useful and important clue" in classifying it as either a public right or private right.[33] This heuristic makes sense. If a public right is a privilege *granted* by one of the political branches, such as by Congress, then this is done via a positive enactment—a statute. In contrast, a private right, as the California Supreme Court further explained, "refers to the right of citizens generally at common law."[34] Professor Caleb Nelson identifies this "core private right" as comprising the rights of personal security, personal liberty, and private property—classic individual rights long secured by common law writs and later by the modern doctrines of property, tort, and contract.[35] Thus, it makes sense as "an investigative tool" (to continue to use language from patent law[36]) for courts to identify which branch of government is the source of the legal right in question—a legislature or court.

Of course, there is much greater complexity in defining the precise contours of this fundamental distinction between legal rights and the constitutional protections they receive.[37] Since the United States rejected the office of the Crown as the Executive, this meant that the more precise three-part English classification between private right, public right, and royal prerogative was compressed into a dichotomy between only public rights and private rights.[38] With public rights referring to both fundamental franchises, like the right to vote, due process, or the jury trial right, and grants of purely discretionary policy prerogative, such as utility or bridge monopolies, there has been some understandable confusion, especially in defining the constitutional protections provided to public rights within the modern administrative state.[39] As a result, like other constitutional doctrines today, the distinction has become more indeterminate in practice than it is in its abstract framing as a legal rule. The Supreme Court itself complains now that its decisions on the public right versus private right distinction have "not been entirely consistent."[40]

---

[32] Spring Valley Water Works v. Schottler, 62 Cal. 69, 106-07 (1882).

[33] Bilski v. Kappos, 561 U.S. 593, 604 (2010) (identifying whether an invention or discovery uses a machine or makes a transformation of materials in the real world as a "helpful clue" as to whether it is patentable).

[34] Spring Valley Water Works v. Schottler, 62 Cal. 69, 107 (1882).

[35] Nelson, *supra* note 5, at 567 (citing William Blackstone's Commentaries).

[36] *Bilski*, 561 U.S. at 604.

[37] *See* Goldberg v. Kelly, 397 U.S. 254 (1970) (extending constitutional due process protections to recipients of welfare benefit privileges); *see also Oil States*, 138 S. Ct. at 1379 (In holding that patents are public rights, "our decision should not be misconstrued as suggesting that patents are not property for purposes of the Due Process or the Takings Clause.").

[38] *See* Adam MacLeod, *Public Rights after* Oil States Energy [draft paper].

[39] *See id.* Also, some scholars maintain that the administrative state and the public rights it creates represent in the American constitutional order the ongoing unconstrained exercise of the English royal prerogative. *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

[40] Stern v. Marshall, 564 U.S. 462, 488 (2011). *See also* Oil States Energy Serv. v. Greene's Energy Group, LLC, 138 S. Ct. 1365, 1373 (2018) (quoting same).

But this complexity in the broader constitutional doctrine is beyond the scope of an article that details only how it is misapplied in patent law by commentators and courts. For this article, it is sufficient to identify the noncontroversial distinction between public rights (grants of privilege) and private rights (individual rights). The settled practice of inquiring into the provenance of a legal right—a statute enacted by a legislature or a court decision creating a common law doctrine—is similarly noncontroversial. This question about provenance makes sense, if only because a public right can be a *grant* of special privilege on the basis of a discretionary, policy-based decision-making process in the political branches (including the administrative state). In contrast, a private right is a "core" individual right to life, liberty and property that is typically *secured* through private law doctrines of property, contract, and tort, and which historically have been adjudicated by courts in the Anglo-American legal system.[41] It is this distinction between statutes enacted by legislatures or court decisions at common law that is now deemed to be per se determinative in classifying patents as public rights, and this is a profound error.

The Framing of Patents as Public Rights by Modern Commentators and Courts

In intellectual property scholarship and in court decisions today, identifying the constitutional and statutory provenance of a patent right is deemed sufficient in classifying a patent as a public right. Professors and policy analysts across the legal and political spectrum casually characterize intellectual property rights like patents and copyrights as grants of special privileges or even as welfare benefits for inventors or artists. Courts similarly reduce the public right-private right distinction to one of merely a distinction between statutes and common-law rights.

This is especially true of libertarian commentators who differentiate regulatory favors granted by legislatures from individual rights secured by common-law courts. In recent years, they have applied this distinction to both copyrights and patents.[42] Jerry Brito, a libertarian policy analyst formerly of the Mercatus Center, asserts that copyright stands in "contrast to traditional property, [because] copyright was created by the Constitution; it did not exist in the common law. Without the Constitution's copyright clause, there would be no preexisting right in creative works."[43] (As an aside, this is historically incorrect.[44]) Tom Bell similarly argues that copyright is a "welfare

[41] Nelson, *supra* note 5, at 567 (adopting the phrase "core private rights" as distinguished from the "privileges or "franchises" comprising public rights).

[42] *See, e.g.*, Tom Palmer, *Intellectual Property: A Non-Posnerian Law and Economics Approach*, 12 Hamline L. Rev. 261, 263 (1989) ("Patents and copyright are forms, not of legitimate property rights, but of illegitimate state-granted monopoly.").

[43] Jerry Brito, *Why Conservatives and Libertarians Should Be Skeptical of Congress's Copyright Regime*, *in* COPYRIGHT UNBALANCED: FROM INCENTIVE TO EXCESS 9 (2012).

[44] Unlike patent law, which never was protected by courts at common law, copyright was in fact secured at common law. *See* Tomas Gomes-Arostegui, *Copyright at Common Law in 1774*, 47 Conn. L. Rev. 1 (2014); *see also* THE FEDERALIST No. 43, at 271-72 (James Madison) (Clinton Rossiter ed., 1961) ("The copyright of authors has been solemnly adjudged in Great Britain to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors."). This common law copyright regime was transplanted to the Americas and it existed in the states until complete federal preemption was imposed for all works created after January 1, 1978 by 17 U.S.C. § 301(a) of the 1976 Copyright Act. *See* House Rep. 94-1476 ("Section 301, one of the bedrock provisions of the bill, would accomplish a fundamental and significant change in the present law. Instead of a dual system of 'common law copyright' for unpublished works and statutory copyright for published works, which has

grant" to authors by Congress.[45] In a recent monograph, Professor Bell claims that, "As a creature of statute, copyright represents a notable exception to our natural and common-law rights."[46] Copyright is merely "a form of intellectual *privilege*," he argues, which is granted by Congress solely "in the service of the general welfare."[47]

While Brito's and Professor Bell's claims about the solely statutory nature of copyright are admittedly extreme (and incorrect), their classification of intellectual property rights as privileges (public rights) simply because they arise first from statutes is widely shared by many academics. In *Oil States*, 72 professors joined an amicus brief that argued that "as federal statutory rights that do not replace any common law rights, Congress has broad power to provide for administrative adjudication of the validity of issued patents."[48] Mark Lemley, one of the authors of this amicus brief, has compared intellectual property rights to welfare benefits, just as Professor Bell did.[49] Greg Reilly, another author of the *Oil States* amicus brief, has argued that a key inquiry in applying constitutional protections to legal rights is "the source of those rights," and while "[s]tate common law property rights" receive constitutional protection under the separation of powers doctrine, "when federal law creates a right, it generally can be adjudicated in a non-Article III tribunal."[50] Professor Reilly concludes this is "particularly clear with regard to patent rights. Patent rights are private property only because of a federal statute."[51] (As with the earlier claims about copyright, this is similarly incorrect.[52]) The academic literature is rife with such claims, confirming the conventional wisdom that a key distinction exists between patents and private property rights due to their respective origins in statutes or court decisions.[53]

---

been the system in effect in the United States since the first copyright statute in 1790, the bill adopts a single system of Federal statutory copyright from creation.").

