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## Bringing America Back to the Future: Reclaiming a Principle of Honesty in Property and IP Law

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## **Bringing America Back to the Future: Reclaiming a Principle of Honesty in Property and IP Law**

*Joshua J. Schroeder*<sup>\*</sup>

“If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone. . . . He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation.”<sup>1</sup>

“ [The] truth is great and will prevail if left to herself, that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons free argument and debate errors ceasing to be dangerous when it is permitted freely to contradict them.”<sup>2</sup>

— Thomas Jefferson, Founder, United States of America

### **INTRODUCTION: THE PROBLEM OF INTANGIBLE**

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<sup>1</sup> Letter from Thomas Jefferson to Isaac McPherson, Aug. 13, 1813, *in* JEFFERSON: WRITINGS 1291 (Merrill D. Peterson, ed. 1984).

<sup>2</sup> Thomas Jefferson, *A Bill for Establishing Religious Freedom*, *in* JEFFERSON: WRITINGS, *supra* note 1, at 347 (This bill was enacted by the Virginia General Assembly with the support of James Madison. It vindicates religious and intellectual freedom and was one of the sources that Congress drew upon when drafting the Bill of Rights in 1789).

## PROPERTY

It has been five years since the global market sunk into a “great recession”<sup>3</sup> and thus far there has been a serious lack of reevaluation. The “tea party” libertarians and the “occupy movement” liberals don’t seem to carry us much further than the ruminations of F. Scott Fitzgerald and Ayn Rand on the economy.<sup>4</sup> Meanwhile, the deep division between the public interest and private property ownership has been rushed to extremes. For example, the Tenth Circuit has allowed local government officials to sell the freedom of speech in Salt Lake City’s town to the private corporate ownership of a religious institution.<sup>5</sup> Of course the project of defining the scope of public property, public goods, and the public interest under the First Amendment has always been at a constant tension with private property ownership.<sup>6</sup> However, as it

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<sup>3</sup> DAVID A. STOCKMAN, *THE GREAT DEFORMATION: THE CORRUPTION OF CAPITALISM IN AMERICA* 3–5 (1st ed. 2013) (Stockman called the approval of the TARP bill bail out the “triumph of crony capitalism.”). *See generally*, Mark Szeltner et al, *Diminished Lives and Futures: A Portrait of America in the Great-Recession Era*, RUTGERS: WORK TRENDS (Feb. 2013), available at [http://www.heldrich.rutgers.edu/sites/default/files/content/Work\\_Trends\\_February\\_2013.pdf](http://www.heldrich.rutgers.edu/sites/default/files/content/Work_Trends_February_2013.pdf).

<sup>4</sup> *Compare* F. SCOTT FITZGERALD, *THE GREAT GATSBY* 110 (The Scribner ed. 1925) (“Can’t repeat the past? . . . Why of course you can!”), *with* AYN RAND, *ATLAS SHRUGGED* 577 (First Plume Printing ed. 1957) (“[Robin Hood] is remembered not as a champion of *property*, but as a champion of *need*, not as a defender of the *robbed*, but as a provider to the *poor*. . . . He is the man who became the symbol of need, not achievement, is the source of rights, that we don’t have to produce, only to want, that the earned doesn’t belong to us, but the unearned does.”).

<sup>5</sup> *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1256 (10th Cir. 2005) (signs informing the public that the town square was no longer “public” along with the Mormon Church’s purchase of the property including the public’s easement to traverse the town square ousted the public’s free speech rights in Salt Lake City’s main street plaza including the ability for homosexuals to show affection while on the plaza grounds).

<sup>6</sup> Letter From John Adams to James Sullivan, May 26, 1776, *in* 9 *THE WORKS OF JOHN ADAMS* 375–78 (C. Adams, Ed., 1854) (“Such is the frailty of the human heart, that very few men who have no property, have any judgment of their own. They talk and vote as they are directed by some man of property, who has

was intended by the framers,<sup>7</sup> this tension was not meant to protect the “human interposition” of dishonest creation, allocation and valuation of intangible property that is commonplace in the market today.<sup>8</sup> After all, it was in the framer’s plan to waylay the dangers of “error” by guaranteeing the public’s freedom to contradict them with truth.<sup>9</sup> Thus, as intangible property is used to cloak error as truth,<sup>10</sup> thereby disarming the truth of “her natural weapons [of] free

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attached their minds to his interest. . . . [P]ower always follows property. . . . [T]he balance of power in a society, accompanies the balance of property in land. The only possible way, then of preserving the balance of power on the side of *equal liberty* and public virtue, is to make the acquisition of land easy to every member of society.”) (italics added).

<sup>7</sup> *Id.*

<sup>8</sup> Thomas Jefferson, A Bill for Establishing Religious Freedom, enacted on January 16, 1786, in JEFFERSON: WRITINGS, *supra* note 1, at 347 (This bill was enacted by the Virginia General Assembly with the support of James Madison. It vindicates religious and intellectual freedom and was one of the sources that Congress drew upon when drafting the Bill of Rights in 1789).

<sup>9</sup> *Id.*

<sup>10</sup> Thomas Lee Hazen, *Volatility and Market Inefficiency: A Commentary on the Effects of Options, Futures, and Risk Arbitrage on the Stock Market*, 44 WASH. & LEE L. REV. 789, 795 (1987) (noting that options and futures trading can be “manipulative and artificial”). *C.f.* John Letzing, *Google Says Patents, Tech Were Less Than Half of Motorola's Price*, THE WALL ST. J., July 24, 2012, <http://blogs.wsj.com/digits/2012/07/24/google-says-patents-tech-were-less-than-half-motorolas-price/> (“Google said . . . that \$2.9 billion of the purchase price for Motorola was attributable to cash acquired, \$2.6 billion was related to goodwill, \$730 million for customer relationships and \$670 million for ‘other net assets acquired.’” Google characterized consumer relationships with Motorola and what consumers thought about Motorola as worth billions of dollars when consumer’s themselves may own their relationships and thoughts); Jon Leibowitz, F.T.C. Chairman, *Remarks as Prepared for Delivery at the Sixth Annual Georgetown Law Global Antitrust Enforcement Symposium*, FEDERAL TRADE COMMISSION, Sept. 19, 2012, WL 4339298 at 3 (Noting a major circuit split over pay-for-delay contracts regarding whether they violate antitrust law between the Third and the Second, Eleventh and Federal Circuits: “Eliminating pay-for-delay deals would save American consumers \$3.5 billion annually and, because the federal government accounts for roughly one-third of the nation’s prescription drug spending, it would lower the federal budget deficit by \$5 billion over ten years.”). *See In re K-Dur Antitrust Litig.*, 686 F.3d 197, 214 (3d Cir. 2012) (“First, we take

argument and debate,”<sup>11</sup> the Courts must hold intangible property claims to a minimum standard of honesty as a formality.<sup>12</sup>

Intangible property springs from the positivist view that anything from which value can be derived is “property.”<sup>13</sup> Thus, intangibles can be defined as any property that is not physical or tangible. Intangibles may include the field of law known as Intellectual Property (IP), but so far is not limited by it. Stocks, futures, mortgages, securities, insurance and other creative business tools can be included in the category of “intangible property.” Since intangible property is not necessarily connected to real, tangible property it is notoriously dubious to value.<sup>14</sup> In fact, market-wide

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issue with the scope of the patent test's almost un-rebuttable presumption of patent validity.”). See also C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement As A Regulatory Design Problem*, 81 N.Y.U. L. REV. 1553, 1616 (2006) (Noting that self-help measures like pay-for-delay contracts disrupt the balance struck by patent regulation between innovation and competition).

<sup>11</sup> Thomas Jefferson, A Bill for Establishing Religious Freedom, enacted on January 16, 1786, in JEFFERSON: WRITINGS, *supra* note 1, at 347.

<sup>12</sup> J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY, 320 (2d ed. 1979) (noting that even the claims of innocent owners gave way to “honest sales which took place in a market or fair.”). See also 2 WILLIAM BLACKSTONE, COMMENTARIES \*448–49 (commenting on market overt, that honesty was so important to England's Saxon ancestors in the transfer of title that sales and bargains of chattels had to be “contracted in the presence of credible witnesses.”).

<sup>13</sup> Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE L.J. 16, 19 (1913) (hereinafter *Hohfeld I*). See generally Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 26 YALE L.J. 710, 712–13 (1917) (hereinafter *Hohfeld II*). See Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 357 (1980).

<sup>14</sup> Brief of Antitrust Economists as Amici Curiae in Support of Respondents, 23–24, Fed. Trade Comm’n v. Actavis, Inc., 133 S. Ct. 2223 (2013) (No. 12-416), 2013 WL 836946 (One of the arguments made to the Supreme Court for not limiting pay-for-delay agreements regarding drug patents included the difficulty of valuating the agreements due to the central nature of intangibles to them: “There is typically significant ambiguity around the value of such agreements because they often include the purchase of intellectual property, real options (through joint ventures), supply agreements, risk sharing, and the settlement of other litigation. Determining the value of such one-of-a-kind business agreements

problems with the creation, allocation and valuation of intangible property resulted in perpetual cycles of market failure.<sup>15</sup>

Seemingly undaunted by global market crisis, intangible property owners have pushed their property claims beyond precedent.<sup>16</sup> In fact, some have voiced their desire for unlimited and absolute rights to intangibles.<sup>17</sup> Perhaps the most telling example is

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can be very difficult."); Hazen, *supra* note 10, at 795; Ben Hirschler, *UK Watchdog Accuses GSK Over "Pay-For-Delay" Drug Deals*, REUTERS, April 19, 2013, <http://www.reuters.com/article/2013/04/19/us-glaxosmithkline-antitrustidUSBRE93I07720130419>.

<sup>15</sup> STOCKMAN, *supra* note 3, at 3–5, 361–63, 501–07 (Drawing a correlation between market failures due to widespread opportunism and overvaluation of intangible property in America).

<sup>16</sup> Compare Milton Friedman, *The Need for Futures Markets in Currencies*, 31 CATO J. 635, 636 (Fall 2011) <http://www.cato.org/sites/cato.org/files/serials/files/cato-journal/2011/9/cj31n3-15.pdf> (advocating for a need for a futures market in the 1970's when America's currency was "floated" and no longer backed by a promise of gold value in exchange.), with 2 WILLIAM BLACKSTONE, COMMENTARIES \*398 ("By the rules of the ancient common law, there could be no future property, to take place in expectancy, created in personal goods and chattels."), and *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2590 (2012) ("The proposition that Congress may dictate the conduct of an individual today because of prophesied future activity finds no support in our precedent. We have said that Congress can anticipate the effects on commerce of an economic activity. . . . But we have never permitted Congress to anticipate that activity itself in order to regulate individuals not currently engaged in commerce.").

<sup>17</sup> William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 517–18 (2003) (explaining how maximized copyright protection could be drafted in federal statute to avoid unconstitutionality); Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 STAN. L. REV. 455, 482, 520 (2010) (Proposing a "carryover hypothesis" involving the determination of "how few deviations from the traditional views of property intangibles need to be made in order to develop a sensible system form copyright and patents."); Frank H. Easterbrook, *Intellectual Property is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108, 112, 118 (1990) ("Old rhetoric about IP equating to monopoly seemed to have vanished, replaced by a recognition that a right to exclude IP is no different in principle from the right to exclude in physical property. . . . Except in the rarest case we should treat intellectual and physical property identically in the law - which is where the broader currents are taking us."). See also Geoffrey Neri, *Sticky Fingers or Sticky Norms? Unauthorized Music Downloading and*

the rise of an unprecedented coalition between powerful American content owners and internet service providers called the Center for Copyright Information.<sup>18</sup> This organization was established with the purpose of enforcing self-help measures to eradicate uses of online content by the public in the wake of public outcry against the Stop Online Piracy Act (SOPA), Protect IP Act (PIPA) and the Anti-Counterfeiting Trade Agreement (ACTA) and the resulting government rejection of SOPA, PIPA and ACTA.<sup>19</sup> According to

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*Unsettled Social Norms*, 93 GEO. L.J. 733 (Noting a movement towards the view that unauthorized internet downloading is theft "plain and simple.") (quoting Press Release, Motion Picture Ass'n of Am., Inc., *Motion Picture and Music Industries File Suit Against Scour.com* (July 20, 2000), available at <http://www.mpa.org/Press/ScourPressRelease.htm>); Eric H. Holder, Jr., Remarks at the Press Conference Announcing the Intellectual Property Rights Initiative (July 23, 1999), available at <http://www.usdoj.gov/criminal/cybercrime/dagipini.htm>; Dowling v. United States, 43 U.S. 207, 217 (1985).

<sup>18</sup> About the Center for Copyright Information, (last visited March 25, 2013), <http://www.copyrightinformation.org/about-cci/> (CCI is a coalition of major copyright owner interest groups and ISPs, and they are initiating copyright alert systems in violation of net neutrality). See also John Tarnoff, *We Don't Need Six Strikes*, HUFFINGTON POST, March 7, 2013, [http://www.huffingtonpost.com/johntarnoff/we-dont-need-six-strikes\\_b\\_2831489.html](http://www.huffingtonpost.com/johntarnoff/we-dont-need-six-strikes_b_2831489.html); Ernesto, *MPAA: BitTorrent is the Best Way to Pirate Movies and TV-Shows*, TORRENTFREAK, March 23, 2013, <http://torrentfreak.com/mpaa-bittorrent-is-the-best-way-to-pirate-movies-and-tv-shows-130323/> ("The MPAA, RIAA and the Internet providers participating in the "six strikes" anti-piracy scheme have informed the Congressional Internet Caucus Advisory Committee about their plans."); *Kneecapping the Future: Comcast's Unjustified Internet Caps and the Plan to Kill Video Competition*, FREE PRESS, June 25, 2012, [http://www.savetheinternet.com/sites/default/files/resources/Comcast%20New%20Caps%20Factsheet\\_FINAL.pdf](http://www.savetheinternet.com/sites/default/files/resources/Comcast%20New%20Caps%20Factsheet_FINAL.pdf) (reporting that Comcast has a cap on the data an internet subscriber can download through Comcast, but exempted its video provider Xfinity); *The Facts About AT&T's Facetime Blocking*, FREE PRESS (Sept. 20, 2012), <http://www.savetheinternet.com/sites/default/files/att-factsheet-fp.pdf>.

<sup>19</sup> See Larry Magid, *What Are SOPA and PIPA And Why All the Fuss?*, FORBES (Jan. 18, 2012), <http://www.forbes.com/sites/larrymagid/2012/01/18/what-are-sopa-and-pipa-and-why-all-the-fuss/> (noting that the laws pit the tech industry against the entertainment industry); Erik Kain, *Final Draft of ACTA Watered Down, TPP Still Dangerous on IP Rules*, FORBES (Jan. 28, 2012), <http://www.forbes.com/sites/erikkain/2012/01/28/final-draft-of-acta-watered->

the Federal Communications Commission (FCC) net neutrality rules and the First Amendment, these self-help measures are illegal.<sup>20</sup> The major content owners' zeal comes from an overblown concept of property alone. Not unlike the fate of property claims in the African American slaves of 1865,<sup>21</sup> the People may eventually recognize some of the property claims of the Motion Picture Association of America (MPAA) and the Recording Industry Association of America (RIAA) as baseless, destructive and immoral.<sup>22</sup>

Granting absolute claims to intangible property would also put unbearable pressure on the U.S. Constitution that was written in the time of Blackstone—when property was necessarily physical.<sup>23</sup>

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down-tpp-still-dangerous-on-ip-rules/ (noting that ACTA would force the DMCA on developing nations and is a dangerous law to pass); David Meyer, *ACTA Rejected by Europe, Leaving The Treaty Near Dead*, ZDNET (July 4, 2012), <http://www.zdnet.com/acta-rejected-by-europe-leaving-copyright-treaty-near-dead-7000000255/> (noting that massive protests in Europe prompted the European parliament to reject the treaty).

<sup>20</sup> Preserving the Open Internet, 47 C.F.R. § 8 (2011); U.S. CONST. amend. I.

<sup>21</sup> U.S. CONST. amend. XIII (The Thirteenth Amendment abolished property rights in people in 1865. This is a perfect example of how human rights can win out over property rights).

<sup>22</sup> Compare Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1033 (2005) ("Courts and commentators . . . make a subconscious move, one that the economic theory of property does not justify: they jump from the idea that intellectual property is property to the idea that the IP owner is entitled to capture the full social value of her right."), with Hillary Clinton, then acting U.S. Secretary of State, *Trafficking in Persons Report*, at 20, THE U.S. DEP'T OF STATE, (June 2012) available at <http://www.state.gov/documents/organization/192587.pdf> (noting that many corporate supply chains have been found to have been tainted with slavery, also noting that an estimated 20.9 million modern slaves exist today and that it constitutes an estimated \$20 billion dollar industry globally). See also President Barak Obama, *Fact Sheet: the Obama Administration Announces Efforts to Combat Human Trafficking at Home and Abroad*, THE WHITE HOUSE, Sept. 25, 2012 (The President said that modern slavery should "concern every business, because it distorts markets.").

<sup>23</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES \*316–17, \*396–97 (Noting that there is a difference between grant and livery to account for the incorporeal aspects of estates. "Grants, *concessionēs*; the regular method by the common law of transferring the property of *incorporeal* hereditaments, or such things whereof



In fact, a strict positivist approach to property would characterize a right to free speech as intangible property. Such a mischaracterization trivializes violations of the First Amendment.<sup>24</sup> A property right in free speech would make it seem like the marketplace-of-ideas in itself is a monetizable commodity.<sup>25</sup> If the

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no livery can be had. For which reason all corporeal hereditaments, as lands and houses, are said to lie *in livery*; and the others, as advowsons, commons, rents, reversions, etc., to lie *in grant*." Also noting that other than physical property "in things personal" held in absolute possession, there were natural goods like light and water that could only held in a qualified (i.e. less than absolute) possession. Finally, Blackstone recognized "property in action" which "depends entirely upon contracts." Thus, property was once parsed into categories and absolute rights were only granted to physical property held in absolute possession). *See* Vandevelde, *supra* note 13, at 333 ("The courts of Blackstone's era claimed to be protecting the possession of things." As such, incorporeal rights were only granted in limitation and depended on contract law until it "had been reified, and the resulting thing was owned absolutely.").

<sup>24</sup> *See, e.g.*, DVD Copy Control Ass'n, Inc. v. Bunner, 31 Cal. 4th 864, 881 (2003) (holding that "[t]he First Amendment does not prohibit courts from incidentally enjoining speech in order to protect a legitimate property right.") (citing San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 537–40 (1987) (a trademark case that enjoined the use of the word "Olympic" in advertising without permission from the Olympic Committee)).

<sup>25</sup> *Compare* Utah Gospel Mission v. Salt Lake City Corp., 425 F.3d 1249, 1256 (10th Cir. 2005) (finding that Salt Lake City's sale of its Main Street Plaza, including public use easement, to the LDS church for a total of \$13.375 million to manage it as an "ecclesiastical park" constituted a relinquishment of any first amendment free speech rights in the town square. Thus, private ownership in a traditionally public forum ousted public rights to free speech), *with* Paul Barbagallo, *Verizon First Amendment Challenge of Net Neutrality Tests Century of Regulation*, BLOOMBERG BNA, Jan. 24, 2013, <http://www.bna.com/verizon-first-amendment-n17179872014/> (noting that Verizon's recent challenge seeks to destroy any First Amendment justification for FCC prophylactic regulation to protect free speech over the internet because internet networks are privately owned and operated by corporations). *See also* Nicole Radzievich, *Law Professor Takes Issue with Free-Speech Restrictions at Steel Stacks*, LEHIGH VALLEY'S NEWSPAPER: THE MORNING CALL, Oct. 11, 2012, [http://articles.mcall.com/2012-10-11/news/mc-bethlehem-steelstacks-free-speech-20121011\\_1\\_seth-moglen-restrictions-aim-steelstacks](http://articles.mcall.com/2012-10-11/news/mc-bethlehem-steelstacks-free-speech-20121011_1_seth-moglen-restrictions-aim-steelstacks) (noting that local governments and organizations are cleverly drafting free speech restrictions in under the guise of private property, in deed restrictions regarding public forums – *Unclear wording/sentence structure*;

rights guaranteed in the Constitution are propertized and valued, some may begin to believe that rights guaranteed by the Constitution may not only be purchased, but also placed in the “despotic dominion” of a private owner.<sup>26</sup> This is exactly the hope of those who would maximize copyright and patent rights beyond the express limits to the Copyright and Patent Clauses.<sup>27</sup>

Before the strong upswing of positivist thought took hold in the early twentieth century,<sup>28</sup> property in a legal sense was bound to be physical and absolute.<sup>29</sup> In other words, the protection of intangibles was perceived as mere covenant or promise unless or until it resulted in a legal claim to actual physical property.<sup>30</sup> As all property presumably had something physical backing up the property claim, it was easy to require due diligence on the part of the buyer and seller to value the property correctly before a property sale.<sup>31</sup> However, buyer’s remorse is not so easily applied

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*do you mean to say: “in deed restrictions regarding public forums, local governments and organizations are cleverly drafting free speech restrictions under the guise of private property.”*).

<sup>26</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES \*2.

<sup>27</sup> Landes & Posner, *supra* note 17, at 517–18. *But see* Dowling v. U.S., 473 U.S. 207, 216–17 (1985) (reasoning that a copyright is “no ordinary chattel.”); Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 540 (1985) (noting that “[t]he First Amendment’s protections [are] embodied in the [Copyright] Act’s distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use.”); Kirtsaeng v. John Wiley & Sons, Inc., No. 11–697, slip op. at 19, 31 (2013) (noting the objective of copyright in the constitution is “Progress in Science and useful Arts,” as well as noting that “the Constitution describes the nature of American copyright law[as] providing Congress with the power to ‘secur[e]’ to ‘[a]uthors’ ‘for limited [t]imes’ the ‘exclusive [r]ight to their . . . [w]ritings.’”) (quoting U.S. CONST. art. I, § 8, cl. 8).

<sup>28</sup> Hohfeld I, *supra* note 13, at 19 (noting that all valuable interests can be conceptualized as property). *See generally* Hohfeld II, *supra* note 13, at 712–13 (1917). *See* Vandavelde, *supra* note 13, at 357.

<sup>29</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES \*316–17, \*396–97. *See* Vandavelde, *supra* note 13, at 333–35.

<sup>30</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES \*316–17, \*396–97.

<sup>31</sup> Sherwood v. Walker, 66 Mich. 568, 577, 33 N.W. 919, 923 (1887) (deciding that, where the buyer of a cow believes the cow to be a breeding cow, and finds,

in cases of intangible property for the simple reason that there is nothing physically there to inspect. Thus scholars suggest that intangible property rights should be inherently limited.<sup>32</sup> However, intangible property owners do not seem to share this idea.

Unheeded by most, the dangers ahead continue to mount as intangible assets continue their dauntless course toward maximization as an absolute form of property. Companies worldwide have been mindlessly criticized for not claiming hundreds of billions of dollars of intangible value including unclaimed marketplace goodwill.<sup>33</sup> In fact, overvalued intangible property has proven to have a serious detrimental effect on pension funds, retirement and the stock market.<sup>34</sup> Shareholders continue to

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after the fact, that the cow is barren, the buyer does not have a contract remedy when the buyer could have inspected the cow beforehand. The court reasoned that "the mistake was not of the mere quality of the animal, but went to the very nature of the thing. A barren cow is substantially a different creature than a breeding one."). *See also* Wood v. Boynton, 64 Wis. 265, 25 N.W. 42, 44 (1885) (deciding that a person who sold a diamond for a dollar, because she was ignorant of the "nature and value" of the stone, did not have a contract remedy for making a bad bargain. "If she chose to sell it without further investigation as to its intrinsic value to a person who was guilty of no fraud or unfairness which induced her to sell it for a small sum, she cannot repudiate the sale because it is afterwards ascertained that she made a bad bargain."); John Patrick Hunt, *Taking Bubbles Seriously in Contract Law*, 61 CASE W. RES. L. REV. 681, 693 (2011).

<sup>32</sup> Vandavelde, *supra* note 13, at 357–58 ("This new property had been dephysicalized and thus consisted not of rights over things, but of any valuable right. The new property had also been limited. It consisted not of an absolute or fixed constellation of rights, but of a set of rights which are limited according to the situation.").

<sup>33</sup> Tim Boreham, *IP assets a closed book for most companies*, THE AUSTRALIAN, April 5, 2013, <http://www.theaustralian.com.au/business/opinion/ip-assets-a-closed-book-for-most-companies/story-e6frg9lo-1226612839028> (noting that, in a disagreement regarding the going value of international businesses, a possible value of \$850 billion, \$250 billion pertained to the value of unrecorded IP assets a possible \$850 billion valuation disagreement regarding going value of international businesses, \$250 billion of which pertained to the value of unrecorded IP assets, like brand recognition).

<sup>34</sup> James B. Stewart, *Bad Directors and Why They Aren't Thrown Out*, N. Y. TIMES, Mar. 29, 2013, [http://www.nytimes.com/2013/03/30/business/why-bad-directors-arent-thrown-out.html?\\_r=0](http://www.nytimes.com/2013/03/30/business/why-bad-directors-arent-thrown-out.html?_r=0) (noting that HP's purchase of Autonomy, a

have very little recourse when public businesses write off bad acquisitions of intangibles worth billions.<sup>35</sup> The problem has infected our government to the highest levels. For instance, in 2011, the U.S. treasury's valuation of the U.S. varied by \$2 trillion from Standard and Poor's valuation.<sup>36</sup> Furthermore, estimates of the daily U.S. hedging activity including futures and option contracts is around \$4 trillion. In contrast, the underlying daily trade of physical merchandise is only \$40 billion.<sup>37</sup> This constitutes a 100:1 ratio of the trade of intangibles in the form of options and futures to the underlying physical property value being traded. Furthermore, when contracts involving intangibles are ripe for judicial review, judges are told to look the other way.<sup>38</sup> Lawmakers should not listen to such requests because intangibles have played a central role in the generation of massive deadweight losses that have been shamelessly foisted onto the U.S. government and the middle class.

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British software maker, for \$11.1 billion, was "the worst corporate acquisition" in history, even though HP later attributed \$8.8 billion of that price to fraud; being HP's purchase of Autonomy, a British software maker, for \$11.1 billion. HP later wrote off \$8.8 billion of that price, claiming that it had been defrauded—also noting that HP's failure had a detrimental effect on New York City's pension fund.).

<sup>35</sup> See, e.g., Amy Thompson, *Microsoft Drops After Goldman Says PC Market Share Will Falter*, SAN FRANCISCO CHRONICLE, April 11, 2013, <http://www.sfgate.com/business/bloomberg/article/Microsoft-Drops-After-Goldman-Says-PC-Market-4427371.php> (noting a possible overvaluation of Microsoft Window's 8 software IP).

<sup>36</sup> Ian Katz & Vinny Del Giudice, *S&P's Analysis was Flawed by \$2 Trillion Error, Treasury Says*, BLOOMBERG, Aug. 5, 2011, <http://www.bloomberg.com/news/2011-08-06/s-p-s-analysis-was-flawed-by-2-trillion-error-treasury-says.html> (when the going value of businesses and countries are given the color of property, future projections of value become fixed in the present as if they are real and as such projections can vary wildly.).

<sup>37</sup> STOCKMAN, *supra* note 3, at 289 (an estimated \$3.96 trillion dollar gap between future and actual tangible property is traded every day).

<sup>38</sup> Brief of Antitrust Economists as Amici Curiae in Support of Respondents, 23-24, *Federal Trade Commission v. Actavis, Inc.*, 133 S. Ct. 2223 (2013) (No. 12-416), 2013 WL 836946; Friedman, *supra* note 16, at 636; Hirschler, *supra* note 14.

This article puts forth one central argument: The hyper-broad concept of property used to justify absolutist claims to intangible property is unconstitutional. This article demonstrates how a principle of honesty enforced by the Court can keep intangible property claims within the bounds of the constitution. Furthermore, a principle of honesty can be used to protect property common law from the political fallout driven by the highly contentious valuations of intangibles that have escalated to differences in valuation within the trillions of dollars. Finally, enforcing honesty in the courts will enable the lower and middle classes to continue to better themselves by participating in the marketplace.

