

## Redeveloping Patent Property Law

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# REDEVELOPING PATENT PROPERTY LAW

## I. INTRODUCTION

This Article analyzes the patent reexamination process, *inter partes* review, in light of the 2018 *Oil States* decision the Supreme Court of the United States decided in 2018. Inter partes review was intended to invalidate patents owned by entities that use patents in a predatory manner. However, this patent review process has been found to be just as useful in invalidating patents owned by commercial competitors. This patent invalidation process has damaged the reliance interest patent holders have in their U.S. issued patents.

To safeguard the interests of patent holders that rely on their intellectual property, natural law theories suggest some special protections to patent holders who implement their intellectual property in the market. These natural law theories could be implemented by statutory amendment to protect patent holders that use their intellectual property in the market from being subjected to *inter partes* review. The natural law theories encourage limiting the invalidation of an issued patent that a patent holder relies on.

The danger *inter partes* review poses to patent holders increases volatility to numerous patent portfolios. Volatility in patent validity for patent holders motivated the current analysis. The first Part of this Article investigates the current laws that govern the application for an issuance of a U.S. patent. The second Part additionally describes some of the natural law foundations for America's intellectual property rights. The third Part of this Article discusses the *Oil States* decision and the corresponding dissent. The fourth Part evaluates whether the *Oil States* decision was improperly decided and ultimately suggests that Congress should overturn the decision by statutory amendment.

## II. BACKGROUND

The U.S. patent system entitles inventors to patents for their inventions.<sup>1</sup> But, the United States Patent and Trademark Office (USPTO) has the power to reject a patent if the invention as set forth in a patent

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1. "Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title." 35 U.S.C. § 101. United States patent laws are codified in Title 35 of the United States Code as authorized by Article I, Section 8, Clause 8 of the United States Constitution.

application was (1) not novel or otherwise obvious at the time the patent was filed,<sup>2</sup> (2) insufficiently described to allow an ordinary artisan to make the invention,<sup>3</sup> or (3) not an abstract idea without significantly more than a judicial exception.<sup>4</sup> In the United States, patents grant inventors the right to exclude others from making, using, or selling an invention as claimed in an issued patent.<sup>5</sup>

The Constitution grants Congress the power to establish a patent system and allows inventors to exclude others from claiming an invention.<sup>6</sup> Accordingly, the United States has had a patent system in some form since the Patent Act of 1790.<sup>7</sup> Similar to the current patent system, this Act granted patents for any “useful art, manufacture, engine, machine, or device . . .”<sup>8</sup> Further, the Patent Act of 1790 enabled patent owners and their assignees to take patent infringers into court and sue the infringer for damages in jury decided civil cases.<sup>9</sup> These basic facets of the original Act have remained constant through the history of American patent law.<sup>10</sup>

### A. *Natural Law Theories*

The U.S. patent system was based on the developments in the English patent system prior to the formation of the United States.<sup>11</sup> Much of American intellectual property law has been influenced by historical theories found in natural law.<sup>12</sup> While much can be said on natural law theories of property law, two such theories that are applicable to the U.S. patent law system will be discussed here.

2. “A person shall be entitled to a patent unless—the claimed invention was . . . available to the public before the effective filing date of the claimed invention[.]” *Id.* § 102(a)(1). “A patent for a claimed invention may not be obtained . . . if the differences between the claimed invention and the prior art . . . would have been obvious before the effective filing date of the claimed invention . . .” *Id.* § 103.

3. “The specification shall contain a written description of the invention . . . as to enable any person skilled in the art to . . . carry[ ] out the invention.” *Id.* § 112.

4. *Id.* § 101.

5. “[W]hoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States . . . infringes the patent.” *Id.* § 271.

6. U.S. CONST. art. 1, § 8 cl. 8.

7. Patent Act of 1790, ch. 7, § 1, 1 Stat. 109-110.

8. *Id.*

9. *Id.*

10. See Brief for Solicitor General as Amici Curiae Supporting Respondents at 2–3, *Oil States Energy Servs., LLC v. Greene’s Energy Grp.*, 138 S. Ct. 1365 (2018).

11. See Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550–1800*, 52 HASTINGS L.J. 1255, 1267, 1315 (2001) (discussing utilitarian treatment of patents in discourse concerning patents and similar case law cited in both England and the United States).

12. *Id.* at 1273–74.

### 1. *Labor Theory of Property*

One natural law theory of property is that, in essence, labor creates personal property.<sup>13</sup> Incorporating one's labor into the common resources available to all appropriates the common resource into the property of the laborer, as long as there is a sufficient amount of common resources for other individuals.<sup>14</sup>

John Locke, one of the primary advocates for the labor theory of property, asserted that when someone "takes something . . . [and] mixes his labour with it, . . . in that way he makes it his property."<sup>15</sup> This theory suggests that the person's labor, being entirely the property of the laborer, is infused into the natural resources and makes the mixed labor and natural resources the property of the laborer.<sup>16</sup> As a result, the person who cuts down a tree or picks wild berries, has taken from the common resources of all and appropriated the resources to himself by inputting his labor into common resources, so the resources become his property (e.g., the wood from the tree and the berries themselves).

The labor theory is, in some respects, utilitarian, as the common resources are not transformed into private property until the common resources are made beneficial to mankind.<sup>17</sup> Accordingly, all of John Locke's references to labor are for the sake of productive activity.<sup>18</sup> Thus, the labor theory is interested in the effect of work that creates products necessary for life.<sup>19</sup> Put alternatively, the labor theory grants property rights to a person who adds value to common resources.<sup>20</sup> And, coincidentally, the productive activity promotes the flourishing of human life.<sup>21</sup>

13. William Fisher, *Theories of Intellectual Property*, BERKMAN KLEIN CTR. FOR INTERNET & SOC'Y AT HARV. UNIV. 1, 2 (Oct. 27, 2018), available at <https://cyber.harvard.edu/people/tfisher/iptheory.pdf>.

14. *Id.* at 3.

15. See generally JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett, ed., 1988); Karen I. Vaughn, *John Locke and the Labor Theory of Value*, 2 J. LIBERTARIAN STUDIES, 1978, at 312 ("All discussions of Locke's 'labor theory of value' ultimately refer to the theory of property he develops in Chapter V of the *Second Treatise*. It is there that Locke presents his famous justification for private ownership of goods and land on the basis of the effort or labor which individuals expend to produce goods . . . of value to human beings.").

16. See generally LOCKE, *supra* note 15.

17. Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 542 (2005).

18. Mossoff, *supra* note 11, at 1309.

19. *Id.*

20. Bell & Parchomovsky, *supra* note 17, at 566–57.

21. Mossoff, *supra* note 11, at 1310.

## 2. *Occupation Theory of Property*

An additional natural law theory of property, originating with the Romans, is that of ownership by occupation of the property itself.<sup>22</sup> This theory suggests that the person who occupies property is the owner of the property. The person that holds the property or states, by words or actions (e.g., a fence around land), “[t]his is mine,” thus possesses the property by occupation.<sup>23</sup> This simple understanding of property is one of the older theories of property.<sup>24</sup>

One early case in American law that was based on an occupation theory of property was *Pierson v. Post*.<sup>25</sup> The New York Superior Court found that wild animals are owned by no person, yet “property in such animals is acquired by occupancy only.”<sup>26</sup> Further, the Court rationalized its finding based on the natural law philosophy that maiming an animal is insufficient to claim title of property unless the hunter actually takes physical possession of the animal or otherwise mortally wounds the animal.<sup>27</sup>

This foundational property case provides a different perspective to inform our understanding of property; namely, that in some circumstances, labor alone is insufficient to claim something as property.<sup>28</sup> Where the hunter’s efforts have failed to give him physical possession of the wild animal, the hunter has failed to claim title in the wild animal, regardless of the ease by which a different hunter quickly kills the hunted prey.

The occupation theory of property also requires a certain amount of communication between the property holder and the world.<sup>29</sup> The notion of communicating an intention to appropriate something as one’s property is still quite pertinent in property jurisprudence today, particularly in adverse possession.<sup>30</sup> In taking possession of or occupying property, the adverse possessor informs the community that it is for

22. Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 522 (1990).

23. Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 81 (1985).

24. *Id.* at 74.

25. *Pierson v. Post*, 3 Cai. 175, 177 (N.Y. Sup. Ct. 1805).

26. *Id.*

27. *Id.* at 177–78 (The court cited the Justinian Institutes, Fleta, and Breton for the notion that pursuit, even when accompanied by nonfatal wounding was ineffective for the sake of asserting property. The court further cited Puffendorf and Bynkershock for the principle that a mortally or otherwise greatly wounded animal cannot be intercepted by another person. Lastly, the court continued with Barbeyrac who asserted that a combination of a mortal wounding and an uninterrupted pursuit manifested possession.).

28. Yen, *supra* note 22, at 523–24.

29. Rose, *supra* note 23, at 78–79.

30. *Id.* at 79.

the exclusive use and enjoyment of the adverse possessor.<sup>31</sup> Regardless of the manner of informing the community of possession (e.g., killing a wild animal to occupy it, putting up a fence to occupy land, etc.), the occupation asserts the ownership of property and, when communicated by the title holder, inhibits adverse possession of the property.<sup>32</sup>

### 3. *Natural Law Views Influencing U.S. Intellectual Property Law*

The natural law theories of property have been and are still prevalent in U.S. intellectual property law.<sup>33</sup> Several courts in years past have analyzed copyrights in the context of the labor theory of property, finding that the labor of the author in preparing the work is such that grants the right of controlling the work's publication.<sup>34</sup> Additionally, trademarks in the United States exemplify both the labor theory and occupation theories of property.<sup>35</sup> Lastly, as will be discussed in greater detail in this Article, patents also have natural law origins.<sup>36</sup>

Copyright acknowledges property rights in original expressions created by authors.<sup>37</sup> Copyrights protect a variety of original works including literary, musical, artistic, and architectural works.<sup>38</sup> Protection of copyrights is the protection of the intellectual labor and ingenuity of the artist.<sup>39</sup> In contrast to any economic incentive theory that justifies copyright protection, the labor theory justifies protection of those artistic works that cannot provide economic stimulation.<sup>40</sup> The concept that "an author owns [their] mind's labor, and must also own the creations of that labor, no matter how humble or accidental the result" is a fair understanding of modern American intellectual property law.<sup>41</sup>

31. *Chi. Title & Tr. Co. v. Drobnick*, 169 N.E.2d 792, 796 (Ill. 1960).

32. *Rose*, *supra* note 23, at 79.

33. Benjamin G. Damstedt, *Limiting Locke: A Natural Law Justification for the Fair Use Doctrine*, 112 *YALE L.J.* 1179, 1179 (2003).

34. *Yen*, *supra* note 22, at 533, 538 (citing *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 250 (1903); *Jefferys v. Boosey*, 10 Eng. Rep. 681, 702 (1854)). The labor theory applied to copyright law should not be confused with the old "sweat of the brow" theory applied to copyrights. Here, the labor is intellectual labor in the creation of an original, creative work. For example, the labor in compiling facts is not protected by copyright. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991).

35. *See infra* notes 45–48.

36. *See infra* Part II.C.3.

37. "Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression." 17 U.S.C. § 102(a).

38. *Id.* § 102(a)(1)–(8).

39. *Yen*, *supra* note 22, at 524.

40. *Id.*

41. *Id.* at 537.

Trademarks, another form of intellectual property in the United States, protect words, names, symbols, or devices (alone or in combination) that are used to identify goods or unique products when compared to goods or products manufactured by another.<sup>42</sup> As a result, trademarks provide great value to companies, manufacturers, and people who sell their services to establish and protect a share of any given market.<sup>43</sup> Some trademarks are integral to a company's brand and become one of their most valuable assets, with valuation worth billions of dollars.<sup>44</sup>

Trademarks employ the labor theory of property in the intellectual creation and designing of the trademark and the association of the trademark with the product.<sup>45</sup> This labor theory understanding of owning a trademark is similar to the labor theory of copyrights. From the common resources of writing and graphical depictions (e.g., the sum total of letters, words, and artistic tools) a designer has added labor to create a new trademark or logo to identify a new product or good. For this reason, we can find that a person owns the trademark.

However, in the United States, trademarks require use in commerce or a bona fide intention to do so.<sup>46</sup> The requirement to include a trademark in the stream of commerce is different from the natural law understanding of copyrights, which only focuses on the artist's labor.<sup>47</sup> With trademarks, the law appears to require a use or occupancy of the intellectual property in order to leverage the force of law against people or corporations that would infringe on the trademark.<sup>48</sup>

### B. *The America Invents Act*

The America Invents Act of 2013 altered several aspects of the patent system. Prior to its enactment, the patent system had not had a

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42. “[T]rademark’ includes any word, name, symbol, or device, or any combination thereof . . . to identify and distinguish his or her goods[.]” 15 U.S.C. § 1127.

43. John E. Elmore, *The Valuation of Trademark-Related Intangible Property*, INSIGHTS, Winter 2015, at 66–67.

44. Sean Stonefield, *The 10 Most Valuable Trademarks*, FORBES (June 15, 2011, 11:22 AM), <https://www.forbes.com/sites/seanstonefield/2011/06/15/the-10-most-valuable-trademarks/#703659be36b8>.

45. Jesse R. Dill, *Possessing Trademarks: Can Blackstone or Locke Apply to Fast Food, Grocery Stores, and Virtual Sex Toys?*, 14 MARQ. INTELL. PROP. L. REV. 371, 383 (2010).

46. “A mark shall be deemed to be ‘abandoned’ if . . . its use has been discontinued with intent not to resume such use.” 15 U.S.C. § 1127.

47. *Copyright in General*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/help/faq/faq-general.html> (last visited July 6, 2021).

48. 15 U.S.C. § 1127; Dill, *supra* note 45, at 383.

major overhaul in nearly sixty years.<sup>49</sup> The Patent Act of 1952 included a new nonobviousness requirement to obtain a patent.<sup>50</sup> The nonobvious requirement permitted the USPTO to reject a patent application if the invention was a combination of other inventions that a reasonably skilled person in the art would have found obvious.<sup>51</sup>

With the most recent overhaul of U.S. patent law, the America Invents Act changed the patent system from a first-to-invent system to a first-inventor-to-file system.<sup>52</sup> The previous system permitted inventors to submit evidence of the original date of invention to circumvent prior art.<sup>53</sup> As a result, if a second inventor filed a patent application first, the first inventor could obtain the patent by showing evidence that they created the invention at a date prior to the second inventor's application.<sup>54</sup> Under the current system, the invention must be novel and nonobvious prior to the date the first patent application was filed with the USPTO, regardless of the date of invention.<sup>55</sup>

The first-inventor-to-file system is similar to the first-to-file systems that are more prevalent around the world.<sup>56</sup> The first-inventor-to-file system grants patent rights to the inventor that is first to file, but provides a certain grace period not permitted in strict first-to-file systems.<sup>57</sup> This grace period allows an inventor a period of time to file a patent application after the inventor has published their invention, made an offer for sale, or publicly used the invention.<sup>58</sup>

Another change to the patent system that came with the America Invents Act was the inclusion of the *inter partes* review (“IPR”) proceedings as a new post-grant opposition proceeding.<sup>59</sup> IPR allows the USPTO to invalidate the claims of an issued patent after the issuance of the patent and without the benefit of claim amendments with a patent examiner.<sup>60</sup> These changes were instituted to modernize the

49. *America Invents Act Changes*, FINNEGAN, <https://www.finnegan.com/images/content/1/1/v2/116002/finnegan-america-invents-act-changes-brochure.pdf> (last viewed July 6, 2021).

50. 35 U.S.C. § 103 (pre-AIA), App'x L, available at <https://www.uspto.gov/web/offices/pac/mpep/mpep-9015-appx-l.html>.

51. *Id.*

52. *Id.* §§ 102, 102 (pre-AIA), App'x L.; see FINNEGAN, *supra* note 49.

53. 35 U.S.C. § 102(g) (pre-AIA), App'x L.

54. *Id.* App'x L.

55. 35 U.S.C. § 102(a).

