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Public Rights after Oil States Energy

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PUBLIC RIGHTS AFTER *OIL STATES ENERGY*

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The concept of public rights plays an important role in the jurisprudence of the Supreme Court of the United States. But as the decision in Oil States *last Term revealed, the Court has often used the term to refer to three different concepts with different jurisprudential implications. Using insights drawn from historical and analytical jurisprudence, this Article distinguishes the three concepts and examines how each of them is at work in patent law. A precise reading of* Oil States *also bears lessons for other areas of law that implicate both private rights and duties and the administration of public, regulatory schemes.*

INTRODUCTION

The Supreme Court of the United States is quietly taking a jurisprudential turn. The Court's October 2017 Term produced profound debates between and among the Justices over terms and concepts drawn from classical jurisprudence, such as vagueness as a criterion of legal invalidity,[1] the role

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1 *See* Sessions v. Dimaya, 138 S. Ct. 1204, 1210 (2018); *id.* at 1223 (Gorsuch, J., concurring); *id.* at 1242 (Thomas, J., dissenting); *cf.* 1 THE DIGEST OF JUSTINIAN 1.3.7–15 (Alan Watson ed., 1985) (discussing law as commanding and to prohibiting, and "more exact" provisions of legislative acts or a "clear" sense of laws being needed to allow for enforcement); 1 WILLIAM BLACKSTONE, COMMENTARIES *53–54, *87–92 (explaining that "every law may be said to consist of several parts: one, *declaratory*; whereby the rights to be observed, and the wrongs to be eschewed, are clearly defined and laid down"; laws that are ambiguous must be construed strictly against the government and laws are "void" to the extent that they call for "absurd consequences"); LON L. FULLER, THE MORALITY OF LAW 33–38, 63–70 (rev. ed. 1969) (arguing that an act of promulgation fails to produce law if the enactment is not clear or contradicts itself).

of culpable intention in shaping public accommodation licenses,[2] and the nature of sovereign immunity over title to land at common law.[3] In several cases, analysis of the law and the holdings that followed turned on jurisprudential questions; pragmatic or policy considerations were ancillary.

Even in patent law, which is often thought to be exceptional, autonomous, forward looking, and utilitarian in its orientation,[4] traditional legal concepts play a critical role. A conceptual distinction determined the result in the most-discussed patent case of the term, *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*.[5] The case turned on the question whether patents are private or public rights. That distinction has girded the architecture of common-law jurisprudence since the seventeenth century,[6] and its antecedents can be traced all the way back to ancient Roman jurisprudence.[7] Ultimately, the majority ruled that patents confer public rights for Article III purposes because they result from a government-issued franchise.[8] The idea of a franchise originates in early Norman law of the eleventh and twelfth

2 Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1734 (2018) (Gorsuch, J., concurring); *id.* at 1732 (Kagan, J., concurring); *cf.* 3 BLACKSTONE, *supra* note 1, at *212–13 (discussing intent determining status of a possible trespasser in a tavern).

3 Upper Skagit Indian Tribe v. Lundgren, 138 S. Ct. 1649 (2018); *cf.* Green v. Biddle, 21 U.S. (8 Wheat.) 1 (1823) (for the Court, Justice Story explaining that a state's unalienable sovereign rights include the power to settle title); 3 BLACKSTONE, *supra* note 1, at *78–79. It seems significant that all three of these debates involved Justice Gorsuch, who studied jurisprudence at Oxford and published a jurisprudence monograph with Princeton University Press. Two of them involved Justice Thomas, who has a thin notion of stare decisis and frequently recurs to first principles. And two of them involved Justice Kagan, who was dean of Harvard Law School and published scholarly articles in elite law reviews. The *Oil States* case, discussed at length below, again brought Justice Gorsuch into debate with Justice Thomas about the meaning of "public right" and other classical, legal concepts. In light of all this, we might call the Court's renewed interest in legal concepts the Thomas-Kagan-Gorsuch effect, or "TKG" for short.

4 This view is often attributed to Thomas Jefferson, who famously characterized patents as a necessary "embarrassment," justified only insofar as they incentivize productive innovation. *See* Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *in* 13 THE WRITINGS OF THOMAS JEFFERSON 326, 335 (Andrew A Lipscomb & Albert Ellery Bergh eds., 1903). Jefferson's view of patents is conventionally contrasted with that of James Madison, who analogized both patents and copyright to private property rights. *See* THE FEDERALIST NO. 43 (James Madison). However, Jefferson's idea of utility was not the pure, consequence-oriented idea of nineteenth-century utilitarians such as Jeremy Bentham and John Stuart Mill. After all, Jefferson penned the Declaration of Independence, that quintessential expression of natural rights political philosophy. The Intellectual Property Clause reflects not a nineteenth-century utilitarianism but rather an eighteenth-century classical legal and political philosophy, which did not draw a dichotomy between natural rights and utility.

5 138 S. Ct. 1365, 1373 (2018).

6 *See generally* J.M. Finnis, Note, *Blackstone's Theoretical Intentions*, 12 NAT. L.F. 163 (1967).

7 J.M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 41–45 (1992).

8 *Oil States*, 138 S. Ct. at 1375, 1378–79.

centuries. The result in *Oil States* therefore turned on legal concepts that occupied Justinian,[9] Matthew Hale,[10] William Blackstone,[11] and other jurists who never encountered a light bulb, much less artificial intelligence.

The Court's use of the concept of public rights in *Oil States* has profound implications not only for patent law but also for admiralty and maritime law,[12] bankruptcy,[13] federal regulation of employment contracts and other commerce,[14] native tribal sovereignty,[15] and other areas of law that implicate both private rights and the administration of federal law.[16] As the Court affirmed in *Oil States*, patents are private property rights for many purposes, and patent disputes are like tort disputes. But patents are also governed by a substantial administrative apparatus, and the issuance of a patent is like a public grant.[17] The ruling suggests that Congress may bring private property rights within the public rights exception to Article III jurisdiction and the Seventh Amendment if those rights exhibit certain public features.

The majority in *Oil States* upheld a provision of the Leahy-Smith America Invents Act (AIA) by which Congress conferred on an executive agency, the Patent and Trademark Office, jurisdiction to adjudicate patent validity, a power traditionally exercised by courts of law and civil juries.[18] However, the Court also affirmed that patents are property rights for Fifth Amendment purposes, thus inviting future challenges to the AIA under the Due Process and Takings Clauses.[19] The Court employed the concept of "public rights" as the fulcrum for its analysis.

The concept of public rights used in *Oil States* is in potentiality and principle the fulcrum for *all* contests that implicate both private law and federal

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9 *See* THE DIGEST OF JUSTINIAN, *supra* note 1, at 1.1.1 (Ulpian, Institutes 1).

10 *See* MATTHEW HALE, OF THE LAW OF NATURE 89–93 (David S. Sytsma ed., 2015) (c. 1670) [hereinafter HALE, LAW OF NATURE]; MATTHEW HALE, THE HISTORY OF COMMON LAW OF ENGLAND, AND AN ANALYSIS OF THE CIVIL PART OF THE LAW, §§ 46–47 (Charles Runnington ed., London, Hennry Butterworth 6th ed. 1820) (1713) [hereinafter HALE, ANALYSIS].

11 4 BLACKSTONE, *supra* note 1, at *1.

12 *See* Crowell v. Benson, 285 U.S. 22, 38 (1932).

13 *See* Stern v. Marshall, 564 U.S. 462, 464 (2011).

14 *See* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 457 (1977).

15 Saint Regis Mohawk Tribe v. Mylan Pharm. Inc., 896 F.3d 1322, 1326–29 (Fed. Cir. 2018) (relying on *Oil States* to determine that a tribe that owns a patent is not immune from an IPR proceeding).

16 For example, the Federal Court of Claims employed an extensive analysis of the Court's public-private distinction in *Oil States* in an attempt to determine whether the court has subject-matter jurisdiction over a claim for federal expropriation of timber. TrinCo Inv. Co. v. United States, 140 Fed. Cl. 530, 531–32, 535–39 (2018).

17 *See* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1373–74 (2018).

18 *Id.* at 1370. The AIA is codified in Title 35 of the U.S. Code.

19 *Oil States*, 138 S. Ct. at 1379.

executive power.[20] So, it is important to know what the Court meant by "public rights." Unfortunately, as the majority in *Oil States* conceded, the Court has never "definitively explained" the idea[21] and has failed to employ it consistently.[22] After attempting to employ the concept in a case supposed to be within the concept's ambit, a lower court expressed in frustration that "this Court is convinced that the Supreme Court has no precise notion of the public/private right distinction."[23] The concept is important and muddled.

Fortunately, *Oil States* contains several clues that might help us achieve clarity. Close attention to the opinions reveals three distinct concepts,[24] each drawn from a different strand of classical jurisprudence: (1) rights that the public as a whole enjoys not to be defrauded by an ill-gotten patent or otherwise wronged; (2) rights generated by positive laws that are not primarily determined by natural rights but are instead matters of indifference that lawmakers settle by their choices; and (3) rights that are derived from prerogative grants, such as franchises and letters patent. Each of these three kinds of rights is found in a patent, but in different aspects. And each has different legal and constitutional implications for private and public law. The first and third senses determine who may initiate an action concerning the validity or limits of a right. The second and third senses determine who has the power to adjudicate the boundaries of rights.

The idea of public rights performs important work in many areas of law, and legal scholars continue to examine and discuss the idea's meaning, just as Justinian and Blackstone did.[25] But contemporary legal scholarship does

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20 It might theoretically implicate even criminal law. Imagine that Congress were to find that patents are insufficiently protected and were to amend the Patent Act to specify criminal sanctions for patent infringement, converting the private wrong of patent infringement into a crime. On the common-law account discussed in this Article, that amendment would be conceptually confused and constitutionally suspect. But if Congress has the power to transform private rights into public rights then it is not immediately obvious why it lacks power to do so for patent infringers as well as patent owners.

21 *Oil States*, 138 S. Ct. at 1373 (quoting N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69 (1982) (plurality opinion)).

22 *Id.* (quoting Stern v. Marshall, 564 U.S. 462, 488 (2011)).

23 TrinCo Inv. Co. v. United States, 140 Fed. Cl. 530, 538 (2018).

24 *Cf.* Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183 (2011) (showing that the concept of "dignity," which performs important work in the Court's constitutional jurisprudence, is actually three distinct concepts).

25 *See, e.g.*, Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?*, 78 YALE L.J. 816, 818 (1969); Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1035–37 (1968); Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 552 (2006); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 561–62 (2007); Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1142 (1993); John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1219 (1993); Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1432–34 (1988); Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1018–19 (2006); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 693 (2004). For an instructive conceptual

not generally differentiate which meaning or sense of "public rights" is on the table in any particular case, and so tends to run together different meanings that have different legal implications. Like other legal concepts, the idea of public rights is useful as a modular referent that facilitates legal analysis and reduces the information costs of legal practice.[26] But if the idea is used in a way that confuses more than it clarifies, then the benefits of the concept are lost, and legal analysis can go awry.

The most useful feature of the concept of public rights, and the reason why its career continues in American jurisprudence, is that it signals who has which powers over a proceeding that can produce a valid judgment of a right's validity or limits. The first sense of "public right," as what is at stake in a public wrong, concerns who has power to initiate a proceeding that might affect the right holder's legal status in some way, as by depriving him of a liberty or imposing on him some liability. Standing is one instance of this first sense. The second sense, as positive law's authoritative settlement of a matter of indifference, concerns who has power to adjudicate a right, such as a court of law, a jury, chancery, or a commission. This was the issue in *Oil States*. The third sense, as a right emanating from a public grant or franchise, determines both the power to adjudicate and the power to initiate an adjudication but within the constraints of due process.

Those issues are among the questions that the Court expressly bracketed and set aside in *Oil States*. The AIA stretches traditional legal concepts in challenging ways. And the Court signaled that its decision in *Oil States* will not be the final word on the private or public status of patents but the first.[27] For example, the Court reiterated that patents are private property within the meaning of the Fifth Amendment, though not fully private rights within the meaning of the Seventh Amendment. Lower federal courts are still see-

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history of the private-public divide in Continental jurisprudence, see Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869, 873 (2013).

26 On the information-cost efficiencies of legal concepts, see generally Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742 (2007); Henry E. Smith, *Modularity and Morality in the Law of Torts*, 4 J. TORT L., no. 2, 2011, art. 5; Henry E. Smith, *On the Economy of Concepts in Property*, 160 U. PA. L. REV. 2097 (2012); Henry E. Smith, *The Persistence of System in Property Law*, 163 U. PA. L. REV. 2055 (2015); and Ted Sichelman, *Very Tight 'Bundles of Sticks': Hohfeld's Complex Jural Relations*, *in* THE LEGACY OF WESLEY HOHFELD (Shyam Balganesh et al. eds., forthcoming), https://ssrn.com/abstract=2947912.

27 For example, the Court just recently decided that an agency of the United States government is not a "person" within the meaning of the AIA, and is thus without power to initiate and prosecute a covered business method proceeding challenging a patent. Return Mail, Inc. v. U.S. Postal Serv., 139 S. Ct. 1853, 1859 (2019). The legal concept to which the term "person" refers has long been the very first conceptual concern of Western jurisprudence, from Justinian to John Finnis. THE INSTITUTES OF JUSTINIAN 1.2.12 (J.B. Moyle trans., 5th ed. 1913) ("And first let us speak of persons: for it is useless to know the law without knowing the persons for whose sake it was established."); JOHN FINNIS, *The Priority of Persons*, *in* INTENTION AND IDENTITY 19 (2012); JOHN FINNIS, *Personal Identity in Aquinas and Shakespeare*, *in* INTENTION AND IDENTITY, *supra*, at 36.

ing takings claims for patent rights,[28] and the United States Court of Appeals for the Federal Circuit recently issued an opinion meant to control the "growing number of retroactivity challenges" to the AIA, which cite *Oil States* as precedential authority.[29] Those claims, which the majority in *Oil States* expressly bracketed and seemed to invite, presuppose that patents are, at least in part, vested private rights.[30] Furthermore, the very next term after *Oil States*, the Supreme Court ruled in *Return Mail, Inc. v. United States Postal Service* that the U.S. Postal Service is a public sovereign and not a "person" who possesses the private right of an accused infringer to initiate a covered business method proceeding at the Patent and Trademark Office.[31] This means that patents implicate private rights for some interested parties and public rights for others.

So, it seems that the Court will continue to revisit the concept of public rights in the near future. The Court will have opportunities to clarify the senses in which it is using the term and the implications for legal challenges to the AIA. Those rulings will establish precedents for many other areas of law.

After this introduction, Part I examines the reasoning of the *Oil States* decision, digging below the terminology to uncover the underlying concepts at work. This examination reveals that the Court had different legal concepts in mind, though it used the same term to describe them, and that those concepts have different implications for future cases. Part II explains the common-law concept of public rights, how public rights differ from private rights, and why that distinction determines who has power to initiate a legal proceeding to sanction or remedy a wrong. Part III examines more closely the concept that explains the holding in *Oil States*. That concept refers not to a right's publicity but rather to its original authority, which determines who has power to adjudicate a right's validity and boundaries. Part IV examines the Court's concept of a patent as a "franchise," and shows how common-law franchises partake of both publicity and positive authority. Part V picks up where *Oil States* and *Return Mail* left off. It examines which aspects of a patent are private and which are public, which implicate legal rights and which indifferent privileges, and what this might mean for pending and future challenges to the AIA. This Article then briefly concludes.

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28 *See, e.g.*, Golden v. United States, No. 13-307, 2019 WL 2056662 (Fed. Cl. May 8, 2019), *appeal docketed*, No. 19-2135 (Fed. Cir. July 12, 2019); Christy, Inc. v. United States, 141 Fed. Cl. 641, 649–50 (2019), *appeal docketed*, No. 19-1738 (Fed. Cir. Apr. 4, 2019).

29 Celgene Corp. v. Peter, 931 F.3d 1342, 1356 (Fed. Cir. 2019).

30 Gary Lawson, *Appointments and Illegal Adjudication: The America Invents Act Through a Constitutional Lens*, 26 GEO. MASON L. REV. 26, 31–53 (2018); Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. REV. 689, 689 (2007).

31 *Return Mail*, 139 S. Ct. at 1861–62, 1867.

I. *OIL STATES*: THE COMPLEXITY OF RIGHTS IN PATENTS

A. *Concepts of Rights in* Oil States

In *Oil States*, the Supreme Court affirmed the power of the Patent and Trademark Office (PTO) to conduct inter partes review (IPR) of patent validity, a key structural element of the AIA.[32] In so doing, the Court ratified the AIA's casting of patent rights as so-called "public" rights, the Court's term for franchises conferred by Congress and executive officials on behalf of the people as a whole.[33] The Court ruled that patents are generated by positive law, rather than common law.[34] Therefore, the Court reasoned, the validity of patents need not be litigated in an Article III tribunal nor determined by a civil jury in accordance with the Seventh Amendment.[35]

The majority indicated that *both* property rights and franchise grants are at stake in a patent dispute. As the majority acknowledged,[36] Article I, Section 8 authorizes Congress to issue patents on terms that Congress may determine, but only to secure to inventors the exclusive rights to "their . . . [d]iscoveries."[37] This and other historical evidence suggest that a patent's exclusive right is a franchise given to the inventor as consideration for the inventor's disclosure of her prepositive, natural property.[38] The majority contrasted "public" rights with common-law rights,[39] by which it seems to have meant rights emanating from the unwritten common law—customary, private, and natural rights—as opposed to statutes. However, many common-law rights are declared, secured, and specified by statute.[40] The majority also compared "public" rights with property rights, and concluded that "[p]atents convey only a specific form of property right—a public franchise."[41] But the Court also favorably cited its precedents that establish that patents are vested property rights for various purposes.[42]

Significantly, the Court insisted that, in ruling that IPRs do not offend Article III, it was not resolving questions that might arise under the Takings

32 Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1371, 1373 (2018).

33 *Id.* at 1373.

34 *Id.* at 1374.

35 *Id.* at 1378.

36 *Id.* at 1374.

37 *Id.* (citing U.S. CONST. art. I, § 8).

38 Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent "Privilege" in Historical Context*, 92 CORNELL L. REV. 953, 958, 991 (2007); Sean M. O'Connor, *The Multiple Levels of "Property" in IP and Why That Matters for the Natural Versus Regulatory IP Debates*, 27 GEO. MASON L. REV. (forthcoming 2019), https://ssrn.com/abstract=3252253.

39 *Oil States*, 138 S. Ct. at 1374.

40 *See generally* Adam Mossoff, Essay, *Statutes, Common Law Rights, and the Mistaken Classification of Patents as Public Rights*, 104 IOWA L. REV. 2591 (2019).

41 *Oil States*, 138 S. Ct. at 1375.

42 *Id.* at 1379.

and Due Process Clauses of the Fifth Amendment.[43] Justice Thomas wrote for the Court,

> We emphasize the narrowness of our holding. We address the constitutionality of inter partes review only. We do not address whether other patent matters, such as infringement actions, can be heard in a non-Article III forum. . . . Moreover, we address only the precise constitutional challenges that Oil States raised here. Oil States does not challenge the retroactive application of inter partes review, even though that procedure was not in place when its patent issued. Nor has Oil States raised a due process challenge. Finally, our decision should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause.[44]

Furthermore, both the majority and dissent cited favorably the Court's older precedents, which describe patents as part prepositive property right and part posited, exclusive grant.[45] In this light, it seems likely that the Court will be asked to return to the private-public distinction again, that the holding in *Oil States* will not resolve all future cases, but that the concepts at work in *Oil States* will guide the Court's future deliberations.

