

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

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*ABSTRACT: Patents are increasingly swept up into the operations of agencies in the modern administrative state. This has raised anew the fundamental question whether patents are private property rights or special privileges (“public rights”), because this determines how constitutional guarantees apply to patents in administrative proceedings. In *Oil States v. Greene’s Energy*, the Supreme Court held for the first time that patents are public rights that may be canceled by an administrative tribunal solely because patents are “creatures of statute.” This classification of patents as public rights solely given their statutory provenance is profoundly mistaken. Modern courts and commentators have misconstrued a heuristic used by earlier courts in distinguishing between private rights and public rights. It was only a heuristic because all legal rights share mixed origins in both statutes and judicial decisions, including property rights in land and in inventions. This Essay surveys these well-known sources of property rights in both statutes and judicial decisions, revealing that conflating “common law” with private property rights is legal myth, not historical fact. As cases proliferate at the intersection of patent law, administrative law, and constitutional law, it is a fundamental error to classify patents as public rights in relegating vested private property rights to administrative processes and decrees.*

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I. INTRODUCTION

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

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, 115 (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, 405–06 (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, 508–09 (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, 174 (2011) (“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

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 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 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 this significant case at the intersection of administrative law, constitutional law, and patent law.

Unfortunately, the distinction between public rights and private rights 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

a narrower sense, to mean claims that were owned by the government—the sovereign people as a whole—rather than in persons’ individual capacities.” (footnotes omitted)).

5. Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 566–67 (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’ . . .” (footnote omitted)); 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.” (footnotes omitted)).

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., *N. 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. See generally *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365 (2018) (holding that patents are public rights and thus the PTAB does not violate either the separation of powers doctrine or a patent owner’s Seventh Amendment right to a jury trial in canceling patents via its administrative proceedings).

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.”).

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 Essay 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. Part II briefly explains the public right and private right distinction and the import of this classification for property rights in the modern administrative state. Part III 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. Part IV describes why it is a 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.

II. 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 this distinction between public rights and private rights, and how it was mistakenly applied by the Supreme Court in classifying patents as public rights in *Oil States*.

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”) (first quoting *Crown Die & Tool Co. v. Nye Tool & Mach. Works*, 261 U.S. 24, 40 (1923); then quoting *Gayler v. Wilder*, 10 How. 477, 494 (1851)).

12. See *infra* notes 40–50 and accompanying text.

The distinction between public rights and 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 children when parents revoke their privileges in playing video games 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 law¹⁹ and “franchise” has several senses in the law more

13. See *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 174 (2011) (“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 BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 2 (1962) (“The Romans themselves made a distinction between public law and private law. The former was concerned with the functioning of the state, and . . . the latter was concerned with relations between individuals.”); 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”).

15. See Nelson, *supra* note 5, at 588, 624; Woolhandler, *supra* note 4, at 1020 (detailing this history); see also *Pierson v. Post*, 3 Cai. 175, 176, 178 (N.Y. Sup. Ct. 1805) (citing English and Roman Law authorities, as well as natural law and philosophers and civilian legal theorists, as authority); Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 391–92, 406 n. 140 (citing early American cases employing Roman law and the English Common Law).

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] largesse were ‘rights’ and which were ‘privileges.’ Legal protection of the former was by far the greater.”).

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) (“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

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 The other 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

The classic adage applies to these and other privileges conferred as public rights: “As Congress giveth, Congress [can] taketh away” without legal

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) (“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 Servs., LLC v. Greene’s Energy Grp., 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.*, *Charles River Bridge v. Warren Bridge*, 36 U.S. 420, 546 (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); *Spring Valley Water Works*, 62 Cal. at 107 (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”); *see also* *Crowell*, 285 U.S. at 51 (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.”).