56. Intellectual Property Team, *Leahy-Smith America Invents Act*, NAT'L L. REV. (Sept. 19, 2011), <https://www.natlawreview.com/article/leahy-smith-america-invents-act>.

57. Gene Quinn, *A Brave New Patent World – First to File Becomes Law*, IP WATCHDOG (Mar. 16, 2013), <http://www.ipwatchdog.com/2013/03/16/a-brave-new-patent-world-first-to-file-becomes-law/id=37601/>.

58. 35 U.S.C. § 102; Quinn, *supra* note 57.

59. Intellectual Property Team, *supra* note 56.

60. 35 U.S.C. §§ 311, 318.

U.S. patent system and, at least in part, to combat “Patent Trolls.”<sup>61</sup> Since the late 1990s, the term “Patent Troll” was used for individuals or companies that made or bought patents for the sake of levying lawsuits to obtain settlements.<sup>62</sup> Patent trolls are otherwise known as non-practicing entities because they obtain numerous patents for the sake of asserting those patents against entrepreneurs, who do not have the capital to defend a patent litigation suit, but do not use the inventions they have patented.<sup>63</sup>

### 1. *The Purpose of Inter Partes Review*

IPR was established with the passing of the America Invents Act.<sup>64</sup> *Inter partes* review was created as a means to reduce the number of weak or improper patents issued by the USPTO.<sup>65</sup> It allows for a cheaper venue to seek the invalidation of a patent.<sup>66</sup> Several senators, including Senators Leahy, Grassley, and Reid, sought to improve the ability of the USPTO to inhibit abuses of the patent system by passing reform laws to the U.S. patent system.<sup>67</sup> Rather, their hope was to encourage the goal of the patent system: technical innovation.<sup>68</sup> Previously, third parties could invalidate a patent through *inter partes* reexamination or via lawsuit.<sup>69</sup> But under the America Invents Act, third parties can petition the Director of the USPTO for a review of the patentability of at least one claim of any given patent.<sup>70</sup>

### 2. *The Procedure of IPR*

The process of IPR begins with petitioning the Director of the USPTO to institute an IPR.<sup>71</sup> The petition must allege that at least one claim of the patent is unpatentable.<sup>72</sup> The petitions for IPR may only involve questions of novelty and obviousness.<sup>73</sup>

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61. 112 CONG. REC. S8517 (daily ed. Dec. 28, 2012) (Statement of Senator Leahy).

62. Robert L. Stoll, *Patent Trolls: Friend or Foe?*, WORLD INTELL. PROP. ORG. MAG. (Apr. 2014) [http://www.wipo.int/wipo\\_magazine/en/2014/02/article\\_0007.html](http://www.wipo.int/wipo_magazine/en/2014/02/article_0007.html).

63. *Id.*

64. 35 U.S.C. § 311.

65. Robert Stoll, *A Review at Five Years of Inter Partes Review*, IP WATCHDOG, (Sept. 12, 2017) <http://www.ipwatchdog.com/2017/09/12/five-years-inter-partes-review/id=87424/>.

66. Jeff John Roberts, *The Supreme Court's Blockbuster Patent Case: What You Need To Know*, FORTUNE (Nov. 27, 2017), <http://fortune.com/2017/11/27/supreme-court-patents/>.

67. 112 CONG. REC. S8517 (daily ed. Dec. 28, 2012) (Statement of Senator Leahy).

68. *Id.*

69. *Oil States Energy Servs., LLC v. Greene's Energy Grp.*, 138 S. Ct. 1365, 1370–71 (2018).

70. 35 U.S.C. § 311.

71. *Id.*

72. *Id.* § 312.

73. *Id.* §§ 102–103.

The director must find a reasonable likelihood that the petitioner will succeed against at least a single challenged claim.<sup>74</sup> After the director institutes *inter partes* review, the IPR is given to the Patent Trial and Appeal Board (“PTAB”), which must review all claims challenged by the third party.<sup>75</sup> This review may result in the cancelling of either all or none of the claims of the patent.<sup>76</sup>

The Director of the USPTO, at their discretion, has the power to add additional judges to the PTAB.<sup>77</sup> The director usually states that the addition of judges to the PTAB is to prevent results that break from the precedent of the Board.<sup>78</sup> The director even has the power to include himself in the IPR proceedings to vote in favor or against the cancelling of the patent claims at issue.<sup>79</sup>

IPR proceedings before the PTAB are very similar to an adversarial litigation proceeding.<sup>80</sup> Both parties enter into discovery, can depose witnesses, and have hearings before the typically three-judge panel.<sup>81</sup> However, unlike a patent case handled in the district courts, the PTAB only needs to find a preponderance of the evidence to invalidate a patent, while the district courts generally hold patents as presumptively valid except by clear and convincing evidence.<sup>82</sup>

### 3. *The Effect of Inter Partes Review*

IPR has drastically changed the way patents are handled after their issuance.<sup>83</sup> IPR has been beneficial to third parties challenging the validity of patents, having invalidated more than half the patents being challenged in the process.<sup>84</sup> The primary effect of the review has been the sudden shift in patent litigation efforts.<sup>85</sup>

74. *Id.* § 314(a).

75. *Id.* § 318(a); *see also* SAS Inst. Inc. v. Iancu, 138 S. Ct. 1348 (2018).

76. 35 U.S.C. § 318(b).

77. *Id.* § 6(d).

78. Brief for Petitioner at 10, *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. (2018).

79. 35 U.S.C. § 6(a).

80. *Oil States Energy Servs., LLC*, 138 S. Ct. at 1378.

81. 35 U.S.C. §§ 6(c), 316(a)(5)(A).

82. *Id.* § 316(e); *Microsoft Corp. v. i4i Ltd. P’ship*, 564 U.S. 91, 91 (2011).

83. Luke Ali Budiardjo, *The Effect of Arbitration Agreements on the American Invents Act’s Inter Partes Review Procedure*, 118 COLUM. L. REV. 83, 95 (2018). The USPTO has found that of the 2,399 final written decisions as of October 31, 2018, 1,540 final written decisions (64%) found all challenged claims unpatentable. TRIAL STATISTICS, U.S. PAT. & TRADEMARK OFF. (Oct. 2018), [https://www.uspto.gov/sites/default/files/documents/trial\\_statistics\\_oct\\_2018.pdf](https://www.uspto.gov/sites/default/files/documents/trial_statistics_oct_2018.pdf).

84. Budiardjo, *supra* note 83, at 95.

85. Ann E. Motl, *Inter Partes Review: Ensuring Effective Patent Litigation Through Estoppel*, 99 MINN. L. REV. 1975, 1978 (2015).

Patent holders are wary to bring patent suits partly due to a fear that their patents will be invalidated in a pre-trial IPR proceeding.<sup>86</sup> This is because IPR proceedings have reduced the value of issued patents because patents are more readily invalidated in these proceedings.<sup>87</sup> A patent that is brought into court against an alleged infringer can be diverted into an IPR proceeding that does not presume the validity of the patent<sup>88</sup> and may find the patent invalid.<sup>89</sup>

IPR has been found to reduce the effectiveness of patent trolls to extort money with low quality patents against larger companies.<sup>90</sup> However, there is little evidence that IPR proceedings have truly inhibited patent troll activities against small companies and tech startups.<sup>91</sup> In spite of IPR's failure to inhibit patent trolls, it has effectively been used to attack normal business operations, as seen in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*.<sup>92</sup>

### C. Oil States Case

*Oil States Energy Services, LLC v. Greene's Energy Group, LLC* ("Oil States") is a Supreme Court case that investigated the constitutionality of *inter partes* review.<sup>93</sup> Oil States Energy Services, LLC and Greene's Energy Group, LLC are both oil field service providers.<sup>94</sup> Additionally, both hold intellectual property rights regarding oil field apparatus and methods.<sup>95</sup>

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86. Paul Morinville, *How the America Invents Act Harmed Inventors*, IP WATCHDOG (Sept. 10, 2016), <http://www.ipwatchdog.com/2016/09/10/america-invents-act-harmed-inventors/id=72551/>.