To arrive at a principle of honesty, this article discusses the role of intangible property in constitutional interpretation. In Part I it analyzes the recent *Sebelius* and *Kirtsaeng* decisions, arguing that a reevaluation of Constitutional interpretation is currently underway. Then, in Part II this article lays out the current concept of property discourse (centered on a Liberal/Libertarian debate) and its role in spurring America on a course toward worldwide intangible property maximization. Finally, in Part III this article will propose that the Court reclaim a standard of honesty in the context of property rights analysis as a minimum formality requirement. The marketplace allowance of shameless dishonesty in the creation, marketing and valuation of intangible property as if it is physical or tangible has exacerbated and accelerated market failure to a global crescendo in 2008. Thus, all lawmakers should take a clearer stance against this type of dishonesty in the future.

#### **PART I: THE ROLE OF PROPERTY IN CONSTITUTIONAL INTERPRETATION**

According to the Commerce Clause, Congress can regulate “things” in interstate commerce.<sup>39</sup> These “things” Congress can regulate are informed by claims to property in a broadening class of items. For example, Justice Ginsberg’s concurrence in *Sebelius* sought to assert a strong property right in medical licenses against

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<sup>39</sup> U.S. CONST. art.I, § 8, cl. 3.

any poor, lower class citizen who would not have been able to afford the costs of necessary medical services. The federal government, according to Justice Ginsberg, should be accorded the authority to coerce lower class, impoverished Americans to purchase insurance to ensure that doctors always get paid. With this cart before the horse view, poor people that depend on free medical services from licensed professionals are seen as trespassers. This section will consider the new *Sebelius* decision regarding the function of the Article I Constitutional grants of legislative power, and its possible effect on past decisions. Finally it will discuss the *Kirtsaeng* decision that interpreted common law property rights as a limitation on copyright protection.

### **The *Sebelius* Decision**

With its recent decision regarding the Affordable Care Act, known popularly as Obamacare, the Supreme Court reached perhaps its most pivotal Constitutional law decision since *Brown v. Board of Education*.<sup>40</sup> Three concurrences carried the day,<sup>41</sup> without a clear majority opinion on exactly how the Commerce and Necessary and Proper Clauses interact with other Article I grants of legislative power. However, one majority found that the Commerce Clause could not be used to enact a penalty-tax and mandate for Americans to buy health insurance.<sup>42</sup> A second majority held that nevertheless, the tax clause could justify the penalty-tax and mandate even without Commerce Clause support.<sup>43</sup> Only Chief Justice Roberts found that both of these propositions may legally

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<sup>40</sup> Compare *Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), with *Brown v. Bd. of Ed. of Topeka, Shawnee County, Kan.*, 347 U.S. 483, 492 (1954) *supplemented sub nom.* *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955).

<sup>41</sup> *Sebelius*, 132 S. Ct. at 2566, 2609, 2642 (Ginsberg, J. concurring in part, concurring in the judgment in part, and dissenting in part) (Kennedy, J. dissenting).

<sup>42</sup> *Id.* (Chief Justice Roberts and Justices Scalia, Kennedy, Thomas and Alito).

<sup>43</sup> *Id.* (Chief Justice Roberts and Justices Breyer, Kagan, Ginsberg and Sotomayor).

coexist.<sup>44</sup> None of the Justices considered the practical effect of their decision as a work around for the Constitutional limit that all Federal taxes be “uniform.”<sup>45</sup>

None of the Justices intended to underwrite a workaround for limits on the legislative grants of power in Article I in general. However, Chief Justice Roberts (with the support of the Ginsberg concurrence for purposes of the remedy) put forward a hands-off approach that may indicate that he would allow *de facto* workarounds.<sup>46</sup> Because the Chief Justice also found that states cannot be coerced to expand Medicaid, only the states opting in would be subject to the penalty-tax. The practical result is a non-uniform federal tax that only Chief Justice Roberts held up as constitutional.

This penalty-tax is no ordinary tax or penalty.<sup>47</sup> In order to avoid being struck under the Anti-Injunction Act,<sup>48</sup> the Chief Justice decided that it was actually a penalty for purposes of the statute.<sup>49</sup> On the other hand, he decided that the penalty was a tax for the purpose of constitutionality under the Tax Clause.<sup>50</sup> However, every Justice other than the Chief Justice agreed that this sort of two-sided finagling was either not needed or not justified.<sup>51</sup>

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Sebelius*, 132 S. Ct. at 2608 (“the Court does not express any opinion on the wisdom of the Affordable Care Act. Under the Constitution, that judgment is reserved for the people.”).

<sup>47</sup> *Id.* at 2566 (finding a penalty payable to the IRS.).

<sup>48</sup> Anti-Injunction Act, 26 U.S.C. § 7421(a) (2013) (barring suits to “restrain the assessment or collection of any tax.”).

<sup>49</sup> *Sebelius*, 132 S. Ct. at 2584 (“The Affordable Care Act does not require that the penalty for failing to comply with the individual mandate be treated as a tax for purposes of the Anti-Injunction Act.”).

<sup>50</sup> *Id.* at 2600 (“The Affordable Care Act’s requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness.”).

<sup>51</sup> *Id.* at 2609 (Ginsberg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“The Chief Justice’s crabbed reading of the Commerce Clause harks back to the era in which the Court routinely thwarted

The Ginsberg concurrence noted that judicial treatment of the Commerce Clause should continue to justify tax-like laws like this.<sup>52</sup> The Kennedy dissent decided that the Affordable Care Act should be overturned because the Commerce Clause should not justify the law as enacted, and because the individual mandate cannot be a penalty for purposes of the Anti-Injunction Act and a tax for purposes of the Tax Clause.<sup>53</sup> Justice Thomas especially made clear in his own concurring dissent that the substantial effects test itself should be wholly removed.<sup>54</sup>

A majority of the court centered their opinions on a determination of the scope of the Commerce Clause. Furthermore, the *de facto* majority did not attempt to give a workable definition of interstate commerce other than the one already existing. Thus, Chief Justice Roberts' interpretation of the Necessary and Proper Clause as a limit on the Commerce Clause carried the day, but should not control future Constitutional interpretation. This reading of the Necessary and Proper Clause should still be seen as a minority view.<sup>55</sup> However, the view that the Commerce Clause is

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Congress' efforts to regulate the national economy in the interest of those who labor to sustain it." Essentially, the tax for one purpose and penalty for another is merely dicta in Ginsberg's dissent because the Commerce Clause is already sufficient to justify the Affordable Care Act making the legitimacy of Congress' tax power to support the individual mandate an "auxiliary holding." She did not discuss the Anti-Injunction Act.); *Id.* at 2647 (Kennedy, J., dissenting) ("As we said at the outset, whereas the precise scope of the Commerce Clause and the Necessary and Proper Clause is uncertain, the proposition that the Federal Government cannot do everything is a fundamental precept.").

<sup>52</sup> *Id.* at 2609 (Ginsberg, J., concurring in part, concurring in the judgment in part, and dissenting in part) (arguing that the Chief Justice's reading of the Commerce Clause "should not have staying power.").

<sup>53</sup> *Sebelius*, 132 S. Ct. at 2656 (Kennedy, J., dissenting) ("What the Government would have us believe in these cases is that the very same textual indications that show this is *not* a tax under the Anti-Injunction Act show that it *is* a tax under the Constitution. That carries verbal wizardry too far, deep into the forbidden land of the sophists.").

<sup>54</sup> *Id.* at 2677 (Thomas, J., dissenting).

<sup>55</sup> U.S. CONST. art. II, § 2 (Past Supreme Court decisions about the Necessary & Proper Clause stretching back to *McCulloch v. Maryland* allowed Congress the *necessary* regulatory power to institute effective regulation and remains



somehow more limited than it had been is a majority view over Justice Ginsberg's concurrence.<sup>56</sup>

Thus, the *Sebelius* decision seems to announce that our constitutional interpretation has shifted, and that the Commerce Clause is now more limited than it was in the past.<sup>57</sup> In response to Chief Justice Roberts' concern that constitutional provisions are being rendered "superfluous" this article will turn to IP law. Past IP case law that had relied on an expansive reading of the Commerce Clause provides a useful lens to propose an agreeable limit on Commerce Clause application going forward. The Article I grants of power must coexist, including the limits to each grant of power. To this end, by adopting reasonable limits to Congress's Commerce Power informed by the First Amendment and the Copyright and Patent Clauses, the Court may also protect property law itself from being commandeered by interests in intangible property.<sup>58</sup> The result would be a rationalized constitutional interpretation that functions independently from the economic interests of those who

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controlling); *McCulloch v. Maryland*, 17 U.S. 316, 324, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."). *See also* *Missouri v. Holland*, 252 U.S. 416, 432 (1920); *Reid v. Covert*, 354 U.S. 1, 6–19 (1957) (deciding that though the Necessary and Proper Clause may increase the scope of regulatory power granted to Congress, Congress may not invoke the Necessary and Proper Clause merely to comply with a treaty that would otherwise override an express prohibition in the Constitution).

<sup>56</sup> *Sebelius*, 132 S. Ct. at 2609 (Ginsberg, J. concurring in part, concurring in the judgment in part, and dissenting in part) (Justice Ginsberg's constitutional interpretation included herself and Justices Breyer, Kagan, and Sotomayor. This is a four Justice minority interpretation.).

<sup>57</sup> *Id.* at 2586 (The Chief Justice seems to have limited his constitutional interpretation in such a way as to give every provision effect: "If the power to 'regulate' something included the power to create it, many of the provisions in the Constitution would be superfluous.").

<sup>58</sup> *Kirtsaeng v. John Wiley & Sons, Inc.*, No. 11–697, slip op. (2013) (using property common law rights in physical property that may contain copyrighted works to limit ambiguous portions of the copyright act).

engage in dishonest practices in the creation, valuation and allocation of intangibles.

In fact, an unbridled conception of intangible property rights undertook a subtle but powerful role underlying the *Sebelius* decision. In Justice Ginsberg's concurrence, she noted that the legislature enacted the changes to the Medicaid program as a solution to a "free-riding problem."<sup>59</sup> Ginsberg implicitly validated, and no other Justice challenged, that there actually is a free-riding problem in the American health system. The idea that the existence of poverty itself creates free-riders, and that being a sick, poor person in need of medical help makes a person by their very nature a trespasser is an abominable notion. The concept of property itself, first adopted to ensure the equality of class,<sup>60</sup> becomes an oxymoron when it is used to label the weakest and poorest among us as trespassers by their very nature of being impoverished and in need of care.

This characterization is an absolutist claim to intangible property at work. Medical licenses, the intangibles in play here, are not supposed to carry with them a property assurance that all services performed by medical professionals will be paid for. It is good and right in any society of mortals, that doctors and hospitals

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<sup>59</sup> *Sebelius*, 132 S. Ct. at 2623 (Ginsberg, J. concurring in part, concurring in the judgment in part, and dissenting in part). Cf. Lemley, *supra* note 22, at 1043 n.48–54 (giving a number of examples of how IP courts are preoccupied with uprooting free riders); Wendy J. Gordon, *On Owning Information: Intellectual Property and the Restitutionary Impulse*, 78 VA. L. REV. 149, 167 (1992) ("A culture could not exist if all free riding were prohibited within it."); PHILLIP E. AREEDA & HERBERT HOVENKAMP, 2 THE FUNDAMENTALS OF ANTITRUST LAW 818 (Aspen Law & Business ed., 2002) ("Our initial examples of free riding on another's innovation or property beautification indicate that free riding is both widespread and socially tolerated unless society enacts special legislation to control it, such as the patent laws.").

<sup>60</sup> Letter From John Adams to James Sullivan, May 26, 1776, in 9 THE WORKS OF JOHN ADAMS, *supra* note 6, at 375–78 (arguing that in order to promote "equal liberty," voting and property rights should be given to women). See also Thomas C. Grey, *The Disintegration of Property*, in PROPERTY NOMOS XXII 69 (New York Univ. Press 1980) ("property conceived as the control of a piece of the material world by a single individual meant freedom and equality of status.").

would be expected to write off some of their practices to help “the least of these.”<sup>61</sup> These costs should never be and should never have been characterized as free-riding on a type of property. A standard of honesty is a practicable way for the Judiciary to adjudicate these types of property claims, as they are of the dishonest type that nearly destroyed our nation in 2008. Furthermore, such a standard would limit the Commerce Clause power in a way not only distinguishable from the *Lochner* era, but hopefully also acceptable to Justice Ginsberg herself who feared the era’s reemergence.<sup>62</sup>

### **The Pre-*Sebelius* IP Cases**

The Second and Eleventh Circuits have drawn upon a number of Supreme Court interpretations of the Commerce Clause to uphold the copyright bootlegging provision as constitutional. Both found that the Copyright Clause does not positively forbid Congress “from extending copyright-like protection under other constitutional clauses, such as the Commerce Clause, to works of authorship that may not meet the fixation requirement inherent in the term ‘Writings.’”<sup>63</sup> However, both also recognized the Supreme Court’s acknowledgement that “in some circumstances the Commerce Clause cannot be used to eradicate a limitation placed

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<sup>61</sup> *Matthew* 25:40 (“Truly I tell you, whatever you did for one of the least of these brothers and sisters of mine, you did for me.”).

<sup>62</sup> *Sebelius*, 132 S. Ct. at 2609 (Ginsberg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

<sup>63</sup> *U.S. v. Moghadam*, 175 F.3d 1269, 1280–81 (11th Cir. 1999) (it is notable that this case did not consider the “limited times” limit because it was not raised in trial whereas *Martignon* did). *See also* *U.S. v. Martignon*, 492 F.3d 140, 149, 152 (2d Cir. 2007) (“Congress exceeds its power under the Commerce Clause by transgressing limitations of the Copyright Clause only when (1) the law it enacts is an exercise of the power granted Congress by the Copyright Clause and (2) the resulting law violates one or more specific limits of the Copyright Clause.” But, “[g]iven the nexus between bootlegging and commerce, it is clear that absent any limitations stemming from the Copyright Clause, Congress would have had the power to enact [the Bootlegging Provision] under the Commerce Clause.”).

upon Congressional power in another grant of power.”<sup>64</sup> However, both decisions seized on a weak logical inference from case law; that because *Gibbons* struck a tax law and not a tax-like law for being non-uniform, the Commerce Clause could not act as a workaround for an actual “copyright law” but could act as a workaround for “copyright-like laws.”<sup>65</sup>

The Commerce Clause allows Congress to regulate the “channels of interstate commerce”, instrumentalities, persons or things in interstate commerce, and “intrastate activities that substantially affect interstate commerce.”<sup>66</sup> Thus, the applicable test was “whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.”<sup>67</sup> The substantial

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<sup>64</sup> *Moghadam*, 175 F.3d at 1279–80 (citing *Ry. Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 468–69 (1982) (“[I]f we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws.”)). See also *Martignon*, 492 F.3d at 149.

<sup>65</sup> *Martignon*, 492 F.3d at 150 (“[I]n order to demonstrate unconstitutionality, *Martignon* must establish that [the Bootlegging Provision] is a copyright law and not just that it is copyright-like.”) (citing *Gibbons*, 45 U.S. at 465; *Heart of Atlanta Motel, Inc. v. U. S.*, 379 U.S. 241, 261 (1964); *In re Trade-Mark Cases*, 100 U.S. 82, 89 (1879)); *Moghadam*, 175 F.3d at 1280 (citing *Gibbons* 45 U.S. at 465; *Heart of Atlanta*, 379 U.S. at 261; *Trade-Mark Cases*, 100 U.S. at 89). See also *Kiss Catalog, Ltd. v. Passport Int’l Prods., Inc.*, 405 F. Supp. 2d 1169, 1176 (C.D. Cal. 2005) (“In contrast to [*Gibbons*], the question is not whether legislation empowered by the Copyright Clause—but invalid under it—can otherwise be empowered by the Commerce Clause. The question is whether matters not encompassed within the Copyright Clause can be addressed by the Commerce Clause free of the restrictions of the Copyright Clause. The answer to that question is, clearly, yes.”). But see *Sebelius*, 132 S. Ct. 2566, 2586 (2012) (the answer is not clearly yes anymore).

<sup>66</sup> *Moghadam*, 175 F.3d at 1275 (citing *United States v. Lopez*, 514 U.S. 549, 558–59 (1995) (“The Commerce Clause empowers Congress to legislate regarding three things: (i) the use of channels of interstate commerce; (ii) instrumentalities and persons or things in interstate commerce; and (iii) intrastate activities that substantially effect interstate commerce.”)). See also *Martignon*, 492 F.3d at 152–53.

<sup>67</sup> *Moghadam*, 175 F.3d at 1275 (internal quotation marks omitted) (quoting *Lopez*, 514 U.S. at 557) (internal quotation marks omitted).

effects test required a law to “bear more than a generic relationship to several steps removed from interstate commerce and it must be a relationship that is apparent, not creatively inferred.”<sup>68</sup>

*Martignon* and *Moghadam* upheld a criminal statute known as the Copyright Bootlegging Provision as bearing the requisite apparent relationship to interstate commerce.<sup>69</sup> The provision provides criminal relief of five years of imprisonment (or ten years for the second offense) when a person, “without the consent of the performer or performers, ‘knowingly’ and for ‘commercial advantage or private financial gain’ (1) fixes the sounds or sounds and images of a live musical performance in a copy or phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation, (2) transmits or otherwise communicates to the public the sounds or images of a live musical performance, or (3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent or traffics in any recording described in (1).”<sup>70</sup> Finally, Congress believed that it was legislating under its grant of power from the Copyright Clause so it did not include a jurisdictional element to the law, which would normally appear in laws enacted under the Commerce Clause.<sup>71</sup> Nevertheless, the courts decided that the court could, on its own initiative, test the

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<sup>68</sup> *Moghadam*, 175 F.3d at 1275 (quoting *United States v. Wright*, 117 F.3d 1265, 1270 (11th Cir. 1997) *opinion vacated in part on reh'g*, 133 F.3d 1412 (11th Cir. 1998) (cert denied, 525 U.S. 894) (vacated on other grounds) (internal quotation marks omitted).

<sup>69</sup> Anti-Bootlegging Provisions, 18 U.S.C. § 2319A (2006).

<sup>70</sup> *Martignon*, 492 F.3d at 142–43 (quoting 18 U.S.C. § 2319A (2006)). *See Moghadam*, 175 F.3d at 1272.

<sup>71</sup> *Martignon*, 492 F.3d at 143 (citing S. REP. NO. 103-412, at 224 (1994)); *Moghadam*, 175 F.3d at 1275 (“Congress thought it was acting under the Copyright Clause”) (citing *Lopez*, 514 U.S. at 562–63 (“Congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye. . . . Congress normally is not required to make [such] formal findings.”)).

jurisdictional scope and decide whether the statute fits within the limit of interstate commerce.<sup>72</sup>

*Martignon* found that the Bootlegging Provision “regulates only fixing, selling, distributing, and copying with a commercial motive, activities at the core of the Commerce Clause.”<sup>73</sup> But this is assuming that intangibles act the same way marijuana, a tangible good, does. *Moghadam* cited to *Wickard*, a Supreme Court opinion about farming wheat that held a Federal law constitutional even though it regulated growing wheat for home consumption because it depressed interstate commerce.<sup>74</sup> Again, wheat is a tangible good. *Moghadam* distinguished itself from *Lopez*, a Supreme Court opinion that struck a law banning guns within 1000 feet of a school because it “ha[d] nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms.”<sup>75</sup> In so doing it concluded “the antibootlegging statute has a sufficient connection to interstate and foreign commerce to meet the *Lopez* test.”<sup>76</sup>

The Second and Eleventh Circuits arrived at their conclusions about how bootlegging implicates commerce by mixing in an expansive conception of property.<sup>77</sup> In fact, *Martignon* said of the bootlegging provisions that “[i]t is, perhaps, analogous to the law of criminal trespass.”<sup>78</sup> Both *Moghadam* and *Martignon* included trademark and copyright under the category of “Intellectual Property” and decided that trademark laws are thus

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<sup>72</sup> *Moghadam*, 175 F.3d at 1276 (“The absence of such a jurisdictional element simply means that courts must determine independently whether the statute regulates activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect[] interstate commerce.”) (quoting *Lopez* 514 U.S. at 561) (internal quotation marks omitted).

<sup>73</sup> *Martignon*, 492 F.3d at 152 (citing *Gonzales v. Raich*, 545 U.S. 1, 25 (2005)).

<sup>74</sup> *Moghadam*, 175 F.3d at 1276.

<sup>75</sup> *Id.* (citing *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942); *Lopez* 514 U.S. at 561).

<sup>76</sup> *Id.* at 1277.

<sup>77</sup> *Martignon*, 492 F.3d at 150–51 (“[T]hough allocation of property rights is not a sufficient condition for calling something a copyright law... it is a necessary one.”); *Moghadam*, 175 F.3d at 1278.

<sup>78</sup> *Martignon*, 492 F.3d at 151.

copyright-like laws that are entirely enacted under the Commerce Clause.<sup>79</sup> Thus, both courts decided that copyright-like acts could be justified under the Commerce Clause even if they would have exceeded limits had they been enacted under the Copyright Clause.<sup>80</sup> Then the courts distinguished the fact that a law against criminal trademark infringement was unconstitutional because there was no jurisdictional element to trigger criminal penalties because the *Trade-mark Cases* predated the New Deal expansion of the Commerce Clause.<sup>81</sup> In effect, the court used property to draw an analogy between trademark and copyright that perhaps it ought not.<sup>82</sup> Then the court used a mere property analogy to infer Commerce Clause authority, when trademarks can implicate

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<sup>79</sup> *Moghadam*, 175 F.3d at 1278–79 ("Indeed, modern trademark law is built entirely on the Commerce Clause. . . . and we have found no case which suggests that trademark law's conferral of protection on unoriginal works somehow runs afoul of the Copyright Clause.") (citing Michael B. Gerdes, *Getting Beyond Constitutionally Mandated Originality As A Prerequisite for Federal Copyright Protection*, 24 ARIZ. ST. L.J. 1461, 1470 (1992) ("The constitutionality of current federal trade-mark legislation . . . supports the conclusion that the Copyright Clause does not limit Congress's Commerce Clause power to grant copyright-like protection."); *Martignon*, 492 F.3d at 146 ("[W]hen an intellectual property law could not have been enacted pursuant to the Copyright Clause because it governs works that lack originality, a court should alternatively consider whether it was validly enacted under the Commerce Clause.") (citing *In re Trade-Mark Cases*, 100 U.S. 82, 94 (1879) (noting that trademark protection does not require originality, however that criminal trademark protection was not bound by interstate commerce and thus was unconstitutional).

<sup>80</sup> *Moghadam*, 175 F.3d at 1278.

<sup>81</sup> *Id.*

<sup>82</sup> The Lanham Act, 15 U.S.C. § 1127 (2006) (Trademarks are defined as anything that signifies in the minds of consumers the origin of goods or services. This means that granting trademarks protection is entirely driven by a goal of minimizing customer confusion and is limited by it. This also means that a trademark is necessarily connected or affixed to a certain class of good, and alone the mark is no trademark and is not protected). *See also* *Chance v. Pac-Tel Teletrac Inc.*, 242 F.3d 1151, 1157 (9th Cir. 2001) (explaining that token uses merely to reserve a mark are not enough to create a trademark protection, and that to have trademark protection a trademark owner must have engaged in an actual, *bona fide* use of the trademark in connection with goods or services).

interstate commerce whether or not they are labeled “Intellectual Property” because they are necessarily affixed to goods that are bought and sold to minimize customer confusion. Copyright laws neither share this inherent nexus with the marketplace for tangible goods nor the purpose of minimizing customer confusion. Thus, trademark laws are probably not copyright-like laws at all and they do not need an analogy to being intangible property to implicate interstate commerce.

The purpose of justifying the bootlegging provisions under the Commerce Clause was to address two of the Copyright Clause limits it allegedly breached.<sup>83</sup> The district court found in *Martignon* that, “Congress may not, if the Copyright Clause does not allow for such legislation, enact the law under a separate grant of power, even when that separate grant provides proper authority.”<sup>84</sup> In fact, this finding seems to agree with prior Supreme Court precedent as well, that the Copyright Clause is “both a grant of power and a limitation.”<sup>85</sup> Recognizing these limits, the Second Circuit said that the question in *Martignon* was “the extent to which the Copyright Clause can be read to limit Congress’s power to enact legislation under the Commerce Clause.”<sup>86</sup> However, the Second Circuit overturned the district court opinion and offered a work around for express Constitutional limits noting that “[s]ometimes Congress can enact legislation under one constitutional provision that it couldn’t under another.”<sup>87</sup>

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<sup>83</sup> *Martignon*, 492 F.3d at 143–44 (“[T]he district court held that [the bootlegging provisions] could not be sustained under the Copyright Clause because it ‘provides seemingly perpetual protection for unfixed musical performances.’”) (quoting *United States v. Martignon*, 346 F. Supp. 2d 413, 423 (S.D.N.Y. 2004)).

<sup>84</sup> *United States v. Martignon*, 346 F. Supp. 2d 413, 425 (S.D.N.Y. 2004) *vacated and remanded*, 492 F.3d 140 (2d Cir. 2007).

<sup>85</sup> *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 5 (1966).

<sup>86</sup> *Martignon*, 492 F.3d at 144 (“in limited instances, the expressed limitations on a clause do apply to externally to another clause”) (citing *Ry. Labor Executives’ Ass’n v. Gibbons*, 455 U.S. 457, 468 (1982)).

<sup>87</sup> *Id.* at 146, 148 (The Heart of Atlanta court “simply reasoned that it didn’t matter if Congress lacked the power to enact anti-discrimination legislation covering private actors under the Fourteenth Amendment as long as it possessed



Once *Moghadam* found that the Commerce Clause justified the constitutionality of the bootlegging provisions, the court refused to consider whether the Copyright Clause, or any other clause, sustains the legislation.<sup>88</sup> However, had they looked closer at the copyright act itself they may have found a major problem with their reasoning. The *Moghadam* Court decided that though public performances are not “fixed” they are required to be fixed in order to be triggered, and thus concluded that it is not completely adverse to the fixation requirement. However, the Copyright Act’s definition of fixed already includes these sorts of recordings.

The bootlegging provision’s fixation trigger directly collides with the Copyright Act’s broad definition of fixation that employs a legal fiction of “simultaneous fixation” in order to include transmissions of sporting events and other live televised performances. The Copyright Act states that a work is “‘fixed’ for purposes of this title if a fixation of the work is being made simultaneously with its transmission.”<sup>89</sup> Thus the victims of bootlegging may already have a copyright infringement cause of action identical to the criminal bootlegging provision that is enacted, provided that they prove that they “authored” a recording of the performance. Yet televised performances are “copyright” and bootlegged televised performances are “copyright-like.” One is limited by the Copyright Clause and the other is not. Even so *Moghadam* boldly states that “common sense” dictates that the

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sufficient power under the Commerce Clause.”) (citing *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 250 (1964)).

<sup>88</sup> *Moghadam*, 175 F.3d at 1277 (“[T]he various grants of legislative authority contained in the Constitution stand alone and must be independently analyzed.”) (citing to *Heart of Atlanta*, 379 U.S. at 250 (“[W]e have therefore not considered the other grounds relied upon. This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass but merely that since the commerce power is sufficient for our decision here we have considered it alone.”)).