B. Common-Law Concepts in Oil States *and Patent Law*

At this point we might wonder whether the concepts at work in *Oil States* are very important. After all, judges are not obligated to follow legal concepts; they are obligated to follow the law. And the complexity of the Court's characterization of patents might lead us to conclude that concepts about rights provide a mere façade in front of more pragmatic considerations, which are doing the real, normative work. Furthermore, Congress has discretion to fashion patent remedies and the formal terms on which patents are granted. In principle, patent law might adopt new forms and follow new jurisprudential paths. Yet the classical ideas on which the Court drew in *Oil States* are likely to shape its jurisprudence in future cases for at least two reasons.

First, the power of Congress to specify the respective rights of patentees and the public is limited by the Constitution. The same Constitution that confers upon Congress the power to generate intellectual property grants in Article I, Section 8 also limits the power of Congress to interfere with certain vested rights by the Contracts Clause and the Fifth Amendment, and guarantees due process to those whose rights state actors put at stake. And of course, the Intellectual Property Clause itself specifies normative justification for, and limitations on, Congress' power. The Constitution limits the rights

43 *Id.*; *see also* Mossoff, *supra* note 30. Richard Epstein predicts that due process challenges "surely will arise." 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. 188, 197 (2018).

44 *Oil States*, 138 S. Ct. at 1379.

45 *Id.*; *id.* at 1382–84 (Gorsuch, J., dissenting).

of Congress that it confers. And the Constitution is shot through entirely with legal concepts taken directly from common law.

It is instructive that Justice Thomas for the Court and Justice Gorsuch in dissent spent much of their opinions debating about common-law concepts and institutions—the respective jurisdictional boundaries of English law courts, the Court of Chancery, and the Privy Council;[46] the differences between private rights and franchises or "feudal favors";[47] the social contract and consideration for the patent grant;[48] and the pre- and postpolitical status of different property rights.[49] All of this historical and conceptual jurisprudence informed their interpretations of what the Constitution requires.

Second, insofar as the Court is obligated faithfully to interpret the Patent Act, the Justices must respect the choices that Congress has made in fact.[50] And the Patent Act incorporates legal concepts taken directly from common law. Examples abound. A few: the Act establishes the PTO as an "agency of the United States,"[51] and confers upon it enumerated "powers" and "duties."[52] The term "patentee" includes the original patentee's "successors in title."[53] The Act requires an application to make an "oath or declaration."[54] A finding of "willful" infringement still warrants an award of multiple damages.[55] Also, Congress has never abrogated the common-law exception to infringement liability for exercising a patent to satisfy intellectual curiosity.[56] All of the common-law concepts signified by these terms and doctrines have implications for the rights of patentees and nonpatentees who are interested in an invention.

The Court thus does well to draw upon classical legal concepts as it interprets the Patent Act. For example, the AIA empowers any "person" other than the patentee to initiate an IPR. The IPR has its origin not in public rights but in prerogative proceedings. Prerogative proceedings were put under law during the seventeenth century and not anyone could initiate

46 *Id.* at 1376–77(majority opinion); *id.* at 1381–83 (Gorsuch, J., dissenting).

47 *Id.* at 1373 (majority opinion); *id.* at 1382 (Gorsuch, J., dissenting).

48 *Id.* at 1377 (majority opinion); *id.* at 1382 (Gorsuch, J., dissenting).

49 *Id.* at 1373–74 (majority opinion); *id.* at 1384–85 (Gorsuch, J., dissenting).

50 *Cf.* Jeffrey A. Pojanowski, *Reading Statutes in the Common Law Tradition*, 101 VA. L. REV. 1357 (2015) (discussing the common-law interpretive method, which requires deference to the intent of Congress).

51 35 U.S.C. § 1(a) (2012).

52 *Id.* § 2.

53 *Id.* § 100(d).

54 *Id.* § 111(a)(3).

55 Halo Elecs., Inc. v. Pulse Elecs., Inc., 136 S. Ct. 1923, 1929–30 (2016) (tracing the history of courts seeking to punish willful infringement as being the "backdrop that Congress . . . enacted § 284" against and concluding that § 284 declares and preserves the power of courts to award punitive damages against willful infringers); *accord* 35 U.S.C. § 284.

56 *See* Madey v. Duke Univ., 307 F.3d 1351, 1360–63 (Fed. Cir. 2002) (discussing the exception for experimental use); Sawin v. Guild, 21 F. Cas. 554, 555 (C.C.D. Mass. 1813) (No. 12,391) (discussing the exception for philosophical experiments); Whittemore v. Cutter, 29 F. Cas. 1120, 1121 (C.C.D. Mass. 1813) (No. 17,600) (same).

them, nor for any reason. Historical research has shown that "a 'personal stake' or standing was indeed necessary to invoke the power of English courts even in prerogative proceedings."[57] Prerogative proceedings initiated by strangers to a case were exceptional, and those "strangers" were understood to have some particular interest in the proceedings.[58]

This history explains the Court's interpretation of "person" in *Return Mail.* Though Justice Sotomayor's opinion for the Court confined itself to a textual reading of the AIA, the holding in *Return Mail* confirms the conventional understanding. Congress authorized only a person who has been sued for infringement to initiate a covered business method proceeding. The government is immune from infringement liability and therefore, unlike a person who is exposed to liability for laboring productively on resources that they believe they are at liberty to use, the government is not directly interested in a patent's validity (unless and until it wants to take a license to exercise the patent by eminent domain, which is a different legal right altogether).

C. Disaggregating the Concepts

Though the majority opinion in *Oil States* uses the language of "public" rights throughout, its reasoning refers to different sets of legal concepts. Some public rights are the rights of the public not to be wronged by an unmeritorious or fraudulently obtained patent. These are the traditional public rights at common law, violation of which constitutes a public wrong. This concept refers to the *publicity* of a right. Others arise out of positive law that legislatures use to settle formally aspects of intellectual property law that are matters of indifference at common law; they could reasonably have been otherwise.[59] These rights are sometimes called positive privileges and are contrasted with common-law or legal rights. The concept at work here refers to the *authority* of a right.[60]

Unfortunately, the *Oil States* majority did not seem to notice when it slipped from one set of concepts to the other. This is a problem because the authority of a right and the publicity of a right have different implications. While the public-private distinction concerns whose right is at stake in the dispute and therefore who has the power to initiate proceedings,[61] the common-law-right–legislated-privilege distinction that the Court employed in *Oil*

57 Bradley S. Clanton, *Standing and the English Prerogative Writs: The Original Understanding*, 63 BROOK. L. REV. 1001, 1008 (1997).

58 *See id.* at 1009–33.

59 For example, the length of patent term has varied throughout American history.

60 Woolhandler teaches that the term "public right" has been used to refer to both of those ideas, and others, in later American jurisprudence. Woolhandler, *supra* note 25, at 1020–22.

61 *Id.* at 1022; Woolhandler & Nelson, *supra* note 25, at 694–700.

States concerns the authority of the right and determines who has power to adjudicate its boundaries and remedial implications.[62]

When it invoked "public rights" to explain the constitutionality of IPRs, the majority seems to have had in mind not the common-law concept of public rights but the rather different concept of indifferent privileges, which are determined by positive law. This inference seems compelled by the majority's sharp dichotomy between rights that exist "at common law" and those that are created by "statute law,"[63] and by its heavy reliance upon *Murray's Lessee v. Hoboken Land & Improvement Co.*[64] and the line of cases that follow it.[65] *Murray's Lessee* raised the issue whether a distress warrant proceeding constituted due process of law.[66] The Court began by observing that "due process," which Coke identified as the "law of the land" declared in Magna Carta, includes the jury trial secured in the Sixth and Seventh Amendments, but is also more, or else the Fifth Amendment would be superfluous.[67] To determine the scope of the "law of the land," the Court was required to

> look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.[68]

A common-law lawyer (which, in 1856, is to say a "lawyer") would read this to refer to customs and usages that were accepted in American practice. That American lawyers employed an English mode of proceeding is evidence that American lawyers accepted the proceeding's status as customary law. Since both English and American lawyers always used summary proceedings to collect revenues, the Court reasoned, the distress warrant did not offend the Fifth Amendment's due process requirement.[69]

The *Murray's Lessee* Court helpfully contrasted customary rights and proceedings, on one hand, with indifferent privileges and posited proceedings on the other. Property rights were at stake in the distress warrant proceeding, the deprivation of which implicates due process. By contrast, Congress may specify any proceeding it chooses to adjudicate an indifferent privilege. The Court gave the example of "[e]quitable claims to land by the inhabitants

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62 Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005, 1035 (1992) (noting that whether juries can "participate in the adjudication of statutory rights and obligations" usually turns on whether the legal right at issue is "one the legislature has created by the passage of a statute" or "is one that has been developed by the courts through the evolving judge-created common law").

63 Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1374 (2018) (first quoting Gayler v. Wilder, 51 U.S. (10 How.) 477, 494 (1850); and then quoting Crown Die & Tool Co. v. Nye Tool & Mach. Works, 261 U.S. 24, 40 (1923)).

64 59 U.S. (18 How.) 272 (1856).

65 *E.g.*, *Oil States*, 138 S. Ct. at 1373–78.

66 *Murray's Lessee*, 59 U.S. (18 How.) at 275–76.

67 *Id.* at 276.

68 *Id.* at 277.

69 *Id.* at 277–78. This makes jury trials and distress warrants unlike commissions, the use of which varies throughout Anglo-American history. *Id.* at 276–80.

of ceded territories" and immediately went on to explain that "as it depends upon the will of congress whether a remedy in the courts shall be allowed at all, in such cases, they may regulate it and prescribe such rules of determination as they may think just and needful."[70]

Similarly, the *Oil States* Court concluded from the fact that patent standards are posited by Congress that Congress can assign adjudication of the merits of a patent to the PTO. This is not to say anything about who has power to initiate an action at the PTO. It is to identify the source of the PTO's power to adjudicate an action.

American common-law jurists have thought from the beginning that both questions are important.[71] And their importance is reflected in American constitutions. Most state constitutions have civil jury trial provisions that secure a right to jury trial in common-law actions.[72] Likewise, the Seventh Amendment guarantees a jury trial in "[s]uits at common law" under the "rules of the common law."[73] This Article is not the place to unpack the original or contemporary meanings of those provisions. But their existence, and their express reference to common law demonstrate the significance that Anglo-American jurists have long attributed to a right's authority.

What follows is a history of an idea, or more precisely, the different ideas to which the designation "public rights" has at times been attached. This is not a *legal* history, that is to say, a history of the law of public rights.[74] It is a short history of a legal *concept* or, more precisely, three different legal *concepts* that now travel together under the same term, "public rights."

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70 *Id.* at 284.

71 *See, e.g.*, James Wilson, Lectures on Law: Comparison of the Constitution of the United States, with That of Great Britain, *in* 1 COLLECTED WORKS OF JAMES WILSON 718, 745–46 (Kermit L. Hall & Mark David Hall eds., 2007).

72 *See* Eric J. Hamilton, *Federalism and the State Civil Jury Rights*, 65 STAN. L. REV. 851, 854–59, 890–900 (2013). *Contra* Franchise Tax Bd. v. Superior Court, 252 P.3d 450, 458 (Cal. 2011); People v. One 1941 Chevrolet Coupe, 231 P.2d 832, 843 (Cal. 1951) (per curiam); Wisden v. Superior Court, 21 Cal. Rptr. 3d 523, 526 (Ct. App. 2004); Anzaldua v. Band, 550 N.W.2d 544, 551 (Mich. Ct. App. 1996), *vacated*, 578 N.W.2d 306 (Mich. 1998); Young v. City of LaFollette, 479 S.W.3d 785, 793 (Tenn. 2015). In light of the differential treatment between rights and privileges for jury trial purposes, Kenneth Klein argues that a common-law civil jury trial guarantee "depends upon the source of the legal right." Klein, *supra* note 62, at 1035.

73 U.S. CONST. amend. VII. On the history of the Seventh Amendment, see generally Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973). Scholars disagree about the extent to which the Seventh Amendment tracks the common-law distinction drawn by state constitutions. *Compare* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 89 (1998), Meyler, *supra* note 25, at 595–600, *and* Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852, 872–93 (2013), *with* Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966), Stanton D. Krauss, *The Original Meaning of the Seventh Amendment Right to Jury Trial*, 33 RICH. L. REV. 407 (1999), *and* Klein, *supra* note 62.

74 Instructive legal histories include Nelson, *supra* note 25; Woolhandler, *supra* note 25; and Woolhandler & Nelson, *supra* note 25.

II. PRIVATE RIGHTS, PUBLIC RIGHTS

A. An Ancient Distinction

In common-law jurisprudence, the person or group whose right is at stake has power to seek a remedy or sanction for its usurpation in a wrongful act. A wrong is simply the deprivation of a right.[75] And the purpose of adjudication in common law is to provide remedies for legal wrongs.[76] A private right is infringed in a private wrong, and the person whose right is injured may initiate an action for a remedy.[77] A public right is usurped in a public wrong, and only a duly authorized agent of the public may initiate an action for sanction or remedy of the right.[78] Even qui tam and other relator proceedings do not disprove this general rule.[79] The relator of a qui tam has no right to maintain the action, only a contingent delegation of public authority.[80] The action itself belonged to the Crown at common law, who held on behalf of the people.[81] Blackstone identified qui tam as a species of "popular actions, because they are given to the people in general."[82]

The fundamental and architectonic significance of the public-private distinction is most clearly seen in William Blackstone's classic and influential *Commentaries on the Laws of England*[83] and the numerous treatises that have built upon Blackstone's basic structure.[84] In the *Commentaries*, a right is that which is infringed or taken in an act of wrong, redress of wrongs being the primary concern of the common law. Private wrongs are the "infringement or privation of the private or civil rights" of persons considered as *persons*, rather than members of the public, "termed *civil injuries*."[85] These are distinguished from "breach and violation of public rights and duties, which affect

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75 3 BLACKSTONE, *supra* note 1, at *2–6; THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 98 (Chicago, Callaghan & Co. 1879).

76 COOLEY, *supra* note 75, at 1.

77 Woolhandler & Nelson, *supra* note 25, at 694–703.

78 *Id.* (discussing public nuisances and only "public authorities" or private plaintiffs with "special injur[ies]" tied to the nuisance have standing to sue).

79 *Compare* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 176 (1992), *and* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1409 (1988), *with* 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 335 (John Curwood ed., London, C. Roworth 8th ed. 1824), *and* Woolhandler & Nelson, *supra* note 25 at 724–31.

80 *See* Vt. Agency of Nat. Res. v. United States *ex rel* Stevens, 529 U.S. 765, 773 (2000).

81 Clanton, *supra* note 57 at 1034.

82 3 BLACKSTONE, *supra* note 1, at *160 (emphasis omitted).

83 *Id.* at *2.

84 *See, e.g.*, COOLEY, *supra* note 75, at 1–441; James Wilson, Lectures on Law: Of the General Principles of Law and Obligation, *in* 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 71, at 464, 467–73 [hereinafter Wilson, General Principles]; James Wilson, Lectures on Law: Of the Natural Rights of Individuals, *in* 2 COLLECTED WORKS OF JAMES WILSON, *supra* note 71, at 1053, 1054–58.

85 3 BLACKSTONE, *supra* note 1, at *2.

the whole community, considered as a community; and are distinguished by the harsher appellation of *crimes* and *misdemesnors*."[86]

For Blackstone, as for common-law jurists generally, the divide between public rights and private rights has jurisprudential, constitutional, and procedural importance. Jurisprudentially, the right at stake in any alleged legal wrong determines the character of the wrong and what, if anything, must be done about it.[87] Constitutionally, that the person whose right is injured has power to obtain redress from competent tribunals makes possible the rule of law.[88] It means that all persons—rich and poor, powerful and weak, official and nonofficial—have an enforceable duty not to deprive another person of her right[89] *and* an enforceable duty to obey the laws duly enacted by the people as a whole and their lawful representatives.[90] Procedurally, as the *Oil States* decision also shows, the status of the right can determine venue, standing, remedy, retrospectivity, burdens of proof and persuasion, and other significant, even dispositive, aspects of a legal dispute.[91]

Blackstone did not invent the distinction between public and private rights.[92] Roman jurists famously distinguished private law from public law.[93] Summarizing the *Institutes* of Gaius and of Ulpian,[94] Justinian's jurists divided all legal study into two branches, public law and private law.[95] A legal right was tied to the status of a person, so that the law that determined any particular right was the law appropriate to that status.[96] Status was relative to the complex, three-fold nature of a human being—as a being possessing an animal nature, a rational nature, and a relational nature in society[97]—and

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86 *Id.*

87 1 BLACKSTONE, *supra* note 1, at *118–19.

88 *See* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 107–22 (Liberty Classics reprt. 1982) (8th ed. 1915); *see also* 1 BLACKSTONE, *supra* note 1, at *46–61; *cf.* David Sloss, *Polymorphous Public Law Litigation: The Forgotten History of Nineteenth Century Public Law Litigation*, 71 WASH. & LEE L. REV. 1757 (2014) (examining nineteenth-century cases and showing that federal courts regularly enforced limitations on public law-making that inhere in common law and the *jus gentium*, thus allowing claimants to vindicate their rights against unlawful state action without always referring to constitutional texts).

89 *See* DICEY, *supra* note 88, at 114–15, 120.

90 *See* 3 BLACKSTONE, *supra* note 1, at *158–59.

91 *See* John F. Duffy, Response, *Standing to Challenge Patents, Enforcement Risk, and Separation of Powers*, 83 GEO. WASH. L. REV. 628, 640–46 (2015).

92 Citing the *Rhetoric*, one scholar suggested that "[t]he division of law into public law and private law is as old as Aristotle." Robert Ludlow Fowler, *American Public Law*, 2 FORDHAM L. REV. 111, 111 (1916).

93 JOHN GEORGE PHILLIMORE, PRIVATE LAW AMONG THE ROMANS 31 (London, MacMillan & Co. 1863); FREDERICK PARKER WALTON, HISTORICAL INTRODUCTION TO THE ROMAN LAW 350–56 (Lawbook Exch. reprt. 2016) (4th ed. rev. 1920).

94 W.W. BUCKLAND, ELEMENTARY PRINCIPLES OF THE ROMAN PRIVATE LAW 1–12 (1912).

95 THE DIGEST OF JUSTINIAN, *supra* note 1, at 1.1.1 (Ulpian, Institutes 1); THE INSTITUTES OF JUSTINIAN, *supra* note 27, at 1.1.4.

96 *See* BUCKLAND, *supra* note 94, at 13–57, 61–62.

97 PHILLIMORE, *supra* note 93, at 26–28.

the complex hierarchies of domains within Roman society.[98] Some of those domains, especially the family, which would in modern times be classified as part of private law, were autonomous from—indeed unaccountable to—public authorities in many important matters and were governed by customary and religious law.[99]

Roman jurists handed the private-public distinction down to English and American jurists by way of Justinian's *Corpus Juris Civilis*, continental legal concepts brought across the Channel in the Norman Conquest, and ecclesiastical jurisprudence.[100] Roman law generally, and public and private *dominium* specifically,[101] were known in early English jurisprudence,[102] though they did not play as large a role as did the ideas of lawful possession and redress of wrongs.[103] Many medieval English jurists were instructed in Roman law or in canon law, which borrowed heavily from Roman terms and concepts.[104] Bracton,[105] Glanvill,[106] and other medieval English jurists drew from Justinian and the scholastics and introduced many Latin terms and

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98 WALTON, *supra* note 93, at 351–56 (explaining that the division between public rights and private rights is determined by relations within the various domains of society).

99 In early Roman law, the lawmaking power of the paterfamilias over the family "is absolute. The law of the State does not extend there." *Id.* at 71. So, for example, Gibbon remarked, concerning a father's absolute dominion over his household,

> In the forum, the senate, or the camp, the adult son of a Roman citizen enjoyed the public and private rights of a *person*; in his father's house he was a mere *thing*, confounded by the laws with the moveables, the cattle, and the slaves, whom the capricious master might alienate or destroy without being responsible to any earthly tribunal.