87. *Id.*

88. Motl, *supra* note 85, at 1977–78.

89. Budiardjo, *supra* note 83.

90. Joe Mullin, *Supreme Court will weigh in on troll-killing patent-review process*, ARS TECHNICA (June 13, 2017, 8:10 AM) <https://arstechnica.com/tech-policy/2017/06/supreme-court-will-weigh-in-on-troll-killing-patent-review-process/>.

91. *Id.*

92. *Greene's Energy Grp., LLC v. Oil States Energy Servs., LLC*, 2015 WL 2089371, \*1 (PTAB May 1, 2015); *Oil States Energy Servs., LLC v. Greene's Energy Servs.*, 138 S. Ct. 1365, 1372 (2018).

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

94. *Id.*

95. The USPTO Full-Text and Image Database lists 27 patents to "Oil States Energy Services, L.L.C." and lists 3 patents to "Greene's Energy Group, LLC." <http://patft.uspto.gov/netahtml/PTO/search-bool.html> (select quick search and insert "Oil States Energy Service L.L.C." or "Greene's Energy Group, LLC" to see results).

### 1. Overview of the Case and Controversy

This case involved an IPR proceeding of Patent 6,179,053 (the “’053 patent”).<sup>96</sup> The ’053 patent relates to apparatus and methods for locking oil field equipment in an operative position and securing the oil field equipment to a wellhead.<sup>97</sup> In response to Oil States suing Greene’s Energy Services, Greene’s petitioned the Director of the USPTO to initiate an IPR proceeding on Claims 1 and 22 of Oil State’s patent.<sup>98</sup> The USPTO found a sufficient reasonable likelihood of success to institute IPR proceedings.<sup>99</sup> After the director approved the IPR proceedings, both the District Court proceedings and the IPR commenced simultaneously.<sup>100</sup>

Both the District Court and the PTAB evaluated the validity of the patent claims.<sup>101</sup> First, the District Court issued a claim construction order that construed the claims such that the ’053 patent was valid over the prior art.<sup>102</sup> This order was given to the PTAB before the board reached their final decision.<sup>103</sup> In spite of the District Court order, the PTAB conducted their own claim construction applying the broadest reasonable interpretation standard.<sup>104</sup> After evaluating the claims without regard for the District Court’s analysis, the PTAB ultimately concluded Claims 1 and 22 were anticipated by Canadian Patent Application 2,195,118.<sup>105</sup>

### 2. The Court’s Oil States Decision

In a 7–2 decision, the Supreme Court found that IPR proceedings were constitutional.<sup>106</sup> The Court found that patents are public rights, namely public franchises, and accordingly were subject to review by something other than an Article III court.<sup>107</sup> In accepting this view, the Court rejected the notion that patents are private property, but

96. See generally Lockdown Mechanism for Well Tools Requiring Fixed-Point Packoff, U.S. Patent No. 6,179,053 (filed Aug. 12, 1999) (issued Jan. 30, 2001); *Oil States Energy Servs., LLC*, 138 S. Ct. at 1372.

97. ’053 Patent, at 4.

98. *Greene’s Energy Grp., LLC, v. Oil States Energy Servs., LLC*, 2015 WL 2089371, \*1 (PTAB May 1, 2015); see generally ’053 Patent.

99. *Greene’s Energy Grp., LLC*, 2015 WL 2089371 at \*1.

100. *Oil States Energy Servs., LLC v. Greene’s Energy Grp.*, 138 S. Ct. 1365, 1372 (2018).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Greene’s Energy Grp., LLC*, 2015 WL 2089371 at \*4.

105. *Id.* at \*9–13.

106. *Oil States Energy Servs., LLC*, 138 S. Ct. at 1379.

107. *Id.* at 1373.

instead a public franchise.<sup>108</sup> The Court's primary contention is that the statutes relating to patents make patents property subject to the provisions of the statute.<sup>109</sup>

The public rights doctrine was relied on to permit *inter partes* review. Some matters that relate between government and the people fall under the public rights doctrine.<sup>110</sup> Typically, these public rights relate to the functions that are specific to the executive or legislative branches.<sup>111</sup> Additionally, the Court found public rights that can be decided by the executive or legislative branches are those that have previously been exclusively decided by those branches.<sup>112</sup> Both parties conceded that the granting of a patent is a public right.<sup>113</sup>

The Court analyzed the public rights granted in the issuance of a patent.<sup>114</sup> The Court found that, historically, it was possible for a patent to be revoked by an executive agency, namely the English Privy Council.<sup>115</sup> The Privy Council was a council of advisors to the English Crown in eighteenth century England.<sup>116</sup> This council had the authority to revoke a patent or dismiss a petition to revoke a patent.<sup>117</sup> As a result, the Court found historical executive branch reviews of the validity of patents.<sup>118</sup>

Additionally, the Court further relied on statutory provisions enacted in the America Invents Act.<sup>119</sup> The Court acknowledged that patents are given the status of personal property in the Act, but additionally pointed to statutory language that requires such property be subject to the provisions of Title 35 of the United States Code.<sup>120</sup> Based on the statutory provision, the Court found its view that patents are subject to executive branch review was further substantiated.<sup>121</sup> The Court's logic was rather straightforward. Patents are the enactment of a public right, created by statute.<sup>122</sup> The public right, which

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108. *Id.* at 1375.

109. *Id.* at 1375–76. In finding that patents are property subject to the provisions of the statute, they overlook the statutory provision, 35 U.S.C. § 261, that “[s]ubject to the provisions of this title, patents shall have the attributes of personal property.” 35 U.S.C. § 261.

110. *Oil States Energy Servs., LLC*, 138 S. Ct. at 1373.

111. *Id.*

112. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67–68 (1982).

113. *Oil States Energy Servs., LLC*, 138 S. Ct. at 1373.

114. *Id.* at 1373–74.

115. *Id.* at 1377.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Oil States Energy Servs., LLC*, 138 S. Ct. at 1375.

120. 35 U.S.C. § 261; *Oil States Energy Servs., LLC*, 138 S. Ct. 1365, 1375.

121. *Oil States Energy Servs., LLC*, 138 S. Ct. at 1375 (citing 35 U.S.C. §§ 311–19).

122. *Id.* at 1374.

historically was decided by a council representing the executive branch, now again is decided by a board created by the executive branch through the decision of the legislative branch.<sup>123</sup> Accordingly, the public right, which by its nature may be reviewed by an executive branch board, and currently is reviewable by an executive branch board as established by statute, is appropriately approved or rejected in review by a non-Article III court.<sup>124</sup>

### 3. *The Oil States Dissenting Opinion*

The dissent, written by Justice Neil Gorsuch and joined by Chief Justice John Roberts, rejected the Court's determination of patents as a public right, subject to executive branch review, in light of their historical understanding of patents being viewed as private property.<sup>125</sup> The dissent further argued that IPR proceedings are not an acceptable substitute to an independent judiciary.<sup>126</sup> The dissent urged that patents had historically been viewed as private property and, as such, should be granted the benefit of an impartial judge reviewing the case.<sup>127</sup>

To support his dissent, Justice Gorsuch first explains on his view of the impropriety of an executive agency handling patentability questions after the issuance of a patent.<sup>128</sup> Justice Gorsuch raised large concerns that the IPR proceedings prevent an impartial body, such as an impartial Judge, from reviewing the validity of a patent.<sup>129</sup> The dissent acknowledged that an IPR proceeding may be more efficient than litigating the matter in federal court, but his objection is that expediency does not give the government the right to circumvent individual property rights.<sup>130</sup>

Justice Gorsuch pressed the point on the independent judiciary reviewing patent cases because his historical understanding of patents was different from the rest of the court.<sup>131</sup> His understanding was that patents no longer were the anticompetitive monopolies granted by the Crown, but were now a "procompetitive means to secure to individuals the fruits of their labor and ingenuity[.]"<sup>132</sup> Accordingly, Justice

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123. *Id.* at 1377.

124. *Id.* at 1374.

125. *Id.* at 1384 (Gorsuch, J., dissenting).

126. *Id.* at 1380 (Gorsuch, J., dissenting).

127. *Oil States Energy Servs., LLC*, 138 S. Ct. at 1385–86 (Gorsuch, J., dissenting).