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, 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 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 over the past 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 drawn by the Illinois Supreme Court in 1857 between rights that may be revoked by the “legislature power” and rights that can only be revoked by “courts”³¹ is a longstanding heuristic used by courts to distinguish between public rights and private rights. This heuristic is captured in a basic question: Was the right created and defined by a statute or a court decision? The California Supreme Court, for example, once framed this question as follows:

25. *NGS Am., Inc. v. Barnes*, 998 F.2d 296, 298 (5th Cir. 1993) (construing Congress’ regulation of employee benefit plans by ERISA); *see also* *Mirabal v. Gen. 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 JOHN DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW* 36 (1927)).

27. *See generally* *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365 (2018) (discussing the public rights doctrine).

28. *See Crowell*, 285 U.S. at 51 (“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*, 135 S. Ct. at 1316 (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 grant 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 these “core private rights” 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 law³⁶) 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, 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

32. *Spring Valley Water Works v. Schottler*, 62 Cal. 69, 106–07 (1882) (emphasis in original).

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*, 62 Cal. at 107.

35. Nelson, *supra* note 5, at 567 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *7).

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

37. *See Commodities Futures Trading Comm’n v. Schor*, 478 U.S. 833, 853–54 (1986) (holding that the CFTC can adjudicate in agency proceedings private rights asserted in counterclaims). *See generally* *Goldberg v. Kelly*, 397 U.S. 254 (1970) (extending constitutional due process protections to recipients of welfare benefit privileges).

38. *See* Adam J. MacLeod, *Public Rights After Oil States Energy*, 95 NOTRE DAME L. REV. (forthcoming 2019) (manuscript at 9–13), <https://ssrn.com/abstract=3327002>.

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

But this complexity in the broader constitutional doctrine is beyond the scope of an Essay that details only how it is misapplied in patent law by commentators and courts. For this Essay, 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.

III. 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 merely a distinction between statutes and common law rights.

It is now conventional wisdom among many academics to classify intellectual property rights as privileges (public rights) simply because they arise first from statutes. In *Oil States*,⁷² professors joined an amicus brief that

39. *See id.* at 31–35. 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 Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018) (quoting same).

41. Nelson, *supra* note 5, at 567 (adopting the phrase “core private rights” as distinguished from the “‘privileges’ or ‘franchises’” comprising public rights).

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.”⁴² Mark Lemley, one of the authors of this amicus brief, has compared intellectual property rights to welfare benefits, as have other law professors.⁴³ 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.”⁴⁴ Professor Reilly concludes “[t]his is particularly clear with regard to patent rights. Patent rights are private property only because of a federal statute.”⁴⁵ 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.⁴⁶

42. See Brief of 72 Professors of Intellectual Property Law as Amici Curiae in Support of Respondents at 15, *Oil States*, 138 S. Ct. 1365 (No. 16-712), 2017 WL 5171470, at *15.

43. 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. . . .”); see also 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.” (footnote omitted)).

44. Greg Reilly, *The Constitutionality of Administrative Patent Cancellation*, 23 B.U. J. SCI. & TECH. L. 377, 406 (2017).

45. *Id.*

46. See, e.g., *Intellectual Property, the Right to Health, and Human Rights*, 2006 U. ILL. J.L. TECH. & POLY 63, 94–95 (“Courts and commentators agree in characterizing copyrights and patents not as natural property rights, but rather as statutory creations designed to maximize public welfare.” (quoting Tom W. Bell, Professor of Law at Chapman University Law School, during the Federalist Society’s “Life, Liberty, and Intellectual Property” panel discussion on October 12, 2005)); 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.); 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) (“[I]ntellectual property rights, for the most part, are statutorily created rights rather than inherent and inalienable natural rights.”); 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) (“[S]tatutory intellectual property rights confer legal monopolies on qualified creators and inventors.”); 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

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).⁴⁷ 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”⁴⁸ and they are “a ‘creature of statute.’”⁴⁹ The rest of the *Oil States* opinion merely recites decisions allegedly supporting this conclusion or distinguishes Supreme Court decisions that appear to conclude otherwise.⁵⁰ 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 2015,⁵¹ 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.⁵²

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

statutory origin.”); 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.”); Lemley, *supra* note 43, at 1075 (“[C]opyright law is neither tort law nor property law in classification, but is statutory law.” (quoting *Compo Co. Ltd. v. Blue Crest Music*, [1980] 1 S.C.R. 357 (Can.))).