7 EDWARD GIBBON, THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE 341 (J.B. Bury ed., Fred de Fau & Co. 1907) (1776). And a father possessed absolute power to dispose of his property by will, even to the disinheritance of his children. PHILLIMORE, *supra* note 93, at 352. However, even in early Roman law the paterfamilias was not a tyrant. WALTON, *supra* note 93, at 73. He was obligated to obey religion and custom. *Id.* The Roman household was thus governed by the laws of tradition and morals, and wives and children were protected against absolute patriarchal rule by the social pressure that fathers felt to avoid scandal resulting from tyrannical behavior, *id.* at 73–74, and by religious laws administered by the College of Pontiffs and customary laws administered by the so-called "Hundred" court. JILL HARRIES, CICERO AND THE JURISTS: FROM CITIZENS' LAW TO THE LAWFUL STATE 60–61 (2006).

100 KELLY, *supra* note 7, at 41–45, 121–23, 179–81; *see also* 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I, at 96–97 (Cambridge, Univ. Press 2d ed. 1898).

101 *See* 2 POLLOCK & MAITLAND, *supra* note 100, at 4–6.

102 *See* 1 *id.* at 37–43, 119–44, 230–31.

103 *Id.* at 56–57.

104 See generally the essays in GREAT CHRISTIAN JURISTS IN ENGLISH HISTORY (Mark Hill QC & R.H. Helmholz eds., 2017).

105 *See generally, e.g.*, HENRY DE BRACTON, DE LEGIBUS ET CONSUETUDIENIBUS ANGLIÆ (London 1569).

106 *See generally, e.g.*, RANULF DE GLANVILL, TRACTATUS DE LEGIBUS ET CONSUETUDINIBUS REGNI ANGLIE (London 1554).

ideas into English jurisprudence.[107] Ecclesiastical courts, which employed canon law, competed (successfully) with local courts and the Crown's courts to supply legal justice.[108] And of course, before Thomas More, the Chancellor was always an ecclesiastic and learned in both canon and civil law.[109]

The extent to which Roman concepts took root in English common law is a matter of some dispute.[110] If the concepts of public and private rights specifically did not gain traction immediately, it was not because early English jurists rejected the idea of private law. To the contrary, it was because they had no category for public rights. Preliberal English law treated

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107 Nicholas Vincent, *Henry of Bratton (*alias *Bracton), in* GREAT CHRISTIAN JURISTS IN ENGLISH HISTORY, *supra* note 104, at 19, 32; *e.g.*, R.H. HELMHOLZ, NATURAL LAW IN COURT: A HISTORY OF LEGAL THEORY IN PRACTICE 58–59 (2015). Blackstone declared, with characteristic flair, that the "struggle" between English and Roman law continued until the time of Edward I, the "English Justinian," who obtained for English law "a complete and permanent victory." 4 BLACKSTONE, *supra* note 1, at *415, *418. That the victory was incomplete is shown by Blackstone's own *Commentaries*, which cite Justinian and are replete with Latin maxims and phrases.

108 Adam Smith offered a practical explanation for why English citizens preferred to take their actions to ecclesiastical courts in medieval times: they were less corrupt, better administered, and offered remedies for more civil rights. ADAM SMITH, LECTURES ON JURISPRUDENCE 89–90 (Meek et al. eds., 1978).

109 *See* ARTHUR R. HOGUE, ORIGINS OF THE COMMON LAW 22, 167–68 (1966); Timothy A.O. Endicott, *The Conscience of the King: Christopher St. German and Thomas More and the Development of English Equity*, 47 U. TORONTO FAC. L. REV. 549, 552–53, 565–67 (1989). After More's chancellorship, English equity adhered to the principles laid down in Christopher St. German's *Doctor and Student*, which drew from a combination of ancient Greek, medieval natural law, and Christian sources. *Id.* at 558–59; Ian Williams, *Christopher St. German: Religion, Conscience and Law in Reformation England, in* GREAT CHRISTIAN JURISTS IN ENGLISH HISTORY, *supra* note 104, at 69, 77–82.

110 HOGUE, *supra* note 109, at 22–24. Phillimore denigrated common-law jurists for resisting the insights of Roman jurisprudence. He ranted that England "repelled with jealous vigilance the encroachments of light from the primæval darkness of her law, and has preserved in all its shapeless deformity the chaos accumulated by the successive contributions of empirical mechanics . . . to whom all method was unknown and everything that resembled principle unintelligible." PHILLIMORE, *supra* note 93, at 6. Less polemically, Pollock and Maitland suggested that Bracton and Glanvill made little use of Roman concepts in their monumental treatises on the common law, both of which instead emphasized the law of actions. 1 POLLOCK & MAITLAND, *supra* note 100, at 174–76. Indeed, they cited "Bracton's text" as evidence "that the influence of Roman law is on the wane, is already very slight" in medieval England. *Id.* at 218. But this has since been shown to be an overstatement. Pollock and Maitland themselves inferred from the available evidence that whoever wrote the treatise attributed to Ranulf Glanvill "knew something of Roman and of canon law." *Id.* at 165. Likewise, the author of Bracton's treatise, whoever he was, "was an expert civilian lawyer," and his jurisprudential statements about the relationship between king, law, and society were largely drawn from Roman sources and the Vulgate translation of the Bible. Vincent, *supra* note 107, at 32; *see id.* at 26–27, 29–34, 33 n.74 (citing F. Schulz, *Critical Studies on Bracton's Treatise*, 59 LAW Q. REV. 172 (1943); and F. Schulz, *Bracton and Raymond De Peñafort*, 61 LAW Q. REV. 286 (1945)). And "*Bracton* began with definitions of justice drawn from the same Roman law texts" that founded civilian jurisprudence. HELMHOLZ, *supra* note 107, at 89.

all rights as species of property. Pollock and Maitland explained, "Any such conception as that of 'the state' hardly appears" in premodern common law.[111] Though the king is privileged and wealthy, "still his rights are but private rights amplified and intensified."[112]

Because, as Plucknett observed, feudal conditions were equally incompatible with "anything corresponding to the State" and with "property in land as we know it to-day,"[113] feudal law had no such category as "public" law, just as it had no defined category for individual rights. All jurisdiction, offices, and even kingship itself were conceived of as kinds of property, Pollock and Maitland explained, and so "all that we call public law is merged in private law."[114] Thus, any concept of public rights did not fit well in premodern common law, which was instead preoccupied with remediating wrongs by various forms of actions.[115] Procedurally and constitutionally, medieval law was the law of actions for the remediation of wrongs, both what we would today call private and what we would call public.[116]

Between Edward I's formalization of legal proceedings in the late thirteenth century and the ascent of the Tudors in the sixteenth, English kings developed the idea of public wrongs, offenses against the common good that the Crown prosecuted on behalf of the people as a whole. In the stories later told by Blackstone, Adam Smith, and other influential thinkers, the development of public law was a usurpation by the Crown, perpetrated to expand the reach of the royal prerogative at the expense of ordered liberty. Even if justified, this expansion of royal power was a departure from the partly historical, partly mythical concept[117] that Coke referred to as the law "before the Conquest"[118] and Blackstone called the "old Saxon constitution."[119]

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111 1 POLLOCK & MAITLAND, *supra* note 100, at 230–31.

112 *Id.* at 231.

113 THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 509 (Liberty Fund reprt. 2010) (5th ed. 1956).

114 1 POLLOCK & MAITLAND, *supra* note 100, at 230.

115 *Id.* at 148–49. In the polycentric world of ancient and medieval England, ecclesiastic, manorial, and royal courts competed for business, offering various forms and forums to remedy wrongs. HOGUE, *supra* note 109, at 5–6; *see* 1 POLLOCK & MAITLAND, *supra* note 100, at 386–88; 2 *id.* at 585–88; 3 BLACKSTONE, *supra* note 1, at *30–84. Thus, the legal controversies of the time arose out of competing writ practices. *See, e.g.*, HOGUE, *supra* note 109, at 12–18; *see also* R.H. Helmholz, *William Lyndwood*, *in* GREAT CHRISTIAN JURISTS IN ENGLISH HISTORY, *supra* note 104, at 45, 63–66.

116 *See* DICEY, *supra* note 88, at 117–18.

117 JEAN LOUIS DE LOLME, THE CONSTITUTION OF ENGLAND; OR, AN ACCOUNT OF THE ENGLISH GOVERNMENT 23–24 (David Lieberman ed., Liberty Fund 2007) (4th ed. 1784); 1 POLLOCK AND MAITLAND, *supra* note 100, at 29–63.

118 3 EDWARD COKE, REPORTS (1602), *reprinted in* 1 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 59, 62–67 (Steve Sheppard ed., 2003).

119 4 BLACKSTONE, *supra* note 1, at *404–23; *cf.* THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA 35–37 (Williamsburg, Clementina Rind 1774) (describing the ancient "Saxon laws of possession" as securing "absolute dominion" of real and personal property, "disencumbered with any superior").

The conceptual rift between private and public rights opened with emphasis in the crucial seventeenth century, with the rejection of James I's and Charles I's assertions of sovereignty to determine and adjudicate rights.[120] It is especially apparent in the jurisprudence of Matthew Hale.[121] Hale, who was well instructed in medieval scholastic thought and Roman jurisprudence,[122] drew a sharp distinction between civil rights and criminal law.[123] He supplied the jurisprudential concept of private "dominion," the common-law term for property ownership, grounded its fundamental rights and duties in a prepositive state of nature, and severed it from the idea of the king's dominion over his subjects.[124] By conceptually separating personal dominion over things from sovereign dominion over people, Hale made possible a robust category of private rights and duties while preserving the boundaries of dominion constituted by the law of wrongs.[125] Hale's younger contemporary, John Locke, followed this conceptual separation of public and private in his influential treatises.[126]

B. Rights as the Opposite of Wrongs

However, though many other jurists contributed to it, the distinction between public rights and private rights emerges most clearly when one considers Blackstone's own expression of it. It is especially apparent in the arrangement of his four volumes. The architecture of Blackstone's *Commentaries* has provided the starting point for thinking about public and private rights throughout most of American history since before the Founding. It demonstrates the fundamental reason why the power to obtain redress for a wrong belongs to the person or group whose right was infringed or taken by the wrongdoer. A private wrong infringes a private-personal right or deprives someone of a private-thing right, and the person whose right is infringed upon may obtain redress. Similarly, a public wrong usurps a public right, and it is for the public to seek a criminal sanction.

Blackstone divided the whole universe of rights into four quadrants by drawing two intersecting divisions through common law. Following Justinian,[127] he distinguished the rights of persons from the rights of things.[128]

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120 *See* PLUCKNETT, *supra* note 113, at 36–37, 52–55.

121 *See* Finnis, *supra* note 6, at 165–66.

122 *See* David S. Sytsma, *Matthew Hale as Theologian and Natural Law Theorist*, *in* GREAT CHRISTIAN JURISTS IN ENGLISH HISTORY, *supra* note 104, at 163, 165, 167.

123 HALE, *Preface to* ANALYSIS, *supra* note 10, at [A2]; Systsma, *supra* note 122, at 178–79.

124 HALE, LAW OF NATURE, *supra* note 10, at 89–93.

125 Adam J. MacLeod, *The Boundaries of Dominion*, *in* CHRISTIANITY AND PRIVATE LAW (Robert Cochran and Michael Moreland eds., forthcoming 2020).

126 JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT §§ 45–51 (1690), *reprinted in* Two Treatises of Government and a Letter Concerning Toleration 100, 119–21 (Ian Shapiro ed., Yale Univ. Press 2003) (distinguishing between public and private with respect to property interests).

127 Justinian divided the "whole of the law" into parts concerning persons, things, and actions. THE INSTITUTES OF JUSTINIAN, *supra* note 27, at 1.2.12.

128 1 BLACKSTONE, *supra* note 1, at *1; 2 *id.* at *1.

Following Hale, he distinguished private rights and wrongs from public rights and wrongs.[129]

The first distinction, between "thing" rights and "person" rights, reflects the dual concern of common law with persons and resources and the two different modes of right specification in common-law jurisprudence. Sometimes a right is something that one has, possesses, or owns separable from one's actions and person. In Blackstone's words, rights of things are "such as a man may acquire over external objects, or things unconnected with his person."[130] A landlord has a remainder in Blackacre while the tenant lawfully in possession has a finite possessory estate. A bailor has a chose in action for delivery of the item, and the bailee has the right to exclude others from the item. In this first sense of "right," the right has a conceptual existence independent of persons. A right is in rem—a thing out there in the world that can be given, conveyed, bequeathed, or devised and that can belong to any number of different people, simultaneously or in succession.

This first sense of rights makes property possible. Because property consists of rights and interests with respect to a resource, not the tangible resource itself, common law is able to offer a wide variety of estates and interests. For the same reason, intellectual property is possible. Because such rights are associated with certain official statuses in law—owner, bailee, patentee, etc.—rather than attaching to individual persons in their personal capacity, they can be alienated and delimited. They are, in J.E. Penner's terms, separable from persons, only "contingently associated with any particular owner," such that "nothing of normative consequence beyond the fact that the ownership has changed occurs when an object of property is alienated to another."[131]

In this right-as-thing sense, rights are generally impersonal—Penner colorfully says that they "*might just as well be someone else's*"[132]—and multital—good against the world in approximately the same way. Suppose Olivia owns a car. Her exclusive right in the car is impersonal, both in the sense that it is valid against everyone other than Olivia and in the sense that she can sell the car to a buyer, such as Bob. Olivia's rights in the car are multital and categorical. As long as Olivia owns the car, Olivia can exclude everyone else from it, no matter who they are and no matter what reasons they might have for wanting to use or possess it. In jurisprudential terms, this is a two-term right. It can be specified by (i) stating the person who holds the right and (ii) identifying the character of the right—(i) Olivia has an (ii) exclusive right to possess her car. Everyone who is not Olivia is under the same legal disadvantage of being excluded from possessing the car. If Olivia were to sell her car to Bob, then she would join the category of all persons other than Bob who are subject to and legally disadvantaged by Bob's exclusive right.

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129 3 *id.* at *2; 4 *id* at *1.

130 1 *id.* at *118.

131 J.E. PENNER, THE IDEA OF PROPERTY IN LAW 111 (1997).

132 *Id.* at 112.

The simple duty of abstention owed to an owner can be generalized to all owners of all things. Every person has a duty to exclude themselves from Olivia's car, and each person has the same duty to exclude himself from all things he does not own. A general duty of abstention such as this can be owed not only to particular owners but also to the public as a whole. Thus, theft and trespass are not only wrongs against owners but also public wrongs—wrongs that consist in usurping the same, general obligations that all law-abiding persons obey.

There is a second sense of "right" in common-law jurisprudence, that of a conclusive reason (sometimes called, in analytical jurisprudence, a "peremptory" or "exclusionary" reason) for choice and action.[133] For example, a person has a right not to be enslaved. That right cannot be defeated by any other reason. No matter what might motivate a person to enslave another person, or what justification one might offer for enslavement, the act is always legally wrong. It is never right to enslave; it is always right not to enslave.

The function of this sense of "right" is to direct correct judgment about what is to be done or not done with respect to a person (natural or artificial).[134] It is the right of a person. (It is also a common-law right[135] in the sense described in the next Part.) Rights in this sense are, in Blackstone's words, "annexed to the persons of men."[136] A right in this mode is what is right to do or not to do with respect to a person. It directs judgment about actions and omissions.[137] Such rights correlate with duties.[138] A right in this sense is not an impersonal entity but rather a direction for an action or omission that is to be undertaken, in a context or in general, by one person who is exercising right reason with respect to another person who is owed a duty.

In the rights-of-persons sense, rights are personal and generally paucital (though, as in the case of the right not to be enslaved, where many people are burdened by the same correlative duty, such rights can be generalized as multital). Suppose Olivia has an exclusive, nonassignable licensing agreement with Larry. The agreement requires Larry to pay Olivia five cents for every widget he produces that reads on Olivia's patent. Olivia's right to be

133 *See generally* H.L.A. Hart, *Commands and Authoritative Legal Reasons*, *in* ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY(1982); JOSEPH RAZ, THE MORALITY OF FREEDOM 165–92 (1986); JOSEPH RAZ, PRACTICAL REASON AND NORMS 35–48, 73–84 (Oxford Univ. Press 1999) (1975); GRÉGOIRE C.N. WEBBER, THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS 116–46 (2009); J. Raz, *Reasons for Action, Decisions and Norms*, 84 MIND 481 (1975).

134 1 BLACKSTONE, *supra* note 1, at *119.

135 Buckner v. Street, 4 F. Cas. 578 (C.C.E.D. Ark. 1871) (No. 2098); Somerset v. Stewart (1772) 98 Eng. Rep. 499 (K.B.); Forbes v. Cochrane (1824) 107 Eng. Rep. 450 (K.B.).

136 1 BLACKSTONE, *supra* note 1, at *118.

137 Blackstone explained that a rule of common law that generates rights and duties is called a rule "to distinguish it from *advice* or *counsel*, which we are at liberty to follow or not, as we see proper; and to judge upon the reasonableness or unreasonableness of the thing advised." *Id.* at *44.

138 *Id.* at *119.

paid five cents by Larry is the same duty that Larry has to pay Olivia five cents. The right is personal to Olivia, the duty is personal to Larry, and the right and duty correlate exactly with each other. In jurisprudential terms, this is a three-term right. It is specified by identifying (i) the person who holds the legal advantage (in this case, Olivia), (ii) the person who holds the legal disadvantage (Larry), and (iii) the action or omission required by the right (not to make or sell the invention without paying five cents). Rights against unfair competition are also conventionally understood to be personal in this sense.[139]

Three-term rights are products of legal judgments. Judgment specifies the right in conclusive terms identifying the right holder, the duty bearer, and the action or omission required or forbidden. This is the sense of saying that common law is "judge-made" law. Once all the relevant facts are known about the validity of Olivia's patent claims and the legally significant relations between Olivia and Larry, a court can render a judgment determining that Larry is at liberty to practice the invention (or not). But judgments are determined, in part or whole, by two-term rights. This is the sense of saying that judges do not make the law but instead declare it, identifying and giving legal force to preexisting rights. Two-term right statements are useful in practice because human reason and knowledge are finite and because we need default presumptions. We cannot anticipate every circumstance in which Olivia's claims and defenses might be vindicated or not, but we can often say with good-enough certainty that Olivia is likely to prevail on a claim or defense because she possesses a right and that anyone denying the existence of her right bears the burden of persuasion.

Some but not all personal rights can be universalized as general obligations and can thus be public. We all have the same general duty of abstention not to enslave anyone else. My duty not to enslave can be stated as a particular, three-term duty running to a particular right bearer or as a general, two-term duty running to all human beings. To enslave is both a public wrong and a private wrong. By contrast, not everyone has the same duty to pay royalties to Olivia for the widgets they produce. Olivia's license with Bob is a private right, and his breach of that license would be a private wrong.

Both senses of "right"—thing rights and person rights, the subject matters of volumes two and one of the *Commentaries*, respectively—are at work in the third and fourth volumes, which concern "wrong." The "thing" sense of right, as a legal entity distinct and severable from particular persons, is taken from someone without lawful authority in a "wrong." To wrong someone is to deprive them of—sometimes: to take, to expropriate—that person's right.