<sup>89</sup> Copyright Act, 17 U.S.C. § 101 (2006) (definition of “fixed”); H. R. REP. NO. 94-1476 (1976) (commenting on the legal fiction of “simultaneous fixation”).

bootlegging provision is not at odds with the fixation requirement whereas *Gibbons* was in conflict with the uniform taxation limit.<sup>90</sup>

*Sebelius* arguably overturns both *Moghadam* and *Martignon* in that the Commerce Clause may no longer be used to supplement other grants of legislative power.<sup>91</sup> However, it is not clear whether the Commerce Clause is limited by definition,<sup>92</sup> or by means of the Necessary and Proper Clause.<sup>93</sup> The practical effect of the opinion of the court, which was underwritten by the Ginsberg dissent for purposes of the remedy, was that a Constitutional limit can be worked around even without the support of another grant of power like the Commerce Clause.<sup>94</sup> However, according to Chief Justice Roberts it is unlikely that the Constitutional grounding will merely shift while leaving the ultimate outcome of *Moghadam* and *Martignon* intact because doing so would render some Constitutional provisions “superfluous.”<sup>95</sup> Thus, the Court should hold that the Article I grants of power must coexist and thus not accept a reading of the constitution that leaves portions superfluous and without effect.

*Martignon* was remanded to decide whether the traditional contours of copyright have been abandoned and whether the bootlegging provision violates First Amendment Free speech.<sup>96</sup> Though the issue was not decided, the government’s argument that it had the authority under the Necessary and Proper Clause might be

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<sup>90</sup> *Moghadam*, 175 F.3d at 1281.

<sup>91</sup> *Sebelius*, 132 S. Ct. 2566, 2586 (2012). *Cf. Martignon*, 492 F.3d at 150–51; *Moghadam*, 175 F.3d at 1278.

<sup>92</sup> *Sebelius*, 132 S. Ct. at 2643 (Kennedy, J. dissenting) (Congress cannot force someone into an interstate market in order to justify their regulation under the Commerce Clause).

<sup>93</sup> *Id.* at 2592, 2599 (noting that necessary and proper actually precludes improper laws).

<sup>94</sup> *Id.* at 2607; *Sebelius*, 132 S. Ct. at 2630 (Ginsberg, J. concurring in part, concurring in the judgment in part, and dissenting in part).

<sup>95</sup> *Id.* at 2586 (finding that if the Judiciary continued reading an over-expansive Commerce Clause power, “many of the provisions of the constitution would be superfluous.”).

<sup>96</sup> *Martignon*, 492 F.3d at 143–44. *See generally Moghadam*, 175 F.3d (did not raise the First Amendment).

in conflict with Chief Justice Roberts' constitutional interpretation.<sup>97</sup> The Supreme Court has held that copyright law itself is not immune to First Amendment scrutiny.<sup>98</sup> However, it also held that if the traditional contours are abided by, then First Amendment scrutiny is unlikely. The traditional contours of copyright include fair use and the idea/expression distinction.<sup>99</sup>

*Martignon* and *Moghadam* pick up on a recurring theme in IP law: that international treaties play a significant role in judicial and legislative processes. The bootlegging provisions were one of the enactments of the World Trade Organization's Uruguay Round Trade Agreements.<sup>100</sup> The WTO currently embraces 159 countries as signatories to the agreements.<sup>101</sup> Any international protection of IP must be gained through treaty. Furthermore, treaties are not automatically enacted in the United States. In order for a treaty to obtain the force of law it must also be enacted by Congress. However, treaties find support by those who wish to convince Congress to expand IP protection to that effect, as well as convince the judiciary that an enacted law is legitimate.<sup>102</sup>

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<sup>97</sup> Compare *Martignon*, 492 F.3d at 143–44, with *Sebelius*, 132 S. Ct. at 2592, 2599 (noting that necessary and proper actually precludes *improper* laws).

<sup>98</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 219–21 (2003) (copyright acts are not "categorically immune to challenges under the First Amendment.").

<sup>99</sup> 17 U.S.C. §§ 102, 107 (2013). See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 540 (1985) ("[T]he First Amendment's protections [are] embodied in the [Copyright] Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use.").

<sup>100</sup> Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

<sup>101</sup> *Understanding the WTO: The Organization, Members and Observers*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (159 members as of March 2, 2013) (last visited Apr. 19, 2013).

<sup>102</sup> *Moghadam*, 175 F.3d at 1271 (citing Todd D. Patterson, *The Uruguay Round's Anti-Bootlegging Provision: A Victory for Musical Artists and Record Companies*, 15 WIS. INT'L L.J. 371, 380–83 (1997)); *Martignon*, 492 F.3d at 142. Cf. Zack Whittaker, *How ACTA Would Affect You: FAQ*, ZDNET (Jan. 29, 2012), <http://www.zdnet.com/blog/london/how-acta-would-affect-you-faq/2773>

(explaining the Anti-Counterfeiting Trade Agreement (ACTA) which has not

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The bootlegging provisions are only one of many ways Copyright law has tried to keep up with the times.<sup>103</sup> Accordingly, a major law enacted to modernize copyright law was the Digital Millennium Copyright Act (DMCA). One of its purposes was to prevent pirates from making perfect copies of works that can be rapidly disseminated on the internet without restriction.<sup>104</sup> Among its provisions, the DMCA states that “[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title.”<sup>105</sup>

Since this anti-circumvention provision modified preexisting copyright law, its constitutionality has not been challenged in a way similar to the bootlegging provisions for exceeding the limits in the Copyright Clause. However, since it was presumably enacted under the Copyright Clause without support of the Commerce Clause, the Copyright limits are still in play. Thus, if the underlying copyright being protected by a DMCA anti-circumvention provision fails to meet the copyright goal of creating “progress” in knowledge and learning then anti-circumvention measures should no longer receive DMCA protection.<sup>106</sup>

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been adopted, but may have had the same effect as legislation in the long run if it were).

<sup>103</sup> S. REP. NO. 105-190, at 2 (1998) (“Copyright laws have struggled through the years to keep pace with emerging technology from the struggle over music placed on a player piano roll in the 1900’s to the introduction of the VCR in the 1980’s. With this constant evolution in technology, the law must adapt in order to make digital networks safe places to disseminate and exploit copyright materials.”). See The Anti-Circumvention Provision 17 U.S.C. § 1201 (2006).

<sup>104</sup> H.R. REP. NO.105-551 (I), at 11 (1998).

<sup>105</sup> 17 U.S.C. § 1201(a)(1)(A) (2006).

<sup>106</sup> Compare *Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc.*, 964 F.2d 965, 972 (9th Cir. 1992) (finding that a company that made Game Genies was a fair user, even though their product allowed users to cheat on their Nintendo games without Nintendo’s authorization), with *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 950 (9th Cir. 2010) *opinion amended and superseded on denial of reh’g*, No. 09-15932, 2011 WL 538748 (9th Cir. Feb. 17, 2011) (deciding that the DMCA anti-circumvention provision could be enforced without considering Game-Genie-like fair uses, and rejecting the Federal Circuit’s

In fact, property principles have been employed to justify these constitutionally questionable penalties. It seems that an implicit acknowledgement has been adopted by courts that rights to liberty and security in anything that seems like property, including at least one form of online currency,<sup>107</sup> supplements the constitutionality of Congress harshly regulating the so called hackers. Thus traditional works, like literary, audiovisual, and musical works, have been granted broad protection under the anti-circumvention provisions.<sup>108</sup> These protections were justified over public outcry for the protection of free speech when a circumventing hack, made by a Norwegian teenager, had already been distributed widely. In fact, T-shirts bearing the illegal hack were made, distributed and worn by members of the public.<sup>109</sup> Arguably, under the court's decision, the T-shirt wearers could have been rounded up and arrested on criminal charges for distributing the hack.

The DMCA has not only been raised to protect traditional works, however. One case in the Federal Circuit and another in the

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requirement of a nexus of the circumvention with a substantial underlying copyrighted work).

<sup>107</sup> *Compare MDY Indus.* 629 F.3d, at 935 (protecting Blizzard's right to manage its video game's online virtual economy and currency which can be bought and sold for real money and valued in terms of U.S. dollars), *with* Reuben Grinberg, *Bitcoin: An Innovative Alternative Digital Currency*, 4 HASTINGS SCI. & TECH. L.J. 159, 174 (2012) (describing many online currencies that exist in a grey market and may eventually be found illegal for a number of reasons including tax evasion and counterfeiting).

<sup>108</sup> *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 459 (2d Cir. 2001); *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F. Supp. 2d 1085, 1093 (N.D. Cal. 2004). *See, e.g.*, *Realnetworks, Inc. v. DVD Copy Control Ass'n*, 641 F. Supp. 2d 913, 935 (N.D. Cal. 2009); *DirecTV, Inc. v. Randy Borow*, No. 03-C-2581, 2005 WL 43261 (N.D. Ill. Jan. 6, 2005); *United States v. Whitehead*, 532 F.3d 991, 992 (9th Cir. 2008); *CoxCom, Inc. v. Chaffee*, 536 F.3d 101, 105 (1st Cir. 2008).

<sup>109</sup> Farhad Manjoo, *Court to Address DeCSS T-Shirt*, WIRED (Aug. 2, 2000), <http://www.wired.com/science/discoveries/news/2000/08/37941>; *DVD Copy Control Ass'n, Inc. v. Bunner*, 31 Cal. 4th 864, 871 (2003) (describing how a Norwegian teenager was able to reverse engineer DeCSS, write a circumvention code and disseminate it throughout the world on the internet).

Sixth Circuit involved plaintiffs who sought to use the anti-circumvention protections to protect encryptions as copyrighted works in themselves, with no other underlying copyright being protected.<sup>110</sup> One involved garage door openers that had embedded anti-circumvention codes to create an obstruction for consumers who tried to purchase used “aftermarket” parts, apparently to increase the sale of new garage door openers.<sup>111</sup> The other involved software embedded in ink cartridges for home printers that counted the number of pages printed and indicated to the printer that the ink was empty before it was actually empty to get consumers to buy more ink cartridges.<sup>112</sup> The page counting program had an encryption that was being circumvented with a hack to allow the user to use all the ink they purchased.<sup>113</sup> Both of these cases decided that there was not a sufficient nexus between these encryptions and copyrighted material to use copyright law to prosecute the “hackers” otherwise known as the plaintiff’s customers.<sup>114</sup> The “thin” copyright in the software encryptions protecting the garage door openers and ink cartridges was not enough.<sup>115</sup>

The *Kirtsaeng* decision might extend to support these decisions by balancing ambiguous portions of the anti-circumvention provision with common law rights in physical property.<sup>116</sup> Arguably the garage door and ink cartridge anti-

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<sup>110</sup> *Chamberlain Grp., Inc. v. Skylink Technologies, Inc.*, 381 F.3d 1178, 1204 (Fed. Cir. 2004) (requiring a "critical nexus between access and protection"); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 550 (6th Cir. 2004) (all three liability provisions of this section of the DMCA require the claimant to show that the 'technological measure' at issue 'controls access to *a work protected under this title*,' and that the computer code composing the anti-circumvention measure was not one of these protected works).

<sup>111</sup> *Chamberlain*, 381 F.3d at 1183.

<sup>112</sup> *Lexmark*, 387 F.3d at 563.

<sup>113</sup> *Id.* at 564.

<sup>114</sup> *Chamberlain*, 381 F.3d at 1204; *Lexmark*, 387 F.3d at 550.

<sup>115</sup> *Chamberlain*, 381 F.3d at 1186; *Lexmark*, 387 F.3d at 550.

<sup>116</sup> *Kirtsaeng*, No. 11–697, slip op. at 17, 26 (2013) (especially because interpreting "lawfully made under this title" may be similar to interpreting "a work protected under this title" as *Lexmark* and *Chamberlain* did). See 17 U.S.C.

circumvention measures trespassed on the consumer's common law rights to alienate, destroy, and otherwise manage their physical property.<sup>117</sup> Somehow, it seems that the anti-circumvention provision gave printer and garage door opener companies the color of legitimacy when they violated physical property rights. Similarly, in January, 2013 the Librarian of Congress removed the exception to violations of the anti-circumvention provision for unlocking cell phones.<sup>118</sup> Whether there are physical property rights within the purchased machinery of a cell phone for consumers to justify unlocking cell phones to switch service providers is debatable.<sup>119</sup> However, according to the FCC it is likely that Congress will limit the DMCA before the question is submitted to the Court.<sup>120</sup>

The anti-circumvention nexus requirement was rejected by the Ninth Circuit in *MDY Industries* to allow Blizzard's use of the DMCA to protect its management and allocation of digital gold and experience in its popular video game World of Warcraft (WoW).<sup>121</sup>

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§ 1201(a)(1)(A) (2006) (Outlawing the circumvention of technological measures used to protect "a work protected under this title.").

<sup>117</sup> *Kirtsaeng*, No. 11-697, slip op. at 17 (Interpreting "lawfully made under this title" so as to "retain the substance of common law." In this case, the lawful consumer's property right to alienation of chattels).

<sup>118</sup> Exemption to Prohibition Against Circumvention, 37 C.F.R. § 201.40 (2013) (no longer including an exemption for unlocking cell phones).

<sup>119</sup> *Kirtsaeng*, No. 11-697, slip op. at 17.

<sup>120</sup> Wireless Device Independence Act of 2013, S. 467, 113th Cong. (2013) (Introduced on March 5, 2013); Statement from FCC Chairman Julius Genachowski on the Copyright Office of the Library of Cong. Position on DMCA & Unlocking New Cell Phones, 2013 WL 812666 (F.C.C. Mar. 4, 2013) (asking the legislature to rethink their stance on default criminalization the jail breaking of cellphones); Statement of Comm'r Ajit Pai on Unlocking Cell Phones, 2013 WL 953595 (F.C.C. Mar. 11, 2013) ("American consumers should not face jail time for unlocking their cell phones." Pai also commended Congress's movement toward adopting the Wireless Device Independence Act of 2013).

<sup>121</sup> *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 950 (9th Cir. 2010) *opinion amended and superseded on denial of reh'g*, No. 09-15932, 2011 WL 538748 (9th Cir. Feb. 17, 2011). *See also* *Sony Computer Entm't Am., Inc. v.*

The constitutionality of the DMCA anti-circumvention provision for adhering to all of the Copyright Clause limits of “writings,” “authors,” “limited times” and “progress,” should arise once a nexus requirement is abandoned.<sup>122</sup> Otherwise, statements such as “the founding social contract of the new millennium [is] the End User License Agreement (EULA), [and] not the U.S. Constitution” will cease to be metaphorical.<sup>123</sup> Blizzard’s EULA and Terms of Use agreement (ToU) includes a licensing agreement that regulates “valuable in-game currency.”<sup>124</sup> The ToU also bans bots and hacks.<sup>125</sup>

The defendant in *MDY Industries* created and sold bots that were able to mine digital gold and increase the experience of a WoW character automatically, playing the game on autopilot while the user is away from the game.<sup>126</sup> By September 2008, the

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Gamemasters, 87 F. Supp. 2d 976, 987 (N.D. Cal. 1999) (using the DMCA anti-circumvention provisions to protect underlying trademark infringement).

<sup>122</sup> *Kirtsaeng*, No. 11–697, slip op. at 17; *Chamberlain*, 381 F.3d at 1186; *Lexmark*, 387 F.3d at 550.

<sup>123</sup> Joshua A.T. Fairfield, *Nexus Crystals: Crystallizing Limits on Contractual Control of Virtual Worlds*, 38 WM. MITCHELL L. REV. 43, 44 (2011).

<sup>124</sup> Blizzard Entertainment, Inc. and Vivendi Games, Inc. Motion for Summary Judgment and Memorandum of Points and Authorities in Support, (March 21, 2008), *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, 629 F.3d 928, 950 (9th Cir. 2010) (No. 206CV02555). See also Battle.net, Terms of Use, Blizzard Entertainment, <http://us.blizzard.com/en-us/company/about/termsfuse.html> (last visited April 20, 2013) (prohibiting users from “gather[ing] in-game currency, items or resources for sale outside of the Game without Blizzard’s authorization”); *MDY Indus.*, 624 F.3d at 935 (noting that WoW users gain access to “in-game currency, weapons and armor” including a comprehensive economic system); World of Warcraft, End User License Agreement, Blizzard Entertainment, [http://sea.blizzard.com/en-sg/company/legal/wow\\_eula.html](http://sea.blizzard.com/en-sg/company/legal/wow_eula.html) (last visited April 20, 2013).

<sup>125</sup> World of Warcraft, End User License Agreement, Blizzard Entertainment, [http://sea.blizzard.com/en-sg/company/legal/wow\\_eula.html](http://sea.blizzard.com/en-sg/company/legal/wow_eula.html) (last visited April 20, 2013); World of Warcraft, Terms of Use, Blizzard Entertainment [http://us.blizzard.com/en-us/company/legal/wow\\_tou.html](http://us.blizzard.com/en-us/company/legal/wow_tou.html) (last visited April 20, 2013)

<sup>126</sup> Motion for Summary Judgment and Memorandum of Points and Authorities in Support of Blizzard Entertainment, Inc. and Vivendi Games, Inc., *MDY*



defendant generated \$3.5 million gross revenues in sales of these bots.<sup>127</sup> His actions, and the use of the bots by purchasers, may have breached the EULA and ToU. Thus, breach of contract could have decided this case. Nevertheless, the property driven sledgehammer of copyright law was invoked instead.<sup>128</sup> Furthermore, the use and distribution of the bots were found to violate the DMCA even though the Warden program that the bots “circumvented” was created and implemented by Blizzard after the defendant had already created and distributed bots.<sup>129</sup> Thus, not only was there possibly no underlying copyright infringement being protected by this case’s finding, but also there was initially no circumvention occurring.

One scholar has counted the dangers of the use of private contract to limit the use of the internet and the DMCA backing up digital rights management [DRM] encryptions.<sup>130</sup> It is said that the effect would be to cast technology as “bad” because it reduces the rents earned by copyright owners, or internet and technology businesses in general if the nexus requirement is abandoned.<sup>131</sup> The

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Indus., LLC v. Blizzard Entm't, Inc., 629 F.3d 928, 950 (9th Cir. 2010) (No. 206CV02555) (“Glider users relied on the [MDY bots] to exploit WoW for commercial purposes, namely the 'farming' [sic] of in-game assets for the purpose of selling the assets in real money transactions outside the game.”).

<sup>127</sup> *MDY Indus.*, 624 F.3d at 936.

<sup>128</sup> Peter S. Menell, *Governance of Intellectual Resources and Disintegration of Intellectual Property in the Digital Age*, 26 *BERKELEY TECH. L.J.* 1523, 1531 (2011) (“When the only tool that you have in your box is a hammer, every problem looks like a nail.”).

<sup>129</sup> *MDY Indus.*, 624 F.3d at 936.

<sup>130</sup> Madhavi Sunder, *IP3*, 59 *STAN. L. REV.* 257, 280–82 (2006) (seeing the use of “[p]rivate contracts” to enhance the “power of private property holders” to back “digital encryption code” with the legal code to “control the people’s access to knowledge” as a special challenge for democracy).

<sup>131</sup> *Id.* (citing Justin Hughes, “*Recoding*” *Intellectual Property and Overlooked Audience Interests*, 77 *TEX. L. REV.* 923, 940–66 (1999)). *See also* *TracFone Wireless, Inc. v. SND Cellular, Inc.*, 715 F. Supp. 2d 1246, 1252 (S.D. Fla. 2010) (using the DMCA to protect the “goodwill [, trademarks, and other intangible] property” from the resale market awarding damages of over \$11 million in statutory damages); *Microsoft Corp. v. EEE Bus. Inc.*, 555 F. Supp. 2d 1051, 1059 (N.D. Cal. 2008) (finding that trafficking counterfeit software licensing

ultimate result of abandoning nexus will limit the democratizing effects of the internet, the success of new authors, and in so doing destroy “the liberation potential for poor underclasses” worldwide.<sup>132</sup> Furthermore, without a nexus requirement, there does not seem to be a meaningful distinction that would keep copyright from protecting other digital currencies, some of which are actually backed by gold and, in the future, could compete with the U.S. dollar.<sup>133</sup> These currencies exist in a grey market that the U.S. government may decide to crack down on for a number of reasons including tax evasion and counterfeiting.<sup>134</sup> Copyright and contract law should not be used to legitimize anti-circumvention protection of content that might be illegal, especially when the protected content bears no nexus with copyrighted works.

As were the bootlegging provisions, the anti-circumvention provisions are a creature of international law.<sup>135</sup> In fact, the

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keys without authorization is considered a violation of the DMCA); *Craigslist, Inc. v. Naturemarket, Inc.*, 694 F. Supp. 2d 1039, 1046 (N.D. Cal. 2010)(finding that automated website use that circumvents CAPTCHA keys violates the DMCA).

<sup>132</sup> *Sunder*, *supra* note 130 at 280–82. *Compare* *Pearl Invs., LLC v. Standard I/O, Inc.*, 257 F. Supp. 2d 326, 349 (D. Me. 2003) (finding that using a VPN violates the anti-circumvention provisions), *with* Ai Weiwei's blog, *A Digital Rallying Cry*, THE ECONOMIST, (April 12, 2011) [http://www.economist.com/blogs/prospero/2011/04/ai\\_weiweis\\_blog](http://www.economist.com/blogs/prospero/2011/04/ai_weiweis_blog) (noting that a contemporary artist and Chinese dissident uses a VPN to disseminate his works and cries for national transparency via twitter. Also China's golden shield law known as "the great firewall" is used to block out western internet businesses to preserve similar Chinese businesses that are highly censored by the Chinese government. For example, Weibo is the Chinese Facebook and Youku is the Chinese YouTube). *See also* Star Chang, *Ai Weiwei's 'Gangnam Style' Video is Banned in China*, M.I.C. GADGET, (Oct. 26, 2012) <http://micgadget.com/31151/ai-weiweis-gangnam-style-video-is-banned-in-china/> (something that might fall into the "parody" category protected by fair use in the U.S.).

<sup>133</sup> *Grinberg*, *supra* note 107, at 174.

<sup>134</sup> *Id.* at 191.

<sup>135</sup> *Chamberlain Grp., Inc. v. Skylink Technologies, Inc.*, 381 F.3d 1178, 1194 (Fed. Cir. 2004) (noting that the DMCA was enacted as a condition of the World Intellectual Property Organization Copyright Treaty) (citing WIPO Treaty, Apr. 12, 1997, art. 11, S. Treaty Doc. No. 105–17 (1997)).

perception that developing nations are not enforcing IP protection enough has inspired global enforcement efforts by Homeland Security.<sup>136</sup> Not only does the movement to globalize intangible property threaten to render “fair use” obsolete and further endanger free expression and the public domain,<sup>137</sup> it might ensure that developing nations never embrace a robust freedom of expression. All this to protect the addictiveness of a video game that is unlikely to create progress in knowledge and learning at all.

The DMCA has not expressly invoked the traditional contours of copyright per se, but it does have some limits that could protect free speech. For example, the Librarian of Congress is allowed to adopt circumvention exceptions every 3 years.<sup>138</sup> The Librarian had adopted exceptions for obsolete software and unlocking cell phones. However, in early 2013 the Librarian removed the cell phone unlocking exception. Under the Ninth Circuit’s nexus-less test, and without a constitutional challenge, this could represent a huge antitrust problem in telecommunications that essentially overturns the effect of *Carterfone*.<sup>139</sup> There are also a

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<sup>136</sup> *Chinese Man Guilty of \$100 Million Hi-Tech Software Piracy*, THE ECONOMIC TIMES (Jan. 9, 2013), [http://articles.economicstimes.indiatimes.com/2013-01-09/news/36237513\\_1\\_piracy-operation-software-titles-copyright](http://articles.economicstimes.indiatimes.com/2013-01-09/news/36237513_1_piracy-operation-software-titles-copyright) (“Li mistakenly thought he was safe from the long arm of HSI, hiding halfway around the world in cyberspace anonymity.”) (quoting ICE Director John Morton). *But see China’s Internet: A Giant Cage*, THE ECONOMIST (April 6, 2013), <http://www.economist.com/news/special-report/21574628-internet-was-expected-help-democratise-china-instead-it-has-enabled>; *The Machinery of Control: Cat and Mouse*, THE ECONOMIST (April 6, 2013), <http://www.economist.com/news/special-report/21574629-how-china-makes-sure-its-internet-abides-rules-cat-and-mouse>.

<sup>137</sup> Sunder, *supra* note 130, at 282. *See also* Alessandra Garbagnati, *The Wrath of the Blizz King: How the Ninth Circuit’s Decision in Mdy Industries, Inc. v. Blizzard Ent. May Slay the Game Genie*, 34 HASTINGS COMM. & ENT L.J. 313, 314 (2012) (explaining how the *MDY Indus.* decision could overrule the Game Genie decision).

<sup>138</sup> 17 U.S.C. § 1201(a)(1)(C) (2006).

<sup>139</sup> *In re Use of the Carterfone Device in Message Toll Tel. Serv.*, 13 F.C.C.2d 420, 424 (1968) (deciding that the Carterfone could compete with the telephone service provider’s competing device). *See* F.C.C. Chairman Julius Genachowski Statement on Preserving Internet Freedom & Openness, 2010 WL 5179798

number of limited exceptions to the anti-circumvention provisions enumerated in the DMCA.<sup>140</sup>

Fair use in a DMCA context would go unrecognized without a nexus requirement.<sup>141</sup> In fact, without requiring a nexus there may be no copyrighted material to apply the four-part fair use test to in anti-circumvention cases.<sup>142</sup> Furthermore, a nexus requirement is necessary in order to preserve the required protection of First Amendment free speech. As a part of the nexus test, a court could determine the underlying work's thinness of protection and its situation close to or far from the "core" of copyright protection.<sup>143</sup> This could enable reasonable findings that in some circumstances

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(F.C.C. Dec. 21, 2010) ("Years after the *Carterfone* decision, as we entered the early days of the Internet age, the Commission reaffirmed its policy of openness and competition by protecting freedom on both the access layer and the architectural layer of the network."). See also Dan L. Burk, *Anticircumvention Misuse*, 50 UCLA L. REV. 1095, 1139 (2003) (arguing that copyright misuse be extended to DMCA violations) (citing *Lasercomb America Inc. v. Reynolds* 911 F.2d 970 (4th Cir.) (1990)); Statement from F.C.C. Chairman Julius Genachowski on the Copyright Office of the Library of Cong. Position on DMCA & Unlocking New Cell Phones, 2013 WL 812666 (F.C.C. Mar. 4, 2013) ("From a communications policy perspective, this raises serious competition and innovation concerns, and for wireless consumers, it doesn't pass the common sense test.").

<sup>140</sup> 17 U.S.C. § 1201(a)(1)(D), (a)(2)(D), (b), (d)–(k) (2006) (discussing that The Librarian of Congress can publish exceptions to anti-circumvention violation every 3 years, there are a few listed exemptions in (d)–(k) and not prohibiting acts of individual circumvention that protect alleged copyright rights, that are unrelated to access itself).

<sup>141</sup> 17 U.S.C. § 1201 (a)(2)(C) (2006) (stating that the DMCA anti-circumvention provisions should not affect free speech and fair use).

<sup>142</sup> See *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 950 (9th Cir. 2010) *opinion amended and superseded on denial of reh'g.*, No. 09-15932, 2011 WL 538748 (9th Cir. Feb. 17, 2011) (not requiring nexus and not considering fair use).

<sup>143</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) (considering whether a work was "closer to the core of intended copyright protection than others."); *Feist Publ'n, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 349 (1991) ("[T]he copyright in a factual compilation is thin.").

protecting EULAs and ToUs with copyright statutory damages and criminal punishment may constitute a violation of free speech.

The effect of *Sebelius* on a potential constitutional challenge of the DMCA that it circumvents the Copyright Clause's express limits and the First Amendment is not yet known. However, *Sebelius* has called into question the Supreme Court's past Constitutional reasoning that the Copyright and Patent Clause grants Congress "broad decision-making leeway."<sup>144</sup> Even its recent finding that "[n]othing in the text of the Copyright Clause confines the 'Progress of Science' exclusively to 'incentives for creation'" may require some explaining.<sup>145</sup> In fact, the entire utilitarian regime underpinning the last era of Intellectual Property jurisprudence may rightfully come under attack because the Commerce Clause may no longer supplement the entire Copyright and Patent Clause's grant of power.<sup>146</sup>

A "free-riding" rationale, buttressed by Utilitarian and Lockean thought, has been an essential foundation to the legislation

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<sup>144</sup> Eldred v. Ashcroft, 537 U.S. 186, 263 (2003) (Breyer, J., dissenting) (recognizing the "the broad decisionmaking leeway that the Copyright Clause grants Congress.").