[45] Tom W. Bell, *Authors' Welfare: Copyright as a Statutory Mechanism for Redistributing Rights*, 69 Brook. L. Rev. 229, 244 (2003) ("The welfare and copyright systems both operate by redistributing rights. More specifically, both use statutory mechanisms to redistribute personal property rights from members of the general public to particular beneficiaries.").

[46] TOM W. BELL, INTELLECTUAL PRIVILEGE: COPYRIGHT, COMMON LAW, AND THE COMMON GOOD 2 (2014).

[47] *Id.* (original emphasis).

[48] *See* Brief for 72 Professors of Intellectual Property Law as Amici Curiae in Support of Respondents at 15, Oil States Energy Services, LLC v. Greene's Energy Group, LLC, 138 S.Ct. 1365 (2018) (No. 16-712).

[49] Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 Tex. L. Rev. 1031, 1072 (2005) ("[T]he closest legal analogy to intellectual property is a government-created subsidy. . . . This is also the point of the welfare system. The government is not doing so out of largess in either case. Rather, it is acting in order to benefit the public more generally . . . .").

[50] Greg Reilly, *The Constitutionality of Administrative Patent Cancelation*, 23 B.U. J. Sci. & Tech. L. 377, 407 (2017).

[51] *Id.*

[52] *See infra* note 62, and accompanying text.

[53] *See, e.g.*, Robin Feldman, *Federalism, First Amendment & Patents: The Fraud Fallacy*, 17 Colum. Sci. & Tech. L. Rev. 30, 71 (2015) (asserting that the Patent and Copyright Clause represents a "creation of a narrow public franchise for limited policy reasons [that] stands in sharp contrast to the Framers' conception of core private property rights, and the way in which those rights are treated in the Constitution"); Chidi Oguamanam, *Beyond Theories: Intellectual Property Dynamics in the Global Knowledge Economy*, 9 Wake Forest Intell. Prop. L.J. 104, 110 (2009) (stating that "intellectual property rights, for the most part, are statutorily created rights rather than inherent and inalienable natural rights"); Tom W. Bell, *Intellectual Property, the Right to Health, and Human Rights*, 2006 U. Ill. J.L. Tech. & Pol'y 63, 94-95 (2006) ("Courts and commentators agree in characterizing copyrights and patents not as natural property rights, but rather as statutory creations designed to maximize public

The courts have followed suit. In *Oil States*, the Supreme Court continued this pattern of converting a long-used heuristic in identifying an indicia of a public right—its statutory provenance—into a per se rule in classifying a legal right as a public right (privilege). Similar to professors and commentators, the argument in *Oil States* that patents are public rights is both straightforward and short: patents "did not exist at common law"[54] and they are a "creature of statute."[55] The rest of the *Oil States* opinion merely recites decisions allegedly supporting this conclusion or distinguishes Supreme Court decisions that appear to conclude otherwise.[56] Such abbreviated judicial reasoning concerning the status of patents as public rights was not novel. Before penning the majority opinion in *Oil States*, Justice Thomas made the same assertion in a patent case in 2015,[57] and the Court of Appeals for the Federal Circuit has similarly concluded that patents are public rights solely given their provenance in statutes and regulations.[58]

A heuristic or investigative tool—a helpful "clue" in identifying the provenance of a legal right in determining its constitutional protections within Anglo-American political theory and constitutional law—has been elevated into the "sole test" by commentators and courts in defining patents as public rights.[59] This excessively reductionist and cramped methodological

---

welfare."); J.H. Reichman & Jonathan A. Franklin, *Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information*, 147 U. Pa. L. Rev. 875, 922 (1999) (asserting that "statutory intellectual property rights confer legal monopolies on qualified creators and inventors"); Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 Cal. L. Rev. 241, 256 (1998) ("Statutes . . . were just expressions of historically and culturally contingent social policy" in the nineteenth century and thus "the Copyright and Patent Acts had no special claim to authority" as did non-statutory rights in property.). *Cf.* Shyamkrishna Balganesh, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 Vand. L. Rev. 1543, 1544 (2010) ("Intellectual property is today thought to be principally of statutory origin."); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 Tex. L. Rev. 1031, 1075 (2005) (asserting that "copyright law is neither tort law nor property law in classification, but is statutory law"); Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 Colum. Bus. L. Rev. 335, 336 ("Anyone who does not believe that the IP laws are a form of regulation has not read the [statutes] and the maze of technical rules promulgated under them . . . .").

[54] *Oil States*, 138 S. Ct. at 1374 (quoting Gaylor v. Wilder, 10 U.S. (How.) 477, 494 (1851)).

[55] *Oil States*, 138 S. Ct. at 1374 (quoting Crown Die & Tool Co. v. Nye Tool & Mach. Works, 261 U.S. 24, 40 (1923)).

[56] Richard Epstein has detailed at length that Justice Thomas' opinion in *Oil States* either quotes these prior decisions out of context or elides language that contradicts the propositions he claims they support. *See* Richard A. Epstein, *The Supreme Court Tackles Patent Reform: Inter Partes Review Under the AIA Undermines the Structural Protections Offered by Article III Courts*, 19 Federalist Soc'y Rev. 123 (2018), https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/qoHHe8ya1VzrC4SBqbC3MBJyMD2sR5Swlc7YH4if.pdf

[57] *See* Teva Pharm. USA, Inc. v. Sandoz, Inc., 135 S. Ct. 831, 848 n.2 (2015) (Thomas, J., dissenting) (distinguishing "core private rights" secured by "the English common law" from grants of "privilege" in patents secured as statutory "franchises" secured "for reasons of public policy") (quotations and citations omitted).

[58] *See* MCM Portfolio LLC v. Hewlett-Packard Co., 812 F.3d 1284, 1290 (Fed. Cir. 2015) (concluding that patents are public rights because the "patent right 'derives from an extensive federal regulatory scheme,' and is created by federal law") (quoting Stern v. Marshall, 564 S. Ct. 462, 490 (2011)). Similar to the misquotes of prior decisions in *Oil States*, *see supra* note 56, Judge Dyk's opinion in *MCM Portfolio* misquotes *Stern* by adding the adjective "extensive." *See Stern*, 564 U.S. at 490 ("The Court has continued, however, to limit the exception to cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority.").