139 *See* Int'l News Serv. v. Associated Press, 248 U.S. 215, 236 (1918) ("The question here is not so much the rights of either party as against the public but their rights as between themselves."); Shyamkrishna Balganesh, *Quasi-Property: Like, But Not Quite Property*, 160 U. PA. L. REV. 1889, 1891–93 (2012). *But see* THOMAS W. MERRILL & HENRY SMITH, PROPERTY: PRINCIPLES AND POLICIES 118 (3d ed. 2017) (suggesting that whether the doctrine of *International News Service* secures an in rem or in personam right remains an open question).

The "person" sense of right, as a relation between persons, is diametrically opposed to "wrong." To wrong a person is to infringe her right. Just as it is right for Bob not to practice Olivia's patent unless he acquires it from her, it would be wrong for him to practice the invention.

To say that some action is wrong is to say that one has a duty not to do it. Duties specify civil rights, that is, the rights one enjoys under law in society.[140] Blackstone and the American jurists after him followed the idea, most famously espoused by Locke, that the purpose of law in society is to make natural rights more secure against wrongs.[141] Civil liberties substitute for natural liberty and are bounded to preserve the liberties of others.[142] Common law thus begins with a presumption of liberty, and the law that places boundaries around civil liberties "restrains a man from doing mischief to his fellow citizens," i.e., from depriving others of their rights.[143] The law of wrongs, "though it diminishes the natural, increases the civil liberty of mankind."[144]

Thus, the common law pursues the twin goals of specifying rights and remedying wrongs simultaneously and by the same means. Rights and duties correlate, such that the natural and customary boundaries upon my rights secure the liberty and power you enjoy. The boundaries around my rights *just are* my duties toward you—your rights, and vice versa. The specification of wrongs *just is* the specification of rights. This is why the power to remedy a wrong belongs to the person whose right was usurped.

Consider again trespass, which conventionally infringes the right to exclude. In the personal sense, a person has a right to exclude if it is right for another person to exclude himself, in other words, if another person has a duty of self-exclusion. Alice has a right to exclude Bob if the right thing for Bob to do is to exclude himself from what Alice owns. Bob's duty of self-exclusion correlates with and specifies Alice's right. If Alice brings a trespass action against Bob, then we will know whether Bob's entry was justified (if, for example, he entered in strict necessity to save a life), and therefore whether Bob committed a wrong, and therefore whether Alice had a right to exclude him in this case.

The right to exclude from a patented invention operates in the same way as the right to exclude from land and chattels.[145] And in the United States, patent infringement was actionable by trespass on the case before the Patent

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140 *See* 1 BLACKSTONE, *supra* note 1, at *121.

141 *See* John Adams, The Report of a Constitution, or Form of Government, for the Commonwealth of Massachusetts (Sept. 1, 1779), *in* THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 295, 298–99 (C. Bradley Thompson ed., 2000); 1 BLACKSTONE, *supra* note 1, at *121–22; ALEXANDER HAMILTON, THE FARMER REFUTED (1775), *reprinted in* The Revolutionary Writings of Alexander Hamilton 47, 51–53 (Richard B. Vernier, ed., 2008); *see also* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

142 1 BLACKSTONE, *supra* note 1, at *121–22; HAMILTON, *supra* note 141, at 53.

143 1 BLACKSTONE, *supra* note 1, at *122.

144 *Id.*

145 *See* Adam J. MacLeod, *Patent Infringement as Trespass*, 69 ALA. L. REV. 723, 733–40, 748–55 (2018).

Act made distinct enforcement provisions.[146] Like trespass, trespass on the case provides a remedy for wrongful harm.[147] If Alice has—possesses, holds, owns—a right to exclude others from practicing her invention, then all other persons have the same correlative duty to abstain from practicing her invention. Everyone has the same duty not to practice her invention without her consent (except to conduct philosophical experiments or satisfy intellectual curiosity), else they infringe.

However, case differs from direct trespass in that the wrong it remedies does not involve the direct intrusion that characterized trespass at common law.[148] And the correlative duty cannot be generalized in the same way as the general duty to self-exclude from tangible resources. One does not have a duty to abstain from using all inventions, for not all inventions are patented. Unlike title in real and personal property, a patent term is limited. And some inventions are not disclosed in patents but rather protected as trade secrets. So many (or most) inventions are not owned by another person.

Viewing rights from the duty side of the right-duty correlation thus enables us to see which are purely private and which are generalizable as public. Put differently, it is through the litigation of legal wrongs that we come to see the existence and contours of legal rights. In common-law jurisprudence the right is epistemically subsequent to the wrong. Adjudication specifies the right as a complete, personal, three-term relation between two persons concerning an action or omission and thus brings it completely into view. But it is logically prior to the wrong, since the wrong consists in its deprivation or infringement. Hence it is possible to see why the two volumes concerning rights in Blackstone's *Commentaries* preceded the two volumes concerning wrongs. This aspect of the architecture reflects the common-law understanding that property, contract, and legislation, the sources of rights, precede the law of wrongs and determine the law of remedies. But judicial officials inquire into the boundaries of rights only when called upon to remedy some wrong on behalf of some person who claims to have been wronged, i.e., when someone is alleged to have breached a duty.

The enigma of common-law jurisprudence is therefore this: the right preexists the wrong, else it would not have been wrong to act; yet the right emerges to view as a fully specified reason for action only in a determinate judgment. This is what makes common law vulnerable to charges of circularity. But common-law jurists were and are comfortable with the idea that rights partly determine judgments and are partly determined by them, an idea that survives analytical scrutiny[149] when rights are understood neither as mere philosophical abstractions nor mere pragmatic constructs but rather as intermediate premises that guide deliberation in a world of imperfect infor-

146 *Id.* at 753.

147 ALAN BRUDNER & JENNIFER M. NADLER, THE UNITY OF THE COMMON LAW 277 (2d. ed. 2013).

148 *Id.*

149 *See* ADAM J. MACLEOD, PROPERTY AND PRACTICAL REASON 173–96 (2015).

mation and human limitations.[150] Rights are both metaphysical and concrete, both prepolitical and positive.[151]

For example, consider how the remedy sought clarifies the right at stake. To make out a case for replevin, a claimant must show only a right of possession, not full title.[152] To be entitled to trespass, the claimant must show something a little more, a right to exclude. To make out a case of conversion, by comparison, a claimant must show deprivation of the most robust form of property, the right of dominion over the thing.[153] To sustain any of these causes of action, the claimant must show that she possessed the requisite right before the defendant committed the alleged wrong. Yet in cases of replevin or trespass, the law will not go so far as to declare the claimant the owner. It will satisfy itself to determine whether the claimant had the right to possess.

III. LEGAL RIGHTS AND INDIFFERENT PRIVILEGES

A. The Authority of a Right

A second conception of public rights emerges from the essential reasoning in *Oil States*. The *Oil States* majority reasoned from the premise that patent franchises did not exist at common law and therefore had to be created by statute.[154] It quoted its precedent in *Brown v. Duchesne*[155] that the patentee's rights are "derived altogether" from patent statutes and "are to be regulated and measured by these laws, and cannot go beyond them."[156] From those premises it derived its holding that Congress lawfully and constitutionally delegated adjudication of patent validity to the PTO in place of an Article III court and civil jury.[157]

To determine whether patent rights must be adjudicated in Article III tribunals, the *Oil States* Court thus followed a distinction between rights that are determined primarily by prepositive (or, if you prefer, prepolitical) sources of legal order and authority and vindicated by common-law causes of action and rights that are indifferent until created and vindicated by positive enactment or equitable discretion, and which are vindicated by equitable or legislatively created proceedings. The former rights are sometimes called absolute rights, common-law rights, private rights, or legal rights.[158] The lat-

150 *See* Thomas W. Merrill & Henry E. Smith, Essay, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1851 (2007).

151 Adam J. MacLeod, *Metaphysical Right and Practical Obligations*, 48 U. MEM. L. REV. 431, 442–45 (2017).

152 Doughty v. Sullivan, 661 A.2d 1112, 1118 (Me. 1995).

153 BARLOW BURKE ET AL., FUNDAMENTALS OF PROPERTY LAW 6–7 (4th ed 2015).

154 Oil States Energy Servs., LLC v. Greene's Energy Grp., 138 S. Ct. 1365, 1374 (2018).

155 60 U.S. (19 How.) 183, 195 (1857).

156 *Oil States*, 138 S. Ct. at 1375 (quoting *Brown*, 60 U.S. (19 How.) at 195).

157 *Id.* at 1379; *cf.* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 450 (1977).

158 1 BLACKSTONE, *supra* note 1, at *117–141; Woolhandler, *supra* note 25, at 1020.

ter are variously called entitlements, privileges, equitable rights, or positive rights.[159]

For the reasons set out below, this Article refers to the former as legal rights or common-law rights and the latter as indifferent privileges. The idea at work here is that the original authority of a right, in either prepositive law or positive law, determines the power to adjudicate the boundaries of the right. A right that is determined by unwritten common law, such as reason or ancient custom, is a legal right and is vindicated in a court of law. A privilege that is indifferent as a matter of reason or ancient custom and is instead settled or specified by positive law is an indifferent privilege and may be adjudicated anywhere the positive law provides. This idea also has a history in common-law jurisprudence. But that history is different than the history of public rights.

In common-law jurisprudence, the sources of common law are plural. And for many centuries in English history, the plurality of jurisdiction mapped over the plurality of law's origins. The Crown's courts, local courts, and ecclesiastical tribunals all adjudicated rights and wrongs according to the rights and wrongs at issue. A wrong against God was not the same as a wrong against one's neighbor and jurisdiction differed accordingly. Even after the Reformation and the acts of the Crown's supremacy, the boundaries of plural jurisdictions settled according to the plural sources of law's authority. Courts of law obtained exclusive competence to adjudicate customs and interpret statutes, even those customs and statutes that affected church law, such as tithes.[160] Yet ecclesiastical courts jealously guarded their exclusive jurisdiction to decide questions of divine law.[161]

After the influence of ecclesiastical courts and canon law waned and secular jurisdiction emerged triumphant, new tribunals emerged to compete with law courts. Matters of conscience came into equity jurisdiction on the terms proposed by Christopher St. German.[162] And prerogative tribunals such as the Star Chamber and High Commission emerged to administer prerogative grants and privileges.[163] The basic idea remained, however, that the original authority of a right can precede, and be binding upon, official action. And certain tribunals, trained in the reason and experience of common law, are competent to adjudicate such rights.[164] While all courts had

159 JEREMY BENTHAM, OF LAWS IN GENERAL 1, 16 (H.L.A. Hart ed., Athlone Press 1970) (1782); Norman Doe, *Richard Hooker: Priest and Jurist*, *in* GREAT CHRISTIAN JURISTS IN ENGLISH HISTORY, *supra* note 104, at 115, 124; Nelson, *supra* note 25, at 567; Woolhandler, *supra* note 25, at 1022, 1055.

160 David Chan Smith, *Sir Edward Coke: Faith, Law and the Search for Stability in Reformation England*, *in* GREAT CHRISTIAN JURISTS IN ENGLISH HISTORY, *supra* note 104, at 93, 111–12.

161 RICHARD HOOKER, OF THE LAWS OF ECCLESIASTICAL POLITY 149–51, 214–16 (Arthur Stephen McGrade ed., Cambridge Univ. Press 1989) (1553).

162 Williams, *supra* note 109, at 69, 80.

163 4 BLACKSTONE, *supra* note 1, at *153, *163–64; *see id.* at *423.

164 ROBERT LOWRY CLINTON, GOD AND MAN IN THE LAW: THE FOUNDATIONS OF ANGLO-AMERICAN CONSTITUTIONALISM 98–99 (1997).

equitable jurisdiction to interpret laws according to the dictates of conscience, only legal courts and juries were to adjudicate the validity and boundaries of legal rights.[165]

Whereas legal rights precede and constrain official action in reason, indifferent privileges exist at the discretion of some official, such as a chancellor, or political institution, such as a legislature.[166] Privileges concern what common-law jurists, following Aristotle, refer to as matters of indifference; absent an official determination, the privilege might have been otherwise.[167] As Blackstone explained, "with regard to things in themselves indifferent, . . . [t]hese become either right or wrong, just or unjust, duties or misdemesnors, according as the municipal legislator sees proper, for promoting the welfare of the society."[168] Legal rights thus have their origin in that aspect of law that is determined prior to official action, while indifferent privileges exist as a matter of official discretion and choice. Thus, when a positive law specifying a matter of indifference (or, more acutely, a positive law contrary to the natural law) is repealed, it no longer has any obligatory force.[169] By contrast, a positive law that is declaratory of the general common law obtains its force from the common law that it declares, which persists even in the absence of legislation.[170]

The idea of legal rights was attributed to what common-law jurists refer to as the "declaratory" part of the common law, which is obligatory before any judge or legislature acts to declare it.[171] In the classic view expressed by Roscoe Pound, common-law rights arise "apart from the [positive] law. . . . The [positive] law does not create them, it only recognizes them."[172] The declaratory part is generally given specific form by legislatures and judges, but its shape is not entirely determined in legislation and judgment.[173]

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165 Blackstone and Story both explained that the role of equity is to interpret justly and to supply the meaning of law in particular applications not anticipated by general legal rules, but not to undo the particular rights settled in law. 1 BLACKSTONE, *supra* note 1, at *61–62; 3 *id.* at *429–34; 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA §§ 9–12, at 9–11 (Jairus W. Perry ed., Boston, Little, Brown & Co. 12th ed. 1877). Thus, the power to cancel a letter patent by *scire facias* belongs to the law court in Chancery rather than to the equitable power. 3 BLACKSTONE, *supra* note 1, at *47.

166 BENTHAM, *supra* note 159, at 16; Doe, *supra* note 159, at 124.

167 *See* 1 BLACKSTONE, *supra* note 1, at *55; CLINTON, *supra* note 164, at 100.

168 1 BLACKSTONE, *supra* note 1, at *55.

169 *E.g.*, Buckner v. Street, 4 F. Cas. 578, 579 (C.C.E.D. Ark. 1871) (No. 2098); *see also* JAMES R. STONER, JR., COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM 130–31 (2003).

170 Ferguson v. Gies, 46 N.W. 718, 719–20 (Mich. 1890).

171 1 BLACKSTONE, *supra* note 1, at *53–54, *86; *see also* CLINTON, *supra* note 164, at 100–03; ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 11–12, 75–76, 90–91 (1921); E. Wyndham Hulme, *On the History of Patent Law in the Seventeenth and Eighteenth Centuries*, 18 LAW Q. REV. 280, 280 (1902) (analyzing the Statute of Monopolies as consistent with the declaratory theory).

172 POUND, *supra* note 171, at 92.

173 *See* 1 BLACKSTONE, *supra* note 1, at *55–58, *76–78, *85–91.

Some or all of the specification precedes official action because its rights and duties are at least partly determined by the axioms and maxims of the law of reason (the jurists' term for the part of natural law that governs our rational, human nature) and by the reasonable choices of humans who govern themselves in acts of custom making and private ordering.[174]

Thus, common-law jurists think that law is in part a prepositive reality.[175] It is not merely the product of official action—state and federal legislation, regulation, and adjudication—but also partly preexists official action as a source of reasons and obligations.[176] The jurist who recognizes a legal right is, in the common-law mind, like a scientist who recognizes and declares the laws of thermodynamics or gravity, or like an anthropologist who recognizes and declares the practices of a human community. This is the sense of John Adams's remark about the "wisdom and humanity of English law" (made in 1768): "I study law as I do divinity and physic; and all of them as I do husbandry and mechanic arts, or the motions and revolutions of the heavenly bodies . . . ."[177] By investigating customs and other acts of lawmaking by human beings in the exercise of their practical reasoning, the lawyer is doing something analogous to the work of a physicist or astronomer, whose obligation is truthfully to report what she finds to be the case about the subject under examination, while allowing for differences of judgment and application to particular cases.[178]

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174 1 BLACKSTONE, *supra* note 1, at *54–60; HALE, LAW OF NATURE, *supra* note 10, 107–19; HOGUE, *supra* note 109, at 9–11; HOOKER, *supra* note 161, at 74–99; R.H. Helmholz, *Bonham's Case, Judicial Review, and the Law of Nature*, 1 J. LEGAL ANALYSIS 325, 331–35 (2009).

175 *See, e.g.*, ROBERT A. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 11–33 (1984); HELMHOLZ, *supra* note 107, at 127–41; HOGUE, *supra* note 109, at 9; STONER, *supra* note 169, at 22–23; Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1, 7 (1996); Morris L. Cohen, Commentary, *Thomas Jefferson Recommends a Course of Law Study*, 119 U. PA. L. REV. 823, 832 (1971); *see also* James M. Ogden, *Lincoln's Early Impressions of the Law in Indiana*, 7 NOTRE DAME LAW. 325, 328 (1932) (explaining that the work of Blackstone, who believed that law was in part a prepositive reality, influenced the thought of Abraham Lincoln).

176 POUND, *supra* note 171, at 75–76, 90–91. As Pound recognized, the declaratory concept of law had both a "good side" and a "bad side." *Id.* at 91. On one hand, it enabled the critique of positive law according to "what ought to be." *Id.* On the other hand, it led to confusion between is and ought. *Id.* Thus, though natural rights ought to be secured by legal rights, Pound insisted it is "fatal to all sound thinking to treat them as legal conceptions." *Id.* at 92. Yet as explained below, Pound failed adequately to account for the understanding of common-law jurists that rights are only partly specified before official action. *See generally* MACLEOD, PROPERTY AND PRACTICAL REASON, *supra* note 149, at 173–96; Eric R. Claeys, *Intellectual Property and Practical Reason*, 9 JURISPRUDENCE 251, 258 (2018); Eric R. Claeys, *Labor, Exclusion, and Flourishing in Property Law*, 95 N.C. L. REV. 413, 430 (2017) [hereinafter Claeys, *Labor and Exclusion*].

177 John Adams, *On Private Revenge: No. 3*, Bos. Gazette, Sept. 5, 1768, *reprinted in* THE REVOLUTIONARY WRITINGS OF JOHN ADAMS, *supra* note 141, at 12, 14.

178 *Cf.* 5 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 501–02 (2d ed. 1937).

The declaratory aspect of law is a real source of legal and constitutional obligation in the common-law way of thinking.[179] Its aspects, especially custom,[180] the law of reason,[181] and private ordering,[182] all generate real law comprising more-or-less-determinate rights and duties that require full specification in legislation or judgment but nevertheless impose obligation on both would-be wrongdoers and officials who deliberate to render judgment.[183] Judges and legislators have a duty first to declare what the law is when they specify rights and the remedies and sanctions for their infringement or deprivation.[184]

Joseph Story supplied many canonical statements of this classic view, adapted to the American context. For example, while accepting installation as the first Dane Professor of Law at Harvard, Story remarked of rights derived from natural law and the ancient usages and customs of common law:

> Much, indeed, of this unwritten law may now be found in books, in elementary treatises, and in judicial decisions. But it does not derive its force from these circumstances. On the contrary, even judicial decisions are deemed but the formal promulgation of rules antecedently existing, and obtain all their value from their supposed conformity to those rules.[185]

That some rights are grounded in prepositive authority was the predicate for Story's belief, shared with other American jurists throughout the eighteenth, nineteenth, and early twentieth centuries, that legislatures have

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179 *See* STONER, *supra* note 169, at 22; Helmholz, *supra* note 174, at 343. However, as Albert Alschuler showed, Blackstone and other common-law jurists never ascribed to the caricatured, so-called "declaratory theory" of law often attributed to Blackstone, in which unwritten law is fixed and fully determinate. Alschuler, *supra* note 175, at 36–43.

180 *See generally* David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996); Neil Duxbury, *Custom as Law in English Law*, 76 CAMBRIDGE L.J. 337 (2017); Henry E. Smith, *Community and Custom in Property*, 10 THEORETICAL INQUIRIES L. 5, 6 (2009).