<sup>145</sup> Golan v. Holder 132 S. Ct. 873, 888 (2012).

<sup>146</sup> *Sebelius*, 132 S. Ct. 2566, 2588, 2643 (dissenting opinion by Chief Justice Roberts and Justice Kennedy, giving a limiting view of the Commerce Clause). See also Landes & Posner, *supra* note 17, at 37–70, 166–209, 294–333 (giving a utilitarian rationale for copyright, trademark and patents that works around the constitutional limits on IP rights that relies on the marketplace and freedom to solve the possible problems with exceeding the Constitution's limits); Wendy J. Gordon, *Fair Use As Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1601 (1982). But see Sunder, *supra* note 130, at 283; Lemley, *supra* note 22, at 1031 (casting free competition as the norm, and IP rights as an exception to the norm); Letter From Thomas Jefferson to Isaac McPherson, Doc. 12, Writings 13:333--35, (Aug. 13, 1813), available at [http://presspubs.uchicago.edu/founders/documents/a1\\_8\\_8s12.html](http://presspubs.uchicago.edu/founders/documents/a1_8_8s12.html) ("Stable ownership is the gift of social law, and is given late in the progress of society. It would be curious then, if an idea, the fugitive fermentation of an individual brain, could, of natural right, be claimed in exclusive and stable property.").

of an ever-growing body of IP protections.<sup>147</sup> Free-riding was also used in the Ginsberg concurrence in *Sebelius* and was not drawn upon by any of the remaining Justices in *Sebelius*.<sup>148</sup> Thus, free-riding can no longer *per se* justify the constitutionality of federal regulation under the Commerce Clause. As made apparent in *Kirtsaeng*, the Court should finally return to its finding in *Dowling v. U.S.*, that copyright is “subjected to precisely defined limits,”<sup>149</sup> and its decision in *U.S. v. Paramount Pictures* that “the copyright law, like the patent statutes, makes reward to the owner a secondary consideration.”<sup>150</sup>

### The *Kirtsaeng* Decision

The Supreme Court seems to have finally taken a course of “simplicity and coherence” when interpreting copyright law.<sup>151</sup> The Court decided on a reading of “lawfully made under this title” as a non-geographical phrase, overturning dicta in *Quality King* that suggested the opposite.<sup>152</sup> Thus, the court found that the copyright limit of “first sale” applied to works legally sold or distributed abroad and copyright owners would not be able to police imports of them into the United States.<sup>153</sup> To justify its position, the Supreme Court drew upon the Constitutional limit of “progress,”<sup>154</sup> the

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<sup>147</sup> Lemley, *supra* note 22, at 1066–67; David McGowan, *Copyright Nonconsequentialism*, 69 MO. L. REV. 1, 2–3, 7, 38, 71–72 (2004).

<sup>148</sup> *Sebelius*, 132 S. Ct. at 2623–24 (Ginsberg, J. concurring in part, concurring in the judgment in part, and dissenting in part); S. REP. NO. 105-190, at 2 (1998).

<sup>149</sup> *Dowling v. United States*, 473 U.S. 207, 216–17 (1985) (“the copyright owner . . . holds no ordinary chattel . . . for the copyright holder’s dominion is subjected to precisely defined limits. It follows that interference with copyright does not easily equate with theft, conversion or fraud.”).

<sup>150</sup> *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948). *C.f. infra* note 255, and accompanying text.

<sup>151</sup> *Kirtsaeng*, No. 11–697, slip op. at 12 (2013).

<sup>152</sup> *Id.* at 24–25, 30, 33 (citing *Quality King Distributors, Inc. v. L’anza Research Int’l, Inc.*, 523 U.S. 135, 143–154 (1998)).

<sup>153</sup> *Id.* at 26.

<sup>154</sup> *Id.* at 19 (“Association of libraries, used-book dealers, technology companies, consumer-goods retailers, and museums point to various ways in which a

founders' arguments for copyright as a "limited monopoly,"<sup>155</sup> and 15th Century property common law.<sup>156</sup> It also noted that Thomas Jefferson and Benjamin Franklin obtained collections of foreign books for personal and commercial use in the manner being challenged by the plaintiff in this case.<sup>157</sup> In fact, this decision avoided branding Jefferson and Franklin "pirates and thieves" by today's low bar copyright infringement standards. It also noted that a wide variety of items resold internationally bear copies of "copyrightable software programs or packaging" and thus copyright law could halt the resale of all sorts of physical property.<sup>158</sup>

Briefs submitted by libraries, museums, used book sellers and technology companies convinced the Supreme Court that limiting the first sale doctrine geographically would not create "progress" as required by the Constitution or be coherent with other Constitutional limits.<sup>159</sup> Thus, Constitutional limits have finally begun to play a role in stopping copyright expansion in appropriate ways. The Court also seemed to hint that readings of "lawfully made under this title" that limited first sale geographically were

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geographical interpretation would fail to further basic constitutional copyright objectives, in particular 'promot[ing] the Progress of Science and useful Arts.')

(quoting U.S CONST. art. I, § 8 cl. 8).

<sup>155</sup> *Id.* at 31–32 ("The Constitution described the nature of American copyright law by providing Congress with the power to "secur[e] to "[a]uthors" "for limited [t]imes" the "exclusive [r]ight to their . . . [w]ritings." Art. I Section 8 cl. 8. The Founders, too, discussed the need to grant an author a limited right to exclude competition.") (citing Letter from Thomas Jefferson to James Madison (July 31, 1788), in 13 PAPERS OF THOMAS JEFFERSON 440, 442–43 (J. Boyd ed. 1956) (arguing against the grant of any monopoly); Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 13 PAPERS OF THOMAS JEFFERSON 14, at 16, 21 (arguing for a limited monopoly to secure production)).

<sup>156</sup> *Id.* at 17 ("In the early 17th century Lord Coke explained the common law's refusal to permit restraints on the alienation of chattels. ") (citing Charles M. Gray, *Two Contributions to Coke Studies*, 72 U. CHI. L. REV. 1127, 1135 (2005)).

<sup>157</sup> *Id.* at 20–21.

<sup>158</sup> *Kirtsaeng*, No. 11–697, slip op. at 21 (2013) (including "automobiles, microwaves, calculators, mobile phones, tablets, and personal computers.").

<sup>159</sup> *Id.* at 23.

either illogical, disingenuous or both.<sup>160</sup> The majority did not mention the importance of honesty and seemed to limit its stance to requiring precedence.<sup>161</sup> Thus it found precedent in a centuries old right to alienate physical property recognized in common law, and rested its opinion there.<sup>162</sup> However, along with the traditional right to alienation of physical property found in common law histories, there also exists a judicial interest in upholding honesty through formalism.<sup>163</sup>

*Kirtsaeng*'s favored canon of statutory interpretation was: "[W]hen a statute covers an issue previously governed by the common law we must presume that Congress intended to retain the substance of the common law."<sup>164</sup> Thus the Court decided that Congress must have meant for the first sale doctrine to limit a copyright holder's ability to police parallel market pricing, in order to preserve the right to alienate chattels.<sup>165</sup> It also noted that no framer mentioned that copyright should confer a right to police parallel market pricing.<sup>166</sup>

Justices Ginsberg, Scalia and Kennedy concurred in a dissent that may be the most telling of how far property principles have gone astray to justify expansive IP protection.<sup>167</sup> The dissent called upon the position the U.S. had taken on international

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<sup>160</sup> *Id.* at 24 (stating that the other readings "require too many unprecedented jumps over linguistic and other hurdles that in our view are insurmountable.").

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 17.

<sup>163</sup> BAKER, *supra* note 12, at 320; 2 WILLIAM BLACKSTONE, COMMENTARIES \*449.

<sup>164</sup> *Kirtsaeng*, No. 11–697, slip op. at 17 (citing *Samantar v. Yousuf*, 130 S. Ct. 2278, 2290 n.13 (2010)).

<sup>165</sup> *Id.* at 31–32.

<sup>166</sup> *Id.* at 32 ("But the Constitution's language nowhere suggests that its limited exclusive right should include a right to divide markets or a concomitant right to charge different purchasers different prices for the same book, say to increase or to maximize gain. Neither, to our knowledge, did any Founder make any such suggestion.").

<sup>167</sup> *Compare Kirtsaeng*, No. 11–697 (Ginsberg, J. dissenting) (2013), with Letter from Thomas Jefferson to Isaac McPherson, Aug. 13, 1813, in JEFFERSON: WRITINGS, *supra* note 1, at 1291–92.



copyright protection according to TRIPs, the WTO and WIPO.<sup>168</sup> The treaties we have pushed upon most of the developing world do not include the same kind of first sale and fair use exceptions that we allow our own citizens.<sup>169</sup> The treaties have called a cut back on the first sale limitation a solution to international copyright exhaustion.<sup>170</sup> Thus the dissent argued that the copyright act should allow copyright owners to police imports of all copies of copyright protected items, regardless if they were legally or illegally distributed abroad.<sup>171</sup> The dissent's reasons for so arguing rested in applying traditional property law concepts to copyright itself.<sup>172</sup>

The majority only uses the word property once, when quoting the dissent when it argued that “‘the sale in one country of a good’ does not ‘exhaus[t] the intellectual-property owner’s right to control the distribution of that good elsewhere.’”<sup>173</sup> The dissent, relying on international agreements and the legislation inspired by them, used the word property 15 times.<sup>174</sup> International treaties have commandeered property law to create an over expansive conception of limited monopoly rights. Having rested upon international law, the dissent could not avoid legitimizing a copyright-as-property view. The majority found that the dicta of *Quality King*,<sup>175</sup> proposed by the dissent, was incorrect.<sup>176</sup> This decision removes one incentive for sending American manufacturing jobs overseas and protects purchasers of tangible goods from overbroad IP regulation. The result being that the distribution of cheap second hand goods is

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<sup>168</sup> *Kirtsaeng*, No. 11–697 (Ginsberg, J. dissenting) slip op. at 18–19.

<sup>169</sup> Chang, *supra* note 132 (something that might clearly fall into the "parody" category protected by fair use in the U.S.).

<sup>170</sup> *Kirtsaeng*, No. 11–697 (Ginsberg, J. dissenting) slip op. at 18–19.

<sup>171</sup> *Id.* at 20.

<sup>172</sup> *Id.*

<sup>173</sup> *Kirtsaeng*, No. 11–697, slip op. at 33.

<sup>174</sup> *Kirtsaeng*, No. 11–697 (Ginsberg, J. dissenting) slip op. at 3, 12, 18–22, 33.

<sup>175</sup> *Kirtsaeng*, No. 11–697 (Ginsberg, J. dissenting) slip op. at 3 (citing *Quality King Distributors, Inc. v. L’anza Research Int’l, Inc.*, 523 U. S. 135, 143–54 (1998)).

<sup>176</sup> *Kirtsaeng*, No. 11–697, slip op. at 30, 33.

not kept from American consumers by copyright enforcement at the U.S. border.

In fact, it would not be honest to underwrite the view that corporations have the right, due to the copyright in the trademarks affixed to their products, to charge American consumers more money for things they sell to foreigners at a much cheaper price.<sup>177</sup> Nevertheless, the going value of companies that provide copyrighted and patented content is often propped up by a blanket expectation that Americans pay more,<sup>178</sup> so they have global losses for every good or service they provide that had not been paid-in-full at the prices they set.<sup>179</sup> The practice of divvying up the paychecks of Americans (or any foreigner) as a matter of property has created false security in corporate value that distorts the stock market and continues to cause market harm to stock owners.<sup>180</sup> The idea that

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<sup>177</sup> Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362/R (Jan. 26, 2009) (Deciding that China did not breach Article 61 of TRIPs by interpreting "commercial scale" to mean "a significant magnitude of infringement activity." Thus affirming China's limitations on criminal enforcement of copyright infringement. The U.S. sought to leverage China into cracking down on infringement by criminalizing all infringers for the purpose of commercial gain).

<sup>178</sup> Open Letter from Bill Gates to Hobbyists (Feb. 3, 1976), *available at* [http://en.wikipedia.org/wiki/File: Bill\\_Gates\\_Letter\\_to\\_Hobbyists.jpg](http://en.wikipedia.org/wiki/File:Bill_Gates_Letter_to_Hobbyists.jpg) (calling hobbyists thieves for not paying him for the software his company provided them).

<sup>179</sup> BSA & IDC, *2007 Piracy Study*, BUS. SOFTWARE ALLIANCE (last visited April 21, 2013), *available at* [http://globalstudy.bsa.org/2007/studies/2007\\_global\\_piracy\\_study.pdf](http://globalstudy.bsa.org/2007/studies/2007_global_piracy_study.pdf) (This study showed higher piracy rates in foreign countries like China at 82% and Armenia at 93%, and the U.S. as participating in the lowest amount of piracy at 20%, but also recording a \$1.34 billion more losses in the U.S. as compared to China in 2007). *See* Mike Masnick, *If It's May It's Time for the Press to Parrot Bogus Stats Announcement from the BSA*, TECHDIRT (May, 12 2010), <http://www.techdirt.com/articles/20100511/1516059386.shtml>; Mike Masnick, *BSA's Canadian Piracy Numbers Based on Hunches, Not Actual Surveys*, TECHDIRT (May, 27, 2009), <http://www.techdirt.com/articles/20090527/1125035034.shtml>.

<sup>180</sup> Letzing, *supra* note 10 ("Google said . . . that \$2.9 billion of the purchase price for Motorola was attributable to cash acquired, \$2.6 billion was related to goodwill, \$730 million for customer relationships and \$670 million for 'other net

through going business value and intellectual property one might propertize the future paychecks of others is abominable. This practice garners unauthorized value from consumer bank accounts by taking for granted value that has not yet been granted. It is a lie that lets big business count future business value today, as a matter of property. It is also a lie that pulls the curtain over the fact that modern slavery has infected many of the supply chains that these businesses derive direct benefits from.<sup>181</sup> In the end it lets big business claim untold property value without earning it and subverts the self-evident truth that we are all created equal by objectifying the American public and humanity worldwide. In practical terms, this helps maximize U.S. consumer spending and personal debt even in the wake of a massive debt crisis without addressing the most grotesque part of these intangible property claims: that some of the value claimed is derived from a growing \$20 billion global slave trade industry.<sup>182</sup>

The dissent's stance in *Kirtsaeng* was that copyright should be imbued with strong property that override even common law property rights in the underlying physical property. From here the dissent concluded that the majority "risks undermining the United States' credibility on the world stage."<sup>183</sup> However, the majority's insistence on "simplicity and coherence" is more likely to vindicate U.S. credibility abroad.<sup>184</sup> The dissent even admitted its argument's "potential inconsistency with United States obligations under

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assets acquired." Google characterized consumer relationships with Motorola and what consumers thought about Motorola as worth billions of dollars when consumer's themselves may own their relationships and thoughts. Thus Google shareholders "purchased" billions of dollars in consumer thoughts and relationships that is not stable property because it probably is actually owned by consumers); Ben Fritz, *Netflix Stock Plunges 25% After Analysts Slash Estimates*, L.A. TIMES (July 25, 2012), <http://articles.latimes.com/2012/jul/25/entertainment/la-et-ct-netflix-stock-drop-20120725> (noting that attempts to expand sales globally contributed to losses).

<sup>181</sup> *Supra* note 22.

<sup>182</sup> *Id.*

<sup>183</sup> *Kirtsaeng*, No. 11–697, (Ginsberg, J. dissenting) slip op. at 22.

<sup>184</sup> *Kirtsaeng*, No. 11–697, slip op. at 12.

certain bilateral trade agreements.”<sup>185</sup> Disingenuous incoherence and inconsistency are the true culprits here. Emphasizing honesty, coherence and general clarity is the only way to win back credibility on the international stage, or any stage for that matter.<sup>186</sup>

To be clear, the international credibility of the U.S. businessperson is currently deficient. Recently, the U.S. financial sector swindled the American middle class and the American government out of billions of dollars after destroying the global market through dishonest and at least “incoherent” business practices.<sup>187</sup> Then national and global public outcry stopped SOPA, PIPA, and ACTA.<sup>188</sup> Now, major American copyright owners are resorting to self-help measures, blocking and degrading internet access of whomever they find is a copyright infringer.<sup>189</sup> These self-help measures are directly against the interests of most lower and middle class copyright owners,<sup>190</sup> and they are illegal.<sup>191</sup> Even the

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<sup>185</sup> *Kirtsaeng*, No. 11–697, (Ginsberg, J. dissenting) slip op. at 22.

<sup>186</sup> MODEL RULES OF PROF'L CONDUCT R. 4.1(a), 7.1, 8.1(a), 8.2(a), 8.4(c) (1983).

<sup>187</sup> STOCKMAN, *supra* note 3, at 631–48 (“No Recovery on Main Street”) and at 3–5 (calling Wall Street a gambling hall). *See, e.g.*, Gretchen Morgenson & Louise Story, *Banks Bundled Bad Debt, Bet Against It and Won*, N.Y. TIMES (Dec. 23, 2009), available at [http://www.nytimes.com/2009/12/24/business/24trading.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2009/12/24/business/24trading.html?pagewanted=all&_r=0) (noting the result of “peddling complex securities” was to cause billions of dollars in losses to “pension funds and insurance companies.”).

<sup>188</sup> *See* Magid, *supra* note 19 (noting that the laws pit the tech industry against the entertainment industry); Kain, *supra* note 19 (noting that ACTA would force the DMCA on developing nations and is a dangerous law to pass); Meyer, *supra* note 19 (noting that massive protests in Europe prompted the European parliament to reject the treaty).

<sup>189</sup> *About the Center for Copyright Information*, CENTER FOR COPYRIGHT INFO., <http://www.copyrightinformation.org/about-cci/> (last visited Mar. 25, 2013) (CCI is a coalition of major copyright owner interest groups and ISPs, and they are initiating copyright alert systems in violation of net neutrality).

<sup>190</sup> Tarnoff, *supra* note 18; Ernesto, *supra* note 18 (“The MPAA, RIAA and the Internet providers participating in the ‘six strikes’ anti-piracy scheme have informed the Congressional Internet Caucus Advisory Committee about their plans.”). *See also* *Kneecapping the Future: Comcast’s Unjustified Internet Caps and the Plan to Kill Video Competition*, *supra* note 18 (reporting that Comcast

thought of abiding this sort of unilateral, private sector regulation of the internet is the embarrassment here. The FCC has championed net neutrality and internet freedom in developing countries encouraging a serious adoption of free speech globally.<sup>192</sup> In countries where net neutrality and free speech is opposed, the internet has been described as a giant cage—actually enhancing the maneuverability of authoritarian control.<sup>193</sup> By supporting foreign censorship, copyright largess is threatening to delay and destroy the acceptance of freedom and transparency in countries that desperately need it,<sup>194</sup> directly undermining the FCC's international support and encouragement of freedom, and violating net neutrality and free speech itself.<sup>195</sup>

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has a cap on the data an internet subscriber can download through Comcast, but exempted its video provider Xfinity); *The Facts About AT&T's Facetime Blocking*, *supra* note 18.

<sup>191</sup> Preserving the Open Internet 47 C.F.R. § 8 (2011).

<sup>192</sup> Julius Genachowski, Chairman, F.C.C., Statement on the U.S. Submission of Initial Input into the International Telecommunication Union's World Conference on International Telecommunications (Aug. 3, 2012) (noting a fight for "internet freedom" against "some countries [that] restrict the free flow of information online"); Julius Genachowski, Chairman, F.C.C., Prepared Remarks for the International Telecommunications Union Global Symposium for Regulators in Beirut, Lebanon, *ICT: Global Opportunities and Challenges* (Nov. 10, 2009) (touting the FCC's role to preserve a "free, open and robust Internet" as an example to follow on the world stage).

<sup>193</sup> *China's Internet: A Giant Cage*, *supra* note 136; *The Machinery of Control: Cat and Mouse*, *supra* note 136.

<sup>194</sup> Julius Genachowski, Chairman, F.C.C., Statement on the U.S. Submission of Initial Input into the International Telecommunication Union's World Conference on International Telecommunications (Aug. 3, 2012) (noting a fight for "internet freedom" against "some countries [that] restrict the free flow of information online"); Julius Genachowski, Chairman, F.C.C., Prepared Remarks for the International Telecommunications Union Global Symposium for Regulators in Beirut, Lebanon, *ICT: Global Opportunities and Challenges* (Nov. 10, 2009) (touting the FCC's role to preserve a "free, open and robust Internet" as an example to follow on the world stage).

<sup>195</sup> Genachowski, *supra* note 192, Statement on the U.S. Submission of Initial Input into the International Telecommunication Union's World Conference on International Telecommunications; Genachowski, *supra* note 192, Chairman, Prepared Remarks for the International Telecommunications Union Global

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It is unclear how far the inference of real property common law to expand the first sale doctrine will extend. A Ninth Circuit district court did not extend first sale to the resale of digital copies of music in MP3 form.<sup>196</sup> Redigi, an online company that facilitated the resale of digital music at a discounted price, was thus found liable for copyright infringement. The Court did not allow first sale to legitimize this kind of resale of used goods. It is unclear how property common law rights, like a right to alienate, should bear on digital goods. In the wake of the *Redigi* opinion, consumers may opt to purchase physical copies if they wish to have the right to alienate the items they purchase. However, if consumers abandon or destroy their copies of digital music files, they will be asked to purchase a brand new copy at full price. Thus, failing to apply property law concepts to digital copies of music only seems to work in the seller's favor. If digital copies are not "property" then whether consumers have any rights at all in digital copies of music is an open question.

Though copyright-as-chattel is entirely an analogy,<sup>197</sup> the underlying information and knowledge from which patents and copyrights are formed is actually a public good.<sup>198</sup> The project of defining public goods seems to be bound up with First Amendment interpretation.<sup>199</sup> Thus information has a real property explanation that is recognized in the constitution, as relatively bounteous and

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Symposium for Regulators in Beirut, Lebanon, *ICT: Global Opportunities and Challenges*.

<sup>196</sup> *Capitol Records, LLC v. ReDigi Inc.*, 12 CIV. 95 RJS, 2013 WL 1286134 (S.D.N.Y. Mar. 30, 2013).

<sup>197</sup> Letter from Thomas Jefferson to Isaac McPherson, Aug. 13, 1813, in *JEFFERSON: WRITINGS*, *supra* note 1, at 1291 ("It has been pretended by some, (and in England especially,) that inventors have a natural and exclusive right to their inventions, and not merely for their own lives, but inheritable to their heirs."). See generally Bryan Beier, *The Perils of Analogical Reasoning: Joseph William Singer Property and Sovereignty and Property*, 1 *GEO. MASON U. L. REV.* 33 (1994).

<sup>198</sup> Letter from Thomas Jefferson to Isaac McPherson, Aug. 13, 1813, in *JEFFERSON: WRITINGS*, *supra* note 1, at 1291–92.

<sup>199</sup> U.S. CONST. art. I, § 8, cl. 8.

subject to only momentary possession like air or fire.<sup>200</sup> Thus, a real property (no analogy needed) explanation for copyright and patent is as a limited monopoly right in a public good (i.e. the public good of free flowing information, knowledge and education). If people have a right to alienation of their privately held goods, they might at least have a right to “proliferate” publically owned goods at least as much as they paid a limited monopoly owner in a specific expression of that good in order to use or copy that specific expression. Thus, through a *limited* proliferation right based on the public’s underlying rights to foster free flowing knowledge and information, digital copies of copyrighted works sold online should have first sale and other copyright limitations assigned to them.

## PART II: THE AMERICAN CONCEPT OF PROPERTY

A conception of property seems to be made of two things. First, property is formed out of a common sense connection with thing-ownership. Things as necessarily physical things once seemed to be inferred into our concept of what property was. Second, property is a highly political creation. In fact it was originally offered as a vehicle to ensure liberty from government and equality of class. After the States won the Revolution, overthrowing English rule in the Americas, the debate over how property should be conceived settled into a struggle between Libertarian and Liberal thought. This section explains how the inherent flaws in the political conception of property have carried us far afield of the common sense idea that property is related to thing-ownership.

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<sup>200</sup> Letter from Thomas Jefferson to Isaac McPherson, Aug. 13, 1813, *in* JEFFERSON: WRITINGS, *supra* note 1, at 1291–92. *Cf.* Susan P. Crawford, *The Radio and the Internet*, 23 BERKELEY TECH. L.J. 933, 961 (2008) (noting that Congress directed the FCC to auction off licenses to use certain wavelengths of energy that exist in the air naturally and had previously been used by TV broadcasters: “The 700 MHz auction was designed to sell off licenses to valuable beachfront spectrum that television broadcasters have been forced to relinquish.”).

### Lost in a Struggle Between Liberalism and Libertarianism

Before western law recognized personal property, feudalistic society only recognized property owned by the king. Feudalism was in many ways characterized as a great villain by enlightenment thinkers.<sup>201</sup> The failure of feudalism to recognize the citizenry's natural freedom and equality of class justified not only broad, but absolute rights to personal property in physical things.<sup>202</sup> The dual goals of freedom and equality joined because of a common enemy. Since then, many attempts at casting new villains in our collective American property story to gather political ground have been raised.<sup>203</sup> However, none of these new villains have been able to unify the interests of the people the way the enlightenment's rally against feudalism facilitated the overthrow of many western kingdoms, including the overthrow of England in the Americas.<sup>204</sup>

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<sup>201</sup> Letter From John Adams to James Sullivan, May 26, 1776, in 9 THE WORKS OF JOHN ADAMS *supra* note 6, at 375–78 ("the only moral foundation of government is, the consent of the people"); Grey, *supra* note 60 (These thinkers included Blackstone, Hegel, Adams, Jefferson, Locke and the French and American Revolutionaries. "[T]he concept of property as thing-ownership served important ideological functions. Liberalism was the ideology of the attack on feudalism.").

<sup>202</sup> Grey, *supra* note 60 ("[P]roperty conceived as the control of a piece of the material world by a single individual meant freedom and equality of status.").

<sup>203</sup> Grey, *supra* note 60; William H. Taft, *The Right of Private Property*, 3 MICH. L.J. 215, 233 (1894) (calling for lawyers to rise up and protect property owners against the enflamed and more powerful working class that would otherwise bring the evils of socialism and communism to the U.S.); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 646 (1988) [hereinafter Singer I] (calling for property reform based on the destructive actions of property owners and evil corporations that undermined the free market).

<sup>204</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. . . . But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security."); Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) ("The institution called



It would not have been possible to create the broadly accepted convictions necessary to carry out a revolution without the assurances of both liberty from the government and equality of class as a result. In fact, the convictions about “equal liberty” held by the framers, often took shape in discussions over property ownership.<sup>205</sup>

The role of recognizing private property as an essential component to securing freedom and equality quickly settled into a debate that carries on in today’s politics.<sup>206</sup> Libertarians and Liberals hold opposite positions over how to conceive of property based on whether freedom or equality is more important.<sup>207</sup> Libertarians maintain that minimizing the government will maximize freedom, and have argued freedom should be prioritized above securing equality.<sup>208</sup> Conversely, Liberals argue that government regulation should be used to secure equality, and that

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property guards the troubled boundary between individual man and the state. It is not the only guardian; many other institutions, laws, and practices serve as well. But in a society that chiefly values material well-being, the power to control a particular portion of that well-being is the very foundation of individuality.”)

<sup>205</sup> Letter From John Adams to James Sullivan, May 26, 1776, in 9 THE WORKS OF JOHN ADAMS *supra* note 6, at 375–78.

<sup>206</sup> Joseph William Singer, *The Reliance Interest in Property Revisited*, 7 UNBOUND: HARV. J. LEGAL LEFT 112, 116 (2011) [hereinafter Singer II] (“The defining characteristic of American property law is the abolition of feudalism.”). Note that Freedom is “negative” freedom from government control and not a positive conception of freedom to. Taft, *supra* note 203, at 218 (“[W]e inherited from our English ancestors the deep seated conviction that security of property and contract and liberty of the individual are indissolubly linked. . . . The freedom of the citizen is secure. It is the right of private property that now needs supporters and protectors.”).