128. *Id.* at 1380 (Gorsuch, J., dissenting).

129. *Id.* at 1381 (Gorsuch, J., dissenting).

130. *Id.* at 1380–86 (Gorsuch, J., dissenting).

131. *Id.* at 1381.

132. *Id.* at 1382 (Gorsuch, J., dissenting).

Gorsuch argues that the structure of the Privy Council, relied on by the Court, was no longer the accepted and typical forum for handling patent disputes at the time the U.S. was born as a country.<sup>133</sup> Rather, Justice Gorsuch finds that the last three cases were brought to the Privy Council as a last resort forum.<sup>134</sup>

Justice Gorsuch also reviews the historical status of patents in American law. First, the dissent acknowledges the differences between the English system and the U.S. system of patent law.<sup>135</sup> The U.S. system grants patents as a matter of right to those who have ingeniously invented something novel.<sup>136</sup> Contrariwise, in the English system, the Crown granted patents as a matter of grace and favor was based on receiving patents from the Crown as a matter of grace and favor.<sup>137</sup> The entire patent system is founded on the idea that patents improve the availability of knowledge.<sup>138</sup> The U.S. courts, interpreting both the Constitution and the statutes in force at the time, affirmed that patents were property and a right of the inventor.<sup>139</sup> Justice Gorsuch further bases his view of strong, court-reviewed patents on a historical case that rejected an executive review and revocation of a patent.<sup>140</sup> In 1898, the Supreme Court found that (1) patents are the property of the patentee; (2) patents deserve the same protection as other property; and (3) after a patent has been issued, no government officer can revoke or cancel a patent.<sup>141</sup> Such conclusions by the 1898 Court and Justice Gorsuch's dissent stand in contradiction to the legal conclusions presented by the Court in this case.

### III. ANALYSIS

#### A. *What Oil States Got Wrong*

*Oil States* was wrongly decided because the Court failed to consider the legitimate property interest of patent owners and exacerbated the danger that patent trolls pose. The Supreme Court, in recent years, has not looked favorably on patent rights.<sup>142</sup>

133. *Oil States Energy Servs., LLC*, 138 S. Ct. at 1383 (Gorsuch, J., dissenting).

134. *Id.* at 1383 (Gorsuch, J., dissenting).

135. *Id.*

136. *Id.* at 1384 (Gorsuch, J., dissenting).

137. *Id.* (citing *James v. Campbell*, 104 U.S. 356, 358 (1881)).

138. *Id.* at 1383 (Gorsuch, J., dissenting).

139. *Oil States Energy Servs., LLC*, 138 S. Ct. at 1384–85 (Gorsuch, J., dissenting).

140. *Id.* at 1381 (Gorsuch, J., dissenting).

141. *Id.* at 1384 (Gorsuch, J., dissenting) (citing *McCormick Harvesting Mach. Co. v. Aultman & Co.*, 169 U.S. 606, 608–09 (1898)).

142. See generally *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) (finding that an injunction should not automatically issue if there is a finding of patent infringement); *KSR Int'l*

### 1. *The Majority Overlooked Important Case Law*

In coming to its conclusion, the Court found patents fall within the legal framework of public franchises and, as a result, are subject to governmental takings without court review.<sup>143</sup> The Court relied on *Seymour v. Osbourne*; in that case, the Court found that patents are “entitled to protection as any other property, consisting of a franchise, during the term for which the franchise or exclusive right is granted.”<sup>144</sup> As a result, because the Supreme Court has historically found patents to be franchises—a fact neither party contested—the Court permitted the executive branch to invalidate patents after issuance.<sup>145</sup> However, this understanding of public franchises is contrary to previous foundational Supreme Court cases on U.S. public franchise law.

In *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, the Supreme Court decided whether property rights of the owners of the public franchise for the Charles River Bridge were violated.<sup>146</sup> The issue in this case was whether the proprietors were divested of their property rights by the Massachusetts legislature.<sup>147</sup> Beginning in 1650, the Massachusetts legislature granted to Harvard College the right to run a ferry in the surrounding region.<sup>148</sup> As the region developed and more people lived and worked in both cities on either side of the Charles River, the legislature granted a franchise for the purpose of erecting a bridge between the towns.<sup>149</sup> The franchise required the proprietors to collect a toll, keep the bridge open every day, and provide a sum of two hundred pounds to Harvard College to compensate the school for no longer running a ferry service.<sup>150</sup> The franchise was to run for forty years; however, this was later extended to seventy years.<sup>151</sup>

As the two towns developed, the legislature granted a new franchise for the creation of a new bridge, the Warren Bridge.<sup>152</sup> This second

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Co. v. Teleflex Inc., 550 U.S. 398 (2007) (The Court formulated an updated teaching-suggestion-motivation obviousness analysis.); *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014) (The Court’s analysis of abstract ideas resulted in an ambiguous “inventive concept” standard.).

143. *Oil States Energy Servs., LLC*, 138 S. Ct. at 1373.

144. *Seymour v. Osbourne*, 78 U.S. 516, 533 (1870).

145. *Oil States Energy Servs., LLC*, 138 S. Ct. at 1375.

146. *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 548–49 (1837).

147. *Id.* at 537–38.

148. *Id.* at 536.

149. *Id.*

150. *Id.* at 537.

151. *Id.* at 536–37.

152. *Proprietors of Charles River Bridge*, 36 U.S. at 537.

bridge was also to collect tolls, but for a shorter time than the Charles River Bridge.<sup>153</sup> Accordingly, the Warren Bridge reduced the profits of the Charles River Bridge, and when the Warren Bridge no longer collected any tolls, the Charles River Bridge received even fewer tolls.<sup>154</sup> As a result, the proprietors of the Charles River Bridge sued, alleging their seventy-year franchise was inappropriately curtailed.<sup>155</sup>

The Court acknowledged this was “of the gravest character” and the Court gave the questions presented “the most anxious and deliberate consideration.”<sup>156</sup> The Court had to determine if the rights contained in the charter to the corporation owning and operating the Charles River Bridge granted them the exclusive right to owning and operating a bridge across the Charles River.<sup>157</sup> The Court found only the rights enumerated in the charter could be defended.<sup>158</sup> Because the proprietors of the Charles River Bridge had lost none of their rights in running their bridge or exacting tolls of those crossing the bridge, the Court held none of their property rights were infringed upon by the Massachusetts legislature.<sup>159</sup>

The narrow construction of the franchise was so construed based on a historical understanding that ambiguity in franchises between the government to individuals at the expense of the public need to be construed for the benefit of the public.<sup>160</sup> Here, the franchise needed to be construed narrowly to allow the legislature to provide for the public happiness and convenience in the construction of a second bridge, which better accommodated the growing population.<sup>161</sup> But the Court’s decision was made as a balance. The Court acknowledged that “the rights of private property are sacredly guarded,” yet the “community also [has] rights, and that the happiness and well-being of every citizen depends on their faithful preservation.”<sup>162</sup>

This presumed balance implies a legal fiction that the Court in *Oil States* did not acknowledge, namely that the franchise is a right of private property that is to be sacredly guarded.<sup>163</sup> The Court regularly affirmed the property interest the proprietors held in the state granted

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153. *Id.*

154. *Id.* at 549–64.

155. *Id.* at 537.

156. *Id.* at 536.

157. *Id.*

158. *Proprietors of Charles River Bridge*, 36 U.S. at 544.

159. *Id.* at 549.

160. *Id.* at 548.