181 JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 337–42 (2d ed. 2011); HELMHOLZ, *supra* note 107, at 88; MacLeod, *supra* note 151, at 436, 442, 446.

182 *See* TERRY L. ANDERSON & PETER J. HILL, THE *NOT SO* WILD, WILD WEST: PROPERTY RIGHTS ON THE FRONTIER 35, 38 (2004); MACLEOD, PROPERTY AND PRACTICAL REASON, *supra* note 149, at 197–241; Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 672–75 (1986); Adam J. MacLeod, *Universities as Constitutional Law Makers (and Other Hidden Actors in Our Constitutional Orders)*, 17 U. PA. J. CONST. L. ONLINE 1, 4 (2014).

183 1 BLACKSTONE, *supra* note 1, *54–60.

184 *Id.*

185 JOSEPH STORY, A DISCOURSE PRONOUNCED UPON THE INAUGURATION OF THE AUTHOR AS DANE PROFESSOR OF LAW IN HARVARD UNIVERSITY (Boston, Hilliard, Gray, Little & Wilkins 1829), *as reprinted in* ADAM J. MACLEOD & ROBERT L. MCFARLAND, FOUNDATIONS OF LAW 268, 270 (2017) [hereinafter STORY, DISCOURSE]. Commenting on this remark, James Stoner observes that Story is drawing on the classical distinction "between common and statute law" and that "common law remains the basis of American jurisprudence." STONER, *supra* note 169, at 22.

no power to abrogate vested private rights.[186] When a legislature generates privileges as a settlement of a matter of indifference, it may later divest those privileges by changing the law retrospectively.[187] By contrast, vested private rights are settled and specified prior to legislation, usually by a combination of reason (natural law), custom, and acts of private ordering such as conveyance, gift, or contract.[188] Retrospective legislation divesting vested private rights violates "the fundamental principles of the social compact."[189] And so, in Story's interpretation of American constitutionalism (an interpretation that was commonplace), "no State government can be presumed to possess the transcendental sovereignty to take away vested rights of property."[190] On another occasion, while sitting as a Circuit Justice in New Hampshire, Story struck down a retrospective statute.[191] He explained: "Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective; and this doctrine seems fully supported by authorities."[192]

As Story's explanations illustrate, though a right's authority is conceptual, it is no less important for being in the mind. It has meaningful consequences. The *rules* and *judgments* of law are *products* of juridical reasoning and legislative acts. But the rules and judgments are supposed to generalize and specify, respectively, legal obligations that preexist juristic examination of them, and which therefore obligate the reasoning of the judge.

There is nothing particularly mysterious, nor suspiciously metaphysical, nor even theoretical, about the declaratory aspect of law.[193] Indeed, even today it remains an indispensable part of law and legal practice.[194] Consider

186 *See* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1398–99, at 272–74 (Melville M. Bigelow ed., Boston, Little, Brown & Co. 5th ed. 1891); *see also* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 169–73 (Boston, Little, Brown & Co. 1868); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 319 (New York, O. Halsted 2d ed. 1832); Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 253 (1914); James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87, 103 (1993).

187 Woolhandler, *supra* note 25, at 1027–36.

188 *See* Adam J. MacLeod, *Of Brutal Murder and Transcendental Sovereignty: The Meaning of Vested Private Rights*, 41 HARV. J.L. & PUB. POL'Y 253, 284–86, 294–301 (2018); *see also* Lawson, *supra* note 30, at 52.

189 2 STORY, *supra* note 186, § 1398, at 272.

190 *Id.* § 1399, at 273.

191 Soc'y for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 769 (C.C.D.N.H 1814) (No. 13,156).

192 *Id.* at 767.

193 *Cf.* Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 535 (2019).

194 Helmholz, *supra* note 174, at 344–45. For example, courts regularly issue declaratory judgments, in which they declare and clarify what are the respective rights and duties of the parties. 28 U.S.C. § 2201(a) (2012) (authorizing federal courts to render judgments

the simple example of a contract. When two parties form a contract, they are making law to obligate themselves, to bind their own future choices and actions.[195] In the classical, common-law way of thinking, the ultimate source of that obligation is the natural law, sometimes called natural justice or the law of reason.[196]

The parties themselves make the particular obligation. But they make it within the framework of posited law,[197] for the prepositive obligation is not alone sufficient to compel an official to render judgment enforcing the obligation. The general obligation one has in natural justice to honor one's promises requires specification as particular, obligating promises that might be given recognition in law if and to the extent that those promises satisfy the formal criteria that contract law establishes.[198] Also, by themselves, contracts often lack remedies for promises broken.[199] The procedures of law and equity supply those on terms that legal and equitable rules specify.[200] Reason, the choices of the parties, the positive law of contracts, and the process due for remediation of wrongs all play a role in shaping a judgment predicated on the contract.

The sense of a contract judgment being declaratory is that the parties to a contract are generating their own rights and duties by their own moral and legal agency. If one of the parties later comes to court and asks a judicial official to enforce some part of the contract, the resulting judgment does not create the obligations of the parties but rather merely declares them. To be sure, the contract will not be enforced unless it satisfies the formal requirements and substantive limitations that the law imposes on all contracts generally, such as consideration and conscionability, and contracts of the particular kind, such as geographic limits on noncompetition agreements. But consideration, offer, acceptance, and other formal limitations on the enforcement of promises also do not generate the obligations of the parties. To the contrary, they discriminate against certain moral obligations, which

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in appropriate cases to "declare the rights and other legal relations of any interested party seeking such declaration"); Powertech Tech. Inc. v. Tessera, Inc., 660 F.3d 1301, 1307–08 (Fed. Cir. 2011) (vacating dismissal of declaratory judgment action filed to ascertain obligations of patent licensee); Chapel H.O.M. Assocs., LLC v. RME Mgmt., LLC, 808 S.E.2d 576, 581–82 (N.C. Ct. App. 2017) (reversing dismissal of declaratory judgment action where claimant alleged that judicial determination of the parties' "rights, duties, and liabilities" was necessary following failed negotiations to renew a lease as of right).

195 *See* FINNIS, *supra* note 181, at 297–330; RAZ, THE MORALITY OF FREEDOM, *supra* note 133, at 173–76.

196 3 BLACKSTONE, *supra* note 1, at *158; CICERO, THE REPUBLIC AND THE LAWS 130, 138 (Jonathan Powell & Niall Rudd eds., Niall Rudd trans., 1998); BRIAN M. MCCALL, THE ARCHITECTURE OF LAW: REBUILDING LAW IN THE CLASSICAL TRADITION 228 (2018); John C. Hogan, *Joseph Story on the Law of Contract*, 12 RUTGERS L. REV. 366, 367 (1957).

197 H.L.A. HART, THE CONCEPT OF LAW 28, 43 (3d ed. 2012); *see* FINNIS, *supra* note 181, at 320–30; MCCALL, *supra* note 196, at 228.

198 FINNIS, *supra* note 181, at 308–22; MCCALL, *supra* note 196, at 228.

199 3 BLACKSTONE, *supra* note 1, at *153–66.

200 FINNIS, *supra* note 181, at 321–22.

legal and judicial officials are not to declare and recognize as *legal* obligations. When a contract is enforceable, it is the prepositive, preofficial choices and actions of the parties themselves that generated the affirmative duties governing their transactions.[201]

Thus, a contract is the source of a classic, common-law, or legal, right. (Being bilateral between the contracting parties, it is also a classic private right.) A contract right remains a common-law right even after a legislature promulgates a statute codifying the formal requirements for enforcement of a contract, and even after an administrative agency promulgates regulations concerning contracts of various classes and times, such as labor agreements and noncompetition agreements.

Common-law rights are often more complicated than this in practice. They turn out to be intermediate premises in the practical deliberations of lawyers and judges.[202] In Hale's words, they exist "in a sort of middle, incapable of definition, but not impossible to be discerned."[203] In this way they resemble the rights of the old *jus gentium*, the positive laws that all nations were thought to share in common, but which required additional specification and therefore allowed for variation in the particular laws of each nation.[204]

Blackstone followed Hale in this respect (as in many others). So, Blackstone gives three different ways in which the "superior" law of reason relates to positive, or "municipal," law.[205] First, some human laws are entirely undetermined by reason alone; they are matters entirely "indifferent."[206] These laws have "no foundation in nature; but are merely created by the [positive] law, for the purposes of civil society."[207] Blackstone gives as examples coverture and monopolies.[208] These are quintessential indifferent privileges.

Second, some human law is entirely determined by natural reason. Rights in this category derive all their normative force from natural reason and none from human law, and "no human legislature has power to abridge or destroy them," unless the owner forfeits them by committing some wrong.[209] These are quintessential legal rights. This category includes rights

201 *Id.* at 299; HART, *supra* note 197, at 43.

202 MACLEOD, PROPERTY AND PRACTICAL REASON, *supra* note 149, at 185–91.

203 HOLDSWORTH, *supra* note 178, at 502 n.1 (emphasis omitted).

204 Since they first appeared in the medieval Venetian Republic, the use of patents expanded throughout Europe to the United Kingdom and the United States, and eventually became part of the international *jus gentium*. Ted Sichelman & Sean O'Connor, *Patents as Promotors of Competition: The Guild Origins of Patent Law in the Venetian Republic*, 49 SAN DIEGO L. REV. 1267, 1268, 1270 (2012). Patent laws differ from nation to nation. But most of the developed and developing world have patents of some kind.

205 1 BLACKSTONE, *supra* note 1, at *54–62.

206 *Id.* at *54–55.

207 *Id.*

208 *Id.* Other examples of legal doctrines derived entirely from positive law, having no foundation in common law or the law of reason, are forced exile from one's homeland, and capital punishment in cases not involving a strict necessity. *Id.* at *133.

209 *Id.* at *54.

correlating with mala in se offenses and other natural duties.[210] Examples include the right of free English soil—that a slave is emancipated once he manages to step foot on English soil or an English man of war[211]—and rights of life and limb.[212]

Third and finally, most human law is in between, partly determined by the declaratory and partly by the legislator's choice or judge's judgment. It is derived from what Hale called "permissive" natural law[213] (or "middle" rights).[214] Blackstone explains of this middle category that "the thing itself has its rise from the law of nature, [but] the particular circumstances and mode of doing it become right or wrong, as the laws of the land shall direct."[215] As an example, he gives the duty to obey superiors, which is a natural duty, "but who those superiors shall be, and in what circumstances, or to what degrees they shall be obeyed, is the province of human laws to determine."[216] He also gives as an example remedies and sanctions for seizure of chattels in another's possession,[217] and trial by jury, which in general is required by reason in the common-law way of thinking, though particular jury proceedings are specified by statute.[218]

Thus, common-law jurists are not so simple as to deny that the general rights of unwritten common law require specification in legislated rules and particular judgment.[219] To the contrary, they teach that both unwritten common law and written legislation specify the general requirements of the law of reason.[220] In this way, the common law is "built upon" the natural law.[221] Indeed, the entire burden of common-law jurisprudence is to show in exhaustive detail all of the particularity of Matthew Hale's general statement that, though "there are certaine rights of Natural Law and Justice instituted by almighty God and obliging every Person of Mankind," still many of the

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210 *Id.*

211 *Id.* at *123, *399; Somerset v. Stewart (1772) 98 Eng. Rep. 499, 502 (K.B.); Forbes v. Cochrane (1824) 107 Eng. Rep. 450, 458 (K.B.).

212 1 BLACKSTONE, *supra* note 1, at *125–130.

213 HALE, LAW OF NATURE, *supra* note 10, at 192–95. In this, Hale described what Aquinas centuries earlier called "determination." *See id.*

214 HOLDSWORTH, *supra* note 178, at 502 n.1; *cf.* MACLEOD, PROPERTY AND PRACTICAL REASON, *supra* note 149, at 184–96.

215 1 BLACKSTONE, *supra* note 1, at *54–55.

216 *Id.*; *cf.* PENNER, *supra* note 131, at 9.

217 1 BLACKSTONE, *supra* note 1, at *54–55.

218 3 *id.* at *249–362.

219 Common-law jurists recognize "that a generalized sense of justice precedes the case; the need to decide the specific dispute only forces a specific formulation of the rule." JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 2 (2003). Customs, maxims, and "rules of thumb encapsulating years of experience" direct deliberation and judgment. *Id.* at 3.

220 HALE, LAW OF NATURE, *supra* note 10, at 191–99; Harold J. Berman & John Witte, Jr., *The Integrative Christian Jurisprudence of John Selden, in* GREAT CHRISTIAN JURISTS IN ENGLISH HISTORY, *supra* note 104, at 139, 152–53. *See generally* MacLeod, *supra* note 151, at 436.

221 Helmholz, *supra* note 174, at 334.

particular rules and rights of property are "settled" by "civill institutions."[222] By comparison to the declaration of prepositive law, the specification of the right in a judgment that provides a remedy or sanction[223] is a human act in which the judge has agency and some degree of power. It requires interpretation. And, where the right at stake is not absolute, such as the right not to be killed, its specification also requires some degree of practical wisdom.[224] Common-law jurists understood, as Richard Helmholz has explained, that "the law of nature was a general source of law; it was open to some quite important variations created by the positive law."[225] Thus, when Holmes famously derided the "brooding omnipresence in the sky," he was punching a straw man.[226]

B. Legal Rights and Due Process

That the declaratory aspect of law imposes (actual, though not fully determinate) obligations on judges and other officials makes sense of John Selden's argument in the landmark case, reported variously as *Five Knight's Case* or *Darnel's Case*,[227] that the sovereign's commands alone do not constitute the law of the land.[228] Selden argued that royal decrees by Charles I authorizing commissioners and privy counselors to restrain subjects of their liberty without allegation of criminal wrongdoing deprived those imprisoned of "due process of the law,"[229] the phrase that Coke and Selden used to interpret Magna Carta's "law of the land" guarantee.[230]

The "constant and settled laws of this kingdom, without which we have nothing," forbid imprisonment without a prior statement of just cause for the commitment, Selden argued.[231] Thus, the sovereign is powerless to imprison a freeman merely by commanding it, but only after affording "due process of

222 HALE, LAW OF NATURE, *supra* note 10, at 90.

223 1 BLACKSTONE, *supra* note 1, at *56–57.

224 *Id.* *59–62; STORY, DISCOURSE, *supra* note 185, at 271–75, 281; *see* MACLEOD, PROPERTY AND PRACTICAL REASON, *supra* note 149, at 188–96.

225 HELMHOLZ, *supra* note 107, at 176.

226 William S. Brewbaker III, *Found Law, Made Law and Creation: Reconsidering Blackstone's Declaratory Theory*, 22 J.L. & RELIGION 225, 262 & n.27 (2006); *see* Alschuler, *supra* note 175, at 18.

227 Darnel's Case (1627) 3 Cobbett's St. Tr. 1 (K.B.).

228 For summaries of the arguments and their implications, see HERBERT BROOM, CONSTITUTIONAL LAW VIEWED IN RELATION TO COMMON LAW, AND EXEMPLIFIED BY CASES 165–70 (London, William Maxwell 1866); and Amanda L. Tyler, *A "Second* Magna Carta*": The English Habeas Corpus Act and the Statutory Origins of the Habeas Privilege*, 91 NOTRE DAME L. REV. 1949, 1958–61 (2016).

229 Darnel's Case, 3 Cobbett's St. Tr. at 17–18.

230 *See* ORTH, *supra* note 219, at 7–8; Berman & Witte, *supra* note 220, at 142–43; *see* CLINTON, *supra* note 164, at 98.

231 Darnel's Case, 3 Cobbett's St. Tr. at 17.

law."[232] If that clause meant merely "according to the laws," then it meant nothing, Selden reasoned.[233]

> If you will understand these words, "per legem terrae," in the first sense [as "according to the laws"], this statute shall extend to villains as well as to freemen; for if I imprison another man's villain, the villain may have an action of false imprisonment. But the lords and the king, for then they both had villains, might imprison them; and the villain could have no remedy. But these words in the statute, "per legem terrae," were to the freeman, which ought not to be imprisoned, but by due process of law: and unless the interpretation shall be this, the freeman shall have no privilege above the villain.[234]

Selden lost *Five Knights Case*; the court ruled that the command of the king constitutes the law of the land.[235] Nevertheless, Selden's view of due process as a prepositive obligation binding on official action was ultimately vindicated in the petition of right.[236] (Centuries later the Supreme Court of the United States embraced Charles I's view in *Buck v. Bell*,[237] when Holmes and the Court equated due process with the process that positive law stipulates.)[238]

C. *Distinguishing Between Legal Rights and Indifferent Privileges*

Significantly in common-law jurisprudence, both judges and legislators have a duty to acknowledge existing law.[239] Thus, many rights of life, liberty, property, and contract—rights that are prepositive and inhere in the superior part of common law—are declared and secured in part by positive laws.[240] Not all statutes generate new rights or privileges.[241] Some are declaratory of preexisting rights and duties while others change certain rules out of which rights arise in certain respects, while leaving much existing law unchanged.[242]

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232 *Id.* at 18.

233 *Id.*; BROOM, *supra* note 228, at 167.

234 Darnel's Case, 3 Cobbett's St. Tr. at 18.

235 *Id.* at 58–59; Tyler, *supra* note 228, at 1961.

236 Tyler, *supra* note 228, at 1962–63.

237 Buck v. Bell, 274 U.S. 200 (1927).

238 Holmes insisted that "as every step in this case was taken in scrupulous compliance with the statute . . . there is no doubt that in that respect the plaintiff in error has had due process at law." *Id.* at 207.

239 *See* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY 127, 298 (2008).

240 Mossoff, *supra* note 40, at 2592–93, 2599.

241 *See* 1 BLACKSTONE, *supra* note 1, at *86 ("Statutes also are either *declaratory* of the common law, or *remedial* of some defects therein." (capitalization altered)).

242 When lawyers and jurists prior to the legal-realist revolution referred to rights, they generally meant those rights that are part of the declaratory aspect of law, which precede and exist independently of official action. *See, e.g.*, *id.* at *54, *123–37; John Adams, Instructions of the Town of Braintree to Their Representative, 1765 (Oct. 14, 1765), *in* THE REVOLUTIONARY WRITINGS OF JOHN ADAMS, *supra* note 141, at 37. *See generally* HELMHOLZ, *supra* note 107, at 131–41; STONER, *supra* note 169, at 22–23. Indeed, even when

So, for example, a statute specifying punishments and remedies for trespass is declaratory of the common-law right to exclude. It does not create that property right but secures it by giving it greater specification and by changing the legal consequences of trespass, thus remedying the insufficient guarantees for the right that existed before the act.[243] It is, in Blackstonian terms, part declaratory and part remedial.[244]

With respect to any particular right secured by legislation, the question is whether it imposes an obligation on judges and legislators or, instead, is a matter that could reasonably be settled otherwise. The authority of a right therefore cannot be discerned solely by inquiring whether it is mentioned in a statute or regulation. Thus, the Supreme Court has explained that the jury trial right extends both to customary rights and to "statutory rights that are analogous to common-law causes of action."[245] A right's authority concerns whether the right inheres in the common law of reason or is rather a matter of indifference that some sovereign authority settles conclusively in rule or judgment.[246] That settlement might occur by legislation, by the exercise of equitable power, or by some other constitutional power to recognize or change law.

Adam Mossoff explains that the positing of rights by statute is not a bright-line test for classifying rights but rather one "clue" about the status of the right, a "heuristic" for discerning the provenance of a right.[247] All rights, even the most fundamental rights such as life and bodily integrity, are secured by a combination of posited rules and judicial decisions.[248] So, that a right is mentioned in a statute is not determinative. It is the provenance of the right's authority, rather than the heuristic itself, that determines the right's status for constitutional purposes.[249]

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they referred to "privileges and immunities," they often indicated those civil rights that are extended by the political community as security for natural and customary rights. *E.g.*, Pennsylvania Charter of Liberties, *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION 290 (Donald S. Lutz ed., 1998); The Articles of Confederation (Nov. 15, 1777), *reprinted in* COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION, *supra*, at 376, 377–78. *See generally* Mossoff, *supra* note 38, at 1011–12.