<sup>207</sup> Taft, *supra* note 203, at 218 (holding up the villains of anarchy, socialism, and communism to justify high protection of individual and corporate property because it turns individual greed into public benefit).

<sup>208</sup> *Id.* at 233 (commenting on property as a “bulwark of freedom.”). Cf. RAND, *supra* note 4, at 481 (“I do not seek the good of others as a sanction for my right to exist, nor do I recognize the good of others as a justification for their seizure of my property or their destruction of my life.” Eventually Rand’s characters compare the public good to “human sacrifices.”).

any cost to freedom for the cause of equality is worth it.<sup>209</sup> It seems that the legal discourse about property has devolved into how this liberty-equality disagreement interacts with our fundamental rights to “life, liberty and property.”<sup>210</sup>

This article treats a big versus small government conversation as useless. In fact, it is a distraction. The big/small government conversation sheds little truth on the concept of property because both Libertarian and Liberal movements seem to be interested in maximizing property.<sup>211</sup> The ends justify the means

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<sup>209</sup> Singer I, *supra* note 203, at 690–91. *Cf.* FITZGERALD, *supra* note 4, at 5 (Painting a more aristocratic and idle picture of wealthy, upper-crust Americans: "The Carraways are something of a clan, and we have a tradition that we're descended from the Dukes of Buccleuch, but the actual founder of my line was my grandfather's brother, who came here in fifty-one, sent a substitute to the Civil War, and started the wholesale hardware business that my father carries on to-day.").

<sup>210</sup> U.S. CONST. amend. XIV, § 1 (requiring due process before a government deprives someone of their "life, liberty, or property"); JOHN LOCKE, TWO TREATISES OF GOVERNMENT, ch. II, § 131 (1631) (Claiming that men "give up the equality, liberty, and executive power they had in the state of nature" to "preserve himself, his liberty and property" and thus "the power of the society, or legislative constituted by them, can never be supposed to extend farther, than the common good; but is obliged to secure every one's property, by providing against those three defects above mentioned, that made the state of nature so unsafe and uneasy."). *Compare* Lochner v. New York, 198 U.S. 45, 53–55 (1905) (expanding the Fourteenth Amendment, "life, liberty and property" to invalidate state law that infringes on the individual's right to contract), *with* Goldberg v. Kelly, 397 U.S. 254, 265 (1970) (Also expanding the Fourteenth Amendment, "life, liberty and property," to expand state law, and deciding Fourteenth Amendment rights include welfare in its capacity to "help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community.").

<sup>211</sup> Taft, *supra* note 203, at 231 ("the institution of private property is what has led to the accumulation of capital in the world. . . . Without it the whole world would still be groping in the darkness of the tribe or commune stage of civilization with alternating periods of starvation and plenty, and no happiness by of gorging unrestrained appetite."); Lemley, *supra* note 22, at 1035–36 ("both advocates and critics of antitrust enforcement have adopted the maxim that intellectual property is just like any other form of property, though they draw different conclusions from that assumption") (*comparing* U.S. Dep't of Justice

and the result is a vacuum in discussion about what the ends of society and government in fact are.<sup>212</sup> Both Liberals and Libertarians have been known to raise disingenuous caricatures of the other side, not unlike the anti-feudalism sentiments at our roots.<sup>213</sup> Progressives have even been known to characterize the Liberal/Libertarian rhetoric as a “phase” in our journey toward ever-deepening modernity.<sup>214</sup> However, our conception should not

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and Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property § 2.2 (1995), with Hon. Giles S. Rich, *Are Letters Patent Grants of Monopoly?*, 15 W. NEW ENG. L. REV. 239 (1993)).

<sup>212</sup> Compare Isaiah Berlin, *Two Concepts of Liberty*, Berlin, I, 31 (1958) in ISAAH BERLIN, *FOUR ESSAYS ON LIBERTY* (1969) (concluding that accepting pluralism of values that inform our definition of liberty and equality would be a “truer” approach than “faith in a single criterion.”), with LOCKE, *supra* note 210 at ch. II, § 9 (“I doubt not but this will seem a very strange doctrine to some men; but before they condemn it, I desire them to resolve me by what right any prince or state can put to death or punish any alien for any crime he commits in their country.” Thus, if not by applying some monist principal that actually endeavors to justify the ends of an approach, the social contract cannot be legitimate) and G.K. CHESTERTON, *HERATICS*, 16 (1905) (“Suppose that a great commotion arises in the street about something, let us say a lamp-post, which many influential persons desire to tear down. A grey-clad monk, who is the spirit of the Middle Ages, is approached upon the matter, and begins to say, in the arid manner of the Schoolmen, ‘Let us first of all consider, my brethren, the value of Light. If Light be in itself good—.’ At this point he is somewhat excusably knocked down. All the people make a rush for the lamp-post, the lamp-post is down in ten minutes, and they go about congratulating each other on their unmedieval practicality. . . . gradually and inevitably, today, tomorrow, or the next day, there comes back the conviction that the monk was right after all, and that all depends on what is the philosophy of Light. Only what we might have discussed under the gas-lamp, we now must discuss in the dark.”).

<sup>213</sup> Compare Taft, *supra* note 203, at 232 (“The sovereign today is the people, or the majority of people. The poor are the majority. The appeal of the rich to the constitution and courts for protection is still an appeal by the weak against the unjust aggressions of the strong.”) (quoting *Citizens' Sav. & Loan Ass'n v. City of Topeka*, 87 U.S. 655, 658 (1874), saying that forcing tax laws to serve the public interest could in fact be a tyranny of the majority), with Singer I, *supra* note 203, at 646, and Singer II, *supra* note 206, at 112, 114–15 (“I must admit that my argument [in *Singer I*] was more utopian than realistic.”).

<sup>214</sup> Grey, *supra* note 60.

be based on political and disingenuous caricatures that easily fall into straw man,<sup>215</sup> and false alternatives fallacies.<sup>216</sup> These fallacies highlight the importance of the natural law and state of nature arguments proposed by enlightenment thinkers.<sup>217</sup> Modern scholars, who either marginalize or mischaracterize the role of natural law and deductive reasoning as old hat, risk falling into nonsense.<sup>218</sup>

Nevertheless, over the past century this seems to be where politics is driving us. For example, Libertarians tend to see property as a way for private interests to be reclaimed from the government.<sup>219</sup> In so doing they pressure the courts to strike state

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<sup>215</sup> Andrew Jay McClurg, *Logical Fallacies and the Supreme Court: A Critical Examination of Justice Rehnquist's Decisions in Criminal Procedure Cases*, 59 U. COLO. L. REV. 741, 832 (1988). Compare Taft, *supra* note 203, at 222, (Taft characterizes the poor as the strong aggressors taking the rich man's property) (citing *City of Topeka*, 87 U.S. at 832 (to bring attention to a tyranny of the majority situation), with Singer II, *supra* note 206, at 114 (noting that Tea Party libertarians are dedicated to dismantling the government to increase the constitutional protection for the property of the rich and powerful).

<sup>216</sup> See McClurg, *supra* note 215, at 805 (1988) (citing *Illinois v. Gates* 462 U.S. 213 (1983)). Compare Taft, *supra* note 203, at 222 ("It follows as a necessary conclusion that to destroy the guarantees of property is a direct blow at the interests of the working man. . . . Everything which tends to legitimately increase the accumulation of wealth and its use for production will give each laborer larger share of the joint result of capital and his labor."), with Singer I, *supra* note 203, at 638 (Singer argued that "*the question [of ownership] is meaningless,*" trivializing the need to identify "ownership" when talking about property rights in order to create a "reliance interest in property." It "encompass[es] the full range of social relationships, from relations among strangers, between neighbors, among long-term contractual partners in the marketplace, among family members and others in intimate relationships, and finally, between citizens and the government." Singer argues for a "property shift" when these relationships split up).

<sup>217</sup> See, e.g., LOCKE, *supra* note 210, at ch. II, § 131.

<sup>218</sup> JOHN RAWLS, *A THEORY OF JUSTICE* 136 (1971) (The effect of believing Rawls' theory is unearned trust in government decision makers and the basis for Justice as Fairness, though hopeful, is complete nonsense).

<sup>219</sup> *Local 1330, United Steel Workers v. United States Steel Corp.*, 631 F.2d 1264, 1280–81 (6th Cir. 1980); Singer I, *supra* note 203, at 646 (noting that the libertarian "free market" view consists of property being immune from the government, advancing certain sort of chastisement of the poor for not making

and federal law for unconstitutionally violating private property rights.<sup>220</sup> They might even support takings claims in non-existent property that might have existed had the government acted differently.<sup>221</sup> In order to reach the Libertarian ideal of a minimized government, Libertarians have tried to expand the concept of property in order to put pressure on the courts to overturn laws that may redistribute wealth away from property owners.<sup>222</sup>

Conversely, Liberals have tried to redefine property rights in order to redistribute property to the working class and historically disadvantaged classes.<sup>223</sup> In so doing, they have argued for further expansion of the bundle of property rights.<sup>224</sup> Not only would business owners hold property rights in businesses, but so would the workers, the town where the business existed and possibly any other person that had a “fluid relationship” with the business.<sup>225</sup> They also put their trust in legislators to find the right balance to lay claim to a truly egalitarian society.<sup>226</sup> Unfortunately, those

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themselves rich: “If people are unhappy they only have themselves to blame: Wealth and power are there for the taking.”).

<sup>220</sup> Taft, *supra* note 203, at 232.

<sup>221</sup> Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 135 (1978).

<sup>222</sup> *Lochner*, 198 U.S. at 53–56 (1905).

<sup>223</sup> See Singer I, *supra* note 203, at 750 (Singer himself is an avowed Liberal and advocates this).

<sup>224</sup> *Id.* (arguing for a “reliance interest” in property); Singer II, *supra* note 206, at 114–15 (citing *Manufactured Hous. Cmty. of Wash. v. State*, 13 P.3d 183) (noting that the libertarian justices on the Supreme Court has had an effect on state law); *Manufactured Hous. Cmty. of Wash. v. State*, 13 P.3d 183 (2000) (granting mobile home owners a right of first refusal when the landward wants to sell their homes was a taking); Sunder, *supra* note 130, at 330 (“[N]ew theories of property, from personhood to social relations, enhanced our ability to explain and justify legal limits on property, even while they served to bolster some property claimants, such as tenants.”).

<sup>225</sup> Singer I, *supra* note 203, at 652–53.

<sup>226</sup> *Lochner*, 198 U.S. at 72 (Harlan, J., dissenting) (“the public interests imperatively demand that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably beyond all question in violation of the fundamental law of the Constitution.”) (quoting *Atkin v. Kansas*, 191 U.S. 207, 223 (1903)). See also

legislators have actually advanced corporate interests, posturing their causes to be in the name of the poor, blue-collar workers and minorities.<sup>227</sup> As a result of the near complete corporate capture of Congress,<sup>228</sup> the concept of property has been driven to extreme maximization that only a psychopath would find reasonable.<sup>229</sup>

This discussion has continued in the IP field as well. Some have argued for the application of absolute and maximum property protection to IP, as if it were physical property.<sup>230</sup> Others have proposed the adoption of official workarounds of the Constitutional limits on copyright.<sup>231</sup> Some have proposed the adoption of moral rights.<sup>232</sup> Still others have argued that the application of a utilitarian

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Singer II, *supra* note 206, at 114–15 (voicing a preference that state laws recognizing tenant property interests should not be struck down by courts).

<sup>227</sup> Paul Buchheit, *The Corporate Betrayal of America*, THE CONTRIBUTOR (April 8, 2013, 8:30 AM), <http://thecontributor.com/opinion/corporate-betrayal-america>.

<sup>228</sup> Mark A. Lemley, *The Constitutionalization of Technology Law*, 15 BERKELEY TECH. L.J. 529, 532 (2000)

("[I]t is far too easy for Congress to fall into a pattern of responding to private demands, rather than thinking proactively about what should be done. To a disturbing extent, Congress . . . seems to have abdicated its role in setting intellectual property policy to the private interests who appear before it."). *See also* Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 860–61 (1987) ("[T]he [copyright] statute's legislative history is troubling because it reveals that most of the statutory language was not drafted by members of Congress or their staffs at all. Instead, the language [of the 1976 Copyright Act] evolved through a process of negotiation among authors, publishers, and other parties with economic interests in the property rights the statute defines."); Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 193–94 (2003) (noting that copyright, once a right, at some point crossed over became an entire regulatory regime).

<sup>229</sup> *See generally* Ian B. Lee, *Is There A Cure for Corporate "Psychopathy"?*, 42 AM. BUS. L.J. 65 (2005) (commenting and legitimizing the indictment of corporate behavior as psychopathic).

<sup>230</sup> Epstein, *supra* note 17, at 455, 482, 520.

<sup>231</sup> Landes & Posner, *supra* note 17, at 517–18.

<sup>232</sup> Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 363 n.314 (1988) (citing Roberta Kwall, *Copyright & the Moral Right: Is an American Marriage Possible?*, 38 VAND. L. REV. 1, 69 (1985)) ("Protection for creators' personal rights . . . enables society to preserve the integrity of its cultural

analysis should not simply assume “goodness” in the maximization of creative output.<sup>233</sup> At least one scholar has suggested that IP’s economic underpinnings should be balanced with cultural considerations instead of just relying on the marketplace to decide what is best for IP.<sup>234</sup>

In fact, there has been a direct collision of the property concepts underpinning the expansion of IP rights worldwide with culture and identity.<sup>235</sup> Over the last century identity politics have been used by disadvantaged communities to defend and monetize their culture.<sup>236</sup> For example, a New Mexican tribe has sued New Mexico for using its cultural symbol on the state’s flag without authorization.<sup>237</sup> They had demanded a million dollars for every year since New Mexico chose its current state flag, which came to 74 million dollars. Moreover, accusations by minority activists using the property term of art “cultural appropriation” is increasing. For instance, Miley Cyrus was accused of cultural appropriation of African American culture after her recent performance on the VMA’s.<sup>238</sup> Nike pulled a line of women’s exercise clothing because it was accused of cultural appropriation for using exclusively male

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heritage. The public's right to enjoy the fruits of a creator's labors in original form and to learn cultural heritage from such creations has no time limit.").

<sup>233</sup> Sunder, *supra* note 130, at 283–84 ("At times, utility in the intellectual property context is defined simply as the maximization of creative output. The goal then becomes creating the greatest number of cultural artifacts to be trickled down to the greatest number of people.").

<sup>234</sup> *Id.* at 268–69.

<sup>235</sup> MARILYN STRATHERN, PROPERTY, SUBSTANCE & EFFECT: ANTHROPOLOGICAL ESSAYS ON PERSONS AND THINGS 134, 163 (Athlone Press, 1999) ("Late 20th Century cultural politics makes it impossible to separate issues of identity from claims to the ownership of resources.").

<sup>236</sup> See Sunder, *supra* note 130, at 270–71 (noting a number of groups claiming property rights to cultural property that they claim has been or could be misappropriated without their permission).

<sup>237</sup> *Id.*

<sup>238</sup> Hadley Freeman, *Miley Cyrus’s Twerking Routine was Cultural Appropriation at its Worst*, THE GUARDIAN (Aug. 27, 2013, 12:00 PM), <http://www.theguardian.com/commentisfree/2013/aug/27/miley-cyrus-twerking-cultural-appropriation>.

tattoos from Polynesia to inspire the clothing design.<sup>239</sup> Similarly, Forever 21 pulled a line of clothing after a high number of Twitter posts criticized it for cultural appropriation.<sup>240</sup> Some concerned person might ask whether allowing the concept of property to facilitate the commoditization of cultural identity is going too far.

Property maximalists might respond with realism: that property as “thing” ownership itself was always a legal fiction anyway.<sup>241</sup> But it would be disingenuous to stop there and allow this to be the final say. Realism would also conclude that there are limits to expanding the concept of property. One could be the “popular mind[‘s]” ability to comprehend a property claim as thing ownership.<sup>242</sup> This could be recast as a limit against genuine dishonesty about property that the average taxpaying American would see as incomprehensible.<sup>243</sup> At its broadest stroke, realism can only give credence to property claims that are not unconstitutional and that do not put undue pressure on the judiciary.<sup>244</sup>

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Blackstone recognized that all property was necessarily physical and absolute.<sup>245</sup> In other words, there was no such thing as

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<sup>239</sup> Vaimoana Tapaleao, *Nike Commits Cultural Faux Pas*, THE NEW ZEALAND HERALD (Aug. 14, 2013, 5:30 AM), [http://www.nzherald.co.nz/business/news/article.cfm?c\\_id=3&objectid=10912088](http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10912088).

<sup>240</sup> Alexis Kleinman, *Forever 21 Apparently has Pulled its Controversial Compton Shirts*, THE HUFFINGTON POST (Sept. 25, 2013) available at [http://www.huffingtonpost.com/2013/09/25/forever-21-compton\\_n\\_3988643.html](http://www.huffingtonpost.com/2013/09/25/forever-21-compton_n_3988643.html).

<sup>241</sup> Vandeveld, *supra* note 13, at 332.

<sup>242</sup> Grey, *supra* note 60.

<sup>243</sup> *Kirtsaeng*, No. 11–697, slip op. at 12 (2013) (favoring “simplicity and coherence” by refusing to allow American copyright law to continue underwriting multiple streams of commerce worldwide).

<sup>244</sup> *Lochner*, 198 U.S. at 72 (1905) (Harlan, J., dissenting) (“the public interests imperatively demand that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably beyond all question in violation of the fundamental law of the Constitution.”) (quoting *Atkin v. Kansas*, 191 U.S. 207, 223 (1903)).

<sup>245</sup> *Id.*



intangible, limited property. This way property itself would be clearly defined and not limited by the government. Also, property would actually be connected to a physical “thing,” whose existence itself was not necessarily dependent on the market or politics. This conception of property as thing-ownership is not only clear; it is also what the framers were thinking of when they put property into our Constitution.<sup>246</sup>

In 1913, Hohfeld proposed the adoption of a positivist conception of property.<sup>247</sup> The positivists conceived of property as anything from which value could be derived.<sup>248</sup> Scholars in turn began to refer to Hohfeld’s conception of property as the “new property.”<sup>249</sup> However, the Brandeis-Holmes minority view at that time noted that positivism was not a new idea and thus its general acceptance by law makers was the only “new” thing about it.<sup>250</sup> In

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<sup>246</sup> Letter from Thomas Jefferson to Isaac McPherson, Aug. 13, 1813, *in* JEFFERSON: WRITINGS, *supra* note 1, at 1291–92.

<sup>247</sup> Hohfeld I, *supra* note 13, at 19; Hohfeld II, *supra* note 13, at 712–13.

<sup>248</sup> Hohfeld I, *supra* note 13, at 58 (Hohfeld based his conception on eight legal relations that he claimed were “the lowest common denominators of the law” basically allowing any legal relationship to be expressed as property. The eight legal relations are rights, duties, privileges, no rights, powers, liabilities, immunities and disabilities.).

<sup>249</sup> Vandeveld, *supra* note 13, at 361.

<sup>250</sup> *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) (“But the fact that a product of the mind has cost its producer money and labor, and has a value for which others are willing to pay, is not sufficient to ensure to it this legal attribute of property. The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions and ideas—become, after voluntary communication to others, free as the air to common use. Upon these incorporeal productions the attribute of property is continued after such communication only in certain classes of cases where public policy has seemed to demand it.”). *Id.* at 246 (Holmes, J., dissenting) (“Property, a creation of law, does not arise from value, although exchangeable—a matter of fact. Many exchangeable values may be destroyed intentionally without compensation. Property depends upon exclusion by a law from interference.”); *Lochner*, 198 U.S. at 75–76 (1905) (Holmes, J., dissenting) (“[A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain

fact, “the all-absorbing legal conception of the [19th] Century [was] that of the property right. Everything was thought of in terms of property.”<sup>251</sup> Nevertheless, Hohfeld’s “new” property seemed to have allowed lawmakers to break free of Blackstone’s requirement that property be physical. In fact, scholars have noted that Hohfeld characterized Blackstone’s conception of property to be an “obsession with things.”<sup>252</sup> Positivists also proposed that property was not to be absolute or fixed. In Hohfeld’s words: “Since all legal interests are ‘incorporeal’—consisting, as they do, of more or less limited aggregates of abstract legal relations—such a supposed contrast as that sought to be drawn by Blackstone can but serve to mislead.”<sup>253</sup> Complete acceptance of a Hohfeldian concept of property happened when the American Law Institute’s Restatement of Property in 1936 included Hohfeld’s eight legal relations as the elements and correlatives of property instead of a definition of property. These elements and correlatives included potentially every valuable interest.<sup>254</sup>

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opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.”). *See also* Vandavelde, *supra* note 13, at 333–34 (discussing an expansion of dephysicalized property in the nineteenth century). *But see* Entick v. Carrington, 19 Howell State Trial 1029, 1066 (K.B. 1765) (“[T]he eye cannot by the laws of England be guilty of a trespass.”); *Boyd v. United States*, 116 U.S. 616, 628 (1886) (adopting the English view).

<sup>251</sup> Dean G. Acheson, Book Note, 33 HARV. L. REV. 329, 330 (1919) (reviewing MALCOLM H. LAUCHHEIMER, *THE LABOR LAW OF MARYLAND* BY MALCOLM H. LAUCHHEIMER. JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORY AND POLITICAL SCIENCE. SERIES XXXVII, NO. 2. BALTIMORE: JOHNS HOPKINS PRESS. PP. 163 (1919)) (including: “reputation, privacy, domestic relations, and as new interests called for protection their success depended upon their ability to take on the protective coloring of property.”).

<sup>252</sup> Vandavelde, *supra* note 13, at 360.

<sup>253</sup> Hohfeld I, *supra* note 13, at 24.

<sup>254</sup> Vandavelde, *supra* note 13, at 330 (By the beginning of the twentieth century, the Blackstonian conception of property was no longer credible. A new conception emerged and was stated in its definitive form by Wesley Newcomb Hohfeld. This new property was defined as a set of legal relations among persons. Property was no longer defined as dominion over only physical things.).

As positivism began to run its course, critics lambasted the Hohfeldian conception because it threatened to render “property” itself meaningless. If all legal relations were given the attribution of property, then property “could no longer serve to distinguish one set of legal relations from another.”<sup>255</sup> It also would no longer prescribe a degree of protection for different types of legal relations.<sup>256</sup> The resulting broad legal acceptance of the “dephysicalization of property” expanded property law exponentially.<sup>257</sup> It seemed that property law was to become all encompassing.<sup>258</sup> Swayze correctly guessed that business goodwill, trademarks, common law copyright, going value of businesses, franchises, and equitable easements would finally be included within the ambit of “property.”<sup>259</sup> Still, mainstream legal thought resisted these critiques in the misguided belief that intangible property would remain limited, by not including the Blackstonian absolutist bundle of rights.<sup>260</sup> However, clear limits to modern property law have not yet been implemented and many intangible right owners have only pushed for the highest protection of intangibles as if they were tangible.<sup>261</sup>

In fact, as a result of positivism’s apparent success Grey declared the disintegration of property itself.<sup>262</sup> “The dissolution of the traditional conception of property erode[d] the moral basis of capitalism.”<sup>263</sup> Thus Grey proposed that social evolution explained that in our country’s current developmental phase the old ethical

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<sup>255</sup> *Id.* at 362.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 359–61.

<sup>258</sup> *Id.* at 329 (“Any valuable interest potentially could be declared the object of property rights.”).

<sup>259</sup> Francis J. Swayze, *The Growing Law*, 25 YALE L.J. 1, 10 (1915).

<sup>260</sup> Vandeveld, *supra* note 13, at 340–57 (however, admitting that trademarks were recognized to be absolute rights because of their necessary connection with physical property in *In re Trade-Mark Cases*, 100 U.S. 82, 89 (1879) that extend everywhere).

<sup>261</sup> *See supra* note 17 and accompanying text.

<sup>262</sup> Grey, *supra* note 60.

<sup>263</sup> *Id.*

justifications for our property system are no longer needed.<sup>264</sup> Grey saw the problem clearly: that positivism had generally reduced property to an issue of politics.<sup>265</sup> However, his comfort with a concept of property that is neither ethically nor morally justified is disturbing and general acceptance of such a system would be absolutely inappropriate.<sup>266</sup>

It seems that after nearly a century of being declared obsolete,<sup>267</sup> the marketplace still indicates that Blackstone is relevant. Take the price of gold for example.<sup>268</sup> Historically, in times of economic uncertainty consumers have literally stopped trading intangibles like stock and actually bought up large amounts of physical property. This phenomenon explains why the price of gold soared in the wake of the 1930's stock market crash, the 9/11 terrorist attacks, the dot.com bubble, and the 2008 mortgage crisis.<sup>269</sup> Thus, common sense or at least human instinct recognized

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<sup>264</sup> *Id.* ("Modern capitalist property must be seen as a web of state-enforced relations of entitlement and duty between persons.").

<sup>265</sup> *Id.*

<sup>266</sup> *See, e.g.,* SIR WILLIAM DAVID ROSS, *THE RIGHT AND THE GOOD* (1877) (presenting a moral deontological theory based on relationships which might fit the social relations conception of property better than simply no moral underpinning).

<sup>267</sup> Vandavelde, *supra* note 13, at 359 (noting that Blackstone was rendered obsolete because of his physicalism and absolutism).

<sup>268</sup> *Gold Prices as it Relates to the Global Economy*, ITM TRADING, [http://www.itmtrading.com/gold\\_global\\_economy/](http://www.itmtrading.com/gold_global_economy/) (last visited March 27, 2013) ("Gold is considered an asset more than an investment as you have *physical* ownership of it . . .") (italics added); Jacob Goldstein & David Kestenbaum, *A Chemist Explains Why Gold Beat Out Lithium, Osmium, Einsteinium . . .* NPR (Nov. 19, 2010, 12:01 AM), <http://www.npr.org/blogs/money/2011/02/15/131430755/a-chemist-explains-why-gold-beat-out-lithium-osmium-einsteinium> (explaining that Gold and Silver are the only elements in enough abundance to be traded that are not a gas, and that doesn't corrode or burst into flames and doesn't kill you).

<sup>269</sup> Jacob Goldstein, *The Gold Bubble Is 4,000 Years Old, And It Won't End Now*, NPR (Apr. 15, 2013, 3:31 PM), <http://www.npr.org/blogs/money/2013/04/15/177340213/the-gold-bubble-is-4-000-years-old-and-it-wont-end-now> (noting that Gold demand boomed during the dot.com crash and the housing crisis); Floyd Norris & Jonathan Fuerbringer, *A DAY OF TERROR: THE*

that tangible property is more stable than intangible property.<sup>270</sup> Grey noted that the concept of property in “the popular mind” can limit the extent lawmakers are willing to extend property rights to intangibles.<sup>271</sup> Even if we are to fully accept positivism, property reification into something “thing-like,” that average commonsense citizens can accept as property, still matters to our legal analysis.<sup>272</sup>

In fact, there are “dozens of gold-backed digital currencies” in existence today including GoldMoney and Pecunix.<sup>273</sup> Bitcoin, a more popularly known digital currency is not gold-backed but claims to be inflation-resistant because there are a fixed number of Bitcoins in existence.<sup>274</sup> These digital currencies are traded by people that may not trust the U.S. dollar that is subject to inflation and fluctuation due to decisions made by a central banking system. Digital currencies exist in a grey market partly because the U.S. government has a constitutional monopoly on minting currency.<sup>275</sup> However, digital currencies have not yet been subjected to a government crackdown, and in fact may be protected by copyright

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*MARKETS; Stocks Tumble Abroad; Exchanges in New York Never Opened for the Day*, NEW YORK TIMES (Sept. 12, 2001), <http://www.nytimes.com/2001/09/12/business/day-terror-markets-stocks-tumble-abroad-exchanges-new-york-never-opened-for-day.html> (noting that gold and crude oil prices leaped after the 9/11 attacks); Casey Research, *How do Gold Stocks Perform in a Depression?*, INFLATIONDATA.COM (June 5, 2009), <http://inflationdata.com/articles/2009/06/05/how-do-gold-stocks-perform-in-a-depression> (noting that gold stocks didn't drop during the great depression).