161. *Id.*

162. *Id.*

163. *Id.*; cf. *Oil States Energy Servs., LLC v. Greene’s Energy Grp.*, 138 S. Ct. 1365, 1374–75 (2018).

franchise of the bridge.<sup>164</sup> Justice McLean, writing in concurrence with the decision, stated in unequivocal terms that “[t]he right granted to the Charles River bridge company is . . . exclusive . . . [and] it would scarcely be contended by any one, that the legislature could, without compensation, grant to another company the whole or any part of it.”<sup>165</sup>

This franchise grant, considered a private property right by the *Proprietors of Charles River Bridge* Court, would have required compensation if the government removed any part of the right.<sup>166</sup> Following that logic, other franchises, including patents, would similarly require such compensation or private property protections. Additionally, this reinterprets the language of *Seymour v. Osborne*, which stated, “[i]nventions secured by letters patent are property in the holder of the patent, and as such are as much entitled to protection as any other property, consisting of a franchise, during the term for which the franchise or the exclusive right is granted.”<sup>167</sup> Both the *Seymour* Court and the *Proprietors of Charles River Bridge* Court held property rights in franchises in high esteem, but the *Oil States* Court did not find it fit to continue such broad protections for modern day patent holders.<sup>168</sup>

### B. Protecting Patents as Private Property

If the Supreme Court were more concerned with upholding strong property interests in patents, *Oil States* would have been decided properly. It was improper for the Court to sharply curtail the property interests of all legitimate patent holders. First, the historical understanding of patents affirms a strong private property interest in patents.<sup>169</sup> Additionally, natural law understandings of property also continue to affirm the private property interests patent owners hold.<sup>170</sup>

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164. *Proprietors of Charles River Bridge*, 36 U.S. at 564.

165. *Id.* at 560.

166. *Id.* at 567.

167. *Seymour v. Osborne*, 78 U.S. 516, 533 (1870).

168. *Id.* at 540 (“Persons . . . who desire to obtain an exclusive property [in their inventions], may make application in writing to the Commissioner of Patents[.]” (emphasis added)); *Proprietors of Charles River Bridge*, 36 U.S. at 564.

169. Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. REV. 689, 700–11 (2007).

170. See *supra* Part II.A.

### 1. *Patent's Historical Positive Connotation*

Patents have been recognized since the founding of the United States, and are even given special mention in the U.S. Constitution.<sup>171</sup> A system of protecting patents was established for the sake of promoting scientific and industrial advancement in the U.S.<sup>172</sup> The only right expressly mentioned in the Constitution was the right to inventors and authors for the sake of scientific and cultural progress.<sup>173</sup>

While patent rights are those of a public franchise, they are unique, unlike public franchises for the creation and operation of bridges and public markets.<sup>174</sup> Public franchises are not monopolies because they do not take from the public that which was previously available.<sup>175</sup>

### 2. *The Labor Theory Protects an Inventor's Labor*

Patents do not always require an extensive amount of labor to conceive, and thereafter, protect.<sup>176</sup> However, other patents may take years to conceive of and reduce to practice.<sup>177</sup> Regardless of the amount of labor expended in conceiving and protecting an invention, the inventor has expended their labor in inventing. This labor is worth protecting in accordance with the labor theory of property ownership.<sup>178</sup>

The labor theory requires a person to take from the common, mingle their own labor, and as a result, create something that is the property of the laborer.<sup>179</sup> The basis for finding property ownership of the labored-for product relies on the understanding that the work of the

171. Mossoff, *supra* note 169, at 700–11 (evaluating American patent property jurisprudence in the nineteenth century establishing patents as private property).

172. “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

173. U.S. CONST. art. I, § 8, cl. 8.

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

175. *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 186 (1933) (“[A] patent is not, accurately speaking, a monopoly . . . An inventor deprives the public of nothing which it enjoyed before his discovery, but gives something of value to the community by adding to the sum of human knowledge.”)

176. *The Inventor of Saccharine*, 55 SCI. AM. 31, 36 (1886) (describing Dr. Constantine Fahlberg's accidental discovery of saccharine, a sugar substitute, later patented (United States Reissued Letters Patent 10,667 (issued Dec. 1, 1885))).

177. *Overview of the Wright Brothers Invention Process*, NAT'L AERONAUTICS & SPACE ADMIN., <https://wright.nasa.gov/overview.htm> (last updated May 10, 2021, 2:09 PM) (The Wright brothers took four years to reduce their first airplane to practice.).

178. See *supra* text accompanying notes 13–16.

179. See *supra* text accompanying notes 13–16.

laborer is his own property as well.<sup>180</sup> This additionally applies to the intellectual labors of any person, such as authorship or invention.<sup>181</sup>

As applied to patents, the individual is an inventor. The inventor has taken from the common apparatus, methods, and science and added their own intellectual labor to conceive of a novel and nonobvious invention.<sup>182</sup> The invention is the creative and ingenious creation of the inventor.<sup>183</sup> This creative work is, in accordance with the labor theory of property, the property of the inventor.<sup>184</sup>

However, in addition to inventing the new apparatus or method, the inventor, in applying for a patent, has also labored in obtaining the patent. In exchange for sufficiently describing the inventive apparatus and corresponding operation or method, the patentee can obtain the right to exclude others from the manufacture, sale, or use of the same.<sup>185</sup> In this manner, the patentee has entered into a contract with the public, mediated through the federal government.<sup>186</sup>

There is no guarantee in this contract that the patentee or other patent holder be able to make money or profit from the contract of exclusivity.<sup>187</sup> It is well accepted that this contract only grants the right to exclude others from the invention.<sup>188</sup> Society has found this as an acceptable trade between the public and the inventor. In exchange for obtaining the ingenuity and labor of the inventor as described in the patent specification, the public grants the inventor control over the manufacture, original sale, and use of his inventive work.<sup>189</sup>

Every honest applicant for a U.S. patent labored to invent something novel.<sup>190</sup> The *Oil States* Court is seemingly indifferent to the labor of inventing and obtaining a patent. The Court compares the patent franchises to the franchises permitting the erection of a toll bridge, building railroads, or constructing telegraph lines.<sup>191</sup> As a re-

180. *See supra* text accompanying notes 13–16.

181. *See supra* text accompanying notes 13–16.

182. Mossoff, *supra* note 169, at 705–07 (quoting *McKeever v. United States*, 14 Ct. Cl. 396, 420–21 (1878)).

183. *Brooks v. Bicknell*, 4 F. Cas. 247, 251 (1843) (finding, “a man should be secured in the fruits of his ingenuity and labor . . . And it seems difficult to draw a distinction between the fruits of mental and physical labor”).

184. *See supra* text accompanying notes 13–16.

185. 35 U.S.C. §§ 112, 271.

186. *Oil States Energy Servs., LLC v. Greene’s Energy Grp.*, 138 S. Ct. 1365, 1382 (2018) (Gorsuch, J., dissenting).

187. Gene Quinn, *10 Critical Pieces of Advice for Inventors*, IP WATCHDOG (Dec. 30, 2017) <http://www.ipwatchdog.com/2017/12/30/10-critical-pieces-advice-inventors/id=91717/>.

188. 35 U.S.C. § 271.

189. *Oil States Energy Servs., LLC*, 138 S. Ct. at 1382 (Gorsuch, J., dissenting).

190. 37 C.F.R. § 1.56 (2012).

191. *Oil States Energy Servs., LLC*, 138 S. Ct. at 1365, 1375 (2018).

sult, the Court seemingly spurns the intellectual labor of the inventor disclosed to the public for their benefit by refusing to protect the inventor's labored-for property interest.

### 3. *The Occupation Theory Protects a Patent Owner's Reliance*

There are numerous patent holders that do not use their patents to protect any apparatus or method.<sup>192</sup> Some patent holders find no market for the patented invention,<sup>193</sup> while others use patents to build up a protective portfolio;<sup>194</sup> yet still, others retain patents for the sole sake of suing possible patent infringers.<sup>195</sup> These patent holders do not occupy the invention, merely the patent. The intellectual property—the foundation for the patent—is occupied when the patent holder holds the invention and sells it in the market.

The interests of the patent holder that occupies the invention are the interests the patent system was designed to protect.<sup>196</sup> It is the patent holder who advances science and benefits the public. It is sometimes said that patents grant a monopoly to the patent holder, but the occupant of intellectual property exclusively possesses that which the public previously did not have.<sup>197</sup> As a result, the occupant of intellectual property does not possess a monopoly odious to the public, but rather benefits the public by providing a novel invention.<sup>198</sup> In contrast, the patent holder that merely occupies the patent without putting the invention to market has failed to benefit the public, and thus inhibited the advancement of science and technology, creating an odious monopoly of the invention.