[59] *Cf.* Bilski v. Kappos, 561 U.S. 593, 604 (2010) (criticizing the Federal Circuit that "the machine-or-transformation test is not the sole test for deciding whether an invention is a patent-eligible 'process'")

approach in applying the longstanding distinction between public rights and private rights is legally and historically mistaken, as will be explained in next Part.

The Mixed Nature of Statutory and Common-Law Rights in Land and Inventions

At common law and in the early American Republic, courts and commentators recognized that the distinction between statutes and common law rights was merely a generalized distinction that did not reflect the complex institutional relationship between legislatures and courts in creating and applying legal rights. Accordingly, the distinction between statutes and common law rights was neither intended to be nor used as a solely determinative test for distinguishing between public rights and private rights. The reason is simple: all legal rights share a mixed provenance in both statutes and judicial decisions, and thus this distinction between statutes and judicial decisions could never serve as a coherent rule for distinguishing public rights and private rights. Professor Nelson, for example, observes that classic "private rights to bodily integrity will depend to a considerable extent on *statutes* and *common-law* rules."[60] The same can be said about property rights in land, as well as about property rights in inventions.

The Mixed Statutory and Common-Law Nature of Property Rights in Land

The classic example of a private right is the property right secured to individuals in land. The fee simple in land, or at least the right to sue for trespass anyone who breaches one's physical boundaries, is a commonplace reference point for all other property rights. This includes patents,[61] which is not surprising, if only because early American courts often compared patents to titles in fee simples, adopted concepts and common-law doctrines in defining and securing patent rights, and employed property rhetoric in patent cases.[62] While it is undeniable that many doctrines that comprise the fee simple were developed by courts, it is equally true that many doctrines were created or codified in legislation, either by Parliament or American legislatures.

As all law students learn in their first-year Property course, the progenitor of the modern "fee simple" in land with its full range of exclusive rights to use and transfer the estate is found not in common-law court decisions, but rather in a statute enacted by Parliament in 1290: The statute *Quia emptores*.[63] In virtually all first-year property textbooks, this statute is identified as the *foundation* of the modern legal concept of a "fee" in land that was developed in the Anglo-American legal system over the ensuing centuries.[64] It has this foundational status because this

[60] Nelson, *supra* note 5, at 573.

[61] *See* Adam Mossoff, *The Trespass Fallacy in Patent Law*, 65 Florida L. Rev. 1687, 1692-96 (2013).

[62] *See* Adam Mossoff, *Commercializing Property Rights in Inventions: Lessons for Modern Patent Theory from Classic Patent Doctrine*, *in* COMPETITION POLICY AND PATENT LAW UNDER UNCERTAINTY: REGULATING INNOVATION 345, 345–77 (Geoffrey A. Manne & Joshua D. Wright eds., 2011) (discussing property conveyance concepts and doctrines in patent law); Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. Rev. 689, 700–07 (2007) (discussing protection of patents under the Takings Clause); Mossoff, *supra* note 17, at 989–1009 (discussing property concepts, doctrines and rhetoric in patent law).

[63] 18 Edw 1, ch. 1. (Eng.). The statute does not have a title, and thus it is identified today by its first two words, which, in Latin, means "because purchasers."

[64] *See, e.g.*, THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY 505-06 (3d ed., 2017) (identifying the Statute Quai Emptores as part of the shift away from feudalism because it "made what later became the fee simple

statute granted one of the central rights that has been long identified as an essential characteristic of a fee simple—the right to alienate the estate.[65] Lord Edward Coke famously declared that any attempt to impose an absolute restraint on alienation is "repugnant" to a fee simple, and thus it is void.[66] This so-called "common law" rule derived from the statute *Quia emptores* remains in effect to this day in U.S. jurisdictions, and it is usually set forth in statutes.[67]

After the statute of *Quia emptores* was enacted in 1290, courts continued to develop private law doctrines in estates in land, but Parliament also continued to enact more statutes that created or delimited fundamental rights in estates in land. Again, this is standard fare of first-year Property courses, which usually cover the Statute of Gloucester (1278),[68] *De Donis Conditionalibus* (1285),[69] Statute of Uses (1535),[70] Statute of Wills (1540),[71] and Tenures Abolition Act (1660),[72] among others. These statutes, consisting of both declarative and remedial statutes, defined the nature and scope of the core set of rights that commentators and judges now associate with classic "common law" estates in land.

Of course, the Kings Bench, the Court of Common Pleas, and other common-law courts in England interpreted, applied, and extended these statutes, developing in the conventional understanding of "common law" decision-making some of the legal doctrines that define and secure property rights in land. Lord Coke himself was a master of this legal practice; as a lawyer, judge, legislator and commentator, he crafted foundational legal principles in Anglo-American

---

fully alienable"); JESSE DUKEMINIER et al., PROPERTY (7th ed. 2010) ("By the end of the thirteenth century, Quia Emptores settled that the fee was freely alienable" and thus "the [originally feudal] relationship between tenant and lord was basically an economic one"); JOSEPH WILLIAM SINGER, PROPERTY LAW 602 (5th ed., 2010) ("The statute shows the decline in the importance of the personal relationship of lord and tenant . . . . By the end of the thirteenth century, a transfer of a normal fee interest in land was granted by the language, '*O* grants to *A* and his heirs.'").

[65] The enacting clause of the statute states: "[H]enceforth every freeman shall be permitted to sell his land or tenement, or a part of it, at pleasure." BARLOW BURKE ET AL., FUNDAMENTALS OF PROPERTY LAW 187 (3d ed., 2010) (quoting the statute *Quai emptores*). *See* Sparhawk v. Cloon, 125 Mass. 263, 266 (1878) (Gray, C.J.) ("At law, any property, real or personal, that a man owns, may be alienated by him . . . ."); Mandlebaum v. McDonnell, 29 Mich. 78, 95 (1874) ("At common law, however, prior to the statute *quai emptores*, a condition against alienation would in England have been good . . . .").

[66] *See Mandlebaum*, 29 Mich. at 95-96 (quoting Coke on Littleton that "a devise in fee upon condition the devisee shall not alien . . . is void . . . . [f]or it is absurd and repugnant to reason that he that hath no possibility to have the land revert to him should restrain his feoffee in fee simple of all his power to alien").

[67] *See, e.g.*, CAL. CIV. CODE § 711 ("Conditions restraining alienation, when repugnant to the interest created, are void"); N.D. CENT. CODE § 47-02-26 (1943) ("Conditions restraining alienation, when repugnant to the interest created, are void."); N.J. STAT. ANN. §46:3-5 ("From and after March eighteenth, one thousand seven hundred and ninety-five, any freeholder may give, sell, or alien the real estate whereof he is, or at any time shall be, seized in fee simple, or any part thereof, at his pleasure.").

[68] 6 Edw. 1, ch. 5 (Eng.) (creating rights against life estate owners by the owner of either the follow-on future interest or the broader estate).

[69] 13 Edw., ch. 1 (Eng.) (creating the fee tail estate).

[70] 27 Hen. 7, ch. 10 (Eng.) (ending the creation of many new types of estates and future interests by lawyers and judges, and thereby creating the core menu of future interests in land that exist to this day).