243 *See* MACLEOD, PROPERTY AND PRACTICAL REASON, *supra* note 149, at 185–88, 216–41; Claeys, *Labor and Exclusion*, *supra* note 176, at 448–51.

244 1 BLACKSTONE, *supra* note 1, at *86–87.

245 Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 (1989) (citing Curtis v. Loether, 415 U.S. 189, 193 (1974)).

246 1 BLACKSTONE, *supra* note 1, at *54–56; HALE, LAW OF NATURE, *supra* note 10, at 192–93.

247 Mossoff, *supra* note 40, at 2598; *accord.* GRÉGOIRE WEBBER ET AL., LEGISLATED RIGHTS: SECURING HUMAN RIGHTS THROUGH LEGISLATION 1 (2018).

248 Mossoff, *supra* note 40, at 2602.

249 *Compare* Stevenson v. King, 10 So. 2d 825, 826 (Ala. 1942), Franchise Tax Bd. v. Superior Court, 252 P.3d 450, 451 (Cal. 2011), Newland v. Marsh, 19 Ill. 376, 383 (1857), *and* State *ex rel.* Cherry v. Burns, 602 N.W.2d 477, 482–84 (Neb. 1999), *with Ex parte* Moore, 880 So. 2d 1131, 1140 (Ala. 2003), People v. One 1941 Chevrolet Coupe, 231 P.2d 832, 842 (Cal. 1951), Wisden v. Superior Court, 21 Cal. Rptr. 3d 523, 532 (Ct. App. 2004), Anzaldua

American jurists at the time of the Founding and for more than a century afterward followed Blackstone's basic taxonomy of rights origins,[250] with allowance for differences of jurisdiction,[251] such as the merger of law and equity.[252] Indeed, influential American jurists such as James Wilson and St. George Tucker in their commentaries on Blackstone's *Commentaries* embraced the idea of prepolitical rights so thoroughly that they rejected Blackstone's assertions of parliamentary sovereignty to abrogate natural and vested rights.[253] Though he did not go quite that far, John Adams nevertheless insisted that declaratory rights imposed limitations on official action, including legislative power to alter forms of action and jurisdiction over rights.[254] The declaratory aspect of law is the basis for the American doctrine of the supremacy of law over the sovereign.[255]

D. Not the Same as Public Rights

The authority of a right is not reducible to the distinction between private and public rights. For example, the general common-law rights not to be battered or trespassed against each contain *both* a public right, which is now vindicated by criminal prosecution, and a private right, which is vindicated by a writ for trespass. Those writs and procedures were often ratified by statutes. Yet the rights not to be battered and to exclude others from one's property are common-law rights—legal rights—and therefore not "public" in the sense in which the *Oil States* majority used that term.

The concepts which the *Oil States* majority ran together have different implications. Whereas a right's status as public or private determines who has the power to vindicate it, usually by initiating some proceeding for redress of its deprivation, a right's status as a common-law right—or, conversely, a remedy's status as a common-law remedy—determines who has power to adjudicate its alleged deprivation. The most important such power at the time of the Founding, the one which American jurists guarded most jealously, was the jury trial. They considered it "sacred,"[256] the "most excellent method for the investigation and discovery of truth; and the best guard-

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v. Band, 550 N.W.2d 544, 589 (Mich. Ct. App. 1996), *and* FUD's, Inc. v. State, 727 A.2d 692, 699 (R.I. 1999).

250 *See, e.g.*, CLINTON, *supra* note 164, at 102; HAMILTON, *supra* note 141, at 47, 51–54; Wilson, General Principles, *supra* note 84, at 498–99.

251 *See, e.g.*, 1 BLACKSTONE'S COMMENTARIES 62, 79 (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803) [hereinafter TUCKER].

252 *See, e.g.*, 1 STORY, *supra* note 165.

253 1 TUCKER, *supra* note 251, at 48, 49 & n.5; James Wilson, Lectures on Law: Of Municipal Law, *in* 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 71, at 549.

254 Adams, *supra* note 242.

255 EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 36–37 (Liberty Fund 2008) (1928–1929); HAMBURGER, *supra* note 239, at 395–97; PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 290–92 (2014) [hereinafter HAMBURGER, ADMINISTRATIVE LAW]; POUND, *supra* note 171, at 64–65, 75–76.

256 VA. DECLARATION OF RIGHTS of 1776, art. XI.

ian of both publick and private liberty, which has been hitherto devised by the ingenuity of man."[257]

The Court has jumbled Article III and Seventh Amendment doctrine by confusing the authority of a right with the publicity of a right.[258] The Court sometimes identifies "public" rights with "statutory cause[s] of action."[259] And it identifies "private, common law rights" with "any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty."[260] But suits at common law concerned both private and public wrongs, and therefore both private and public rights. Likewise, statutory causes of action secure and give rise to both public and private rights. The Court has deepened the confusion by rendering the Seventh Amendment jury trial right redundant of the Article III adjudication guarantee.[261] No wonder the Court in *Oil States* characterized its public-rights jurisprudence as not "entirely consistent."[262]

The source of the confusion is conceptual. Discerning the authority of a right is a more complicated exercise than discerning whether the right is private or public. It cannot be reduced to asking whether a right appears in a statute. As Mossoff has observed, many rights of life, liberty, property, and contract—classic common-law rights—are secured in part by legislation, both ancient and recent.[263] Nor is the difference to be found in the separate jurisdictions of law and equity. For the chancellor's first charge is to avoid unsettling legal rights. Law provides legal remedies for legal rights.[264] Equity follows the law and provides equitable remedies for those rights that remain unvindicated.[265] Though no one has a legal right to an equitable remedy, law and equity both pursue the vindication of rights.

The point here is not to argue the original meaning of the Seventh Amendment, but rather only to show that the concept of a right's provenance is different from and orthogonal to the concept of a right's publicness. Discerning the authority of a right is a challenging exercise, even more so now after a century of codification and administrative law. Federal law no longer distinguishes between writs as a matter of right and discretionary remedies. Some state supreme courts have simplified the exercise by inquiring whether a right asserted or a cause of action pled has an analog in the law of

257 Wilson, *supra* note 71, at 746.

258 *See* Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 450–55 (1977).

259 Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 53 (1989).

260 Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 854 (1986) (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856)).

261 *See id.* at 853–54; *see also* Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1379 (2018).

262 *Oil States*, 138 S. Ct. at 1373 (quoting Stern v. Marshall, 564 U.S. 462, 488–92 (2011)).

263 Mossoff, *supra* note 40, at 2592–93.

264 1 STORY, *supra* note 165, § 25, at 18.

265 *Id.* §§ 609–23, at 594–601.

the state at the time the state constitution was ratified. Whether this bright-line rule improves upon the U.S. Supreme Court's jurisprudence, whether there remains a better way to conduct the analysis, and whether the idea of a right's authority even has any enduring salience, are all questions beyond the scope of this Article. For present purposes, the point is only that the distinction between rights and privileges is not reducible to the distinction between public and private rights.

IV. PREROGATIVE RIGHTS

A. *The "Tyranny" of the Franchise*

Things become even clearer when one considers a different common-law right that sits comfortably neither in the private nor in the public category: the prerogative power. Because the monarch is a dual person—private and public—the monarch's rights are both private and public. Therefore, the prerogative right is a special case. Furthermore, the U.S. Constitution locates the patent power not in the executive branch but in Congress, whose legislation is supposed to be prospective and generally applicable. Therefore, any attempt to classify a letter patent or other exercise of the prerogative power as either private or public must confront the complicated career of the prerogative power in Anglo-American jurisprudence.

The prerogative power implicates each of the two distinctions explained above. As originally conceived, the power conferred upon the Crown discretion over matters of indifference that were not settled by reason or immemorial custom, especially the issuance of franchises and inheritance by the eldest son. And because the Crown has the duty to prosecute public wrongs, the prerogative includes the power to vindicate public rights.

According to the standard histories which shaped the classic common-law concepts of the eighteenth century, the royal prerogative is not a native feature of English common law. It was imported after the "Norman invasion," as Blackstone called it.[266] The Normans attempted several changes to English common law that proved controversial. Many of them concerned special rights and powers asserted by the Crown. In particular, the Normans introduced to English law the ideas that the Crown could issue a monopoly franchise to use common resources and that all title was held by the king. According to the traditional histories which shaped American legal concepts at the time of the Founding and for decades afterward, the idea of a franchise was foreign to Saxon customs and liberties.[267] The controversy that

266 4 BLACKSTONE, *supra* note 1, at *407.

267 *Id.* at *408; Jefferson, *supra* note 119. English legal historians were skeptical of this narrative. Dicey thought the Saxon ancestors "respectable barbarians" whose laws were "below the level of legal fictions." DICEY, *supra* note 88, at cxxxvi. Pollock and Maitland similarly thought the myth of Saxon independent property ownership was somewhat exaggerated. 1 POLLOCK & MAITLAND, *supra* note 100, at 62–63. For his part, John Adams thought it a "[m]ystery which we have never seen unravelled" how the Crown came to claim ultimate title to English land, John Adams, Two Replies of the Massachusetts House

ensued bears consideration, for it contains valuable lessons for patent law today.

The valuable common resources of that day were wild animals. Before the Norman conquest, legal possession of wild animals was established by a combination of the near-universal rules (famously discussed in the later case, *Pierson v. Post*) of ferae naturae, governing enclosed lands and royal forests, and first appropriation within the commons.[268] By their forest laws, the Norman kings asserted something new—the king's absolute property[269] over game found outside the king's personal lands.[270] Blackstone called this a "violent alteration of the English constitution."[271]

> In the Saxon times, though no man was allowed to kill or chase the king's deer, yet he might start any game, pursue, and kill it, upon his own estate. But the rigour of these new constitutions vested the sole property of all the game in England in the king alone; and no man was entitled to disturb any fowl of the air, or any beast of the field, of such kinds as were specially reserved for the royal amusement of the sovereign, without express license from the king, by a grant of a chase or free warren: and those franchises were granted as much with a view to preserve the breed of animals, as to indulge the subject.[272]

In the Norman assertion of royal monopoly over wild game, we see all the elements of the contemporary "public right" view of patents. The foundation of the right is not located in productive labor but entirely in the discretion and positive enactments of the sovereign. Exclusive possession is contingent upon permission from the sovereign, "usually the subject of special bargains,"[273] and adjudicated in special courts that the sovereign established by letters patent.[274] And the sovereign's reasons for granting

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of Representatives to Governor Hutchison, *in* THE REVOLUTIONARY WRITINGS OF JOHN ADAMS, *supra* note 141, at 117, 134 [hereinafter Adams, Two Replies], and thought perhaps feudalism might even be attributed to the Saxons, *see* John Adams, *Letter to the Printers*, BOS. GAZETTE, Feb. 1, 1773, *reprinted in* THE REVOLUTIONARY WRITINGS OF JOHN ADAMS, *supra* note 141, at 88, 92. But he nevertheless insisted that the notion that all titles "are held mediately or immediately of the Crown" was not only foreign to British North American law but also produced "a State of perpetual War, Anarchy, and Confusion" and led to the "almost utter [e]xtinction of Knowledge, Virtue, Religion and Liberty." Adams, Two Replies, *supra*, at 134.

268 4 BLACKSTONE, *supra* note 1, at *235; J. CHARLES COX, THE ROYAL FORESTS OF ENGLAND 4–5 (1905).

269 Pollock and Maitland explained that "the *dominium* of the Roman system" was unknown in Saxon law. 1 POLLOCK & MAITLAND, *supra* note 100, at 57. "Possession, not ownership, is the leading conception." *Id.*

270 COX, *supra* note 268, at 5; Paul Babie, *Magna Carta and the Forest Charter: Two Stories of Property, What Will You Be Doing in 2017?*, 94 N.C. L. REV. 1431, 1452–53 (2016); Ryan Rowberry, *Forest Eyre Justices in the Reign of Henry III (1216–1272)*, 25 WM. & MARY BILL RTS. J. 513, 516–19 (2016).

271 4 BLACKSTONE, *supra* note 1, at *408.

272 *Id.*

273 1 POLLOCK & MAITLAND, *supra* note 100, at 575.

274 COX, *supra* note 268, at 10–11.

permission are utilitarian, in direct conflict with the customary and natural rights claimed by those who would otherwise take the initiative to deprive the animals of their natural liberty.

Rigorous enforcement of the forest laws by Kings Richard and John were among the "oppressions" and "tyrannical abuse of the prerogative" that incited the insurrections culminating in Magna Carta and Carta de Foresta,[275] the latter of which restored customary liberties to hunt game by "disafforesting" lands that had been brought within the exclusive hunting rights of the king.[276] Henry III and Edward I later confirmed the Forest Charter.[277] But by then, the idea of royal franchises had taken hold and it was spread to other subject matters, especially concerning commerce.

The centuries between William's conquest and the defeat of Charles I were distinguished largely by the question whether the king was under the law or not.[278] In Blackstone's influential account, critical victories for law over the prerogative include Magna Carta and the Forest Charter,[279] and Edward I relinquishing the "royal prerogative of sending mandates to interfere in private causes."[280] Yet the prerogative repeatedly asserted itself over law, especially with the ascent of Henry VIII, who extended the prerogative power "to a very tyrannical and oppressive height."[281] Henry's Parliament "to its eternal disgrace passed a statute, whereby it was enacted that the king's proclamations should have the force of acts of parliament."[282]

Elizabeth I and James I issued monopoly grants aggressively and generally asserted the supremacy of the prerogative over and contrary to law.[283] According to Blackstone, Elizabeth, who empowered the Star Chamber and High Commission, generally carried "the prerogative as high as her most arbitrary predecessors."[284] The Star Chamber was particularly odious for, proceeding "without the intervention of any jury," vindicating "illegal commissions, and grants of monopolies," and "enjoining to the people that which was not enjoined by the laws, and prohibiting that which was not prohibited," it made itself the most dangerous threat to "the foundation[ ] of right."[285] The High Commission under James I also posed a threat to law for, as Roscoe

275 4 BLACKSTONE, *supra* note 1, at *416.

276 COX, *supra* note 268, at 6.

277 *Id.* at 6, 8; 4 BLACKSTONE, *supra* note 1, at *418; HOGUE, *supra* note 109, at 75–79.

278 4 BLACKSTONE, *supra* note 1, at *408–09.

279 *Id.* at *416.

280 *Id.* at *419.

281 *Id.* at *424.

282 *Id.*

283 *Id.* at *426–27; HAMBURGER, ADMINISTRATIVE LAW, *supra* note 255, at 133–39; Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550–1800*, 52 HASTINGS L.J. 1255, 1264–67, 1271–72 (2001).

284 4 BLACKSTONE, *supra* note 1, at *426. Hers were "not those golden days of genuine liberty, that we formerly were taught to believe: for, surely, the true liberty of the subject consists not so much in the gracious behaviour, as in the limited power, of the sovereign." *Id.*

285 *Id.* at *263.

Pound later protested, it had no lawful jurisdiction over temporal rights, proceeded "according to no fixed rules," and was "wholly unknown to the common law."[286] Its jurisdiction, grounded in the "alleged royal prerogative," was thus contrary to the "supremacy of law."[287] Finally, among his other encroachments on common-law rights, including further expanding the jurisdiction of the Star Chamber and commission courts, Charles I revived the forest laws.[288]

Ultimately, law prevailed over the franchise. The Tudors' revolutionary assertions of prerogative power were to incite "as great a revolution in government."[289] Charles I brought the prerogative under law in an effort "to conciliate the confidence of the people."[290] He abolished the Star Chamber and High Commission court and curtailed the forest law privileges.[291] It was not enough to keep his head.

Two enduring limitations on this use of the prerogative power emerged in the wake of the first English Revolution, each discussed in one of the ensuing Sections. First, grants and franchises issued by the Crown are not entirely contingent upon the sovereign will for security and adjudication. They are subject to law. Second, adjudication of the validity of grants and franchises was regularized in standard proceedings according to the due course of law. The Crown therefore does not have unfettered discretion to determine the contestation and adjudication of prerogative grants.

B. Subject to Law

In its broadest sense, the prerogative refers to the "rights and capacities which the king [or queen] enjoys alone, in contradistinction to others, and not to those which he [or she] enjoys in common with any of his [or her] subjects."[292] Thus, Blackstone taught that "the prerogative is that law in case of the king, which is law in no case of the subject."[293] At English common law, the Crown enjoys personal rights of two classes: (1) rights of the king in his natural capacity, a species of personal rights that attached to occupants of the throne as persons, and (2) rights of the king in his political capacity, official rights to distribute legal justice in a corporate capacity.[294] Among the latter are prerogative rights to rule, adjudicate, and administer the laws.[295]

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286 POUND, *supra* note 171, at 60.

287 *Id.*

288 4 BLACKSTONE, *supra* note 1, at *429–30.

289 *Id.* at *426.

290 *Id.* at *430.

291 *Id.* at *429–30.

292 1 *id.* at *232.

293 *Id.*

294 HALE, ANALYSIS, *supra* note 10, § 3; *cf.* 1 BLACKSTONE, *supra* note 1, at *183–225; DALZELL CHALMERS & CYRIL ASQUITH, OUTLINES OF CONSTITUTIONAL LAW, 148–54 (5th ed. 1936).

295 1 BLACKSTONE, *supra* note 1, at *226–326; CHALMERS & ASQUITH, *supra* note 294, at 154; HALE, ANALYSIS, *supra* note 10, §§ 4–9.

The executive or administrative prerogative power includes the rights to create corporations and approve the appointment of ministers and civil servants.[296]

In the thirteenth century, Bracton related the medieval idea that the king was under law only as a matter of conscience, bound to God by virtue to promote the common good, and that no human agent possessed power to overrule him.[297] But even Bracton suggested that the king could be held to account by his earls and barons.[298] In theory, the power of the Crown was to be exercised with counsel rather than alone.[299] Nevertheless, in practice before the Cromwellian revolution, the king "was not constitutionally bound, as now, to take the advice of his Ministers."[300]

Bracton's "addicio" was later cited at the trial of Charles I and came to stand for the proposition that the king is under the law.[301] By that time, the Crown's discretion was much more constrained by the conventions which had grown up around administration of the prerogative.[302] Coke influentially argued that the prerogative is subject to the law of the land; he defined the prerogative as the "powers, pre-eminences and privileges which the law giveth to the Crown."[303] He argued that "monopolies and dispensations of penal laws were against law,"[304] and that private persons may not lawfully have forfeitures for public wrongs.[305]

Coke's insistence that the Crown's public powers are under law ultimately triumphed in the Petition of Right and the trial and execution of Charles I. The two English revolutions established that the prerogative power is answerable to law.[306] Blackstone located in the restoration of Charles II "the complete restitution of English liberty, for the first time, since its total abolition at the [Norman] conquest."[307] The break in monarchical succession established constitutional limits on the prerogative power to encroach on common-law liberties, "and the true balance between liberty and prerogative was happily established by *law*."[308] Like other expressions in the *Commentaries*, these are hyperbolic as descriptions of how law was actually

296 CHALMERS & ASQUITH, *supra* note 294, at 154.

297 Vincent, *supra* note 107, at 34–35.

298 *Id.* at 36–37.

299 *Id.* at 37.

300 CHALMERS & ASQUITH, *supra* note 294, at 147.

301 Vincent, *supra* note 107, at 42–43.

302 CHALMERS & ASQUITH, *supra* note 294, at 147.

303 *Id.* at 146 (quoting 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON 90b (Francis Hargrave & Charles Butler eds., Philadelphia, Robert H. Small 1853)).