47. *Oil States*, 138 S. Ct. at 1372–78.

48. *Id.* at 1374 (quoting *Gayler v. Wilder*, 51 U.S. 477, 494 (1850)).

49. *Id.* (quoting *Crown Die & Tool Co. v. Nye Tool & Mach. Works*, 261 U.S. 24, 40 (1923)).

50. 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 generally Richard A. Epstein, *The Supreme Court Tackles Patent Reform: A Series of Articles Examining Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*, 19 FEDERALIST SOC’Y REV. 132 (2018) (discussing how various misquotes in *Oil States* invert the meaning of the cases being cited).

51. 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” (citations omitted) (internal quotations omitted)).

52. See *MCM Portfolio LLC v. Hewlett-Packard Co.*, 812 F.3d 1284, 1290 (Fed. Cir. 2015) (concluding that patents are public rights because “[t]he patent right ‘derives from an extensive federal regulatory scheme,’ and is created by federal law” (citation omitted) (quoting *Stern v. Marshall*, 564 U.S. 462, 490 (2011))). Similar to the misquotes of prior decisions in *Oil States*, see *supra* note 50 (discussing the misquotes in *Oil States*), 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.”).

as public rights.⁵³ This excessively reductionist and cramped methodological approach in applying the longstanding distinction between public rights and private rights is legally and historically mistaken, as will be explained in the next Part.

IV. 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.”⁵⁴ The same can be said about property rights in land, as well as about property rights in inventions.

A. 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 common reference point for all other property rights. This includes patents,⁵⁵ 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.⁵⁶ While it is undeniable that many doctrines that comprise the

53. Cf. *Bilski v. Kappos*, 561 U.S. 593, 604 (2010) (criticizing the Federal Circuit by stating “[t]he machine-or-transformation test is not the sole test for deciding whether an invention is a patent-eligible ‘process’”).

54. Nelson, *supra* note 5, at 573 (emphasis added).

55. See Adam Mossoff, *The Trespass Fallacy in Patent Law*, 65 FLA. L. REV. 1687, 1692–96 (2013).

56. See 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). See generally 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 (Geoffrey A. Manne & Joshua D. Wright eds., 2011) (discussing property conveyance concepts and doctrines in patent law).

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*.⁵⁷ 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.⁵⁸ *Quia emptores* has this foundational status because it 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.⁵⁹ 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.⁶⁰ 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.⁶¹

After Parliament enacted the statute of *Quia emptores* in 1290, courts continued to develop private law doctrines in estates in land, but Parliament

57. *Quia Emptores* 1290, 18 Edw. 1, c. 1. (Eng.). The statute does not have a title, and thus it is identified today by its first two words, which, in Latin, mean “[b]ecause purchasers.” 2 ARTHUR ENGLISH, A DICTIONARY OF WORDS AND PHRASES USED IN ANCIENT AND MODERN LAW 665 (2000).

58. See, e.g., JESSE DUKEMINIER ET AL., PROPERTY 255–57 (9th ed. 2017) (“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.”); THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY 505–06 (3d ed. 2017) (identifying the Statute *Quia Emptores* as part of the shift away from feudalism because it “made what later became the fee simple fully alienable”); 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.’”).

59. 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 *Quia Emptores* 1290, 18 Edw. 1, c. 1. (Eng.)); see *Sparhawk v. Cloon*, 125 Mass. 263, 266 (1878) (“At law, any property, real or personal, that a man owns, may be alienated by him”); *Mandlebaum v. McDonell*, 29 Mich. 78, 94 (1874) (“At common law, however, prior to the statute *quia emptores*, a condition against alienation would in England have been good”).

60. 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”).

61. See, e.g., CAL. CIV. CODE § 711 (West 2011) (“Conditions restraining alienation, when repugnant to the interest created, are void.”); N.D. CENT. CODE § 47-02-26 (2014) (“Conditions restraining alienation, when repugnant to the interest created, are void.”); N.J. STAT. ANN. § 46:3-5 (West 2014) (“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.”).