[71] 32 Hen. 8, ch. 1 (Eng.) (creating and defining both the property rights and the conveyance interests that can be devised via wills).

[72] 12 Car 2, ch. 24 (Eng.) (eliminating feudal services associated with property rights in land).

constitutionalism.[73] Still, as a matter of historical fact, it is simply untrue that property rights in land were created only by English court decisions and not by statutes. In fact, the English common law system was influenced by the continental natural law philosophers who were working within the context of the Roman Law,[74] especially in securing property rights.[75] Of course, the Roman Law is the first systematic civil law system in the West,[76] and, as noted earlier, the public right versus private right distinction itself finds its roots in the Roman Law.[77]

This symbiotic relationship in England between statutes and judicial decisions in creating and enforcing property rights in land continued in the early American Republic. Beyond property law, there was an extensive debate in the 1790s about the legitimate authority of the English common law as such given the Revolutionary War that concluded with the Treaty of Paris in 1783. This debate was resolved in most states with either an express *provision* in a state constitution or enactment of a *statute*—known as a "reception statute"—declaring that the English common law was authoritative precedent up through the Declaration of Independence.[78]

The fundamental role of statutes in creating property rights in land has continued in the states from the early years of the American Republic up through today. State legislatures have enacted statutes codifying and securing the rights of adverse possessors,[79] creating title recordation requirements,[80] defining and securing conveyance rights,[81] defining and securing wills and the

[73] The most prominent example of this is Lord Coke's famous reframing in the seventeenth century of the Magna Carta as a fundamental declaration of the traditional rights of all English subjects, as opposed to its original, historical function of protecting only the aristocracy against an aggrandizing King. *See* Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 Harv. L. Rev. 365, 377-78 (1929) ("In his *Institutes*, Coke . . . completes his restoration of *Magna Carta* as the great monument of English liberties."); Theodore F.T. Plucknett, *Bonham's Case and Judicial Review*, 40 Harv. L. Rev. 30, 63 (1926) (quoting a colonial American critique of the Stamp Act in 1765 that such an "Act of Parliament is against Magna Charta and the natural rights of Englishmen, and therefore according to Lord Coke null and void").

[74] *See* RICHARD H. HELMHOLZ, NATURAL LAW IN COURT (2015).

[75] *See, e.g.*, Foster v. Reis, 112 A.2d 553, 556 (N.J. 1955) ("The doctrine of *donatio causa mortis* was borrowed by the Roman law from the Greeks, 2 Bl.Com. 514, and ultimately became a part of English and then American common law."). *See also* Adam Mossoff, *What is Property?Putting the Pieces Back Together*, 45 Ariz. L. Rev. 371 (2003) (identifying extensive influence on common law property doctrine by natural law philosophers and Roman Law).

[76] *See* NICHOLAS, *supra* note 14, at 2 (distinguishing between the English common law system and the Roman civil law system).

[77] *See id. at* 2 ("The Romans themselves made a distinction between public law and private law. The former concerned with the functioning of the state, and . . . the latter was concerned with relations between individuals.")

[78] *See* Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 Vand. L. Rev. 791, 798-805 (1951) (identifying all states except for Connecticut in enacting either reception statutes or in providing expressly in their new state constitutions for the authoritative force of the common law).

[79] *See, e.g.*, Iowa Code § 614.1(5); Miss. Code Ann. § 15-1-13(1) (Rev. 2012); N.Y. REAL PROP. § 501 (McKinney 2008); 1889 Ohio Laws 300; REV. CODE WA. § 4.16.020.

[80] *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 13-2.2 (McKinney 2001); OHIO REV. CODE ANN. § 317.08 (West 2015); VA CODE ANN. § 17.1-227 (West 2014); VA. CODE ANN. § 55-48 (West 2014).

[81] *See, e.g.*, Act of Mar. 30, 1864, *reprinted in* SUPPLEMENT TO THE REVISED STATUTES OF THE STATE OF OHIO 346-47 (Robert Clarke & Co. Law Publishers 1868) (An act to authorize the sale of determinable estates, and supplemental to the act for the sale or lease of estates tail in certain cases); VA. CODE ANN. § 55-2 (When deed or will necessary to convey estate; no parol partition or gift valid).

creation of future interests in land,[82] as well as eliminating some English property doctrines in both procedure, such as revising legal presumptions in interpreting conveyances,[83] and in substance, such as eliminating the fee tail that was first created in the English statute *De Donis Conditionalibus* (1285).[84] These and other statutes have been interpreted, applied and extended in "common law" fashion by American courts in the same way that English courts interpreted, applied, and extended *Quia emptores* and other statutes enacted by Parliament creating property rights in land over the centuries.[85]

Even the notorious common-law doctrine, the rule against perpetuities, has been codified in many states.[86] One of the more famous legislative enactments in the modern era—at least famous among legal elites—is that a significant number of states have adopted statutes eliminating the common law rule against perpetuities and replaced it with the Uniform Statutory Rule Against Perpetuities (USRAP) (creating much happiness among lawyers and law students alike).[87]

Lastly, one cannot even say that the originating *source* of property rights in land is found solely in so-called "common law" court decisions. In both historical and legal terms, the exact opposite is the case. While occupation and productive labor create an inchoate claim to ownership of land, legal title is ultimately conferred by an express statutory or administrative grant.[88] This is rooted in English law,[89] and it was continued in both the state and federal governments following the American Revolution. Following English legal practice in both form and substance, titles in land

[82] [cite probate codes]

[83] *See, e.g.*, Tenn. Code Ann. §64-5-101 (2006) (reversing common-law canon of interpretation that, if a conveyance is ambiguous, it is construed to grant a lesser estate and replacing this canon with a presumption that a fee simple will be deemed to have been granted).

[84] *See, e.g.*, 1786 N.Y. LAWS 191-93, Chpt. 12 (Feb. 23, 1786) (providing that "all estates tail shall be and are hereby abolished"); 10 OHIO LAWS 7 (Dec. 17, 1811) (repealed 114 OHIO LAWS 475) (providing that "all estates given in tail shall be and remain an absolute estate in fee simple"); VA. CODE ANN. §55-12 (eliminating the fee tail estate as of October 7, 1776, and providing any attempt at creating a fee tail would create instead a fee simple).

[85] *See, e.g.*, White v. Brown, 559 S.W.2d 938 (Tenn. 1977) (holding a will to be ambiguous and applying modern interpretative canon enacted as a Tennessee statute that a fee simple is deemed as a matter of law to have been devised by the decedent); Mountain Brow Lodge No. 82, Indep. Order of Odd Fellows v. Toscano, 64 Cal. Rptr. 816 (Cal. Ct. App. 1967) (construing statutory prohibition against restraints on alienation do not apply to a fee simple subject to condition subsequent with a defeasible use restriction that merely has a practical effect of restraining alienation).

[86] *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 9-1.1 (McKinney 2018). *See* Symphony Space, Inc. v. Pergola Properties, Inc., 669 N.E.2d 799, 808 (Ct. App. N.Y. 1996) (rejecting argument by lawyers to engage in common-law-style judicial revision of the RAP in § 9-1.1 into a "wait and see" doctrine given that the "very statutory language of EPTL 9-1.1" is clear and precludes such judicial innovations).