<sup>270</sup> Grey, *supra* note 60 (In the face of positivism, “[m]ost people [still] . . . conceive of property as things that are owned by persons.”).

<sup>271</sup> Grey, *supra* note 60 (when commenting on *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978), “The kind of property that can be taken is confined to those conglomerations of rights that, in the popular mind, have been reified into ‘things’ or ‘pieces of property.’”).

<sup>272</sup> *Id.*

<sup>273</sup> Grinberg, *supra* note 107, at 174 (noting gold-backed digital currencies like Pecunix and GoldMoney compete with non-backed digital currencies like Bitcoin).

<sup>274</sup> *Id.*

<sup>275</sup> U.S. CONST. art. I §§ 8, 10.

law.<sup>276</sup> Some digital currencies have been criticized as a means to avoid law enforcement for everything from tax evasion and securities fraud to paying for drugs and hit men.<sup>277</sup> Others defend digital currencies as a commodity itself.<sup>278</sup> As one spectator said: "A Bitcoin is something that simply exists like gold. . . . Of course, it's not entirely like gold because it also, well, doesn't [physically exist]."<sup>279</sup>

Similarly, IP strategists have campaigned tirelessly to convince Americans that copyright is also like gold in that infringement is piracy and that file sharing is stealing. If a significant base of average commonsense Americans accepts a concept of absolute intangible property rights, major content owners could win ever-increasing protections to their copyrights, patents, trademarks, trade secrets and publicity rights.<sup>280</sup> In fact, stock prices and the going value of businesses are currently being

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<sup>276</sup> Compare *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 935 (9th Cir. 2010) *opinion amended and superseded on denial of reh'g*, No. 09-15932, 2011 WL 538748 (9th Cir. Feb. 17, 2011) (This case protected Blizzard's right to manage its video game's online virtual economy and currency which can be bought and sold for real money and valued in terms of U.S. dollars), with Grinberg, *supra* note 107, at 174 (describing many online currencies that exist in a grey market and may eventually be found illegal for a number of reasons including tax evasion and counterfeiting).

<sup>277</sup> Alex Konrad, *Feds Say They've Arrested 'Dread Pirate Roberts,' Shut Down His Black Market 'The Silk Road,'* FORBES (Oct. 2, 2013, 12:08 PM), <http://www.forbes.com/sites/alexkonrad/2013/10/02/feds-shut-down-silk-road-owner-known-as-dread-pirate-roberts-arrested/>.

<sup>278</sup> Sean Vitka, *Bitcoin: I'm Not Dead Yet!*, SLATE (Oct. 16, 2013, 4:45 PM), [http://www.slate.com/articles/technology/future\\_tense/2013/10/silk\\_road\\_shutdo wn\\_does\\_not\\_spell\\_the\\_end\\_for\\_bitcoin.html](http://www.slate.com/articles/technology/future_tense/2013/10/silk_road_shutdo wn_does_not_spell_the_end_for_bitcoin.html).

<sup>279</sup> Hugo Rifkind, *How Bitcoin Could Destroy the State (And Perhaps Make me a Bit of Money)*, THE SPECTATOR (Mar. 30, 2013), <http://www.spectator.co.uk/columnists/hugo-rifkind/8874321/how-bitcoin-could-destroy-the-state-and-perhaps-make-me-a-bit-of-money/>.

<sup>280</sup> H.R. REP. NO. 112-128, at 21 (2012) (Patent owners "need protection in Europe, they need protection in China, they need protection in Korea and Japan and other parts of Asia. And to do that, they are incredibly hampered by patent systems that are totally misaligned. The AIA [America Invents Act] creates a new *gold standard* for patent systems that has been the U.S. system.") (italics added).

inflated by these intangibles which can have a negative effect on pensions and innocent purchasers of intangibles that have no tangible property backing. When suspect contracts involving intangible property had fallen under the purview of the Court, as pay-for-delay contracts recently have, the interested parties have told the Court to look the other way.<sup>281</sup>

Furthermore, public outcry has stifled the growth of government protection of IP rights.<sup>282</sup> Thus, it seems that the commonsense American layperson had not been tracking the government's gradual expansion of intangible property rights. Positioned as a modern and progressive trend, property concepts have been applied to entitlements,<sup>283</sup> the IP field, human rights, in personam rights, contract rights, bodily security, liberty and life itself.<sup>284</sup> The public will not accept all these property interests as legitimate, and may reject some property rights as immoral.<sup>285</sup> This

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<sup>281</sup> Brief of Antitrust Economists as Amici Curiae in Support of Respondents at 23-24, *Fed. Trade Comm'n v. Actavis, Inc.*, 133 S. Ct. 2223 (2013) (No. 12-416) 2013 WL 836946; Hazen, *supra* note 10, at 795 (1987); Friedman, *supra* note 16, at 636; Hirschler, *supra* note 14.

<sup>282</sup> See *supra* note 19 and accompanying text.

<sup>283</sup> *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970); Reich, *supra* note 204, at 785–86 (arguing that property exists to serve security and independence and since entitlements have been used to protect these values in modern times, entitlements should also be included in the new property: "The presumption should be that the professional man will keep his license, and the welfare recipient his pension.").

<sup>284</sup> Grey, *supra* note 60 ("[M]ost property in a modern capitalist economy is intangible. Consider the commercial paper, bank accounts, insurance policies—not to mention more arcane intangibles such as trademarks, patents, copyrights, franchises, and business goodwill."); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1090 (1972) ("life itself will be decided on the basis of 'might makes right.'"). See *Bowman v. Monsanto Co.* No. 11-796, slip op. at 1 (U.S. May 13, 2013) (deciding that a farmer is liable for patent infringement if soybeans that have patented DNA reproduce naturally).

<sup>285</sup> Clinton, *supra* note 22, at 20 (noting that many corporate supply chains have been found to have been tainted with slavery, also noting that an estimated 20.9 million modern slaves exist today and that it constitutes an estimated \$20 billion dollar industry globally). See also Obama, *supra* note 22 (President Obama said that "[i]t ought to concern every person, because it's a debasement of our

has become clear as intangibles have threatened the public's economic and speech interests,<sup>286</sup> and physical property rights themselves.<sup>287</sup> The People may declare these rights disingenuous and dishonest for being nonphysical and completely un-thing-like.

Therefore, the judiciary should return to Blackstone's definition of property as necessarily *physical* property for purposes of constitutional interpretation. The judiciary cannot continue to entertain the positivist conception of property as anything from which value can be derived because it fails to be constitutionally sound. It fails because according to the positivist regime the Copyright and Patent acts may be enacted entirely pursuant to the interstate commerce power.<sup>288</sup> Thus, positivism renders the Copyright and Patent Clause superfluous and meaningless. Accordingly, the limits expressed in the Copyright and Patent Clause have been circumvented, eroding the traditional contours of copyright. Despite this the Supreme Court had continued to rely on these limits to ensure that IP rights do not impede the free speech rights of the First Amendment.<sup>289</sup>

Furthermore, the utilitarian analysis inferred by courts into the word "progress" in the Copyright and Patent Clause should be considered a limit to the preemptory effect of copyright to state granted rights inspired by privacy, tort or Hegelian personhood theory. Margaret Radin has argued that we make a fundamental

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common humanity. It ought to concern every community, because it tears at the social fabric. It ought to concern every business, because it distorts markets. It ought to concern every nation, because it endangers public health and fuels violence and organized crime. I'm talking about the injustice, the outrage, of human trafficking, which must be called by its true name—modern slavery. Our fight against human trafficking is one of the great human rights causes of our time and the United States will continue to lead it.").

<sup>286</sup> See *supra* note 19 and accompanying text.

<sup>287</sup> *Kirtsaeng*, No. 11–697, slip op. at 21 (noting that a copyright in software could even halt the sale of a used car).

<sup>288</sup> *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) ("Things in interstate commerce" and substantial effects tests).

<sup>289</sup> *Eldred v. Ashcroft*, 537 U.S. 186, 191 (2003) ("When, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.").



moral distinction between fungible and personal property.<sup>290</sup> She also argued that fungible property, property that is held for its exchange value, should be given less protection than personal property, property that is held primarily because it is necessary to our sense of self. However, the only kind of property recognized by the Court's current interpretation of the Copyright and Patent Clause is "fungible."<sup>291</sup> Thus, property of the "personhood" type should be left to the states to regulate.

The Courts should adopt a more serious conception of public property to temper private property claims using Carol Rose's "comedy of the commons" rationale.<sup>292</sup> Some property uses work in the opposite direction from a "tragedy"<sup>293</sup> when it is left to public use including public roads, bridges and the Internet.<sup>294</sup> Through custom, prescription and trust, the government has recognized a public interest or right in some sorts of property that constitute the "social glue" of a society.<sup>295</sup> Rose noted that our society's social glue might be our right to free speech and the social

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<sup>290</sup> Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957–60 (1982).

<sup>291</sup> *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985) ("In our haste to disseminate news, it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas.").

<sup>292</sup> Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 723 (1986) [hereinafter Rose: *The Comedy*].

<sup>293</sup> Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244 (1968) (Negative externalities are the economic problem. Property rights internalize those externalities by allowing private internalization of the some of the positive externalities as well.).

<sup>294</sup> Rose: *The Comedy*, *supra* note 292, at 768 ("In a sense, this is the reverse of the 'tragedy of the commons': it is a 'comedy of the commons,' as is so felicitously expressed in the phrase, 'the more the merrier.'").

<sup>295</sup> *Id.* at 778 ("[T]he Romans had a category of public property for religious structures and places; this makes sense in a society that regards religions as a 'social glue' that holds the whole together.").

activity brought about by commerce itself.<sup>296</sup> In fact there is compelling historical evidence that the First Amendment was crafted to protect public goods.<sup>297</sup> Finally, she noted the dangers of failing to temper grants of private property with the public interest. Rose's concern was that in cases of holdouts and monopolies, unreasonably high rents would be sought in the form of prohibitively high prices. She noted that a cause for the higher rents may have been brought about by the public's participation, and not the property owner's personal investment in the property.<sup>298</sup>

To this end, intangible property claims should be subjected to a strict ethical standard of honesty during creation, allocation and valuation.<sup>299</sup> This standard would require intangible property claims

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<sup>296</sup> *Id.* ("Perhaps an important social glue in our own society is free speech rather than religion."). See also Thomas Jefferson, A Bill for Establishing Religious Freedom, enacted on January 16, 1786, in JEFFERSON: WRITINGS, *supra* note 1, at 347 (This bill was enacted by the Virginia General Assembly with the support of James Madison. It vindicates religious and intellectual freedom and was one of the sources that Congress drew upon when drafting the First Amendment in 1789, illustrating the symbiotic relationship freedom of speech and freedom of religion in the United States.). Cf. *Genesis* 1:3 ("And God said, 'Let there be light,' and there was light."); *John* 1:1, 14 ("In the beginning was the Word, and the Word was with God, and the Word was God . . . . The Word became flesh and made his dwelling among us."). For a Judeo-Christian society like the United States, creation and authorship itself may clearly be seen as an act of free speech, thus Rose's quip that our social glue might be free speech may not be as far from the religious values that Ancient Rome based its public right on for the founders.

<sup>297</sup> Roger Williams (1603–1683), *A Plea for Religious Liberty*, excerpt from THE BLOODY TENENT OF PERSECUTION, FOR CAUSE OF CONSCIENCE (1644), available at <http://www.constitution.org/bcp/religlib.htm> ("[I]t is the will and command of God that (since the coming of his Son the Lord Jesus) a permission of the most paganish, Jewish, Turkish, or antichristian consciences and worships, be granted to all men in all nations and countries; and they are only to be fought against with that sword which is only (in soul matters) able to conquer, to wit, the sword of God's Spirit, the Word of God.").

<sup>298</sup> Rose: *The Comedy*, *supra* note 292, at 749–50.

<sup>299</sup> Singer II, *supra* note 206, at 113–14 (Courts "have felt that companies are 'owned' by the shareholders and that the main purpose of a corporation is to maximize profits. If that depends on shedding workers, so be it." However, "both common law and statutory law impose minimum standards on all K relationships to ensure contracting parties do not engage in fraudulent, deceptive or unfair

to have a sufficient nexus with actual value backing that does not simply arise from a “comedy of the commons.”<sup>300</sup> If a property claim were to fail this strict honesty standard, then the claim or right would be stripped of the legal attribute of property. This honesty standard could preserve efforts at the state level to regulate fields of law that would otherwise have been swallowed by an over-expansive concept of property. Adopting these changes to the concept of property is the most reasonable way to limit the expansion of the Commerce Clause so as to protect the Copyright and Patent Clause from being rendered meaningless.

Some may not believe that we need to enforce honesty in the creation, allocation and valuation of intangible property. However, in the name of the waning middle class of America, this article disagrees vehemently. We are in the wake of a housing crisis, a massive corporate buyout by the government, a resulting world economic crisis and now an attitude that banks are not only too big to fail but also too big to be held accountable. The unabashed demand for maximized enforcement of IP rights throughout the entire world has only recently been challenged by public outcry and the Supreme Court.<sup>301</sup> In response, the content industry and internet service providers engage in self-help measures by slowing or blocking the internet to individuals they perceive are violating their economic interest in property rights.<sup>302</sup> Such measures are a direct violation of FCC net neutrality rules which

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practices and to ensure that the relationship is subject to minimum standards designed to recognize the dignity and humanity of the parties.”).

<sup>300</sup> Rose: *The Comedy*, *supra* note 292, at 723; Benjamin G. Damstedt, *Limiting Locke: A Natural Law Justification for the Fair Use Doctrine* 112 YALE L.J. 1179, 1182–83 (2003) (suggesting that public goods are in danger of waste by way of underuse instead of waste by overuse. This conception could fit the Comedy of the Commons idea into Lockean labor theory).

<sup>301</sup> See *supra* note 19 and accompanying text.

<sup>302</sup> About the Center for Copyright Information, <http://www.copyrightinformation.org/about-cci/> (last visited Mar. 25, 2013) (CCI is a coalition of major copyright owner interest groups and ISPs, and they are initiating copyright alert systems in violation of net neutrality).

internet service providers are comfortable flouting,<sup>303</sup> calling upon a conception of copyright-as-property. Furthermore, many U.S. Circuits validated the use of self-help measures by patent owners who are granted an “almost un rebuttable presumption of patent validity.”<sup>304</sup> These trends indicate that the dangers to consumers, of the unbridled and arbitrary grant of intangible property ownership, is great and thus a higher standard of honesty in intangible property ownership should be enforced.

### **Property Maximization, Public Outcry and the Constitution**

[T]he current subprime crisis has made it abundantly clear that the creation of a property right is not a self-regarding act. The banking and mortgage industries created & marketed subprime mortgages which they then securitized and insured with credit default swaps lacking any backing. When the housing bubble burst, these property rights wrecked the world economy.<sup>305</sup>

Despite this conclusion about the dangers of granting property rights, Joseph William Singer embraced the classic Liberal answer that recognizes yet more property rights in intangibles.<sup>306</sup> However, his call for increased diversity in intangible property rights through a social relations conception of property only

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<sup>303</sup> Preserving the Open Internet, 47 C.F.R. § 8 (2011).

<sup>304</sup> *In re K-Dur Antitrust Litig.*, 686 F.3d 197, 214 (3d Cir. 2012) (“First, we take issue with the scope of the patent test’s almost un rebuttable presumption of patent validity.”). *See also* Brief of Antitrust Economists as Amici Curiae in Support of Respondents at 23-24, *Fed. Trade Comm’n v. Actavis, Inc.*, 133 S. Ct. 2223 (2013) (No. 12-416) 2013 WL 836946 (this issue is being heard by the U.S. Supreme Court).

<sup>305</sup> Singer II, *supra* note 206, at 114 (His solution, which is actually *not* apparent to all, is to give the legislature a wider leeway to regulate: “It is apparent to all that regulations of property are needed to prevent and respond to the externalities associated with arrangements that are indifferent to the rights and needs of third parties and to the nation as a whole.”).

<sup>306</sup> Singer I, *supra* note 203, at 742–43.

legitimizes the creation and marketing of destructive intangible property in the first place. To stem the tides of the great injustice of opportunism preying upon the middle class, lawmakers must recognize the dishonest creation and marketing of intangible property for what it is: a lie. Preserving the ability for businesses to cloak lies in property in order to shift losses to the weaker classes is destructive and purposeless.

Grey saw the problem perhaps in its most clear form—disintegration.<sup>307</sup> The problem became unavoidable when we began recognizing intangibles as property. Short of Blackstonian physicalism, there is no bright line to keep property a “distinct legal category from other legal rights, in that they pertain to things.”<sup>308</sup> Grey said that this is true because “most property in a modern capitalist economy is intangible.”<sup>309</sup> What he did not foresee was that lawmakers would begin to conceptualize intangibles as “things” simply because they were given the attribute of property and not because they are physical, or even detectable with any of our five senses.<sup>310</sup> Simply applied to constitutional law

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<sup>307</sup> Grey, *supra* note 60.

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* (“Consider the common forms of wealth: shares of stock in corporations, bonds, various kinds of commercial paper, bank accounts, insurance policies--not to mention the arcane intangibles such as trademarks, patents, copyrights, franchises and business good will.”).

<sup>310</sup> Lemley, *supra* note 22, at 1071 (“My worry is that the rhetoric of property has a clear meaning in the minds of courts, lawyers, and commentators as ‘things that are owned by persons’ and that fixed meaning will make it all too tempting to fall into the trap of treating intellectual property as an absolute right to exclude.”). See also Grey, *supra* note 60; BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 74 (1967) (noting that perhaps it would be okay to call copyright property as long as we think of property as a general concept); Stewart E. Sterk, *What's in a name? The Troublesome Analogies Between Real and Intellectual Property*, Cardozo Law Legal Studies Research, Working Paper No. 88, 43 (2004), <http://papers.ssrn.com/abstract=575121> (arguing that “[i]t is far too late to expunge the rhetoric of property from dialogue about copyright.”); Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 631 (1998) [hereinafter Rose: *Canons*] (despotic dominion is a caricature of property rights rather than an accurate description of them).

before *Sebelius*, “things” in interstate commerce became all encompassing. Thus, the effect of the positivist movement on federalism, state sovereignty and human rights that were once seen as free from federal limitation is nothing short of eclipsing.

There is ample historical evidence to conclude that robust protection of intangible property does not result in the “substantial direct effect[s] on economic growth” that enforcement of general property rights do.<sup>311</sup> Furthermore, granting overbroad IP rights have been criticized for having the effect of incentivizing too much investment into innovation as compared to “other forms of production.”<sup>312</sup> This “distort[ion of] the general economic

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<sup>311</sup> JAMES BESSEN & MICHAEL J. MEURER, PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK 92–93 (2008) (“The historical evidence, the cross-country evidence, and the evidence from economic experiments all point to a marked difference between the economic importance of general property rights more generally. With the cross-country studies in particular, the quality of general property rights institutions has a substantial direct effect on economic growth. Using the same methodology and in the same studies, intellectual property rights have at best only a weak and indirect effect on economic growth . . . . [T]he empirical evidence strongly rejects simplistic arguments that patents universally spur innovation and economic growth. ‘Property’ is not a ritual incantation that blesses the anointed with the fruits of innovation; legislation of ‘stronger’ patent rights does not automatically mean greater innovation. Instead, the effectiveness of patents as a form of property depends critically on the institutions that implement the law. And there appear to be important differences in the effectiveness of implementation across different technologies and industries.”). *But see* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 379 (2003) (“making intellectual property excludable creates value.”).

<sup>312</sup> Lemley, *supra* note 22, at 1064.

equilibrium”<sup>313</sup> may be seen best in the current business decisions made by the telecommunications titan known as Comcast.<sup>314</sup>

In the past five years, Comcast has purchased NBC/Universal, a company that creates and owns copyrighted content, and established Xfinity, an Internet video distribution company that competes with Hulu and Netflix.<sup>315</sup> In fact, Comcast’s subsidiary NBC was the sole distributor of the 2012 Olympics in the United States.<sup>316</sup> These projects represent tens of billions of dollars devoted to the involvement of Comcast in copyright ownership and distribution. Meanwhile, 30% of America is not connected to the Internet at all, and only 8% has an updated fiber optic connection.<sup>317</sup> Everyone else is still connecting to the Internet via copper wiring, and we are quickly losing the global race to high

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<sup>313</sup> *Id.* at 1062, 1064. See also Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 491–92 (1996); Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 931 (2005) (“[E]conomic analysis of many infrastructure resources fails to fully account for how the resources are used as inputs to create social benefits and thus fails to fully account for the social demand for the resources.”).

<sup>314</sup> Sam Gustin, *Is Broadband Internet Access a Public Utility?*, TIME (Jan. 9, 2013), <http://business.time.com/2013/01/09/is-broadband-internet-access-a-public-utility/> (“Because the U.S. government has allowed a small group of giant, highly profitable companies to dominate the broadband market, Crawford argues, American consumers have fewer choices for broadband service, at higher prices but lower speeds, compared to dozens of other developed countries, including throughout Europe and Asia.”). See also Crawford, *supra* note 200 (“[T]he U.S. is rapidly losing the global race for high-speed connectivity, as fewer than 8 percent of households have fiber service. And almost 30 percent of the country still isn't connected to the internet at all . . . All Americans need high-speed access, just as they need water, clean air and electricity. But they have allowed a naive belief in the power and beneficence of the free market to cloud their vision. As things stand, the U.S. has the worst of both worlds: no competition and no regulation.”).

<sup>315</sup> Gustin, *supra* note 314.

<sup>316</sup> *Id.*

<sup>317</sup> Crawford, *supra* note 200.

speed Internet.<sup>318</sup> In fact, because of Comcast's lackluster investment in the utility it oversees, some towns have rolled out their own last mile fiber optic networks using public funds.<sup>319</sup>

The FCC's net neutrality rules require transparency, no blocking and no favoring of Internet traffic by internet providers. Verizon has challenged these rules in the Federal Circuit.<sup>320</sup> Without these rules nothing will stand in the way of telecommunications companies becoming the largest beneficiaries of copyright protection.<sup>321</sup> Comcast has every incentive to and

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<sup>318</sup> *Id.* See also *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 193 (1973) (Brennan, J., dissenting) ("For in the absence of an effective means of communication, the right to speak would ring hollow indeed. And, in recognition of these principles, we have consistently held that the First Amendment embodies, not only the abstract right to be free from censorship, but also the right of an individual to utilize an appropriate and effective medium for the expression of his views.").

<sup>319</sup> See Crawford, *supra* note 200.

<sup>320</sup> Brief of Respondent-Appellee at 14, 15, 50, 57, 75, *Verizon v. Fed. Comm'n Comm'n*, No. 11-1355 (D.C. Cir. Jan. 16, 2013). See also FEDERAL COMMUNICATIONS COMMISSION, *FCC Grants Approval of Comcast-NBCU Transaction* (Jan. 18, 2011), available at <http://transition.fcc.gov/transaction/comcast-nbcu.html#orders> (noting that FCC approval of the Comcast/NBC merger was made on the condition that Comcast would fulfill a number of public interest commitments including "Protecting the Development of Online Competition." Comcast/NBC's exclusive grant of the copyright in the Olympics arguably violates a number of these conditions including "unreasonably withhold[ing] programming from Hulu."); *Who Owns the Media?*, FREE PRESS, <http://www.freepress.net/ownership/chart> (last visited on Dec. 2, 2013) (showing the high consolidation of media industries).

<sup>321</sup> Brief of Respondent-Appellee at 14, 15, 50, 57, 75, *Verizon v. FCC*, No. 11-1355 (D.C. Cir. Jan. 16, 2013). See also Marguerite Reardon, *Franken: Comcast Thumbs Nose at Net Neutrality Rules*, CNET (May 7, 2012, 12:20 PM), [http://news.cnet.com/8301-13578\\_3-57429373-38/franken-comcast-thumbs-nose-at-net-neutrality-rules/](http://news.cnet.com/8301-13578_3-57429373-38/franken-comcast-thumbs-nose-at-net-neutrality-rules/) (noting that Comcast might be violating net neutrality rules by exempting its Xfinity video service from monthly data caps). *But see* *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 973 (4th Cir. 1990) (finding that there is a copyright misuse defense inherent to copyright by interpreting English common law history of copyright into U.S. CONST. art. I, § 8, cl. 8. This defense is rarely raised, even more rarely applied, and yet it is the antitrust release valve for copyright).



actively favors traffic in Xfinity's favor.<sup>322</sup> Since Comcast naturally pays the exact minimum rate for connecting itself to the Internet, it will be able to offer predatory prices to consumers for similar video services provided by Netflix, Apple, Amazon and Google.<sup>323</sup> The chosen Trojan horse for Internet service providers like Comcast is copyright because lawmakers have cloaked copyright in property so well, even the Supreme Court has acknowledged it.<sup>324</sup>

IP's complete transformation into a form of property is partly due to an outright failure of courts to properly apply a utilitarian economic analysis to IP rights.<sup>325</sup> Because of the difficulties in properly applying a utilitarian analysis, lawmakers have fallen to their assumptions while couching those arguments in utilitarian terms.<sup>326</sup> Some rely on Locke, granting higher protection to reward labor.<sup>327</sup> Others lean on Mill's marketplace of ideas, limiting grants of IP according to the free-market.<sup>328</sup> Thus, courts

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<sup>322</sup> Reardon, *supra* note 321.

<sup>323</sup> See Tony Bradley, *Comcast Toll on Netflix Screams for Net Neutrality*, PC WORLD (Nov. 30, 2010, 5:57 AM), [http://www.pcworld.com/article/211964/comcast\\_toll\\_on\\_netflix\\_screams\\_for\\_net\\_neutrality.html](http://www.pcworld.com/article/211964/comcast_toll_on_netflix_screams_for_net_neutrality.html) (explaining how Comcast's non-neutral stance toward Netflix stems from its apparent moral ground in blocking peer-to-peer file sharing services).

<sup>324</sup> Grey, *supra* note 60 ("To own property is to have exclusive control over something . . . Legal restraints on the free use of one's property are conceived as departures from an ideal conception of full ownership."); *United States v. Moghadam*, 175 F.3d 1269, 1280 (11th Cir. 1999) ("The [Copyright Clause] grant [of legislative power] itself is stated in positive terms, and does not imply any negative pregnant that suggests the term 'writings' operates as a ceiling on Congress' ability to legislate pursuant to other grants. Extending quasi-copyright protection also furthers the purpose of the Copyright Clause to promote progress of the useful arts by securing some exclusive rights to the creative author.").

<sup>325</sup> Lemley, *supra* note 22, at 1057 (noting that IP rights are justifiable only to the extent that excludability does in fact create value necessary to incentivize creation and innovation). See also Richard A. Posner, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621, 638 (2003) ("[T]he unauthorized use of another's IP, unlike unauthorized use of another's physical property, lacks clear normative significance.").

<sup>326</sup> McGowan, *supra* note 147, at 2–3, 7, 38, 71–72.

<sup>327</sup> Lemley, *supra* note 22, at 1066–67.

<sup>328</sup> *Id.*

fail to address what incentives are appropriate in order to spark creation and innovation and have presented a smattering of inconsistent and conflicting outcomes.<sup>329</sup> This is an indication that the current framework underpinning IP law is ineffective.

Two shortcomings of a legal utilitarian analysis have been recognized by IP scholars. First, it is difficult to impossible to define utility or even to determine which types of utility are favored.<sup>330</sup> This adds to the difficulty of applying a utilitarian analysis. Second, it lacks a mechanism to encourage dissemination of copyrighted and patented materials especially to women and the poor.<sup>331</sup> In fact, philosophical ethicists have long criticized Mill and Bentham for merely supporting a form of Hedonism.<sup>332</sup> Other

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<sup>329</sup> DAVID D. FRIEDMAN, *LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS* 135 (2000) (We have missed the boat, because "what we want . . . is not merely an incentive but the right incentive."). *See also* Lawrence Lessig, *Intellectual Property and Code*, 11 ST. JOHN'S J. LEGAL COMM. 635, 638–39 (1996) ("'Sufficient incentive,' however, is something less than 'perfect control.' The question we must ask is what kind of control the Net should yield to owners of intellectual property."); Lemley, *supra* note 22, at 1059 (enumerating the costs of overbroad grant of IP rights as: 1, IP rights distort markets away from the competitive norm by creating static inefficiencies and deadweight losses, 2, it interferes with other creators' to work (dynamic inefficiencies), 3, it creates rent-seeking behavior that is socially wasteful, 4, they have high administrative costs and 5, the cause overinvestment in research and development itself that is distortionary). *Cf.* The Sony Bono Copyright Extension Act 17 U.S.C. § 302(a) (The retroactive provisions gave no new incentive to authors to create and yet was not unconstitutional.).