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 often cover the Statute of Gloucester (1278),⁶² *De Donis Conditionalibus* (1285),⁶³ Statute of Uses (1535),⁶⁴ Statute of Wills (1540),⁶⁵ and Tenures Abolition Act (1660),⁶⁶ among others. These statutes, consisting of both declaratory 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 constitutionalism.⁶⁷ 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,⁶⁸ especially in securing property rights.⁶⁹ Of course, the Roman Law was the

62. Statute of Gloucester 1278, 6 Edw., c. 5 (Eng.) (creating rights against life estate owners by the owner of either the follow-on future interest or the broader estate).

63. The Statute of Westminster the Second (*De Donis Conditionalibus*) 1285, 13 Edw., c. 1 (Eng.) (creating the fee tail estate).

64. Statute of Uses 1535, 27 Hen. 8, c. 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).

65. The Statute of Wills 1540, 32 Hen. 8, c. 1 (Eng.) (creating and defining both the property rights and the conveyance interests that can be devised via wills).

66. Tenures Abolition Act 1660, 12 Car. 2, c. 24 (Eng.) (eliminating feudal services associated with property rights in land).

67. 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 colonial American Thomas Hutchinson’s 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”).

68. See R.H. HELMHOLZ, *NATURAL LAW IN COURT* (2015).

69. See, e.g., *Foster v. Reiss*, 112 A.2d 553, 555 (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 Mossoff, *supra* note 15, at 391–92 (identifying extensive influence on common law property doctrine by natural law philosophers and Roman Law).

first systematic civil law system in the West,⁷⁰ and, as noted earlier, the public right versus private right distinction itself finds its roots in the Roman Law.⁷¹

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, 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.⁷²

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,⁷³ creating title recordation requirements,⁷⁴ defining and securing conveyance rights,⁷⁵ defining and securing wills and the creation of future interests in land,⁷⁶ as well as eliminating some English property doctrines in both procedure, such as revising legal presumptions in interpreting conveyances,⁷⁷ and in substance, such as eliminating the fee tail

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

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

72. 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).

73. See, e.g., IOWA CODE § 614.1(5) (2017); MISS. CODE ANN. § 15-1-13 (2012); N.Y. REAL PROP. ACTS § 501 (McKinney 2009); Act of April 15, 1889, 86 OHIO LAWS 300 (codified as amended at OHIO REV. CODE ANN. § 2305.04 (2017)); WASH. REV. CODE § 4.16.020 (2017).

74. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 13-2.2 (McKinney 2008); OHIO REV. CODE ANN. § 317.08 (West 2005); VA CODE ANN. §§ 55-106–55-112 (2012).

75. See, e.g., Act of Mar. 30, 1864, ch. 33, 61 OHIO LAWS 80 (codified as amended at OHIO REV. CODE ANN. § 5303.21 (2016)) (“An [a]ct [t]o 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.”).

76. See, e.g., CAL. CIV. CODE § 1046 (West 2019) (making the right of entry for condition broken alienable); IOWA CODE §§ 633.211–633.226 (2017) (defining the rules of descent); MINN. STAT. §§ 524.2-501–524.2-517 (2018) (defining various aspects of making a will); N.Y. EST. POWERS & TRUSTS LAW § 6-4.10 (McKinney 2008) (defining contingent remainders); N.Y. REAL PROP. LAW § 345 (McKinney 2009) (requiring periodic re-recording of certain restrictions on the use of land in order to allow freer transferability of future interests).