[87] *See, e.g.*, VA. CODE ANN. §55-12.1 (2000). *See* THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY 573 (3d ed., 2017) ("Close to half the states have adopted the USRAP . . . eight states have abolished the RAP outright . . . .").

[88] *See* 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *311-12; *cf.* De La Croix v. Chamberlain, 25 U.S. (12 Wheat.) 599, 600–01 (1827) (noting that "actual possession" established an "inchoate right, but not a perfect legal estate" that could support "an action of ejectment").

[89] *See* 3 JAMES KENT, COMMENTARIES ON AMERICAN LAW __ (1824) [part 6, lecture 50] ("It is a fundamental principle in the English law, derived from the maxims of feudal tenures, that the king was the original proprietor of all the land in the kingdom, and the true and only source of title.")

in the United States are created by *patent grants*.[90] Similar to patents in inventions issued by the federal government, owners of property rights in *land* can trace their title to a patent first issued by the federal or state governments.[91]

Moreover, just as with patents for inventions, many of the patent grants creating titles in land imposed defeasible conditions, including both conditions precedent and conditions subsequent, in order to receive and retain title in the real estate. The most famous of the federal legislative enactments are the Homestead Acts.[92] With the first Homestead Act of 1862, the federal government established a system for granting title in real estate up to 160 acres to an individual who affirmed in an affidavit that the "application was made for his or her exclusive use and benefit, and that said entry is made for the purpose of actual settlement and cultivation."[93] The Act further provided that "no certificate shall be given or patent issued therefor until the expiration of five years from the date of such entry" of the claimant upon the land.[94] In sum, a claimant was required to stake a claim to a plot of land, labor upon it through its possession and use for five years, and affirm in another affidavit that "no part of said land has been alienated" during this five-year period.[95] Upon completion of these statutory preconditions, Congress provided (in language earlier similar to the patent statutes) that the individual "shall be entitled to a patent."[96] Disputes concerning violations of these defeasible conditions imposed on these statutory patent grants in land were common enough that they served as a point of comparison for the Supreme Court's decision in 1898 that the Patent Office could no more revoke a vested

[90] *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *316 ("The king's . . . . grants, whether of land, honors, liberties, franchises, or aught besides, are contained in charters, or letters patent, that is, open letters, *literae patentes* . . . ."); Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550-1800*, 52 Hastings L.J. 1255, 1259 (2001) (detailing how the "letter patent" was the general legal device by which the Crown exercised its authority to make grant to subjects).

[91] *See, e.g.*, Sherman v. Buick, 93 U.S. 209, 211 (1876) ("The contest in this case [between two claimants to title in a parcel of land] is between a patent of the United States and a patent of the State of California."); *see also* 43 U.S.C. § 945 (imposing an easement upon "all patents for lands taken up after August 30, 1890, under any of the land laws of the United States"); Home on the Range v. AT&T Corp., 386 F. Supp. 2d 999, 1000 (S.D. Ind. 2005) ("Plaintiffs are private landowners. . . . The United States issued land patents to plaintiffs' predecessors in interest . . . ."); Schwab v. Timmons, 589 N.W.2d 1 (Wis. 1999) ("In 1854, the United States granted by patent Lot 4 to Ingebret Torgerson . . . ."); Chever v. Horner, 11 Colo. 68, 70-71 (1888) ("In construing the foregoing statutes, this court has held that the execution and delivery of a deed to a portion of the Denver town-site, by a probate judge, acting under and by virtue of these statutes, was analogous to the granting of a patent by the land department of the government, and that the same presumptions in favor of the regularity of such deed exists as in the case of a patent issued by the government."); Buckley v. Cunningham's Heirs, 7 Ky. 285, 285 (1815) (noting that "the appellees had manifested their claim by exhibiting the patent under which they derive title, [and] the appellant showed in evidence two patents under which he claimed the land").

[92] *See* An Act to secure Homesteads to actual Settlers on the Public Domain (Homestead Act of 1862), ch. 75, 12 Stat. 392-393 (1862) (codified at 43 U.S.C. §§ 161-164) (repealed 1976); *see also* Act of Mar. 21, 1864, ch. 38, 13 Stat. 35 (amending the Homestead Act); Act of June 21, 1866, ch. 127, 14 Stat. 66 (applying the Homestead Act to lands in Alabama, Mississippi, Louisiana, Arkansas, and Florida); Act of June 22, 1874, ch. 394, 18 Stat. 192 (amending the Homestead Act).

[93] *See* Homestead Act, 12 Stat. at 392.

[94] *Id.*

[95] *Id.*

[96] *Id.*

title in a patent in an invention than it could similarly revoke a vested title in a patent granted in land—both must have their vested private rights in property adjudicated by Article III courts.[97]

In sum, it is wrong both historically and legally to assert that property rights in land are the result of so-called "common law" decisions by courts. At common law, there was a symbiotic and mutually reinforcing relationship between statutes and court decisions in both creating and delineating these property rights in land, and this legal practice continued in both substance and form in the United States after the American Revolution—and continues up through today.

There is a subtle equivocation in the sense of "common law" as it is has been used by modern commentators and courts in characterizing property rights in land as private rights. The Anglo-American property system is a common law system insofar as courts have developed the law and provide reasons and justifications without being required to base their decisions in a particular statute. Common law courts can create a doctrine—or "discover" it, as it used to be said.[98] This is in contrast to the modern "civil law" system in Europe in which courts must refer to a statute as a validating source of their decisions. In fact, it bears emphasizing that the Roman Law did not require this.[99] The emphasis on statutes in modern civil law systems is entirely a modern development after the Napoleonic Code. All of this goes to show that to say the Anglo-American property system is a "common law system" does not mean, of course, that there were no statutes creating private rights, which were then interpreted, applied and extended by courts.

Many statutes enacted by Parliament defined the foundational rights in Anglo-American property law. Similarly in the United States, the Homestead Act, federal and state patent grants (numbering in the millions), and untold numbers of state and federal statutes have created property rights in land as well. Statutes are not mandated by the Anglo-American legal system as an institutional requirement to justify a court decision, but statutes serve a fundamental role in both creating and enforcing property rights in land—at common law and in the United States.

---

[97] *See* McCormick Harvesting Mach. Co. v. C. Aultman & Co., 169 U. S. 606, 609 (1898) ("The only authority competent to set a patent aside, or to annul it, or to correct it for any reason whatever, is vested in the courts of the United States, and not in the department which issued the patent. And in this respect a patent for an invention stands in the same position and is subject to the same limitations as a patent for a grant of lands.") (citations omitted).