304 Edward Coke, Petition of Grievances; Privileges of Parliament; Impeachments, *in* 3 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE, supra note 118, at 1194, 1206.

305 *Id.* at 1207.

306 *See* HAMBURGER, ADMINISTRATIVE LAW, *supra* note 255, at 61; STONER, *supra* note 169, at 12–13.

307 4 BLACKSTONE, *supra* note 1, at *431.

308 *Id.* at *432.

administered after the restoration; Blackstone acknowledged that.[309] But Blackstone was emphasizing the idea that the prerogative is under the law. The concept was important enough to motivate two revolutions, and it made a significant impression on American jurists and many others.[310]

The prerogative power is now governed by Parliament[311] and controlled by the fundamental principles of law declared in Magna Carta and other expressions of the English constitution. Even the residual prerogative power—what Dicey referred to as the "residue of . . . arbitrary authority" left over in the Crown's hands—yields to the formalism of law.[312] Though the prerogative leaves in executive hands "large powers which can be exercised, and constantly are exercised, free from Parliamentary control," especially in matters of "foreign affairs,"[313] nevertheless the sovereignty of Parliament has "put an end to the arbitrary powers of the monarch."[314]

Thus, by the time of the American Revolution, the king or queen was understood to bear duties in consideration of the prerogative,[315] which included the duty to "govern according to law,"[316] which the king or queen accepted and swore in the coronation oath.[317] Blackstone's definition of the prerogative as "the law in case of the king," stated on the eve of the American Revolution (and quoted in full above), emphasizes that the prerogative is subject to law. To emphasize the point, Blackstone placed his chapter on the king's prerogative *after* his chapter titled, "Of the King's Duties."[318] The Crown's duties to govern according to law and to protect her subjects from violence come first; the Crown's prerogative derives from them and is contingent upon them. Blackstone insisted that it was "in consideration of which duties [the king's] dignity and prerogative are established by the laws of the land: it being a maxim in the law, that protection and subjection are reciprocal."[319]

Since Blackstone's day, the prerogative has come to be even more trammeled within law.[320] The subjection of the prerogative to law was not always a given. It was established first in England by two revolutions, one bloody

309 *Id.* at *430–31.

310 Wilfrid Prest, *Blackstone's Magna Carta*, 94 N.C. L. REV. 1495, 1518–19 (2016). Concerning Blackstone's general influence on American jurists, see FERGUSON, *supra* note 175, at 11; HELMHOLZ, *supra* note 107, at 131–41; HOGUE, *supra* note 109, at 249–54.

311 Edward Corwin related in the 1920s that "the royal prerogative is subject absolutely to the legislative power of Parliament." CORWIN, *supra* note 255, at 40–41, 40 n.6.

312 DICEY, *supra* note 88, at 282. "None of his successors have after the manner of George the Third made their personal will decisive as to general measures of policy." *Id.* at 309.

313 *Id.* at 310.

314 *Id.* at 314.

315 1 BLACKSTONE, *supra* note 1, at *226–29.

316 *Id.* at *229.

317 *Id.* at *227–28.

318 *Id.* at *226–31.

319 *Id.* at *226.

320 CHALMERS & ASQUITH, *supra* note 294, at 149.

and one bloodless, then in the United States by a definitive declaration that governments are instituted among men to secure the rights with which men are endowed by God and by the constitution of the realm.[321]

The American Revolution made the subjection of prerogative to law even more categorical. American founders ratified legislative power over the prerogative and the jurisdiction of courts of law, rather than prerogative tribunals.[322] For example, they placed the intellectual property power in Article I of the Constitution of the United States.[323] And for good measure, they placed the legislative power under external constraints, especially the separation of powers[324] and the vested rights doctrine.[325] Congress now holds the power to create patents, and Congress lacks the power to adjudicate cases and controversies concerning patents or to change the criteria for a patent's validity retrospectively after the patent has issued.[326]

C. Patents and Regular Process

Furthermore, the power to enforce or challenge prerogative grants is regularized according to law. It belongs to designated officials, rather than to the king personally or to the public at large. Thus, though the Crown retains the power to establish new tribunals, Blackstone insisted that any such new tribunals must adhere to common-law forms and methods of proceeding.[327] That a letter patent or franchise issues from the prerogative power on behalf of the sovereign, and that the sovereign acts for the good of the whole people, does not entail that the whole people may own any action against a patentee or franchisee. And only certain grounds are valid to revoke a patent or franchise, and only certain officers are competent to assert those grounds.

In other words, that a right derives from the prerogative does not exempt it from the law governing public and private rights. The law of the land, including the law of private and public rights discussed above, determines both who has power to contest the validity of prerogative grants and who has power to adjudicate them. This was not always uncontroversial, but recent historical jurisprudence shows that it was settled in the seventeenth

321 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

322 American suspicion of commissions and other executive tribunals persisted well into the twentieth century. *See* CORWIN, *supra* note 255, at 40–41; POUND, *supra* note 171, at 7, 51, 56, 179. And it has recently revived. *See* HAMBURGER, ADMINISTRATIVE LAW, *supra* note 255, at 290–91.

323 U.S. CONST. art. I, § 8. Other examples are found in American constitutions. Understanding the significance of the Crown's power over foreign affairs, Dicey observes, the Framers "lodged the treaty-making power in the hands, not of the President, but of the President and the Senate." DICEY, *supra* note 88, at 310. And they made presidential appointment subject to the advice and consent of the Senate for the same reason. *Id.*

324 *See, e.g.*, JOHN ADAMS, THOUGHTS ON GOVERNMENT (1776), *reprinted in* THE REVOLUTIONARY WRITINGS OF JOHN ADAMS, *supra* note 141, at 285, 289–90

325 *See, e.g.*, COOLEY, *supra* note 186, at 357–413; KENT, *supra* note 186, at 319; 2 STORY, *supra* note 186, §§ 1398–99, at 272–74.

326 McClurg v. Kingsland, 42 U.S. (1 How.) 202, 206–07 (1843).

327 1 BLACKSTONE, *supra* note 1, at *138.

century. The defeat of the absolute prerogative ended the idea that the king could litigate in his own name. And it stripped jurisdiction from the king's prerogative courts.

James I unsuccessfully asserted the power to litigate in his own name in his consequential showdowns with Coke.[328] When King James arrived at Hampton Court intending to decide cases in his own person, Coke and the other judges informed him that "any judgment in any cause whatsoever" must be "solely determined in the courts of justice" by those judicial officials who are learned in the "laws of his realm," the "artificial reason and judgment of the law, which law is an act which requires long study and experience."[329] On other occasions, Coke resisted various assertions of right by the Crown on the ground that "the King hath no prerogative, but that which the law and the land follows."[330] This meant not only that the king had no power to adjudicate but also that he could not by exercise of the prerogative "make a thing unlawful which was permitted by the law before."[331] These incompetencies of the king vindicated the principle, as Coke's contemporary jurist Richard Hooker expressed it, that the "King of himself cannot change the nature of pleas nor courts . . . because the law is a bar unto him."[332]

In the same era, lawyers and Parliament brought prerogative adjudication to heel. Before the seventeenth century, the Star Chamber and other prerogative courts had exercised jurisdiction outside the bounds of common law and due process.[333] That ended abruptly when the English reasserted their fundamental, common-law rights. Philip Hamburger explains:

> On the eve of the English Civil War, in 1641, Parliament voted to abolish the prerogative courts, beginning with the Star Chamber. Against this tribunal, Parliament recited the provision of Magna Charta that no one was to be deprived of his liberty or property, other than by the judgment of his peers or the law of the land.[334]

At the same time, Parliament made clear that matters subject to prerogative adjudication would "have their proper remedy and redress . . . by the common law of the land and in the ordinary course of justice."[335] This is significant because, as explained above, in the common-law mind, the redress provided for particular wrongs corresponds to the nature of the right being vindicated.

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328 POUND, *supra* note 171, at 60–61.

329 CORWIN, *supra* note 255, at 36–37; *cf.* HOOKER, *supra* note 161, at 150–51; POUND, *supra* note 171, at 60–61.

330 CORWIN, *supra* note 255, at 40 (quoting Case of Proclamations (1610) 77 Eng. Rep. 1352, 1354; 12 Co. Rep. 74, 76 (KB)).

331 *Id.* at 40–41.

332 HOOKER, *supra* note 161, at 150 (emphasis omitted).

333 HAMBURGER, ADMINISTRATIVE LAW, *supra* note 255, at 133–39.

334 *Id.* at 138.

335 *Id.* (omission in original); *see* 16 Car. 1, c. 10 (1640).

Because prerogative adjudication was outside of the law, Parliament abolished not only particular tribunals but "all prerogative adjudication."[336] The contests of the seventeenth century between absolute prerogative and independent law, and the decisive victory of the lawyers, vindicated the fundamental principle that the Crown is not the source of legal justice but rather the steward and distributor of it.[337] Jurisdiction is thus determined not by the prerogative power but rather by the law of the land.[338]

V. DECIPHERING THE JURISPRUDENCE OF *OIL STATES*

A. Part Private, Part Public, Part Indifferent

In light of this conceptual history, the Court's insistence in *Oil States* that a patent is private property for some purposes and public right for others seems less enigmatic. The concept of public rights is actually three concepts, and each serves different jurisprudential purposes. The concept of property—rights in rem or in things—is an entirely different concept, which can refer to both public and private rights and which serves different jurisprudential purposes, such as determining a government's just compensation liability under the Takings Clause for expropriating a patent. To pull these concepts and their implications apart is both to understand patents better and to begin to understand the Court's public rights jurisprudence more clearly.

B. Franchises Are Not Entirely Different

The first thing to observe is that the term "franchise" is not a talisman. Rather, franchises are subject to the same due process protection as other rights. The Court in *Oil States* referred to patent grants as "public franchises."[339] It reasoned that the Constitution confers on Congress, and Congress confers on the PTO, the power to grant patents without judicial involvement, and that IPR involves the same subject matter as issuance.[340] And the majority made much of the fact that the Crown's Privy Council had power in England to reexamine patents after issue.[341] From this evidence, the Court concluded, "[p]atents thus remain 'subject to [the PTO's] authority' to cancel outside of an Article III court."[342]

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336 *Id.* at 139.

337 CHALMERS & ASQUITH, *supra* note 294, at 154–56.

338 *See id.* at 156 ("It necessarily follows that even our Kings themselves cannot, without parliamentary sanction, grant any addition of jurisdiction to such Courts, nor authorise anyone to hold them in a manner dissimilar to that established by the common law or statute law of the land.").

339 Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1373 (2018) (quoting Seymour v. Osborne, 78 U.S. (11 Wall.) 516, 533 (1871)).

340 *Id.* at 1376–78.

341 *Id.* at 1377.

342 *Id.* at 1374 (quoting Crowell v. Benson, 285 U.S. 22, 50 (1932)).

Clearly, a majority of the Court views patents as emanating from the public and discretionary aspect of the royal office. But it would be a mistake to jump from this idea over the fundamental changes in the common law since the seventeenth century. In particular, the Statute of Monopolies constrained the prerogative franchise under law.[343] As the Forest Charter of 1217 placed franchises to hunt wild animals under law and restored customary liberties to use game lawfully caught, the Statute of Monopolies did the same for franchises to practice inventions and the customary liberties to make use of one's invention lawfully attained.[344]

After the Statute of Monopolies in 1624, a patent could be issued without resort to courts or law, but could only be challenged or adjudicated according to the common law.[345] Hamburger explains that the *issuance* of patents was discretionary because, as long as an invention was truly novel and meritorious, it was not thought to impose new duties or obligations on the public.[346] A patent grant for a new invention did not generate public rights or duties because it "did not prevent any subject from doing what he had done beforehand."[347] By contrast, after the patent issued it became vested property, and rescission "needed a judicial decision holding the patent unlawful and void."[348]

The power to contest a patent thus was grounded not in the unfettered discretion of the Crown but in law, either to invalidate a patent "which ought not to be granted" or to divest a patentee who "hath done an act that amounts to a forfeiture of the grant."[349] Chalmers explained that "the Crown is said to be deceived where the invention turns out not to be a novelty, and every part of the patent is void."[350] Alternatively, if a patent was not truly novel, even if innocently issued, its use constituted a wrong by infringing the liberties of action and property rights of others.[351] In other words, like other grants of freehold estates, a patent was to be revoked if its issuance or use amounted to a wrong.[352] But not otherwise.[353]

So, after the seventeenth century, Privy Council could not cancel a patent for any reason but only for reasons related to the merits of the underlying invention, that is, the scope of the prepositive liberty of which the patent is partly declaratory. Like other prerogative grants, English patents were adjudicated according to law. Thus, Blackstone taught that the king's grants and

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343 Mossoff, *supra* note 283, at 1272–76.

344 HAMBURGER, ADMINISTRATIVE LAW, *supra* note 255, at 198–202; Mossoff, *supra* note 283, at 1270–76.

345 21 Jac. 1, c.3 (1623).

346 HAMBURGER, ADMINISTRATIVE LAW, *supra* note 255, at 198–202. "Obviously," Hamburger notes, this idea was "somewhat artificial." *Id.* at 202.

347 *Id.* at 202.

348 *Id.* at 198.

349 3 BLACKSTONE, *supra* note 1, at *260–61.

350 CHALMERS & ASQUITH, *supra* note 294, at 151.

351 HAMBURGER, ADMINISTRATIVE LAW, *supra* note 255, at 198–99.

352 2 BLACKSTONE, *supra* note 1, at *346–48.

353 HAMBURGER, ADMINISTRATIVE LAW, *supra* note 255, at 198–202.

letters patent were necessarily a matter of public record, "that the same may be narrowly inspected by his officers, who will inform him if any thing contained therein is improper, or unlawful to be granted."[354] Blackstone explained that letters "*patent*, that is, open letters" take their name from the requirement that "they are not sealed up, but exposed to open view."[355]

Legislative franchises in the American tradition are even stronger in important respects than prerogative franchises in the English tradition.[356] As Richard Epstein has observed, Article I, Section 8 further rejects executive discretion over patents by placing the power to grant patents in Congress.[357] American franchises become vested rights and thus bear many of the characteristics of private property for due process purposes.[358] Thus, in the absence of a legal wrong, no person or official has any inherent power to initiate proceedings to contest or cancel a patent validly issued under then-extant formal requirements.[359] Only Congress can confer that power.[360] Also, patents are vested in the strong sense that they are immune from retrospective abrogation in the event that Congress were to change the law after issuance.[361] As the Supreme Court has explained, any change in the formal requirements for issuance of a patent "can have no effect to impair the right of property then existing in a patentee, or his assignee, according to the well-established principles" of vested rights doctrine which the Court has recognized and declared.[362]

This idea is carried over into the Patent Act and is unchanged by the AIA and by *Oil States*. Patents are still entitled to a presumption of validity, and are vested private rights in that (weak) sense.[363] This presumption of validity has "long been a fixture of the common law."[364] They are also vested in the stronger sense that, before they can be forfeited for commission of some wrong, the wrong must be proven by competent evidence.[365]

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354 2 BLACKSTONE, *supra* note 1, at *346.

355 *Id.*

356 *Id.* at *201.

357 Epstein, *supra* note 43, at 196–97.

358 *Id.* at 195.

359 United States v. Am. Bell Tel. Co., 167 U.S. 224, 266–70 (1897).

360 United States v. Am. Bell Tel. Co., 32 F. 591, 601–02 (C.C.D. Mass. 1887).

361 McClurg v. Kingsland, 42 U.S. (1 How.) 202, 206–07 (1843). Concerning this strong sense in which some rights are vested, see MacLeod, *supra* note 188, at 295–301; and Christopher M. Newman, *Vested Use-Privileges in Property and Copyright*, 30 HARV. J.L. & TECH. (SPECIAL SYMP.) 75, 80–81 (2016).

362 *McClurg*, 42 U.S. (1 How.) at 206.

363 35 U.S.C. § 282 (2012); Cellspin Soft, Inc. v. Fitbit, Inc., 927 F.3d 1306, 1319 (Fed. Cir. 2019).

364 Microsoft Corp. v. i4i Ltd. P'ship, 564 U.S. 91, 102 (2011).

365 Therasense, Inc. v. Becton, Dickinson & Co., 649 F.3d 1276, 1290 (Fed. Cir. 2011).

C. The Patentee's Rights Are Property Rights

The *Oil States* Court acknowledged the "three decisions that recognize patent rights as the 'private property of the patentee.'"[366] Those decisions are *United States v. American Bell Telephone Co.*,[367] *McCormick Harvesting Machine Co. v. Aultman*,[368] and *Brown v. Duchesne*.[369] Rather than overruling them entirely, the Court distinguished aspects and dicta of those decisions that characterize patents as property, insisting that "those cases do not contradict our conclusion."[370] The Court also favorably cited two earlier decisions for the proposition that patents are property for due process and Takings Clause purposes.[371]

Further supporting the inference that patents are private property rights is that, once issued, they become vested rights. Not even Congress can retrospectively abrogate them after issuance.[372] A patent is vindicated in a private cause of action for infringement to remedy a private wrong,[373] infringement, which is a species of trespass.[374] Positive law provides a remedy for infringement, rather than mere just compensation, because infringement of a patent is a wrong against the patent's owner.[375] Infringement implicates a bilateral, correlative, jural relation between the patent owner and the person who wrongly made, used, sold, or offered the patented invention.

The vestedness of patents raises profound constitutional questions about the validity of the various provisions that Congress has made since 1952 for the administrative cancellation, amendment, and forfeiture of patents already issued.[376] Those questions are beyond the scope of this Article. But they inform a correct interpretation of the Patent Act and the AIA. To avoid constitutional infirmity, federal patent law must be interpreted with a presumption that vested patents can be canceled only for commission of a wrong

366 Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1375 (2018) (quoting United States v. Am. Bell Tel. Co., 128 U.S. 315, 370 (1888)).

367 *Am. Bell Tel. Co.*, 128 U.S. at 370.

368 McCormick Harvesting Mach. Co. v. Aultman, 169 U.S. 606, 609 (1898).

369 Brown v. Duchesne, 60 U.S. (19 How.) 183, 197 (1857).

370 *Oil States*, 138 S. Ct. at 1375.

371 *Id.* at 1379 (first citing Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 642 (1999); and then citing James v. Campbell, 104 U.S. 356, 358 (1882)).

372 McClurg v. Kingsland, 42 U.S. (1 How.) 202, 206–07 (1843).

373 Dmitry Karshtedt, *Causal Responsibility and Patent Infringement*, 70 VAND. L. REV. 565, 624–636 (2017); Mossoff, *supra* note 38, at 993; Christopher M. Newman, *Patent Infringement as Nuisance*, 59 CATH. U. L. REV. 61, 78, 122 (2009); Saurabh Vishnubhakat, *An Intentional Tort Theory of Patents*, 68 FLA. L. REV. 571, 605–610 (2016).

374 Eric R. Claeys, *The Conceptual Relation Between IP Rights and Infringement Remedies*, 22 GEO. MASON L. REV. 825, 851 (2015); MacLeod, *supra* note 145, 733–740.

375 United States v. Palmer, 128 U.S. 262, 269–71 (1888) (contrasting the "tort" of patent infringement with the government's taking of a license, for which it owes just compensation); Lynda J. Oswald, *The "Strict Liability" of Direct Patent Infringement*, 19 VAND. J. ENT. & TECH. L. 993, 999–1005 (2017).