77. See, e.g., TENN. CODE ANN. § 66-5-101 (2015) (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).

that was first created in the English statute *De Donis Conditionalibus* (1285).⁷⁸ 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.⁷⁹

Even the notorious common law doctrine, the rule against perpetuities, has been codified in many states.⁸⁰ 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 (creating much happiness among lawyers and law students alike).⁸¹

Lastly, one cannot even say that the *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.⁸² This rule is rooted in English law,⁸³ and it was continued in both the state and federal governments following the American Revolution. Following English legal

78. See, e.g., Act of Feb. 23, 1786, 1786 N.Y. LAWS 191, 191–93, ch. 12 (codified as amended at N.Y. REAL PROP. ACTS § 245 (McKinney 2018)) (providing that “all estates tail shall be and are hereby abolished”); Act of Dec. 17, 1811, ch. 4 10 OHIO LAWS 7, 8 (codified as amended at OHIO GEN. CODE § 8622 (Baldwin 2d ed., 1926) (repealed Act of April 10, 1931, Sec. 10512-23, 114 OHIO LAWS 320, 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 that any attempt at creating a fee tail would create instead a fee simple).

79. See, e.g., *Mountain Brow Lodge No. 82, Indep. Order of Odd Fellows v. Toscano*, 64 Cal. Rptr. 816, 817–18 (Ct. App. 1967) (construing statutory prohibition against restraints on alienation does not apply to a fee simple subject to condition subsequent with a defeasible use restriction that merely has a practical effect of restraining alienation); *White v. Brown*, 559 S.W.2d 938, 940–41 (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).

80. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 9-1.1 (McKinney 2018); see also *Symphony Space, Inc. v. Pergola Props., Inc.*, 669 N.E.2d 799, 808 (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 “[t]he very language of EPTL 9-1.1” is clear and precludes such judicial innovations).

81. See, e.g., VA. CODE ANN. § 55-12.1 (2000); see also 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 . . .”).

82. See 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *311–12; cf. *De La Croix v. Chamberlain*, 25 U.S. 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”).

83. See 3 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 307–08 (1828) (“It is a fundamental principle in the English law, derived from the maxims of the feudal tenures, that the king was the original proprietor . . . of all the land in the kingdom, and the true and only source of title.”).

practice in both form and substance, titles in land in the United States are created by *patent grants*.⁸⁴ 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.⁸⁵

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 these federal legislative enactments are the Homestead Acts.⁸⁶ 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 [is] made for his or her exclusive use and benefit, and that said entry is made for the purpose of actual settlement and cultivation”⁸⁷ 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.⁸⁸ 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.⁸⁹ Upon completion of these statutory preconditions, Congress provided (in language eerily similar to the patent statutes) that the individual

84. See 2 BLACKSTONE, *supra* note 82, at *346 (“The king’s . . . grants, whether of lands, honours, liberties, franchi[s]es, or [a]ught be[s]ides, 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, 1259–60 (2001) (detailing how the “letter patent” was the general legal device by which the Crown exercised its authority to make grant to subjects).

85. 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 (2012) (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”); *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”); *Schwab v. Timmons*, 589 N.W.2d 1, 4 (Wis. 1999) (“In 1854, the United States granted by patent Lot 4 to Ingebret Torgerson”).

86. See Homestead Act of 1862, ch. 75, 12 Stat. 392, 392–93 (1862) (codified at 43 U.S.C. §§ 161–164) (repealed 1976); see also Act of June 22, 1874, ch. 394, 18 Stat. 192–93 (amending the Homestead Act of 1862); Act of June 21, 1866, ch. 127, 14 Stat. 66–67 (applying the Homestead Act of 1862 to lands in Alabama, Mississippi, Louisiana, Arkansas, and Florida); Act of Mar. 21, 1864, ch. 36, 38 Stat. 30–32 (amending the Homestead Act of 1862).

87. See Homestead Act of 1862, 12 Stat. at 392.

88. *Id.*

89. *Id.*

“shall be entitled to a patent.”⁹⁰ 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 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.⁹¹

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. This legal practice continued in both substance and form in the United States after the American Revolution—and continues up through today.

In conclusion, it bears noting that there is a subtle equivocation in the sense of “common law” as it 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 can develop the law and justify their holdings without basing their decisions in a statute. Common law courts can create a doctrine—or “discover” it, as it used to be said.⁹² 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. Notably, the Roman Law did not require this; the emphasis on statutes in civil law systems is entirely a modern development after the Napoleonic Code.⁹³

90. *Id.* The preamble to § 102 of the Patent Act reads, “A person shall be entitled to a patent unless . . .” 35 U.S.C. § 102.