[98] *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Fedearl Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 10 (1997) ("It is only in this century, with the rise of legal realism, that we came to acknowledge that judges in fact 'make' the common law . . . ."). This historical conception of judicial decision-making was a byproduct of the theoretical connection in the seventeenth and eighteenth centuries between reason, natural rights, and the common law. *See* Mossoff, *supra* note 17, at 981 n.131; *see also* Edward Coke, The First Part of the Institutes of the Laws of England § 213, at 142 (14th ed. 1791) (1658) (stating that "it is to be observed, that the common law of *England* sometimes is called right, sometimes common right, and sometimes *communis justicia*," and that in the Magna Carta "the common law is called right"); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 561 (O.W. Holmes, Jr. ed., 12th ed. 1873) (1826) (explaining that the common law is "the application of the dictates of natural justice and of cultivated reason to particular cases").

[99] *See* NICHOLAS, *supra* note 14, at 19-34 (1962) (detailing key role of judges (magistrates) in the development of the Roman Law); One of the primary sources of Roman Law is *Justinian's Digest*, which is a collection of commentaries and other sources of law in Roman jurisdictions. *See* THE DIGEST OF JUSTINIAN (Alan Watson trans., 1985).

One can say that private rights in land are a "creature of statute,"[100] just as the *Oil States* Court, the Federal Circuit, and many commentators have said of patents in inventions.

The Mixed Statutory and Common-Law Nature of Property Rights in Inventions

Given the heuristic of looking to the provenance of a legal right in assessing whether it is a public right, it might seem that patents are a classic example of a public right. Their source is in statutes that have been enacted since the Patent Act of 1790, one of the first federal laws enacted by the First Congress.[101] Congress can enact patent statutes only because this is one of its discretionary powers delegated to it in Article I, Section 8 of the Constitution along with, among others, creating and maintaining an army and navy, providing for legal rules on how people can become citizens, and creating trial and appellate courts (separate from the Supreme Court, whose existence is mandated by Article III).[102] The express constitutional grant of power to Congress and the resulting statutory enactments appear to suggest that patents are public rights, as perhaps best evidenced by the conventional wisdom today among commentators and courts.

Patents might seem to fit within the public right category even more than copyrights. Unlike copyrights, patents were not first secured by courts at common law, and common law rights in copyright continued even after Parliament's enactment of the Statute of Anne of 1709,[103] and they continued in the United States until 1978.[104] Instead, patents were born hundreds of years ago from royal prerogative, similar to the royal grants in the feudal system centuries earlier that later gave rise to property rights in land. Patents were given their modern legal foundation in a statute enacted by Parliament in 1623 to limit this royal prerogative power—the Statute of Monopolies.[105] The Statute of Monopolies conferred jurisdiction to adjudicate patent rights upon the common law courts, but the Crown still dispensed patents as an act of royal prerogative and thus the Privy Council did not formally relinquish its power until more than a century later.[106] By the eighteenth century, there was still no real English common law of patents—a lacuna recognized by Lord Chief Justice Eyre in *Boulton v. Watt & Bull* in 1795 when he complained that "[p]atent rights are nowhere, that I can find, accurately discussed in our [law] books."[107]

Of course, as I have identified in prior research, "the cases in which these complaints are voiced [in the eighteenth century] soon became the precedents upon which the 'law of patents' was

[100] *Oil States*, 138 S. Ct. at 1374 (quoting Crown Die & Tool Co. v. Nye Tool & Mach. Works, 261 U.S. 24, 40 (1923)).

[101] *See* Patent Act of 1790, ch. 7, § 1, 1 Stat. 109-112 (repealed 1793).

[102] Many people do not realize that the power of the lower federal courts to receive and adjudicate legal complaints filed by private citizens is entirely within the discretion of Congress. *See* Senate Select Committee on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 55 (D.D.C. 1973) ("When it comes to the jurisdiction of the federal courts, truly to paraphrase the scripture, the Congress giveth and the Congress taketh away.").

[103] 8 Ann. c. 21 (Eng.).

[104] *See infra* note 44.

[105] *See* An Act Concerning Monopolies, 21 Jac. I, c. 3 (1623) (Eng.).

[106] *See* Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550-1800*, 52 Hastings L.J. 1255, 1258-87 (2001).

[107] Boulton & Watt v. Bull, 1 Carp. P.C. 117, 145, 126 Eng. Rep. 651, 665 (C.P. 1795).

created, defined and applied by later courts."[108] Just as with the historical evolution of property rights in land, in which there was a symbiotic relationship between statutes and court decisions in crafting foundational doctrines securing the fee simple and other legal interests in estates, English patent law developed in a similar fashion in the seventeenth and eighteenth centuries. For example, it was English courts, not Parliament, that created the social contract theory of modern Anglo-American patent law and the legal requirement of a submission of a specification (written description of the invention) as the consideration offered by an inventor in receiving a valid patent.[109] The written description requirement is *not* in the Statute of Monopolies; a foundational doctrine in Anglo-American patent law was created at common law.[110]

As with property rights in land, this institutional and doctrinal pattern repeated itself in America. From the first enactments of copyright and patent statutes by the states under the Articles of Confederation, and then by Congress enacting the first federal patent and copyright statutes in 1790, courts interpreted, applied and extended these statutes in common law fashion in crafting the doctrines that comprise the fundamental rights and duties in U.S. patent law. Two jurists in particular are well known among patent lawyers for precisely this reason—Justice Joseph Story and Judge Learned Hand. Patent law historian, Frank Prager, writes that it is "often said that Story was one of the architects of American patent law," if only because "Story was uninhibited in interpreting words into and out of [the patent] statute."[111] Judge Hand's patent law decisions are of such import that, unlike any other federal judge today, his opinions in patent cases have been compiled outside of the *Federal Reports* for ease of reference by lawyers and scholars.[112]

This is all familiar ground to law professors and historians, who are well versed in the historical evolution of American patent law in which Congress has enacted broadly framed statutes and federal courts used these statutes as springboards for classic common-law-style creation of legal doctrines.[113] This at least was the case before 2011 and the more highly detailed statutory language in provisions of the American Invents Act, which created a more public-style

[108] *See* Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550-1800*, 52 Hastings L.J. 1255, 1276 (2001).

[109] *See id.* at 1276-1302.

[110] *See id.* at 1288 ("The specification was unheard of as a requirement for a patent grant prior to the late seventeenth century . . . ."). Section 6 of the Statute of Monopolies is the portion of the statute that becomes the foundation for the modern Anglo-American patent system. According to Lord Coke, § 6 set forth six requirements for a valid patent grant by the Crown, *see* 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 184 (1797) (1644), and the specification is notably absent. *See also* Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550-1800*, 52 Hastings L.J. 1255, 1276-1306 (2001) (discussing Section 6 of the Statute of Monopolies and Lord Coke's famous commentary).

[111] Frank D. Prager, *The Influence of Mr. Justice Story on American Patent Law*, 5 Am. J. Legal Hist. 254, 254 (1961).

[112] *See* LEARNED HAND, *LEARNED HAND ON PATENT LAW* (1983).

[113] *See, e.g.*, Craig Allen Nard, *Legal Forms and the Common Law of Patents*, 90 B.U. L. Rev. 51, 54 (2010) ("It should therefore come as no surprise to learn that a significant portion of U.S. patent law, including some of the most important and controversial patent law doctrines, is either built upon judicial interpretation of elliptical statutory phrases, or is devoid of any statutory basis whatsoever.")

regulatory approach.[114] This common-law decision-making in patent law has occurred in two ways.