376 *See* Lawson, *supra* note 30, at 51–52; Mossoff, *supra* note 30, at 723–24.

that constitutes a forfeiture, and only on the initiative of some person who suffered the wrong. Conversely, infringement liability should only attach to someone who has wronged the patent owner. Because both patents and the liberty to use resources in the commons are vested, private rights, their correlative duties, and the wrongs that consist of violation of those duties, are bilateral and private, not matters of general interest.

This is why the private wrong of infringement is unlike an act of taking by the government, which far from being a private, legal wrong is an exercise of a public right—the power of eminent domain. In *Return Mail*, the Federal Circuit wrongly characterized the patentee's inverse condemnation proceeding against the Postal Service as an "infringement" action.[377] This mischaracterization predicated the court's erroneous holding that the Postal Service is a "person" who was "sued for infringement" within the meaning of AIA § 18(a)(1)(B), with the power to initiate a covered business method proceeding at the Patent and Trademark Office.[378]

The predicate was wrong as a legal matter. An inverse condemnation action against a public agency that has taken a patent license authorized by 28 U.S.C. § 1498 is not the same as an infringement action authorized under 35 U.S.C. § 271. In an infringement action, a wronged patent owner can obtain injunctive relief,[379] multiple damages and costs for willful infringement,[380] and attorneys' fees,[381] all of the remedies to which property owners are entitled in a civil action against wrongful trespassers.[382] By contrast, in an inverse condemnation proceeding under 28 U.S.C. § 1498(a), a patent owner is limited to "compensation," the remedy required by the just compensation provision of the Fifth Amendment Takings Clause.

As Judge Newman observed in dissent, the majority's confusion of inverse condemnation with infringement actions produced the anomalous result that the Postal Service could contest the validity of the same patent in multiple proceedings, while an accused infringer is estopped from denying patent validity who contests patent validity in a covered business method proceeding.[383] The anomaly disappears if one understands that the government is not a person with standing to initiate a covered business method proceeding. But the majority's reasoning "would grant the United States the benefit of post-grant challenge in the PTO, but would omit the statute's estoppel against raising the same challenge in court."[384]

In reversing the Federal Circuit's judgment, the Supreme Court made clear that the Postal Service is not a person because it is a sovereign rather

377 Return Mail, Inc. v. U.S. Postal Serv., 868 F.3d 1350, 1359–63 (Fed. Cir. 2017).

378 *Id.* at 1362–67.

379 35 U.S.C. § 283 (2012).

380 *Id.* § 284; Halo Elecs., Inc. v. Pulse Elecs., Inc., 136 S. Ct. 1923, 1929–30 (2016).

381 35 U.S.C. § 285.

382 *Id.* § 281; MacLeod, *supra* note 145, at 765–74, 776–80.

383 *Return Mail*, 868 F.3d at 1373–75 (Newman, J., dissenting).

384 *Id.* at 1374.

than a private, juridical agent.[385] The Court sidestepped the Federal Circuit's characterization of an inverse condemnation proceeding as a suit for infringement, assuming the premise for the sake of its reasoning on legal personhood.[386] But the Court expressly noted the important differences between an infringement action and an action for just compensation under 28 U.S.C. § 1498.

> We see no oddity, however, in Congress' affording nongovernmental actors an expedient route that the Government does not also enjoy for heading off potential infringement suits. Those other actors face greater and more uncertain risks if they misjudge their right to use technology that is subject to potentially invalid patents. Most notably, § 1498, restricts a patent owner who sues the Government to her "reasonable and entire compensation" for the Government's infringing use; she cannot seek an injunction, demand a jury trial, or ask for punitive damages, all of which are available in infringement suits against nongovernmental actors under § 271(e)(4). Thus, although federal agencies remain subject to damages for impermissible uses, they do not face the threat of preliminary injunctive relief that could suddenly halt their use of a patented invention, and they enjoy a degree of certainty about the extent of their potential liability that ordinary accused infringers do not. Because federal agencies face lower risks, it is reasonable for Congress to have treated them differently.[387]

In other words, Congress has maintained a separation between the private rights and duties that are held by patentees and accused infringers and the public rights and responsibilities of public agencies and officials. And it makes sense for Congress to have preserved this historic, customary separation because private persons have different rights at stake in a patent than do public officials. At stake for the patent owner is most obviously a private property right in the patent. For the person accused of infringement, at stake is whether he is at liberty to use the invention and enjoys immunity from infringement liability for doing so.

By contrast to those private persons, the Postal Service has no power to initiate an administrative proceeding because it has no private rights, only public rights—the powers and immunities of the sovereign. Thus, there was no reason for Congress to provide expressly that the Postal Service is estopped from contesting validity in different venues. The limitations on the Postal Service's powers are inherent in the office it occupies. Congress cannot transform public rights into private rights, or vice versa, because it cannot transform an inherent legal right—eminent domain—into a legal wrong—infringement. The Postal Service cannot commit patent infringement because when it takes someone's patent rights it is exercising the power of eminent domain, a right that is inherent in sovereignty and that implicates different constitutional guarantees than the process due to one who has suffered a private wrong. In other words, Congress could not have made the

385 Return Mail, Inc. v. U.S. Postal Serv., 139 S. Ct. 1853, 1863–67 (2019).

386 *Id.* at 1866–67.

387 *Id.* at 1867.

Postal Service a "person" with private powers because Congress cannot transform public rights into private rights without offending the Due Process Clause of the Fifth Amendment.

Another implication of the status of patents as property is that official action that deprives a patent owner of vested, patent rights is a taking within the meaning of the Fifth Amendment.[388] Recently, both the Federal Circuit and the Federal Court of Claims have ruled that retrospective invalidation of a patent in an inter partes proceeding does not constitute a taking.[389] The reasoning in those decisions, that patents have long been subject to potential invalidation, is facile and too hasty. Because patents are part prepolitical (natural, customary) and private and part postpositive (formal) and public, the *reason* for invalidation determines whether the patentee is being deprived of private property or merely restored to status quo prior to erroneous issuance.

This is not to suggest that the holdings of Federal Circuit and Court of Claims are not justifiable on other grounds. If the result of the inter partes proceeding would have been the same as the result of a pre-AIA ex parte reexamination, for the same reasons and regardless of the adversarial nature of the proceeding, one could reasonably suppose that the patent owner accepted that risk in the quid pro quo of the patent exchange—disclosure for twenty-year exclusivity—at the time of the application. But neither court undertook that analysis. Instead, both courts contented themselves to observe that Congress allowed reexamination after 1980 and before 2011, and that the national government retains some power over patents after issue,[390] as if that makes all of the legal authority of the seventeenth, eighteenth, nineteenth, and early twentieth centuries irrelevant.[391]

After the triumph of law over the prerogative, the practice of scrutinizing letters patent and other prerogative grants, such as forest franchises, for legal validity came to be regularized in Chancery by writ of *scire facias*.[392] *Scire facias* was not a freestanding license to challenge patent validity. It stood only for certain causes and could be prosecuted only by certain people. Blackstone taught that the writ "may be brought either on the part of the king, in order to resume the thing granted; or, if the grant be injurious to a

388 Mossoff, *supra* note 30, at 690–91.

389 Celgene Corp. v. Peter, 931 F.3d 1342, 1358 (Fed. Cir. 2019); Christy, Inc. v. United States, 141 Fed. Cl. 641, 658–59 (Fed. Cl. 2019), *appeal docketed*, No. 19-1738 (Fed. Cir. Apr. 4, 2019).

390 *Celgene Corp.*, 931 F.3d at 1362–63; *Christy, Inc.*, 141 Fed. Cl. at 660.

391 *Christy, Inc.*, 141 Fed. Cl. at 660 ("Christy's reliance on nineteenth-century Supreme Court decisions to equate patent rights to land rights for Takings Clause purposes is ill-considered."). Actually, the *Christy* court went farther, asserting, "[s]ince patent rights derive wholly from federal law, Congress is free to define those rights (and any attendant remedies for an intrusion on those rights) as it sees fit." *Id.* at 658. The court made no attempt to explain this assertion.

392 Mowry v. Whitney, 81 U.S. (14 Wall.) 434, 440–41 (1872); 3 BLACKSTONE, *supra* note 1, at *46–49, *260; THOMAS CAMPBELL FOSTER, A TREATISE ON THE WRIT OF SCIRE FACIAS 3 (London, V. & R. Stevens & G.S. Norton 1851).

subject, the king is bound of right to permit him (upon his petition) to use his royal name for repealing the patent in a *scire facias*."[393] The power to employ the writ *scire facias* was thus reserved to the king's officers and to those private persons who had suffered some injury by the wrongful use or issuance of the patent.

That practice carried over to the United States. In interpreting the 1836 Patent Act, the Court explained:

> The 16th section of the Patent Act of 1836 seems to have in view the same distinction made by the common law in regard to annulling patents, for while it authorizes individuals claiming under conflicting patents, or one whose claim to a patent has been rejected because his invention was covered by a patent already issued, to try the conflicting claim in chancery, and authorizes the court to annul or set aside a patent so far as may be found necessary to protect the right, the suit by individuals is limited to that class of cases. And it is provided that the decree shall be of no validity except between the parties to the suit. The general public is left to the protection of the government and its officers.[394]

Thus, a writ of *scire facias*, requiring a holder of a letter patent to answer why his patent should not be annulled, was not a freestanding license to challenge the validity of extant patents.[395] Only the party wronged may initiate such a claim.[396] Where the patentee perpetrated a fraud against the government, the government has the power to initiate a patent review.[397] Where a private party has rights at stake, or where a person or agency is delegated power to vindicate public rights, such as rights against antitrust violations, those rights are grounds for challenging a patent's validity.[398] But unless the action is brought on behalf of the public to vindicate a public right or remediate a public wrong, the determination of validity is binding only as between the parties, not in rem.[399]

Officials have inherent power to initiate invalidity proceedings against a patentee who procured by fraud or other malum in se wrong.[400] But they lack inherent and equitable power to initiate proceedings against a patentee otherwise. Such a power must be conferred by Congress,[401] subject to the requirements of due process.[402] No person has an inherent power to contest

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393 3 BLACKSTONE, *supra* note 1, at *261.

394 *Mowry*, 81 U.S. (14 Wall.) at 440–41.

395 *Id.* at 441.

396 *Id.*

397 *Id.*

398 United States v. Glaxo Grp. Ltd., 410 U.S. 52, 58 (1973); Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 173–74 (1965).

399 *Mowry*, 81 U.S. (14 Wall.) at 441.

400 *Glaxo Grp. Ltd.*, 410 U.S. at 65–69; *Walker Process Equip., Inc.*, 382 U.S. at 174.

401 *See, e.g.*, 35 U.S.C. § 311(a) (2012).

402 Compare the use of similar administrative proceedings in other common-law nations. Chris Dent, Comment, *Patents as Administrative Acts: Patent Decisions for Administrative Review?*, 30 SYDNEY L. REV. 691, 697–701, 699 n.42 (2008).

the validity of a patent who has no vested right in the patent and has suffered no wrong as a result of issuance of the patent.[403]

As the Federal Circuit recently observed, the reexamination proceedings authorized in the 1980 amendments went further than the *scire facias* writ in allowing reconsideration of a patent, and in some respects those proceedings more resemble cancellation proceedings in Privy Council.[404] For example, an ex parte reexamination can be used to "weed out bad patents," meaning that its result is binding in rem, not just between the interested challenger and the patentee.[405] On the other hand, the intention behind reexamination was to enlist interested persons in bringing relevant prior art to light,[406] not to empower them to challenge the validity of vested patents, much less to avoid infringement liability in a pending lawsuit. Reexamination thus looks much more like a qui tam action than it does an inter partes proceeding. It is not personal to the person who brings forward the information and, unlike inter partes review, it does not operate like litigation.[407] The notion that inter partes review is just a logical extension of a principle established by reexamination proceedings cannot withstand jurisprudential scrutiny. The Federal Circuit is therefore wrong to assert that retrospective application of IPR provisions raise no legal or constitutional issues.[408]

D. The Power to Challenge a Patent Belongs to the Injured Party, Else to Congress

These principles should inform questions of statutory interpretation that concern the retrospective application of AIA inter partes proceedings to patents issued prior to the AIA. Whatever the constitutionality of inter partes review, it cannot be applied retrospectively because, by conferring on interested parties a power to challenge vested patents, Congress has conferred upon them a *new* right and imposed on patentees a *new* correlative disadvantage. That disadvantage cannot be imposed on the patent retrospectively without changing the nature of the patent.

Interested persons other than the patentee have no inherent right to challenge patent validity. Unless a patentee has wronged the public in the disclosure which warranted issuance of the patent, the right to challenge patent validity belongs to the sovereign, Congress. The obvious exception to this is an accused infringer, whose exposure to liability for infringement entails a power to demonstrate, if he can, that the alleged wrong was not wrongful.

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403 *Mowry*, 81 U.S. (14 Wall.) at 440–41.

404 Regents of the Univ. of Minn. v. LSI Corp., 926 F.3d 1327, 1333–34 (Fed. Cir. 2019).

405 *Id.* at 1333.

406 *Id.* at 1334.

407 *Cf.* SAS Inst. Inc. v. Iancu, 138 S. Ct. 1348, 1352 (2018) ("The new [IPR] procedure allows private parties to challenge previously issued patent claims in an adversarial process before the Patent Office that mimics civil litigation.").

408 *See, e.g.*, Arthrex, Inc. v. Smith & Nephew, Inc., 935 F.3d 1319, 1331–32 (Fed. Cir. 2019).

People have no rights in patent titles in which they have no vested rights. A party who seeks to vindicate a "public right" in patented land, for example, has no vested right and cannot initiate a proceeding to determine the validity of title.[409] Similarly, in the absence of a legal wrong, no person, whether a private person or an official, has an inherent power to initiate proceedings to contest or cancel a vested patent.[410] That power must be conferred by Congress,[411] and Congress should not be presumed to have divested patentees of their due process protections. The limitations that Congress has placed on the power to defeas an otherwise indefeasibly vested patent via an administrative proceeding should be interpreted strictly and the powers to initiate such proceedings construed narrowly.

E. A Patent Is Part Legal Right, Part Indifferent Privilege

Finally, as the Court has affirmed on various occasions,[412] a patent is part legal right and part indifferent privilege. Patents are middle rights, intermediate between the prepositive liberty that an inventor enjoys to practice her innovation in secret and a purely posited public franchise. The liberty of an inventor to practice her valuable invention is a common-law right, grounded in the objective merits of the invention and the inventor's natural right to profit from it. This is the right that a patent shares with a trade secret. The right to practice the invention publicly and exclusively is an indifferent privilege. It was created by statute and it could have been specified otherwise. However, it is not entirely indifferent, like coverture and pure monopolies are, for it is given in consideration of the common-law right.

In *Oil States*, Justice Gorsuch explained at length the difference between the early English conception of patents as monopoly franchises and the American conception of patents as security for the inventor's inchoate, prepositive property right in her invention.[413] American founders reconceived the core of the patent—the prepositive right which the patent's exclusive grant secures—on legal right grounds.[414] Whereas in English law, consideration for the grant was either disclosure to the public or the bringing into the kingdom of new industries,[415] in American law priority belonged to the "true

409 *See* Smelting Co. v. Kemp, 104 U.S. 636, 647 (1882) ("It does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it."); Bagnell v. Broderick, 38 U.S. (13 Pet.) 436, 450 (1839) ("Congress has the sole power to declare the dignity and effect of titles emanating from the United States.").

410 United States v. Am. Bell Tel. Co., 167 U.S. 224, 266–270 (1897).

411 Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 642 (1999); United States v. Am. Bell Tel. Co., 32 F. 591, 592 (C.C.D. Mass. 1887).

412 *See* Cont'l Paper Bag Co. v. E. Paper Bag Co., 210 U.S. 405, 430 (1908); *Am. Bell Tel. Co.*, 167 U.S. at 264–65.

413 Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1382–84 (2018) (Gorsuch, J., dissenting).

414 *See id.*; Sean M. O'Connor, *The Overlooked French Influence on the Intellectual Property Clause*, 82 U. CHI. L. REV. 733, 736 (2015).

415 E. Wyndham Hulme, *On the Consideration of the Patent Grant, Past and Present*, 13 LAW Q. REV. 313, 313 (1897).

and first" inventor,[416] whose productive labor brought the invention into existence and who therefore owned the invention as a matter of natural right.[417]

The Court explained in *Oil States* that the patentee's *remedies* for infringement of the right to exclude owe their existence to the prerogative or sovereign power.[418] Thus, the patent power includes the right to establish tribunals and venues to determine the validity of the patentee's exclusive right. However, the patent adds the remedies to a prepolitical liberty to use and is offered in exchange for disclosure of a valuable innovation that the *inventor* created.[419] The inventor's liberty is prepositive, and its merits are not a matter of indifference. This complexity is one source of the famous Jefferson-Madison disagreement about the nature of patents.[420] Madison was interested in the natural merits of inventions as a source of natural and common-law rights,[421] while Jefferson was focused on executive discretion as a source of the exclusive right and the analogy to monopoly franchises.[422]

This suggests that where the inherent merits of an invention are at issue, the matter should be submitted to a court and jury. Where the formal terms and posited, legal conditions of the exclusive right are at issue, such as the adequacy of the inventor's disclosure, then Congress may specify another venue for adjudication. But if the issue concerns the merits of the invention patented—especially its novelty and nonobviousness—then the patentee is entitled to common-law due process before a determination is made that the patent was wrongly issued. Recently, the PTAB has overturned at least one jury verdict concerning the factual merits of patents, i.e., whether the underlying invention was obvious, and the Federal Circuit has affirmed.[423] That action cannot be reconciled with the nature of patents; meritorious, vested patents are private property and obviousness is a fact question.

CONCLUSION

Legal concepts are not going away. Far from it. Concepts such as public rights and private rights seem likely to play an architectonic role in American jurisprudence, and the decisions of the Supreme Court of the United States, for some time to come. Legal concepts are driving patent law just as they

416 Hulme, *supra* note 171, at 280.

417 Mossoff, *supra* note 30, at 717; Mossoff, *supra* note 38, at 959.

418 Because the remedy provided for infringement is a public right in which the public has an interest, the patentee always bears the burden of proving infringement, even when he is the defendant in a declaratory judgment action. *See* Medtronic, Inc. v. Mirowski Family Ventures, LLC, 134 S. Ct. 843, 851–52 (2014).

419 *Oil States*, 138 S. Ct. at 1382–84 (Gorsuch, J., dissenting).

420 *Compare* Mossoff, *supra* note 283, at 1255, *with* Mossoff, *supra* note 30, at 698–99.

421 THE FEDERALIST NO. 43 (James Madison).

422 Letter from Thomas Jefferson to Isaac McPherson, *supra* note 4.

423 Chrimar Sys., Inc. v. ALE USA, Inc., 785 F. App'x 854 (Fed. Cir. 2019); Chrimar Sys., Inc. v. Juniper Networks, Inc., 777 F. App'x 518 (Fed. Cir. 2019) (mem.) (per curiam); Chrimar Holding Co., LLC v. ALE USA Inc., 732 F. App'x 876, 880–81 (Fed. Cir. 2018).

drive much of the Court's jurisprudence in other areas. Common-law taxonomies of rights and wrongs will prove crucial in future patent litigation.

It is therefore imperative to attain conceptual clarity. Different aspects of a patent are properly understood as either private or public, and as either legal or indifferent. Those distinctions determine, respectively, who may initiate a proceeding to challenge or vindicate the right and who may adjudicate the right's validity and boundaries. Because the Court did not provide a comprehensive explanation of these concepts in *Oil States* but rather left most questions for resolution in later disputes, these distinctions and the powers that follow from them should emerge more clearly to view in future cases. The powers at stake are also important in many other areas of law, such as bankruptcy, administrative law, and environmental regulation. Ongoing litigation concerning the AIA will therefore shape the Court's due process jurisprudence all along the boundary between public and private law.