91. *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)).

92. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal 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 (13th ed. 1788) (1658) (stating that “it is to be observed, that the common law of England [s]ometime[s] is called right, [s]ometime[s] common right, and [s]ometime[s] *communis justitia*,” and that in the Magna Carta “the common law is called right”); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 536 (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.”).

93. *See* NICHOLAS, *supra* note 14, at 19–38 (detailing key role of judges (magistrates) in the development of the Roman Law). One of the primary sources of Roman Law is *The Digest of*

Thus, to say the Anglo-American property system is a “common law system” does not mean that there are no statutes creating private rights. Both statutes and court decisions serve a fundamental role in creating and enforcing property rights in land. In the Anglo-American common law system, private rights in land are just as much “a ‘creature of statute’”⁹⁴ as the *Oil States* Court, the Federal Circuit, and many commentators have said of patents in inventions.

B. *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.⁹⁵ 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).⁹⁶ 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; common law rights in copyright continued even after Parliament’s enactment of the Statute of Anne of 1709,⁹⁷ and they continued in the United States until 1978.⁹⁸ Instead, patents were born hundreds of

Justinian, which is a collection of commentaries and other sources of law in Roman jurisdictions. See generally 2 THE DIGEST OF JUSTINIAN (Alan Watson ed., 1998) (1985).

94. *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1374 (2018) (quoting *Crown Die & Tool Co. v. Nye Tool & Mach. Works*, 261 U.S. 24, 40 (1923)).

95. See Patent Act of 1790, ch. 7, § 1, 1 Stat. 109–112 (repealed 1793).

96. 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 Comm. on Presidential Campaign Activities v. Nixon, 366 F. Supp. 51, 55 (D.D.C. 1973) (“When it comes to jurisdiction of the federal courts, truly, to paraphrase the scripture, the Congress giveth, and the Congress taketh away.”).

97. Statute of Anne, 8 Ann. c. 19 (Eng.). See H. Tomas Gomez-Arostegui, *Copyright at Common Law in 1774*, 47 CONN. L. REV. 1, 3 (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.”).

98. Common law copyright existed in the states until complete federal preemption was imposed for all works created after January 1, 1978 by the 1976 Copyright Act. 17 U.S.C. § 301 (a) (2012); see H.R. REP. NO. 94-1476, at 129 (1976) (“Section 301, one of the bedrock provisions

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.⁹⁹ 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.¹⁰⁰ By the eighteenth century, there was still no real English common law of patents—a lacuna recognized by Lord Chief Justice Eyre in *Boulton & Watt v. Bull* in 1795 when he complained that “[p]atent rights are no where that I can find accurately discussed in our [law] books.”¹⁰¹

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 created, defined and applied by later courts.”¹⁰² 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 comprising 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.¹⁰³ The written description requirement is *not* in the Statute of Monopolies; a foundational doctrine in Anglo-American patent law was created at common law.¹⁰⁴

As with property rights in land, this institutional and doctrinal pattern repeated itself in America. From the first enactments of copyright and patent

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 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.”).

99. See English Statute of Monopolies of 1623, 21 Jac. I, c. 3 (Eng.).

100. See Mossoff, *supra* note 84, at 1258–87.

101. *Boulton v. Bull* (1795) 126 Eng. Rep. 651, 665; 2 H. Bl. 463, 491.