First, courts have created out of whole cloth new substantive legal rights that are not listed anywhere in the patent statutes. For instance, courts created the exhaustion doctrine, secondary liability, the experimental use defense, nonobviousness doctrine, and the distinction between the infringement doctrines of literal infringement and equivalents infringement, to name just a few of many substantive doctrines creating or delimiting the rights of patent owners.[115] Moreover, courts extended to patent rights by judicial decision-making procedural doctrines that existed in other areas of law, such as the presumption of validity for issued patents, equitable defenses, and others. Of course, the one judicial doctrine in patent law that most lawyers and commentators are aware of today is the judicially created exclusionary rule on patent eligibility, which prohibits patents issuing for abstract ideas, laws of nature or physical phenomena.[116] Judges and lawyers often observe that this exclusionary rule is neither in § 101 of the modern patent statute nor in any predecessor patent statute.[117] It is a creation solely of the courts.

Second, in addition to this wide-ranging "common law" creation of patent doctrines, courts have created substantive doctrines in interpreting and applying statutory provisions in the Patent Act. These judicially-created doctrines become "the law" that is subsequently applied by courts, and patent law is replete with them. For example, the "all elements rule" in comparing a patent to a product or process in finding either literal or equivalents infringement is found nowhere in § 271; it is derived from a judicial construction of the phrase "patented invention" in this statutory provision.[118] Once liability has been determined in an infringement action, courts have similarly construed § 284's mandate that a "reasonable royalty" be paid to patent owners, creating the competing legal rules of full market value[119] or the smallest saleable patent practicing unit.[120] Neither of these phrases is in the statute. Of course, there is the *Georgia-Pacific* test,[121] the infamous fourteen-factor test for assessing a reasonable royalty that Judge Richard Posner hs

[114] Pub.L. 112-129, 125 Stat. 284 (2011). For example, the AIA's substantial revision to § 102, which is highly particularized with extensive statutory language and sub-provisions, stands in sharp contrast to the novelty provisions in the prior patent acts in 1790, 1793, 1836, 1870, and 1952.

[115] *See, e.g.,* Nard, *supra* note 113, at 54 n.12 ("For example, the entire body of jurisprudence relating to non-literal infringement, claim interpretation, repair-construction, and patent exhaustion is judge-made law.").

[116] *See* Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107, 2116 (2013) ("We have long held that [§ 101 of the Patent Act] contains an important implicit exception: Laws of nature, natural phenomena, and abstract ideas are not patentable."); *see also* Alice Corp. v. CLS Bank Intern'l, 134 S. Ct. 2347, 2354 (2014) (quoting same).

[117] *See* Bilski v. Kappos, 561 U.S. 593, 601-02 (2010) ("The Court's precedents provide three specific exceptions to § 101's broad patent-eligibility principles: "laws of nature, physical phenomena, and abstract ideas." While these exceptions are not required by the statutory text . . . . these exceptions have defined the reach of the statute as a matter of statutory *stare decisis* going back 150 years.") (citation omitted).

[118] *See* Warner-Jenkinson CO. v. Hilton Davis Chem. Co., 520 U.S. 17, 29 (1997) ("Each element contained in a patent claim is deemed material to defining the scope of the patented invention, and thus the doctrine of equivalents must be applied to individual elements of the claim, not to the invention as a whole."). It also goes by "all limitations rule." *See* Dawn Equip. Co. v. Kentucky Farms Inc., 140 F.3d 1009, 1014 (Fed. Cir. 1998) ("To infringe a claim, each claim limitation must be present in the accused product, literally or equivalently.").

[119] *See* Rite-Hite Corp. v. Kelley Co., 56 F.3d 1538, 1549 (Fed. Cir. 1995) (en banc).

[120] *See* Cornell Univ. v. Hewlett-Packard Co., 609 F. Supp. 2d 279, 283 (N.D.N.Y. 2009).

[121] *See* George-Pacific Corp. v. U.S. Plywood Corp., 318 F. Supp. 1116 (S.D.N.Y. 1970).

characterized as "baloney."[122] In court opinions for the past four decades, the *Georgia-Pacific* test reigns supreme as the substantive doctrine for awarding a reasonable royalty under § 284.[123] Yet one will search in vain for any multi-factor tests set forth in the otherwise generalized language in § 284. These are but a few examples of what is an otherwise ubiquitous legal fact throughout most of U.S. patent law—it is judicial opinions, not statutory provisions, that are the reference point for judges, lawyers and scholars in identifying and applying "patent law."

Another well-known example is the four-factor test created by the Supreme Court in 2006 in *eBay Inc v. MercExchange, L.L.C.* for determining the propriety of issuing an injunction under § 283.[124] Similar to the multi-factor test derived from the judicial "interpretation" of § 284 as to how to award a reasonable royalty, one will search in vain for any multi-factor test set forth in the otherwise generalized language in § 283, which provides that patent owners "may" obtain an injunction on a finding of infringement. Moreover, despite the *eBay* Court's assertion that it was only applying a well-established, historical four-factor test for issuing a permanent injunction,[125] remedies scholars have noted that there was no four-factor test used by equity courts historically in issuing permanent injunctions.[126] Thus, *eBay* is another example of the judiciary making a new rule in patent law entirely out of whole cloth. These are just a few of the tens if not hundreds of examples in patent law of "common law"-style judicial construction of the Patent Act in the creation and application of non-statutory legal tests.

Congress sometimes has subsequently codified these judicially created doctrines, although these declaratory acts of legislation are unnecessary, as best evidenced by the fact that Congress often leaves many of these judicially crafted doctrines alone. One such codification of a judge-made doctrine occurred in the 1830s when Congress codified what has become known as the "on-sale statutory bar" that was first created by Justice Story in 1829 in *Pennock v. Dialogue*.[127] In the patent statutes enacted in 1836 and 1870, Congress codified the increasingly common practice of inventors drafting "claims" in their patents to identify more precisely the "principle" of their invention that is secured by the property right granted to them by the Patent Office.[128] In the

[122] Apple Inc. v. Motorola, Inc., 869 F. Supp. 2d 901, 911 (N.D. Ill. 2012), *aff'd in part, rev'd in part, vacated in part, and remanded*, 757 F.3d 1286 (Fed. Cir. 2014). Judge Posner went on to ask, "could a judge or a jury really balance 15 or more factors and come up with anything resembling an objective assessment?" *Id.*

[123] *See, e.g.*, Ericsson, Inc. v. D-Link Sys., Inc., 773 F.3d 1201 (Fed. Cir. 2014); Lucent Tech., Inc. v. Gateway, Inc., 580 F.3d 1301, 1324-36 (Fed. Cir. 2009); In re Innovatio IP Ventures, 2013 WL 5593609, *5-*6 (N.D. Ill. 2009).

[124] *See* eBay Inc. v. MercExchange L.L.C., 547 U.S. 388 (2006).

[125] *See id.* at 390 ("Ordinarily, a federal court considering whether to award permanent injunctive relief to a prevailing plaintiff applies the four-factor test historically employed by courts of equity.").