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192. Tamara Monosoff, *The Top 6 Mistakes Inventors Make*, ENTREPRENEUR (Apr. 10, 2006) <https://www.entrepreneur.com/article/159560> (“[O]nly 2 to 3 percent of all patented items ever make it to the marketplace!”). Some patents that have not succeeded in becoming commercialized include the “Wind Harnessing Bike” (U.S. Patent 6,932,368) that places a sailboat sail on a bike; the “kissing shield” (U.S. Patent 5,727,565) that uses a frame and plastic film to create a barrier between people when kissing; the related “Kissing shield game and method of use thereof” (U.S. Patent 6,789,799) that teaches “safe affection” using the previously mentioned kissing shield, and the “Garment having a buttocks cleavage revealing feature” (U.S. Patent 6,473,908) that includes a see-through fabric just below the pant’s waist to reveal buttocks cleavage.

193. Monosoff, *supra* note 192.

194. *Defensive Patent*, TECHOPEDIA, <https://www.techopedia.com/definition/28565/defensive-patent> (last viewed July 6, 2021).

195. *Id.*

196. *McKeever v. United States*, 14 Ct. Cl. 396, 420 (1878) (“What immediate reasons operated upon the framers of the Constitution seem to be unknown, but . . . they had a clear apprehension of the English law, on the one hand, and a just conception, on the other, of . . . ‘a natural right to the fruits of mental labor.’”).

197. *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 186 (1933).

198. *Id.*

In the age of *Oil States*, where a patent is merely a public franchise that can be revoked by the executive branch, reformulating an understanding of patent rights for patent holders that have brought their inventions to market would be better able to protect the interests of the patent holders. Differentiation of the occupation of the patent and the occupation of the intellectual property can help protect the patent holder's interest in the invention.

The *Oil States* Court found that the timing of the IPR after the issuance of the patent, "does not make a difference here."<sup>199</sup> However, the timing is of importance because after the patent has been issued, the patent holder can rely on the patent and occupy the intellectual property. After the patent has been issued and the invention is put to market, the patent holder has communicated their occupation of the property.<sup>200</sup> Evidently, the Court is not nearly as concerned as it used to be with the trampling of the fence that communicates to the world who owns the property.<sup>201</sup>

#### IV. IMPACT

##### A. *Overturning Oil States*

In response to the *Oil States* decision sharply curtailing the property rights of patent holders, the understanding of patents needs to be reshaped. Congress should amend patent laws to better protect the cultural and personal interests in advancing the progress of useful arts. In particular, the law should be redrafted to grant better protections for patent owners.

First, society is benefited by a strong patent property interest in part because the primary goal of the patent system is the advancement of science.<sup>202</sup> Where a person or corporation is more likely to make a return on investment in research and development, they are more likely to invest in research and development.<sup>203</sup> However, unlike trade secrets that are potentially retained from the public for an indefinite

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

200. *Supra* notes 22–32, and accompanying text.

201. *Supra* notes 22–32, and accompanying text.

202. *Dubilier Condenser Corp.*, 289 U.S. at 186 ("An inventor . . . gives something of value to the community by adding to the sum of human knowledge."), Gene Quinn, *The theory of patents and why strong patents benefit consumers*, IP WATCHDOG (Nov. 24, 2015), <http://www.ipwatchdog.com/2015/11/24/theory-patents-strong-patents-benefit-consumers/id=61341/>.

203. Stephen Yelderman, *Improving Patent Quality with Applicant Incentives*, 28 HARV. J.L. & TECH. 77, 129 (2014) (finding some companies will invest in patents simply for a lottery approach to patent protection and infringement).

period of time, the information necessary to use a patent is provided to the public before any patent protection can be granted.<sup>204</sup>

Second, the personal interests would be retained by the inventor or corporation that invested in creating something new. In this way, the entity investing into the patent can rely on the United States to enforce US patent laws and protect the entity's patent. One of the primary benefits of an advanced legal system is the dependability and reliability of the laws and protections that are afforded.<sup>205</sup> Accordingly, a patent system that is capricious in protecting intellectual property is antithetical to the system of laws and government we have established.

A part of the purpose in granting to inventors the exclusive rights to their inventions was to "insure domestic Tranquility, . . . promote the general welfare, and secure the Blessings of Liberty."<sup>206</sup> In establishing these provisions of the U.S. Constitution, they should not be disregarded in situations where patent rights are so uncertain that individuals choose to avoid seeking patent protections.

### 1. *Protect Patent Owner Reliance*

Most government laws and regulations are enacted to the benefit of at least one group at the expense of at least one other group. Here, the IPR laws are enacted for the benefit of potential patent troll victims.<sup>207</sup> However, patent owners relying on their intellectual property are also being harmed by the IPR laws. For example, Oil States Energy Services, LLC lost a patent in an IPR proceeding, under a preponderance of the evidence standard, while a district court found the patent valid.

Legislation aimed at disarming patent trolls should not then be used as an aggressive tool to attack patent owners who are occupying their intellectual property. As a result, those patent holders should be protected from IPR. This is not to say that entities that occupy their intellectual property cannot have their patents invalidated. Rather, patent owners that occupy their intellectual property should have their property rights adjudicated in Article III courts that hold a higher standard of review than the PTAB.<sup>208</sup>

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204. 18 U.S.C. § 1839; 35 U.S.C. § 112.

205. Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 9 (2012).

206. U.S. CONST. pmbl.

207. Mullin, *supra* note 90.

208. Elizabeth M. Crompton, *Differing Burdens of Proof in the PTAB and District Courts can Allow Patent Challengers a Second Bite at the Apple*, HAYNES BOONE (June 13, 2017), <http://www.haynesboone.com/publications/differing-burdens-of-proof-in-the-ptab-and-district-courts>.

The application of IPR needs to be retailored to no longer be applicable to patent holders that occupy their intellectual property. The change to the patent law can be simple and focused. As a defense to a petition for IPR, a patent holder could assert the patent is (1) currently in use by the patent owner and (2) the intellectual property protected by the patent at issue is a relied-upon property interest.<sup>209</sup> Further, for a patent holder to show they are occupying their intellectual property, they would only need to show they are still using the patent in the stream of commerce.

Unlike previous patent use requirements,<sup>210</sup> the patent holder can still retain the rights to the patent, even if the invention protected by the patent is not in use in commerce. But the patent holder not using the intellectual property would—in exchange for not advancing the progress of useful arts—be vulnerable to the review standards of the IPR proceedings.

## 2. *Watching Out for Legitimate Non-Practicing Entities*

Not all non-practicing entities are misusing the patent system in a predatory manner, and there must be protections for legitimate non-practicing entities. One example of a legitimate non-practicing entity would be a university that has patent rights but is not involved in the manufacture or use of the intellectual property. Furthermore, universities would not be seeking to use the patent for the financial gain as patent trolls do. However, unlike patent trolls, universities often license their patents to corporations that can effectively use the intellectual property, permitting others to manufacture or use the intellectual property.

Numerous universities hold patents, but choose to not practice the inventions.<sup>211</sup> Instead, the universities choose to license the patents to corporations or partner with the inventor in the formation of a new business.<sup>212</sup> And while the university holds the patent, the new business is granted, in some circumstances, an exclusive license to use the patent in exchange for a royalty.<sup>213</sup> These patents (and, by extension, the licenses), having their genesis in the research of university professors, graduate students, and undergraduate students, provide some

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209. 35 U.S.C. § 313.

210. Act of July 13, 1832, ch. 203, 4 Stat. 577 (1832) (requiring foreign applicant to introduce the invention or improvement to public use within one year of the issuance of a patent).

211. Joseph Allen, *Does University Patent Licensing Pay Off?*, IP WATCHDOG (Jan. 27, 2014), <http://www.ipwatchdog.com/2014/01/27/does-university-patent-licensing-pay-off/id=47655/>.