102. See Mossoff, *supra* note 84, at 1258–87, 1276.

103. See *id.* at 1276–1302.

104. 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 of the statute set forth seven requirements for a valid patent grant by the Crown, see 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN AND CRIMINAL CAUSES *184 (E. & R. Brooke eds., 1797) (1644), and the specification is notably absent. See Mossoff, *supra* note 84, at 1273–1306 (discussing Section 6 of the Statute of Monopolies and Lord Coke’s famous commentary).

statutes by the states under the Articles of Confederation,¹⁰⁵ 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 “[i]t 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.”¹⁰⁶ 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.¹⁰⁷

This is all familiar ground to law professors and historians. Commentators are well versed in the historical evolution of American patent law in which Congress has enacted broadly framed statutes and federal courts have used these statutes as springboards for the classic common law-style creation of legal doctrines.¹⁰⁸ 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 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.¹⁰⁹ 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

105. See Camilla A. Hrdy, *State Patent Laws in the Age of Laissez Faire*, 28 BERKELEY TECH. L.J. 45, 67 (2013).

106. Frank D. Prager, *The Influence of Mr. Justice Story on American Patent Law*, 5 AM. J. LEGAL HIST. 254, 254 (1961).

107. See generally PAUL H. BLAUSTEIN, LEARNED HAND ON PATENT LAW (Paul H. Blaustein ed., 1983) (reprinting Learned Hand’s decisions regarding patent law and categorizing them according to specific doctrines).

108. 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.”).

109. See, e.g., *id.* 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.”).

patent eligibility, which prohibits patents issuing for abstract ideas, laws of nature or physical phenomena.¹¹⁰ Judges and lawyers often observe that this exclusionary rule is neither in § 101 of the modern patent statute nor in any predecessor patent statute.¹¹¹ It was a creation solely of the courts in now-classic decisions in the early nineteenth century.

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. 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.¹¹² 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 value¹¹³ or the smallest saleable patent practicing unit.¹¹⁴ Neither of these phrases is in the statute. Additionally, there is the *Georgia-Pacific* test,¹¹⁵ the infamous fourteen-factor test for assessing a reasonable royalty that Judge Richard Posner has characterized as “baloney.”¹¹⁶ In court opinions for the past four decades, the *Georgia-Pacific* test reigns supreme as the substantive doctrine for

110. See *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 589 (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.’” (second alteration in original) (quoting *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 70 (2012)); see also *Alice Corp. v. CLS Bank Int’l*, 573 U.S. 208, 216 (2014) (“We have long held that this provision contains an important implicit exception: Laws of nature, natural phenomena, and abstract ideas are not patentable.” (quoting *Ass’n for Molecular Pathology*, 569 U.S. at 589)).

111. 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) (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980))).

112. 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. Ky. 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.”).

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

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

115. See *Ga.-Pac. Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970).

116. *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.*

awarding a reasonable royalty under § 284.¹¹⁷ 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 in 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 § 283.¹¹⁸ Similar to the multi-factor test derived from the judicial “interpretation” of § 284 in awarding 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,¹¹⁹ remedies scholars have noted that there was no four-factor test used by equity courts in issuing permanent injunctions.¹²⁰ Thus, *eBay* is another example of the judiciary creating a new rule in patent law entirely out of whole cloth. These are just a few highlights of untold examples in patent law of “common law”-style judicial construction of the Patent Act in the creation and application of non-statutory legal doctrines.

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*.¹²¹ 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

117. See, e.g., *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1230–35 (Fed. Cir. 2014); *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1324–36 (Fed. Cir. 2009); *In re Innovatio IP Ventures, LLC Patent Litig.*, No. 11 C 9308, 2013 WL 5593609, at *5–6 (N.D. Ill. Oct. 3, 2013).

118. See *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

119. See *id.* at 390.

120. See, e.g., Doug Rendleman, *The Trial Judge’s Equitable Discretion Following eBay v. MercExchange*, 27 REV. LITIG. 63, 76 n.71 (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 (5th ed. 2010) (noting that the four-factor test for preliminary injunctions “the Court tried to transfer to permanent injunctions in *eBay*”).

121. *Pennock v. Dialogue*, 27 U.S. (2 Pet.) 1, 23–24 (1829).

is secured by the property right granted to them by the Patent Office.¹²² In the Patent Act of 1952, Congress codified numerous judicially created doctrines in patent law over the prior 162 years, including, nonobviousness,¹²³ patent misuse,¹²⁴ continuation application practice,¹²⁵ and secondary liability,¹²⁶ among many others.