[126] *See, e.g.*, Doug Rendleman, *The Trial Judge's Equitable Discretion Following* eBay v. MercExchange, 27 REV. LITIG. 63, 76 n.1 (2007) ("Remedies specialists had never heard of the four-point test."). It appears the *eBay* Court was confused between different legal tests for permanent injunctions and preliminary injunctions. While there is no historical four-factor test for permanent injunctions, there is a four-factor test for preliminary injunctions. *See* DOUG LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 444 (4th ed. 2010) (noting that the four-factor test for preliminary injunctions "the Court tried to transfer to permanent injunctions in *eBay*").

[127] Pennock v. Dialogue, 27 U.S. (2 Pet.) 1, 23-24 (1829).

[128] *See* Patent Act of 1870, ch. 230, § 26, 16 Stat. 198 (repealed 1952) (providing that an inventor "shall explain the principle thereof, and the best mode in which he has contemplated applying that principle so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery"); Patent Act of 1836, ch. 357, § 6, 5 Stat. 117, 119

Patent Act of 1952, Congress codified numerous judicially created doctrines in patent law over the prior 162 years, including nonobviousness,[129] patent misuse,[130] secondary liability,[131] and others. In discussing the codification of aspects of the patent misuse doctrine in *Illinois Tool Works Inc. v. Independent Ink, Inc.*, for example, Justice John Paul Stevens entered the following blooper in the *United States Reports*: "Congress codified the patent laws for the first time" in 1952.[132] Given the extensive "common law" of patents in the United States, one can perhaps forgive Justice Stevens in mistakenly conflating Congress adopting a new provision in § 271(d) with Congress codifying the patent laws writ large in 1952.

Conversely, Congress has abrogated judicially-created legal tests or doctrines as well. The most famous example is § 103 of the 1952 Patent Act, which was enacted in part to reverse the "flash of genius" test created by the Supreme Court in 1937[133] in assessing whether an invention represented an inventive act worthy of being patented.[134] In the 1952 Patent Act, Congress also abrogated the judicially created, non-statutory rule prohibiting patents on "new uses"[135] of inventions and the judicial doctrine prohibiting functional claiming,[136] among others.

In sum, it is deeply mistaken assert that patent rights are based solely in legislation, just as it is equally wrong to say that property rights in real estate are based solely in judicial common-law decisions. Merely identifying that property rights in inventions are first born from legislation and are vested in their owners by grants of patents issued by the U.S. Patent & Trademark Office is neither necessary nor sufficient to classify these legal rights as public rights. The legislative provenance of patents does not legally differentiate these property rights from other property rights, especially private property rights in land, as these are all born of both legislation and judicial common-law decisions.

Conclusion

Given the legal, administrative, and constitutional implications in classifying a patent as a public right, the distinction between public rights and private rights is not a hoary formalism that is

---

(repealed 1870) ("But before an inventor shall receive a patent for any such new invention or discovery, he shall deliver a written description of his invention or discovery, . . . [in which] he shall full explain the principle and the several modes in which he has contemplated the application of that principle or character by which it may be distinguished from other inventions . . . .").

[129] *See* 35 U.S.C. § 103.

[130] *See* 35 U.S.C. § 271(d).

[131] *See* 35 U.S.C. §§ 271(c) & (f).

[132] Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 41 (2006).

[133] *See* Cuno Engineering Corp. v. Automatic Devices Corp., 314 U.S. 84 (1941).

[134] *See* 35 U.S.C. §103 (1952) ("Patentability shall not be negated by the manner in which the invention was made."); *see also* Graham v. John Deere Co., 383 U.S. 1, 16 (1966) ("Congress intended by the last sentence of § 103 to abolish the test it believed this Court announced in the controversial phrase 'flash of creative genius'. . .").

[135] *See* Roberts v. Ryer, 91 U.S. 150, 157 (1875) ("It is no new invention to use an old machine for a new purpose."). This judicial rule against patents on a "new use" was expressly abrogated by Congress in the 1952 Patent Act by expressly defining a patentable "process" to "include[] a new use of a known process, machine, manufacture, composition of matter, or material." 35 U.S.C. § 100(b).

[136] *See* Halliburton Oil Well Cementing Co. v. Walker, 329 U.S. 1 (1946) (invalidating a patent claim given its language of "means . . . for tuning . . ."); 35 U.S.C. § 112(f) (permitting means-plus-function claims).

merely haunting twenty-first century court cases. In fact, the dichotomy between public rights and private rights will continue to be a highly contested issue in the coming years as more cases arrive at the Supreme Court from the PTAB. *Oil States* guarantees this by limiting its holding only to the legal determination of a vested patent's validity under the separation of powers and Seventh Amendment doctrines. In fact, *Oil States* concludes by expressly refraining from deciding any Due Process or Takings Clause challenges against the PTAB,[137] which is the legal equivalent of an open invitation for future lawsuits raising these issues.

The debate about the legal status of patents has existed since the first Patent Act of 1790. Since Congress enacts the patent statutes as one of its many delegated (discretionary) powers, the public right-private right distinction—framed usually in terms of a privilege or property right—has been a hotly contested issue in the policy debates about the nature of patents from the early American Republic.[138] This policy and legal debate is an undeniable fact of the historical record, and it continues to this day.[139] Yet, it is equally undeniable that the dominant approach by Congress and by courts, at least until recently, has been a private law model for the U.S. patent system, securing patents as private property right.[140]

This further confirms the historical and doctrinal evidence reviewed in this article that the originating source of a legal right—whether in a statute or in a court decision—has never been the sole test in classifying it as a public right or private right. Both categories of legal rights have shared origins in statutes and judicial decisions alike—both institutions create and sustain the myriad doctrines in public law and private law. The reduction of the public right and private right categories to a mere distinction between statutes and judicial decisions is deeply mistaken, both historically and legally.[141] As the institutional and doctrinal interplay between patent law and modern administrative law continues to grow—both in size and importance—distinguishing between legal rights on false historical narratives about what it meant to secure a legal right at common law merely creates more indeterminacy and chaos in a fundamental doctrinal distinction that is already accused by the same commentators and courts of being indeterminate and chaotic.

[137] *Oil States*, 138 S. Ct. at 1379 ("[W]e address only the precise constitutional challenges that Oil States raised here. . . . our decision should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause.").

[138] *See generally* Mossoff, *supra* note 17.

[139] *See* Mossoff, *supra* note 17 (detailing aspects of this historical debate); CHRISTOPHER BEAUCHAMP, INVENTED BY LAW 28-29 (2015) (summarizing briefly the historical policy debate between framing patents as property rights or monopoly grants).

[140] *See* Adam Mossoff, *Institutional Design Choice in Patent Systems: Private Property Rights or Regulatory Entitlements*, So. Calif. L. Rev. (forthcoming 2018) (detailing the fundamental design choice by Congress and courts in the U.S. patent system of a private law system).

[141] *Cf.* Mossoff, *supra* note 17, at 967 ("The provenance of the American patent system, as the American property system generally, is found in the English feudal system.")