<sup>330</sup> Sunder, *supra* note 130, at 284. *See also* JOHN STUART MILL, *UTILITARIANISM*, ch. 2 (referring to high and low pleasures, some being worth more than others); ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 5 (1974) ("Indeed, no proposed decision making criterion for choice under uncertainty carries conviction here, nor does maximizing expected utility on the basis of such frail probabilities.").

<sup>331</sup> Sunder, *supra* note 130, at 284 (citing AMARTYA SEN, *EQUALITY OF WHAT? IN CHOICE, WELFARE, AND MEASUREMENT* 353, 354, 356 (1982)).

<sup>332</sup> Walter Sinnott-Armstrong, *Consequentialism*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta, ed. 2012), <http://plato.stanford.edu/archives/win2012/entries/consequentialism/> ("Classic utilitarians held hedonistic act consequentialism."); Andrew Moore, *Hedonism*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta, ed. 2011),

critics have found utilitarianism hopelessly inapplicable and fatally undefined.<sup>333</sup> *Sebelius* could represent a necessary shift in Constitutional interpretation for courts to adopt a more limited and practicable underpinning for IP law.<sup>334</sup> Utilitarianism may in fact be unworkable. But unless and until the federal government recognizes this, the power to regulate by more limited non-utilitarian justifications should be left to the states.

The benefits gained from abandoning utilitarianism would be felt on a worldwide level.<sup>335</sup> Democracy could spread through the Internet to the four corners of the earth. Democracy could spread across the globe not through government propaganda or war, but by the simple fact that everyone, regardless of class, can equally express themselves online. In fact, other values that do not easily fit into a utilitarian framework should be considered including

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<http://plato.stanford.edu/archives/win2011/entries/hedonism/> (noting that Bentham's utilitarianism was regarded as a "pig philosophy.").

<sup>333</sup> See, e.g., Sinnott-Armstrong, *supra* note 332 (For example, utilitarianism has a hard time explaining why one must tell the truth, or otherwise not lie, if telling the truth will cause the teller pain. Utilitarians claim that when there are no negative factors against telling the truth, the theory requires one to tell the truth. But even here, they cannot say why one should tell the truth if it does neither generate nor costs utility to lie. Other criticisms include its failure to clearly define the factors measured in a cost and benefit utility analysis.).

<sup>334</sup> *Sebelius*, 132 S. Ct. at 2644.

<sup>335</sup> Sunder, *supra* note 130, at 280 (The Internet facilitates a "semiotic democracy" by handing us the tools of creation and dissemination). See also ERIC VON HIPPEL, *DEMOCRATIZING INNOVATION* 123–24 (2005) ("democratization of the opportunity to create is important beyond giving more users the ability to make exactly the right products for themselves . . . [T]he joy and the learning associated with creativity and membership in creative communities is also important, and these experiences too are made more widely available as innovation is democratized."). But see *China's Internet: A Giant Cage*, *supra* note 136 (noting that the current Chinese government has been able to leverage internet tools to actually further authoritarian interests); Nicole Perloth, *Hackers in China Attacked The Times for Last 4 Months*, *NEW YORK TIMES* (Jan. 30, 2013), <http://www.nytimes.com/2013/01/31/technology/chinese-hackers-infiltrate-new-york-times-computers.html?pagewanted=all> (Chinese hackers actually cyberattacked the New York Times when they had published political criticism of the Chinese government).

individual autonomy, sovereign autonomy, culture, equality and development.<sup>336</sup> Values that we may take for granted in the U.S. should not go unconsidered by TRIPs. Nor should they be lost on us here at home.

In fact, the result of continuing to press a utilitarian, maximized IP regime onto the world will not be higher profits for western IP owners. It will actually end similar to the current position of the U.S. in the world economy for merchandise. In 2001, President Clinton and Congress opened our markets with China so that we could sell them products,<sup>337</sup> and we actually ended up having them sell us toothbrushes, pencils, knick-knacks, etc.<sup>338</sup> As a result we are losing jobs and billions of dollars of our GDP because of the lack of forethought that went into our trade agreements with China. Now, one of the reasons we passed the America Invents Act (AIA) was to meet China's rise in patent grants.<sup>339</sup>

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<sup>336</sup> Sunder, *supra* note 130, at 324–25.

<sup>337</sup> Letter to Congress from President Clinton (May 23, 2000), *available at* <http://clinton6.nara.gov/2000/05/2000-05-23-letter-from-the-president-to-speaker-hastert.html> ("China—with more than a billion people—is home to the largest potential market in the world. To enter the WTO, China has agreed to open that market to everything from American wheat to cars to computers . . . If Congress makes the right decision, our companies will be able to sell and distribute products in China made by American workers on American soil, without being forced to relocate manufacturing to China, or to sell through the Chinese government, or to transfer valuable technology. We will be able to export products without exporting jobs."); Press Release, *WTO Successfully Concludes Negotiations on China's Entry*, WTO NEWS (Sept. 17, 2001), [http://www.wto.org/english/news\\_e/pres01\\_e/pr243\\_e.htm](http://www.wto.org/english/news_e/pres01_e/pr243_e.htm) (Most of the agreement was focused on opening China's doors to American businesspeople and investors, including in telecom. Not one politician seemed to guess that market pressures would facilitate the near opposite result).

<sup>338</sup> U.S. Department of Commerce, *Foreign Trade: Trade in Goods with China*, UNITED STATES CENSUS BUREAU, *available at* <http://www.census.gov/foreign-trade/balance/c5700.html> (showing that the U.S. has only purchased more Chinese goods every year, far surpassing our exports to China. In 2012 we bought \$315 billion more in Chinese goods than we exported to China).

<sup>339</sup> Floor Statement of Judiciary Committee Chairman Lamar Smith, The America Invents Act, H.R. 1249, (June 22, 2011), *available at*

If we keep reacting to countries that do not believe in equality, transparency or human rights in general we will lose our higher ground not only economically but also ethically. Not only will others' upper classes be the greatest beneficiaries of our IP laws,<sup>340</sup> but our IP laws will also justify the silencing and enslavement of their lower classes.<sup>341</sup> As Wal-Mart has proven with their record of predatory pricing,<sup>342</sup> Main Street America cannot compete with businesses that contract with countries that do not believe in equality of class.<sup>343</sup> EBay has already sold off a portion

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[http://judiciary.house.gov/issues/issues\\_patentreformact2011.html](http://judiciary.house.gov/issues/issues_patentreformact2011.html) ("And while America's innovators are forced to spend time and resources defending their patents, our competitors are busy developing new products that expand their businesses and their economies. According to a recent media report, China is expected to surpass the United States for the first time this year as the world's leading patent publisher."). See also Lee Chyen Yee, *China tops U.S., Japan to become top patent filer*, REUTERS (Dec. 21, 2011), <http://www.reuters.com/article/2011/12/21/us-china-patents-idUSTRE7BK0LQ20111221>.

<sup>340</sup> *Kirtsaeng*, No. 11–697, slip op. at 22–23 (Ginsberg, J., dissenting) ("[T]he Court embraces an international-exhaustion rule that could benefit U.S. consumers but would likely disadvantage foreign holders of U.S. Copyrights.").

<sup>341</sup> Clinton, *supra* note 22, at 20. See also Obama, *supra* note 22 ("It ought to concern every person, because it's a debasement of our common humanity. It ought to concern every community, because it tears at the social fabric. It ought to concern every business, because it distorts markets. It ought to concern every nation, because it endangers public health and fuels violence and organized crime. I'm talking about the injustice, the outrage, of human trafficking, which must be called by its true name—modern slavery. Our fight against human trafficking is one of the great human rights causes of our time and the United States will continue to lead it.").

<sup>342</sup> *Wal-Mart Stores, Inc. v. Am. Drugs, Inc.*, 319 Ark. 214, 234 (1995) (ultimately ruling in favor of Wal-Mart, and deciding that selling goods below market value was not predatory or illegal); Edmund L. Andrews, *International Business; Germany Says Wal-Mart Must Raise Prices*, NEW YORK TIMES (Sept. 9, 2000), <http://www.nytimes.com/2000/09/09/business/international-business-germany-says-wal-mart-must-raise-prices.html>; *Wal-Mart to Sell 85 Stores in Germany*, LOS ANGELES TIMES (July 29, 2006), <http://articles.latimes.com/2006/jul/29/business/fi-walmart29>.

<sup>343</sup> Sam Hornblower, *Wal-Mart & China: A Joint Venture*, FRONTLINE (Nov. 23, 2004), <http://www.pbs.org/wgbh/pages/frontline/shows/walmart/secrets/>

of its company to Alibaba, a similar company that sells cheap products direct from Chinese factories to western consumers.<sup>344</sup> The need for companies like Costco and Wal-Mart could be undermined entirely by the development of international business models that they pioneered.

Non-alienable termination rights may be perceived as a safety-valve for unfairness traditionally found in entertainment contracts of adhesion that make non-authors the beneficial owner of copyrights.<sup>345</sup> For instance, original authors of musical works can reclaim their copyright “after thirty-five years (in some cases), after fifty-six years (in other cases), and sometimes even after seventy-five years” have passed since the grant was first executed,<sup>346</sup> as long as it was executed on or after January 1, 1978.<sup>347</sup> In this way major musical hits can be reclaimed, like the Village People’s *YMCA* song, which was reclaimed in 2012.<sup>348</sup> However, termination rights do nothing for those who transferred their copyright before 1978,<sup>349</sup>

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wmchina.html; Tiejun Cheng & Mark Selden, *The Origins and Social Consequences of China's Hukou System*, 139 THE CHINA QUARTERLY 644 (1994) (Those who have a hukou in Beijing or Shanghai receive social benefits like healthcare and welfare, while those in the countryside do not).

<sup>344</sup> *Alibaba.com Strengthens Position as Go-To Supply Source for U.S. E-commerce Entrepreneurs with Acquisition of Auctiva*, BUSINESS WIRE (Aug. 24, 2010), <http://www.businesswire.com/news/home/20100824006735/en>. See also Sayantani Ghosh & Aurindom Mukherjee, *China's Alibaba Buys Back Half of Yahoo's Stake*, REUTERS (Sept. 18, 2012, 4:02 PM) <http://www.reuters.com/article/2012/09/18/us-alibaba-buyback-yahoo-idUSBRE88H0Y520120918> (if Alibaba buys Yahoo!, they will be completely tapped into the American consumer base).

<sup>345</sup> 17 U.S.C. §§ 203, 304 (2013).

<sup>346</sup> Lydia Pallas Loren, *Renegotiating the Copyright Deal in the Shadow of the "Inalienable" Right to Terminate*, 62 FLA. L. REV. 1329 (2010).

<sup>347</sup> 17 U.S.C. §§ 203(a)(3), 304 (2013).

<sup>348</sup> *Scorpio Music S.A. v. Willis*, No. 11CV1557 BTM(RBB), 2012 WL 1598043 (S.D. Cal. May 7, 2012).

<sup>349</sup> Don Snowden, *Fighting for Artists' Publishing Rights*, LOS ANGELES TIMES (Mar. 1, 1987), [http://articles.latimes.com/1987-03-01/entertainment/ca-6711\\_1\\_artists-rights](http://articles.latimes.com/1987-03-01/entertainment/ca-6711_1_artists-rights) (noting that Richard Berry reached an amicable settlement for half of the publishing rights in the song *Louie Louie* after he had sold it for \$750 30 years earlier).

and termination rights do not extend to works “made for hire.”<sup>350</sup> Even though termination rights may help even out the balance between starving artists and big business, TRIPs continues to leave out lower and middle class rights holders from consideration altogether.<sup>351</sup>

The failure of international IP law to capture the interests of the lower and middle classes was masterfully illustrated in the 2013 Academy Award winning documentary *Searching for Sugar Man*.<sup>352</sup> American artist Sixto Rodriguez’s work rose to fame in South Africa without him ever getting paid and without him ever knowing until Rodriguez’s eldest daughter happened upon a website dedicated to him in 1998. In South Africa his songs had become the rally cry for Afrikaner apartheid protesters. For years, record companies cut and sold his records sending royalties to the record company that dropped Rodriguez after his records flopped in the United States. Meanwhile, Rodriguez and his family returned to their humble beginnings to live out their days in the rough neighborhoods of Detroit.

What is more, TRIPs leverages IP regulation in developing nations that haven’t embraced rights to property, security and liberty regarding physical property.<sup>353</sup> The resulting new regime stifles the expansion of the “self-evident” truth that all men are created equal.<sup>354</sup> Along these lines, Doctors Without Borders

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<sup>350</sup> 17 U.S.C. §§ 203, 304 (2013); Michael Cieply, *Court Ruling Says Marvel Holds Rights, Not an Artist*, THE NEW YORK TIMES (July 28, 2011), [http://www.nytimes.com/2011/07/29/business/media/disney-wins-marvel-comics-copyright-case.html?\\_r=0](http://www.nytimes.com/2011/07/29/business/media/disney-wins-marvel-comics-copyright-case.html?_r=0) (Disney owns Marvel Comics).

<sup>351</sup> Sunder, *supra* note 130, at 264-65 (noting that the composer of *The Lion Sleeps Tonight*, never benefited economically from its use in Disney’s *The Lion King*).

<sup>352</sup> *About Rodriguez*, Rodriguez Official Website, <http://www.rodriguez-music.com/about/> (last visited Apr. 24, 2013).

<sup>353</sup> Sunder, *supra* note 130, at 291.

<sup>354</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”). *See also* Zach Carter, *WikiLeaks Reveals Secret*

reported that patent protection at the level TRIPs requires can kill.<sup>355</sup> Thus some developing countries are acting to limit TRIPs patent protection to preserve human rights and life.<sup>356</sup> In general, developing countries are under pressure to adopt defensive IP policies to protect “poor people’s knowledge.”<sup>357</sup> This includes traditional knowledge, geographical indications, and biodiversity. Finally, Creative Commons offers a Developing Nations Creative Commons License. This license is designed to allow third world citizens to release artistic expression in the developing world without also releasing their work in the developed world.<sup>358</sup> Utilitarianism as a regime that reduces the conception of IP to a matter of wealth maximization without considering the costs tomorrow has stood in the way of these sorts of efforts to protect the poor under classes of the world.

Abandoning utilitarianism would also create positive benefits domestically. First, it would at the very least allow us to limit the trend of commoditization and propertization of anything from which value can be derived. Scholars have warned that the current IP regime is a threat to free speech and the public domain.<sup>359</sup> IP could finally be aligned with the finding in *State v. Shack*, that “[p]roperty rights serve human values.”<sup>360</sup> The current

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*Obama Deal*, HUFFINGTON POST (Nov. 13, 2013, 5:54 PM), [http://www.huffingtonpost.com/2013/11/13/wikileaks-global-health\\_n\\_4269337.html](http://www.huffingtonpost.com/2013/11/13/wikileaks-global-health_n_4269337.html).

<sup>355</sup> See also Zach Carter, *WikiLeaks Reveals Secret Obama Deal*, HUFFINGTON POST (Nov. 13, 2013, 5:54 PM), [http://www.huffingtonpost.com/2013/11/13/wikileaks-global-health\\_n\\_4269337.html](http://www.huffingtonpost.com/2013/11/13/wikileaks-global-health_n_4269337.html), Cf. Amicus Brief of Antitrust Economists, *Fed. Trade Comm’n v. Actavis, Inc.*, No. 12-416, 2013 WL 836946 (U.S. Feb. 28, 2013); Hazen, *supra* note 10, at 795; Hirschler, *supra* note 14.

<sup>356</sup> Sunder, *supra* note 130, at 291.

<sup>357</sup> *Id.* at 298.

<sup>358</sup> *Id.* at 288–89.

<sup>359</sup> MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 90 (2003). See *Golan v. Holder*, 132 S. Ct. 873, 894 (2012) (finding it constitutional for Congress to take things that once fell into the public domain and returning them to foreign private ownership according to international trade agreements under the Uruguay Round Agreements).

<sup>360</sup> *State v. Shack*, 58 N.J. 297, 304 (1971) (finding that a landowner could not “stand between the migrant workers and those who would aid them.”).



trend of commoditization of culture already threatens local foreign cultures, and could end with aspects of our identities (religious, racial and cultural) bought and sold worldwide.<sup>361</sup> If IP is a worldwide “struggle over social relations” we must also count the cost to our own culture if major content owners prevail in achieving absolute global IP protection.<sup>362</sup> As Professor Sunder has remarked:

In the Participation Age, people with access to a computer and relatively cheap but powerful digital hardware challenge the hegemony of traditional cultural authorities and create new cultural meanings from the bottom up. . . . Make no mistake: intellectual property law is no mere bystander in this culture war. It both empowers and disempowers individuals and groups when recognizing (or misrecognizing) authors and inventors, pirates and thieves.<sup>363</sup>

Perhaps we do not need to analogize to property’s “pirates and thieves”<sup>364</sup> at all. We could just call IP law what it is, statutory law.<sup>365</sup> Those who do not follow the rules are what the statutes call

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<sup>361</sup> Sunder, *supra* note 130, at 275 (noting IP measures taken in India to protect Indian candies made at a religious site and uniquely woven sarees). *See also* Zoe Alsop, *Pictures: China's Fake Disneyland, Overgrown and Ghostly*, NATIONAL GEOGRAPHIC (Dec. 22, 2011), <http://news.nationalgeographic.com/news/travelnews/2011/12/pictures/111222-china-fake-disneyland-disney-world-travel/#close-modal> (Someone actually tried to recreate America's main street, the way Disneyland did, in China, and now Disney is opening a "legitimate" theme park in Shanghai. That is our main street being flung out on the world stage.).

<sup>362</sup> Sunder, *supra* note 130, at 274–75.

<sup>363</sup> *Id.* at 322–23.

<sup>364</sup> Kaplan, *supra* note 310, at 74 (“[C]haracterization in grand terms then seems of little value: we may as well go directly to the policies activating or justifying the particular determinations.”).

<sup>365</sup> *Compco v. Blue Crest* [1980] S.C.R. 357, 372–73 (Can.) (“[C]opyright law is neither tort law nor property law in classification, but is statutory law. It neither cuts across existing rights in property or conduct nor falls in between rights and obligations heretofore existing in common law. Copyright legislation simply creates rights and obligations upon the terms and in the circumstances set out in

them: *infringers*. However, in the U.S., this is unlikely because pro-regulation versus de-regulation is a highly politicized aspect of the struggle between Libertarians and Liberals.<sup>366</sup> The attribute of property gives IP rights just the kind of natural rights legitimacy that both Libertarians and Liberals seem to want. Imagine if we leveraged poorer, less fortunate nations into adopting strict IP laws for anything less.<sup>367</sup> The reality is that we probably have. Some are certainly dedicated to an IP-as-property-law regime simply because it would be embarrassing to go back now. Justices Ginsberg, Kennedy and Scalia in their joint dissent in *Kirtsaeng* seemed to think it was an embarrassment to the American government to back out of a maximized regime.<sup>368</sup> However, the majority found that the Constitution called for something more limited, and they had thus avoided the more destructive and, as Jefferson recognized it,<sup>369</sup>

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the statute."). See also Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 COLUM. BUS. L. REV. 335, 336–37 (2004) ("Anyone who does not believe that the IP laws are a form of regulation has not read the [statutes] and the maze of technical rules promulgated under them. . . . The range of government estimation that goes on in the IP system is certainly as great as in regulation of, say, retail electricity or telephone service.").

<sup>366</sup> Lemley, *supra* note 22, at 1074 ("Regulation is out of vogue, and those who talk about IP as regulation usually do so to denigrate it.") (citing Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272 (2004) ("In the end, 'exclusive rights' are merely another form of regulation that Congress may, and frequently does, use to confer economic rents on favored special interests.")).

<sup>367</sup> Lemley, *supra* note 22, at 1074 ("the problem with the property story [is that] it brings with it too much baggage"); *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 8–9, n.2 (1966) ("Inventions . . . cannot, in nature, be a subject of property.") (quoting Letter from Thomas Jefferson to Isaac McPherson, Aug. 13, 1813, in JEFFERSON: WRITINGS, *supra* note 1, at 1291–92 (Jefferson thought giving inventions a limited, exclusive right was an embarrassment, and giving inventions the attribute of property was an impossibility)).

<sup>368</sup> *Kirtsaeng*, No. 11–697, slip op. (Ginsberg, J., dissenting).

<sup>369</sup> Letter from Thomas Jefferson to Isaac McPherson, Aug. 13, 1813, in JEFFERSON: WRITINGS, *supra* note 1, at 1291–92 ("That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature.").

more *embarrassing* result of preserving a double standard of freedom globally.<sup>370</sup>

There has been a lively discussion about what to call IP if not property.<sup>371</sup> Some are concerned that “it is all too common to assume that because something is property, only private and not public rights are implicated.”<sup>372</sup> This is to call into question the

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<sup>370</sup> Compare *Kirtsaeng*, No. 11–697, slip op. (Ginsberg, J., dissenting) (“The Court’s bold departure from Congress’ design is all the more stunning, for it places the United States at the vanguard of the movement for ‘international exhaustion’ of copyrights—a movement the United States has steadfastly resisted on the world stage.”), with Julius Genachowski, Chairman, FCC, Statement on the U.S. Submission of Initial Input into the International Telecommunication Union’s World Conference on International Telecommunications (Aug. 3, 2012) (noting a fight for “Internet freedom” against “some countries [that] restrict the free flow of information online.”), and Julius Genachowski, Chairman, FCC, Prepared Remarks for the International Telecommunications Union Global Symposium for Regulators in Beirut, Lebanon, *ICT: Global Opportunities and Challenges* (Nov. 10, 2009) (touting the FCC’s role to preserve a “free, open and robust Internet” as an example to follow on the world stage).

<sup>371</sup> Lemley, *supra* note 22, at 1074–75 (“My fear is that a focus on analogies will mislead more than it enlightens. If there are sufficient dissimilarities between IP and other areas of law, drawing analogies becomes problematic, not only because of the caveats that are required (‘IP is like any other tort, except in the following ways . . .’), but because those caveats have a way of getting lost over time. This may be what has happened with efforts to talk about IP as a form of property: over time, it is too easy to rely on the shorthand reference to property and come to believe that IP really is like other kinds of property.”); Tom W. Bell, *Authors’ Welfare: Copyright As A Statutory Mechanism for Redistributing Rights*, 69 BROOK. L. REV. 229, 235–67, 273–74 (2003); Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT L. REV. 1295, 1306 (1998); Wendy J. Gordon, *Copyright As Tort Law’s Mirror Image: “Harms,” “Benefits,” and the Uses and Limits of Analogy*, 34 MCGEORGE L. REV. 533 (2003); Bruce P. Keller, *Condemned to Repeat the Past: The Reemergence of Misappropriation and Other Common Law Theories of Protection for Intellectual Property*, 11 HARV. J.L. & TECH. 401, 402 (1998); A. Samuel Oddi, *Product Simulation: From Tort to Intellectual Property*, 88 TRADEMARK REP. 101, 107–08 (1998); KAPLAN, *supra* note 310, at 74; Sterk, *supra* note 310, at 43. See also Rose: *Canons*, *supra* note 310, at 631.

<sup>372</sup> Lemley, *supra* note 22, at 1071. But see Shubha Ghosh, *Deprivatizing Copyright*, 54 CASE W. RES. L. REV. 387, 389 (2003) (noting a debate over

traditional concept of patents and copyrights as grants of *limited* monopoly in an otherwise public good. Public goods are non-rivalrous and non-excludable. The idea is that if we do not grant some excludability in creative invention and expression, we will not achieve the mandate of “progress” called for in the Copyright and Patent Clause. However, once the attribute of property began mixing with this conception of IP law, the question has been flipped on its head. We went all the way from asking how limited we can make the grant of these “monopolies” to how broadly we can construe progress to grant ever-increasing “private property” protection to IP rights.<sup>373</sup>

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The cost of allowing dishonesty in the marketplace to continue in the area of intangibles is much greater than anyone seems to realize. As our global economies continue to intertwine, it is obvious that market failures can lead to global crisis. The current property and IP regimes contributed to cycles of market failure by allowing and encouraging widespread promises of value in intangible property that may or may not exist. Then when the pension, insurance or stock should pay out, there is little or nothing there. These dead weight losses are most frequently endured by the middle class.

There is hope. Unbeknownst to most property legal scholars,<sup>374</sup> the average American layperson still knows the difference between physical property and intangible property. To put it in context, the average American individual knows the difference between a bar of gold and a promise from their employer that they will receive the value of a bar of gold in company shares

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whether "copyright law serves to protect certain essential private property interests or whether copyright law is informed by public, regulatory values.").

<sup>373</sup> Richard Craswell, *How We Got This Way: Further Thoughts on Fuller and Perdue*, 1 ISSUES IN LEGAL SCHOLARSHIP 1, 12 (2001) (warning that thinking of rights as property rights may "exert a sort of psychological force that makes some remedies seem more plausible than others").

<sup>374</sup> Grey, *supra* note 60 ("[T]he theory of property rights held by the modern specialist tends both to dissolve the notion of ownership and to eliminate any necessary connection between property rights and things.").

after many years of faithful service. When they were forced to default on a mortgage that was fatally structured for an economy that only ever grew skyward, they kicked themselves and finally remembered the story of Babel.<sup>375</sup> Now with perfect hindsight, it is shocking that any of us could have believed a lie that the housing market only ever would increase in value. But most Americans did. The housing market crisis represents the greatest redistribution of wealth in our country and it was to the rich upper class. Introducing new limits to the regulatory power of Congress and modifications to our underlying concept of property are not only in order, but according to *Sebelius* these changes are finally underway.

### A Note about Bitcoin and Other Digital Currencies

Increasing trust in Bitcoin and other digital currencies because they are gold-backed, inflation resistant or superior to owning a U.S. dollar in any way should be an important signal to law makers. Ever since we decided not to back our currency with gold, favoring regulation through a centralized banking authority, our currency has become worth as much as the U.S. government's word is worth.<sup>376</sup> Thus, the success of our economic system rests on

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<sup>375</sup> *Genesis* 11:1–9; Yalman Onaran, *Basel Becomes Babel as Conflicting Rules Undermine Safety*, BLOOMBERG (Jan. 2, 2013, 6:01 PM), <http://www.bloomberg.com/news/2013-01-03/basel-becomes-babel-as-conflicting-rules-undermine-safety.html> (describing how the international banking rules make no sense, noting that a \$639 trillion dollar derivatives market has been forced in to clearinghouses where transactions are backed by collateral). *See also* Bruce I. Jacobs, *Tumbling Tower of Babel: Subprime Securitization and the Credit Crisis*, FINANCIAL ANALYSTS JOURNAL, 17 (2009), [http://top1000funds.com/attachments/234\\_Tumbling%20Tower%20of%20Babel-%20%20Subprime%20Securitization%20and%20the%20Credit%20Crisis.pdf](http://top1000funds.com/attachments/234_Tumbling%20Tower%20of%20Babel-%20%20Subprime%20Securitization%20and%20the%20Credit%20Crisis.pdf).