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 creative genius” test created by the Supreme Court in 1941¹²⁷ for assessing whether an invention represented an inventive act worthy of being patented.¹²⁸ In the 1952 Patent Act, Congress also abrogated the judicially created, non-statutory rule prohibiting patents on “new uses”¹²⁹ of inventions and the judicial doctrine prohibiting functional claiming,¹³⁰ among others.

In sum, it is deeply mistaken to 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

122. See Patent Act of 1870, ch. 230, § 26, 16 Stat. 198, 201 (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 (repealed 1870) (“But before any 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 fully 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 . . .”).

123. See 35 U.S.C. § 103 (2012); see also *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 4–5 (1966) (stating that “the 1952 Act was intended to codify judicial precedents embracing the principle long ago announced by this Court in *Hotchkiss v. Greenwood*, 52 U.S. (11 How.) 248 (1851).”).

124. See 35 U.S.C. § 271(d).

125. See 35 U.S.C. §§ 120–121; see also *Symbol Techs., Inc. v. Lemelson Med., Educ., & Research Found., L.P.*, 277 F.3d 1361, 1366 (Fed. Cir. 2002) (“Prior to 1952, continuation practice was governed by common law rather than statute.”).

126. See 35 U.S.C. § 271(b), (c), (f); see also *Hewlett-Packard Co. v. Bausch & Lomb*, 909 F.2d 1464, 1469 (Fed. Cir. 1990) (“Prior to the enactment of the Patent Act of 1952, there was no statute which defined what constituted [secondary] infringement.”).

127. See *Cuno Eng’g Corp. v. Automatic Devices Corp.*, 314 U.S. 84, 91 (1941).

128. See Patent Act of 1952, Pub. L. No. 82-593, § 103, 66 Stat. 792, 798 (codified as amended at 35 U.S.C. § 103) (“Patentability shall not be negated by the manner in which the invention was made.”); see also *Graham*, 383 U.S. at 15 (“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[.]’ . . .”).

129. 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.” Patent Act of 1952 § 100(b).

130. See 35 U.S.C. § 112(f) (permitting means-plus-function claims); *Halliburton Oil Well Cementing Co. v. Walker*, 329 U.S. 1, 8–9 (1946) (invalidating a patent claim given its language of “means . . . for tuning . . .”).

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. Legal property rights in land and in inventions are born of both legislation and judicial common law decisions.

V. 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 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.¹³¹ In fact, *Oil States* concludes by expressly refraining from deciding any Due Process or Takings Clause challenges against the PTAB,¹³² which is the legal equivalent of an open invitation for future lawsuits raising these issues.

An active 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 powers, the public right versus 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.¹³³ This policy and legal debate is an undeniable fact of the historical record, and it continues to this day.¹³⁴ 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 rights.¹³⁵

131. See *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1379 (2018) (“[W]e address only the precise constitutional challenges that *Oil States* raised here. . . . [O]ur decision should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause.”).

132. *Id.*

133. See generally Mossoff, *supra* note 17 (describing this debate within judicial opinions, treatises, and in other primary sources from the early American Republic through the Antebellum Era).

134. See CHRISTOPHER BEAUCHAMP, *INVENTED BY LAW: ALEXANDER GRAHAM BELL AND THE PATENT THAT CHANGED AMERICA* 28–29 (2015) (summarizing briefly the historical policy debate between framing patents as property rights or monopoly grants). See generally Mossoff, *supra* note 17 (detailing aspects of this historical debate).

135. See Adam Mossoff, *Institutional Design Choice in Patent Law: Private Property Rights or Regulatory Entitlements*, 92 S. CAL. L. REV. (forthcoming 2019) (manuscript at 106, 108) (detailing the fundamental design choice by Congress and courts in the U.S. patent system of a private law system).

This further confirms the historical and doctrinal evidence reviewed in this Essay 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 of 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.¹³⁶ 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 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.

136. 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.”).