212. *Id.*

213. *Id.*; *Improving the health, welfare and prosperity of the global community*, YALE OFF. OF COOP. RES. (Feb. 1998), <https://ocr.yale.edu/faculty/policies/yale-university-patent-policy>.

schools millions of dollars in revenue.<sup>214</sup> This revenue is useful to the schools for the sake of funding additional research or filling gaps in research funding when grants are unavailable.<sup>215</sup> Naturally, patent licensing revenue used to fund additional research promotes the progress of science and useful arts, because that revenue can be invested in new lab equipment, research grants, and prototype development, which are among the many financial needs university research departments may have.<sup>216</sup>

Legitimate non-practicing entities would not be without protections from IPR under a scheme that requires the invention to be in use as a defense to IPR proceedings. In the event a petition for IPR is filed against a patent owned by a legitimate non-practicing entity, evidence that the invention is being used in commerce can be filed by the non-practicing entity and/or a licensee of the patent.

### 3. *Speak Softly With the Public, Carry a Big Stick Against the Trolls*

With respect to those entities that do act as patent trolls, little protection needs to be offered to them. IPR was created to minimize the threat patent trolls pose to honest businesses and individuals who are trying to make a living.<sup>217</sup> While IPR is not a system solely created to attack patent trolls, *inter partes* reviews have been largely effective at invalidating patent claims.<sup>218</sup>

With patent holders that occupy their intellectual property relying on their patents to be protected from the unfavorable IPR litigation, the efforts of the PTAB can be more focused only on those patents that are being litigated without any current commercial use or value. Although IPR has been unfavorable for patent holders, there is no guarantee that the patents held by patent trolls will be invalidated.<sup>219</sup> However, patent trolls would pose less danger to innocent members of the public if IPR proceedings are limited to eviscerating the rights patent trolls have in their unoccupied patents.

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214. Sandra Yan, *Royalties from research patents on the rise*, BROWN DAILY HERALD (Mar. 4, 2014), <http://www.browndailyherald.com/2014/03/04/royalties-research-patents-rise/>.

215. *Id.*; YALE OFFICE OF COOPERATIVE RESEARCH, *supra* note 213.

216. Yan, *supra* note 214; YALE OFFICE OF COOPERATIVE RESEARCH, *supra* note 213 (Professors now appreciate the patenting process because the licensing revenues make it easier to get future research grants; Yale's Patent Policy specifies that the University's share of the royalties will be used in support of research.).

217. Mullin, *supra* note 90.

218. See UNITED STATES PATENT AND TRADEMARK OFFICE, *supra* note 83.

219. *Id.*

*B. Restoring Patents as Private Property*

Patents (when the intellectual property is occupied) viewed as private property would be a benefit to the inventive community and to society as a whole. First, this would, at least partially, restore the view of patents as private property. Second, patent holders occupying their intellectual property would have a more secure expectation in their property rights. Lastly, IPR would be more focused, especially against patents that were not being used for the benefit of the public.

The improvement to the patent system is for the sake of the inventor, who, “[a]fter much hard work and no little investment [they] devise something [they] think truly novel. Then [they] endure the further cost and effort of applying for a patent . . . The patent affords [them] exclusive rights to the fruits of [their] labor for two decades.”<sup>220</sup> And, under a view of patents as private property, because the intellectual property was implemented, the validity of the patent will be determined in open court by an impartial judge rather than “a political appointee and his administrative agents[.]”<sup>221</sup>

*1. Restoring the Value of Patents and Stabilizing U.S. IP*

The restoration of protecting the intellectual property of patents as private property with strong protections against revocation would have positive effects for patent holders and the public. Studies have shown that strong intellectual property rights in developed countries encourages economic growth and spurs innovation.<sup>222</sup> Given that the United States is a developed country, strengthening intellectual property rights could benefit American innovation and strengthen the economy.

Strong and broad intellectual property rights justify major research and development expenditures by companies and corporations.<sup>223</sup> Trillions of dollars every year are expended for the sake of obtaining innovative technologies that protect and further establish the company’s position in its respective economic market.<sup>224</sup> By securing those patents that corporations rely on for competitive market advantages,

220. *Oil States Energy Servs., LLC v. Greene’s Energy Grp.*, 138 S. Ct. 1365, 1380 (2018) (Gorsuch, J., dissenting).

221. *Id.*

222. Rod Falvey & Neil Foster-McGregor, *The Role of Intellectual Property Rights in Technology Transfer and Economic Growth: Theory and Evidence*, RESEARCHGATE, Jan. 2006, at, 45.

223. Yelderman, *supra* note 203, at 131.

224. *See generally* JOHN F. SARGENT JR., CONG. RES. SERV., GLOBAL RESEARCH AND DEVELOPMENT EXPENDITURES: FACT SHEET (2018).

corporations will continue to invest in obtaining valuable intellectual property.

Additionally, many start-ups rely on the value of their intellectual property and need patents to establish a market position.<sup>225</sup> This is particularly helpful in markets that are filled with several larger corporations where there is a risk of patent infringement.<sup>226</sup> Although start-ups often do not have the capital to defend their patents in court, the risks of patent infringement are usually too great, even for large corporations.<sup>227</sup> These corporations will avoid the risk of losing such a lawsuit if they believe the lawsuit could occur.<sup>228</sup>

## 2. *Reducing the Threat of Patent Trolls*

By shifting the threat of IPR primarily to those entities that use patents as a threat, the system patent trolls operate in becomes toxic to them. When used primarily against those that parasitically use the patent system, the lower standard of review patents receive in IPR proceedings is justified. If inventions protected by patents need to be used in commerce to be protected from IPR proceedings, three responses from patent trolls are likely.

First, patent trolls will be less likely to extort the money of businesses and individuals. An *inter partes* review program that is more directed towards inappropriate patent troll activities will discourage the use of the patent system as a tool for extorting money. Second, patents that are used to attack business and individuals will be more vulnerable to invalidation from IPR proceedings. The narrow focus of the IPR proceedings will be able to consider the weak merits of the patents retained by patent trolls. Third, and least likely, patent trolls will actually work on implementing the patents they intend to leverage against businesses and individuals. In this case, although the patent troll's efforts would likely be trivial and the benefit to the public minimal, the patent trolls would be forced to find a commercial option for the intellectual property contained in the patent.

## V. CONCLUSION

Congress has given inventors the exclusive right to their inventions for nearly the entire history of this nation. Occasionally, Congress has

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225. Michael J. Kasdan, *What Start-ups Need to Know About Intellectual Property*, NAT'L L. REV. (Sept. 25, 2018), <https://www.natlawreview.com/article/what-start-ups-need-to-know-about-intellectual-property>.

226. *Id.*

227. *Id.*

228. Quinn, *supra* note 202.

found fit to amend the patent laws. In 2012, Congress amended the patent laws to include a new post-grant review of patent validity, known as *inter partes* review (or IPR). While *inter partes* review has been well-intentioned, the process has also detrimentally effected patent holders. Some patent holders have lost patents that might have been upheld if the case was reviewed in federal court.

In 2015, a patent dispute arose between Greene's Energy Group and Oil States Energy Services. Although the District Court held the patent claims were valid over the prior art, the PTAB found the claims invalid. Oil States Energy Services appealed the Board decision up to the Supreme Court, which held that IPR was a valid executive power to invalidate a patent. The Supreme Court held as such because they found very narrow property protections for patents as franchises.

While patents historically have been considered franchises, this has not prevented the Supreme Court from historically granting substantial property protections for patent holders. However, because the Supreme Court will not overrule their decision, Congress should acknowledge the property interests patent holders have in their intellectual property.

Congress should amend the patent laws to better respect the property interest patent holders have in their intellectual property. Congress can amend the patent laws to issue patents on the historical labor theory of property rights. Congress can further grant protections to patent holders who occupy their intellectual property by placing patented inventions into the stream of commerce. The further protections would not subject such patent holders to the procedures of *inter partes* review.

Requiring patent holders to occupy their intellectual property is beneficial for several reasons. First, this advances the primary purpose of the U.S. patent system, the advancement of technology and useful arts. Second, the special protections to the patent holders that occupy their intellectual property protects their reliance interest in the patents they use. This special protection would restore stability to the reliance the patent holder held in their intellectual property before IPR became law. Congress should work quickly to amend the patent laws to ensure that natural conceptions of property be applicable to patent law, namely, that every person has a property interest in the fruits of their labor and that which they have possession over.

*Brian Raddatz*