<sup>376</sup> Friedman, *supra* note 16, at 637–38 ("Traditional floats [of currencies] have now become respectable." Calling the preserving of gold backing a high price for a "trivial . . . gain." Also grounding his argument for debasing world currencies and developing a futures market in the U.S. on the belief that "[e]xchange rates will almost surely continue to be stated in terms of the dollar. In addition, the U.S. has the largest stock in the world of liquid wealth on which the market can draw for support. It has a legal structure and a financial stability that will attract

the honesty of our government in the creation, allocation and valuation of currency. Congress has generally trusted in Friedman and others who blindly hoped that the free market would protect the U.S. government from “errors” in the creation, allocation and valuation of the U.S. dollar.<sup>377</sup> This ultimately resulted in the U.S. treasury and Standard and Poor’s having had a disagreement in valuation within the trillions of dollars.<sup>378</sup> Similarly, there is a connection with errors in the creation, allocation and valuation of intangible property that leads to astronomical dead weight losses that are disproportionately endured by the American middle class.<sup>379</sup>

### PART III: RECLAIMING A PRINCIPLE OF HONESTY

Returning to requirements of honesty and truthfulness is the appropriate answer to our recent market failures. History has long held that the public has a right to an open and honest marketplace.<sup>380</sup> Every common American deserves a marketplace where the rules are clearly presented and enforced. Deceitfulness

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funds from abroad. It has a long tradition of free, open, and fair markets.”); STOCKMAN, *supra* note 3, at 5, 282–83, 290–91 (“Wall Street has become a vast casino where leveraged speculation and rent seeking have displaced its vital function of price discovery and capital allocation. The September 2008 financial crisis, therefore, was about the need to drastically deflate the Wall Street behemoths—that is, dangerous and unstable gambling houses—fostered by decades of money printing and market rigging by the Fed. Yet policy veered in the opposite direction, propping them up and thereby perpetuating their baleful effects, owing to a predicate that was dead wrong.”).

<sup>377</sup> See David Corn, *Alan Shrugged*, MOTHER JONES (Oct. 23, 2008), <http://www.motherjones.com/politics/2008/10/alan-shrugged>.

<sup>378</sup> Katz & Del Giudice, *supra* note 36.

<sup>379</sup> Tami Luhby, *Why America's Middle Class is Losing Ground*, CNN MONEY (Mar. 5, 2013, 11:51 AM), <http://money.cnn.com/2013/03/05/news/economy/middle-class-wages/index.html>. See generally, Szeltner et al, *supra* note 3.

<sup>380</sup> BAKER, *supra* note 12, at 320. See also 2 WILLIAM BLACKSTONE, COMMENTARIES \*449.

should not be read into a nature of some forms of property,<sup>381</sup> and the risks of trading in such property should not be foisted onto purchasers as buyer's remorse. This would undermine contract law's centuries old prohibition of "false purveyor[s]."<sup>382</sup> Instead, the courts should adopt honesty as a formality similar to the form of "special case" which once removed an "unsatisfactory fiction," which equated non-forcible wrongs with wrongs committed with "the force of arms."<sup>383</sup> Intangible property claims being defended as if they are physical property is a similar unsatisfactory fiction. Courts should reclaim the ability to nuance the formal judicial consideration of intangibles so as to recognize the deceitful creation, allocation and valuation of intangibles. After all, establishing the truth is necessary to carrying out justice.<sup>384</sup>

In fact, Thomas Jefferson and James Madison so inspired Congress to draft the First Amendment based on a vigorous defense of religious and intellectual freedom adopted in the Virginia Act for Religious Freedom.<sup>385</sup> The conflict between the puritans and

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<sup>381</sup> Amicus Brief of Antitrust Economists, *Fed. Trade Comm'n v. Actavis, Inc.*, No. 12-416, 2013 WL 836946, at \*23-24 (U.S. Feb. 28, 2013); Hazen, *supra* note 10, at 795; Hirschler, *supra* note 14.

<sup>382</sup> U.C.C. § 2-103(b) (2001) ("'Good faith' in the case of a merchant means *honesty in fact* and the observance of reasonable commercial standards of fair dealing in the trade.") (italics added); BAKER, *supra* note 12, at 278. See Somerton v. Colles (1433), in C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 343 (1949).

<sup>383</sup> BAKER, *supra* note 12, at 329.

<sup>384</sup> U.C.C. § 2-103(b) (2001) ("'Good faith' in the case of a merchant means *honesty in fact* and the observance of reasonable commercial standards of fair dealing in the trade.") (italics added); MODEL RULES OF PROF'L CONDUCT R. 4.1(a), 7.1, 8.1(a), 8.2(a), 8.4(c) (1983) (saying lawyers may be disciplined if they lie).

<sup>385</sup> Thomas Jefferson, A Bill for Establishing Religious Freedom, enacted on Jan. 16, 1786, in JEFFERSON: WRITINGS, *supra* note 1, at 347 (This bill was enacted with the support of James Madison. It vindicates religious and intellectual freedom and was one of the sources that Congress drew upon when drafting the Bill of Rights in 1789: "[T]he truth is great and will prevail if left to herself, [] she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons free argument and debate, errors ceasing to be dangerous when it is

anyone who held different religious beliefs about God inspired the founders to join religious freedom with the freedom of assembly and the freedom of speech in the First Amendment.<sup>386</sup> This decidedly aligned the United States with the views of Roger Williams, the founder of Rhode Island, who argued that the sword of spirit did not hang “at the loins or side, but at the lips.”<sup>387</sup> In fact, the arguments of theologians like Williams may not have carried the day against the puritans were his vision for the colonies without free speech. In fact, the decision to keep the Church and State separate was based on the condition that a robust freedom of speech would be enforced, because the founders trusted the people to seek out the truth for themselves and that if the truth was “left to herself” she could naturally defeat lies, seditiousness and untruth. Thus, free speech would be protected and the truth would fend for herself. However, positivist property concepts have threatened to box in the truth, strip her of her “natural weapons,”<sup>388</sup> and repurpose them to serve private and special interests.

### **Dishonesty, Market Failure and IP**

Property law has long been deferent to the common practices of the marketplace and society’s accepted communications “to the universe.”<sup>389</sup> This deference seems to turn

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permitted freely to contradict them.”). Cf. Rose: *The Comedy*, *supra* note 292, at 778 (noting that the Roman Empire recognized public property in connection with a society’s social glue, which for Rome was religion and noting that our social glue might be free speech); *Genesis* 1:3 (“And God said, ‘Let there be light,’ and there was light.”); *John* 1:1, 14 (“In the beginning was the Word, and the Word was with God, and the Word was God . . . The Word became flesh and made his dwelling among us.”).

<sup>386</sup> U.S. CONST. amend. I.

<sup>387</sup> Williams, *supra* note 297.

<sup>388</sup> Thomas Jefferson, *A Bill for Establishing Religious Freedom*, enacted on January 16, 1786, in JEFFERSON: WRITINGS, *supra* note 1, at 347.

<sup>389</sup> *Pierson v. Post*, 3 Cai. R. 175 (N.Y. 1805) (“If any thing, therefore, in the digests or pandects shall appear to militate against the defendant in error, who, on this occasion, was the foxhunter, we have only to say *tempora mutantur*; and if men themselves change with the times, why should not laws also undergo an



property cases into a yelling match.<sup>390</sup> Courts are often ill-equipped to make a fair determination about the specific factual circumstances pertaining to who owns what.<sup>391</sup> If a party gave up possession a court may take it as evidence of a common practice indication that party never had ownership, or abandoned ownership.<sup>392</sup> Thus the court may decide against, as many courts have, the allegations of those who let go of physical possession. Those who refuse to give away their possession, even if they are acting against the common practice and contrary to the public interest itself, have a much better chance of holding onto their property.<sup>393</sup> Often the quickest and loudest person to stake a claim by yelling the mainstream culture's property jargon will prevail.

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alteration?"); *Swift v. Gifford*, 23 F. Cas. 558, 559 (D. Mass. 1872) ("The cases cited in the argument prove a growing disposition on the part of the courts to reject local usages when they tend to control or vary an explicit contract or a fixed rule of law."); *Heppingstone v. Mammen*, 2 Haw. 707, 712 (1863) ("According to the usage which prevails among whalers, as I understand it from the evidence, if the 'Richmond' had fallen in with the whale dead, having died of the wounds inflicted on it by the 'Oregon's' men the previous evening, and the respondent had arrived and asserted his claim to it, before it was 'cut in,' the libellant must have given it up.").

<sup>390</sup> Carol Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 81 (1985) ("Possession as the basis of property ownership, then, seems to amount to something like yelling loudly enough to all who may be interested. The first to say, 'This is mine,' in a way that the public understands, gets the prize, and the law will help him keep it against someone else who says, 'No, it is mine.'").

<sup>391</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES \*406–07 (Even Blackstone wouldn't admit there was any property in a book once it had been communicated to the world, but for the Statute of Anne which solved his problem).

<sup>392</sup> Compare *Swift* 23 F. Cas. 558 at 560 ("In this case the parties all understood the custom, and the libellants' master yielded the whale in conformity to it.") with *Heppingstone*, 2 Haw. 707 at 710, 713 ("Libellant went on board and saw the respondent, who refused to give him half the whale, whereupon libellant left, saying he would see about it at Honolulu . . . It seems to me, that, under all the circumstances of the case, the whale may fairly be considered the joint prize of both ships.").

<sup>393</sup> *Thomson v. Larson*, 147 F.3d 195, 202–03 (2d Cir. 1998) (noting that an "important indicator" of copyright authorship, which is necessary for owning a copyright, is discerning who exercised "decision-making authority" over the creation of the work).

In the case of the Blackstonian conception of physical property, labor theory and utilitarianism's phobia of inefficiency had convinced us to essentially endure the yelling match, so to speak, in order to avoid a tragedy of the commons.<sup>394</sup> However, the underlying equation that once negative externalities become large enough that the transaction costs for creating a property rights regime is justified cannot support all property claims as positivism suggested it should.<sup>395</sup> Some scholars fear that copyright and patent is no longer creating progress in knowledge and learning as lawmakers have seemingly abandoned a conception of a public good underlying the grant of copyright and patent rights.<sup>396</sup> Accordingly, they note that lawmakers have stopped considering the social costs of granting copyright and patent rights—that these rights actually can exclude the public from important information and opinions. Information is something Carol Rose might call an “inherently public good.”<sup>397</sup> Nevertheless, copyright and patent rights and remedies seem to have been given the color of private property, and has accordingly been used to cast a “tragic” light on the public interest in information.

Other sorts of public goods, like bridges, navigable waterways, and access to public roadways tend not to be privatized because of the ever-increasing positive externalities they create.<sup>398</sup> This has been called an inverse “comedy” from the generally discussed tragedy of the commons.<sup>399</sup> Public rights in property have

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<sup>394</sup> Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. PAPERS AND PROCESS 347, 350–53 (1967).

<sup>395</sup> *Id.*; Lemley, *supra* note 22, at n.38–42, 44, 46–47. *But cf* Landes & Posner, *supra* note 17, at 475.

<sup>396</sup> Peter S. Menell, *Tailoring Legal Protection for Computer Software*, 39 STAN. L. REV. 1329, 1337 (1987).

<sup>397</sup> Rose: *The Comedy*, *supra* note 244, at 723; Sunder, *supra* note 129, at 262–63 (legal scholars continue to understand IP as solely a tool to solve an economic “public goods” problem).

<sup>398</sup> Rose: *The Comedy*, *supra* note 292, at 768–69; Frischmann, *supra* note 313, at 931.

<sup>399</sup> Lemley, *supra* note 22, at 1051 (“The result [of copying and disseminating ideas] is that rather than a tragedy, an information commons is a ‘comedy’ in which everyone benefits. The notion that information will be depleted by overuse

been recognized since Roman times, and had persisted until they were picked up again by the framers, to protect goods that consist of a society's "social glue."<sup>400</sup> What's more is that the framers believed that the minimization of costs to the public for access to public goods was necessary to foster the socialization that occurs in a healthy marketplace.<sup>401</sup> This socialization was essential for continued peace because "a nation of merchants would scarcely reach for its weapons."<sup>402</sup> Thus, the First Amendment protection of free speech, the freedom of assembly and the freedom of religion is the appropriate place to house the American concept of public goods.

In fact, the interaction of copyrights and patents with information and free speech is inverted from the way real property interacts with a commons. This highlights an information common's comedic nature. Instead of being a response to "the allocative distortions resulting from scarcity . . . it is a conscious decision to create scarcity in a type of good in which it is ordinarily absent."<sup>403</sup> Without these rights, a public good would remain relatively non-excludable and thus, difficult to monetize.<sup>404</sup> Public goods are also non-rivalrous. Thus, no matter how many times they are used, they simply never get used up. In contrast, physical goods like apples are rivalrous because they can only be used up once. Thus, there is no tragedy of the commons problem solved by copyright or patent law. Nevertheless, copyright and patent holders have won more protection of their rights than a free market would

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simply ignores basic economics."); DAVID BOLLIER, SILENT THEFT: THE PRIVATE PLUNDER OF OUR COMMON WEALTH 37 (2003) (reverse to "comedy" or "cornucopia" or "inverse" commons that occurs with non-depletable information); Rose: *The Comedy*, *supra* note 292, at 768–69.

<sup>400</sup> Rose: *The Comedy*, *supra* note 292, at 777–78.

<sup>401</sup> *Id.*

<sup>402</sup> *Id.* n.300, 301.

<sup>403</sup> Lemley, *supra* note 22, at 1055.

<sup>404</sup> See generally Kirtsaeng, No. 11–697, slip op. (Ginsberg, J., dissenting).

protect scarce physical property.<sup>405</sup> It follows that today's copyright and patent rights are too robust.<sup>406</sup>

Part of the reason why is that copyright and patent rights are being conceived of as private property. The term "intellectual property" itself may have fueled this shift, a term which became a common descriptor in the field when the World Intellectual Property Organization (WIPO) was established.<sup>407</sup> It seems that international interests and a broad concept of property have gone hand in hand. WIPO and TRIPs have thus continued to buttress our acceptance of Patent, Copyright, Trademark, Trade Secret and Publicity Rights as a collective "Intellectual Property" field. The Ginsberg dissent in *Kirtsaeng* argued that U.S. supported TRIPs agreements strengthened international copyright to a point where it

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<sup>405</sup> Lemley, *supra* note 22, at 1055.

<sup>406</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) ("The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved."); *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 736 (2002) ("[P]atent rights are given in exchange for disclosing the invention to the public."); *W.L. Gore & Assocs., Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1550 (1983) ("Early public disclosure is a linchpin in the [patent] system."); Lemley, *supra* note 22, at 1052 ("[T]here is no general reason to worry about uncompensated positive externalities. Indeed, part of the point of intellectual property law is to promote uncompensated positive externalities, by ensuring that ideas and works that might otherwise be kept secret are widely disseminated."); Bell, *supra* note 371, at 231 ("[C]opyright focuses on generating positive externalities . . . [C]opyright concentrates on increasing the public good afforded by expressive works."); Robert A. Kreiss, *Accessibility and Commercialization in Copyright Theory*, 43 *UCLA L. REV.* 1, 7 (1995) ("[T]he more works that are disseminated, the more [copyright's] goal is advanced.").

<sup>407</sup> Lemley, *supra* note 22, at 1034 (At the very least, the rise of using the term "intellectual property" coincided with the rise of the "property rights" view of IP. Prior to the 1960's, the term "intellectual property" also showed up in European literature) (citing A. NION, *DROIT CIVILS DES AUTEURS, Artistes ET Inventeurs* (1846) (referring to "propriete intellectuelle.")); WIPO Convention Establishing the World Intellectual Property Organization, July 14, 1967, art. 2 (viii), 6 I. L. M. 782, 784 (WIPO defined intellectual property as including "rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.").

overpowered common law alienation rights to physical property.<sup>408</sup> The majority relied on the Constitution and common law to arrive at a much more reasonable solution that did not draw upon an “intellectual property” rationale.<sup>409</sup>

The *Kirtsaeng* majority’s reliance on a constitutional foundation and reluctance to apply property jurisprudence was proper. It was proper because it sought to define copyrights by the grant of power by which they were created. In the United States, copyrights were not created through common law property principles, and in fact they are not meant to interfere with the legal alienation of tangible property. Similarly, all intangible property claims should be tested in court to make sure they fit within the bounds of the law that granted them.

In the age of information, when intangibles from digital currencies to a business’s goodwill are being traded on the open market globally, courts need a test to guarantee the honest creation, allocation and valuation of these “items.”<sup>410</sup> These intangibles cannot be inspected because they are not detectable by our senses. In fact, intangibles can only be comprehended as placeholders for something else, like physical property or other valuable backing. Thus, the lack of a sufficient nexus with a physical thing should indicate that there is no property right in the intangible in question.

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<sup>408</sup> *Kirtsaeng*, No. 11–697, slip op. at 33 (“Moreover, the exhaustion regime the dissent apparently favors would provide that ‘the sale in one country of a good’ does not ‘exhaus[t] the intellectual-property owner’s right to control the distribution of that good elsewhere.’”).

<sup>409</sup> *Id.*

<sup>410</sup> See, e.g., Elizabeth Hester & Erik Holm, *Citigroup to Sell Umbrella Logo to St. Paul Travelers (Update 7)*, BLOOMBERG, (Feb. 13, 2007, 6:44 PM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aAsp4RJRdG7w> (After a series of corporate purchases and sales Citibank found that a TM that is extremely valuable to Travelers was not valuable to Citi which should raise questions about the ‘value’ of these items, and to what extent intangibles can be conceived of as ‘items’: “The biggest U.S. bank plans to sell its red umbrella trademark to St. Paul Travelers Cos. and operate under the ‘Citi’ name after failing to get most consumers to think of anything except insurance when they saw the 137-year-old symbol.”).

De-cloaking intangibles with no actual “thing” backing up its value will create a more stable market. The public, main street America and the marketplace itself can no longer abide dishonest or reckless property claims in intangibles. Furthermore, the blanket recognition of the movement of intangibles over state lines to justify expansive federal regulation violates the co-existence of the grants of legislative power, and federalism. Entertaining regulation based on intangible movement creates undue pressure on the judiciary to explain how intangibles move or exist relative to state geography. In fact, it would be easier for a court to describe the movements of God.<sup>411</sup> The impossibility of describing how non-things move is why we have “arising under” jurisdiction through a separate grant of constitutional power for copyright and patent laws. Nothing would be rejected by the popular mind so quickly as how the movement of a non-thing intangible allows long arm federal regulation that interferes with the interests of most Americans. This was most clearly seen when public outcry shut down SOPA, PIPA and ACTA.

Thus, judicial forbearance requires the Supreme Court to continue its revision of Constitutional interpretation. Affirming a free-riding problem and an expansive view of medical licenses as carrying with them property rights will not do. Allowing the Commerce Clause to continue facilitating the circumvention of the limits of the other grants of legislative power cannot continue. The Court needs to adopt an honest and truthful approach to intangible property that reasonably limits its endorsement of highly political issues best left to other branches. This should include a closer eye on the honest creation, allocation and valuation of intangible property rights.

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<sup>411</sup> *Sebelius*, 132 S. Ct. at 2589 (The Framers “were ‘practical statesmen’ and not metaphysical philosophers.”). *See, e.g.*, *Kidd v. Johnson*, 100 U.S. 617, 619 (1879) (“The right to use the trade-mark is not limited to any place, city, or State, and, therefore, must be deemed to extend everywhere.”).

### Honesty as a Procedural Formality

Formalism was generally abandoned when the Federal Rules of Civil Procedure were adopted stating, “there is but one form of action, the civil action.”<sup>412</sup> Thus, as long as a plaintiff was able to plead in their facts a cause of action a court could hear their case, no matter the form in which the facts were pled. A result of the shift away from formalism has been that the courts no longer are able to develop new causes of action through formalistic “evolution.”<sup>413</sup> Nevertheless, those causes of action that existed when the forms were closed still must be pled, even if informally. In this way “the forms of action . . . still rule us from their graves.”<sup>414</sup> Even so, it was seen as a step forward to cast off formalism and allow parties to move U.S. Courts as long as a colorable action had been pled in whatever form.<sup>415</sup> This practice purportedly removed almost any formalistic requirement on a court to discuss whether the form of action brought was proper. It is precisely because formality has been abandoned that spectators have been able to claim “contract is the new copyright”<sup>416</sup> and that EULA’s are “the new millennium’s founding social contract.”<sup>417</sup>

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<sup>412</sup> FED. R. CIV. P. 2.; Cf. BAKER, *supra* note 12, at 60 (“redistribution of so much of the law under one ‘form’ [trespass on the case] introduced a good measure of procedural uniformity” which eventually facilitated the abolishment of the legal forms in England).

<sup>413</sup> BAKER, *supra* note 12, at 58–60, 264, 303 (“Most of the law as we know it was shaped by this process. Trespass on the case brought new areas of jurisdiction to the royal courts, such as defamation; it filled gaps in the *praecipe* actions, by enabling damages to be awarded for breach of parol contracts, for past nuisances, and for conversion of goods; and finally it enabled the *praecipe* actions themselves to be replaced.”); FIFOOT, *supra* note 382, at 77.

<sup>414</sup> BAKER, *supra* note 12, at 61 (quoting *Young v. Queensland Trustees* 99 CLR 560(1956) (Eng)).

<sup>415</sup> FED. R. CIV. P. 8 (only requiring pleadings to contain a short and plain statement of the claim). *But see* *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001) (citing FED. R. CIV. P. 9(b) that claims of fraud must be pled with particularity to dismiss a claim for lack of particularity in the pleading).

<sup>416</sup> Lydia Pallas Loren, Professor, Lewis & Clark Law School, Classroom Lecture on Copyright and Contract (Mar. 20, 2012). *See also* *Marshall v. New*

Conversely, *Ichbal* and *Twombly* arguably have re-adopted a formalism in Federal Courts that could straighten out these confusions.<sup>418</sup> Where once a plaintiff needed only to plead the elements of a cause of action that were possible, the Supreme Court has increased the formality required by dismissing claims that are not “plausible” on the facts. As the Supreme Court explained, plausibility lies somewhere between possibility and probability. Similarly, minimum formalistic safeguards should be instituted so that dishonest creation, allocation and valuation of intangible property is not *de facto* underwritten by the general informality of today’s age.<sup>419</sup> Requiring truthful claims of intangible property would be so small a burden for the Court and so central to its project of administering justice under rule 1 that it could fit under the plausibility standard put forth in *Ichbal* and *Twombly* without rising to the type of formalism ousted by rules 2 and 8.<sup>420</sup> The

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Kids On The Block P'ship, 780 F. Supp. 1005, 1008 (S.D.N.Y. 1991) (“The line between cases that ‘arise under’ the copyright laws, as contemplated by § 1338(a), and those that present only state law contract issues, is a very subtle one and the question leads down ‘one of the darkest corridors of the law of federal courts and federal jurisdiction.’”) (quoting *Arthur Young & Co. v. City of Richmond*, 895 F.2d 967, 968-69 (4th Cir. 1990)); Orit Fischman Afori, *Implied License: An Emerging New Standard in Copyright Law*, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 275, 294 (2009) (“There is a need for developing a non-contractual new standard in copyright law, rather than the proposed development of the implied license doctrine would not be a total deviation from legal fundamentals.”).

<sup>417</sup> Fairfield, *supra* note 123, at 44.

<sup>418</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (This was a criminal case that seems to require a formal standard that a cause of action be pled plausibly on its face. This is more than mere possibility); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 546 (2007) (This was a civil case that also heightened formal standards to “plausible” from possible on its face); FED. R. CIV. P. 2.

<sup>419</sup> See, e.g., Gretchen Morgenson, *Arcane Market is Next to Face Big Credit Test*, THE NEW YORK TIMES (Feb. 17, 2008), [http://www.nytimes.com/2008/02/17/business/17swap.html?ref=creditdefaultswaps&\\_r=0](http://www.nytimes.com/2008/02/17/business/17swap.html?ref=creditdefaultswaps&_r=0) (Credit default swaps, for instance, could be cabined away from the institution of property when being reviewed in court by formalistically deciding they are purely an animal of contract law).

<sup>420</sup> FED. R. CIV. P. 1, 2, 8.



heightened pleading requirements in Rule 9(b) requiring “particularity” in certain circumstances had not seemed to run afoul of our preference of informal procedure.<sup>421</sup> Perjury laws, designed to ensure the truthfulness of a Court’s findings, could also harbor a procedural enquiry as to an intangible’s honest creation, marketing and valuation.<sup>422</sup> The definition of “good faith,” including “honesty in fact” under the Universal Commercial Code and rules 4.1, 7.1 and 8.4 of the Model Rules of Professional Conduct also support such a simple and virtually costless prophylactic formality.<sup>423</sup>

Honesty as a formal requirement is minimalist by nature, and would quickly ferret out cases on the outset that were not properly brought. This is so because the truth is necessary for carrying out the administration of justice and without it half-truths and lies will slow down the judicial process.<sup>424</sup> If someone claims to have acquired some newfangled property right, they should be obliged to explain on the outset of a case how this right was created, who owns it, and the basis of its worth or value. Once this is established to the court’s satisfaction they would be allowed to proceed under a theory of property. If a party failed to satisfy a court’s inquiry into the honesty of their property claims, any claim under a property theory should be dismissed. The tradition of discussing whether a proper claim had been brought was long practiced in English Courts as a matter of procedure.

Take for instance *The Shepherd’s Case*, heard in 1486 by an English court.<sup>425</sup> A writ of *trespass on the case* was brought against a negligent shepherd that let 100 sheep drown of which he was entrusted to watch. Before the case could be heard, the judges had to discuss whether an “*action sur le cas lie[d]*” or whether it was

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<sup>421</sup> FED. R. CIV. P. 9(b).

<sup>422</sup> 18 U.S.C. § 1621.

<sup>423</sup> U.C.C. § 2-103(b); MODEL RULES OF PROF’L CONDUCT R. 4.1(a), 7.1, 8.1(a), 8.2(a), 8.4(c) (1983). *See also* BAKER, *supra* note 12, at 306 (noting that actions on the case inspired statutes of frauds to ensure more honesty in contracting for property).

<sup>424</sup> 18 U.S.C. § 1621.

<sup>425</sup> *The Shepherd’s Case* Y.B. 2 Hen.7, Hil. f. 11, pl. 9 *in* FIFOOT, *supra* note 382, at 86–87.

more appropriately an “action of Covenant.”<sup>426</sup> Unfortunately, modern judges have been stripped of this tool to parse between whether a case was properly brought under contract or property. Thus, intangible property claims have been allowed to give cases the color of legitimacy without question. In this way copyright has been used to infuse contracts with heavy remedies that contract law was not made to carry.<sup>427</sup>

The form of action called “trespass on the case”<sup>428</sup> was adopted into American common law most famously in *Pierson v. Post*.<sup>429</sup> According to a required formality, the court considered how a property right in a wild animal may be properly claimed.<sup>430</sup> Similarly, courts should require an explanation as to how property rights are created in intangibles. The forms were not federally abandoned until the adoption of the Federal Rules of Civil Procedure in 1938.<sup>431</sup> The states that had not yet abolished the forms of action in 1938 eventually followed suit and today the forms of action have been closed in every U.S. jurisdiction as a matter of procedure. Nonetheless, in property law actual possession continues to be the rule for claiming property in *ferae naturae* and similar cases, as the Second Circuit has found that the application of a foreign sovereign’s patrimony laws required that they had actually exercised a possessory interest in the items being claimed.<sup>432</sup> Thus, abandonment of the forms has only limited the Court’s prerogative

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<sup>426</sup> *Id.*

<sup>427</sup> See Afori, *supra* note 416, at 294.

<sup>428</sup> BAKER, *supra* note 12, at 59 (“The nature of the distinction [between trespass and case] was arbitrary and difficult to appreciate. Eighteenth-century rationalisation made the test one of directness: ‘in trespass the plaintiff complains of an immediate wrong, and in case of a wrong that is the consequence of another act.’ An action of trespass for fixing a spout so that it directed rainwater onto the plaintiff’s house was therefore struck down by the King’s Bench on the ground that the proper action was case.”).

<sup>429</sup> *Pierson v. Post*, 3 Cai. R. 175 (N.Y. 1805).

<sup>430</sup> *Id.*

<sup>431</sup> The Rules Enabling Act, 28 U.S.C. § 2072 (2012).

<sup>432</sup> *United States v. Schultz*, 333 F.3d 393, 405 (2d Cir. 2003) (deciding that Egypt had to have taken possessory interest over the artifacts to claim them under its patrimony law—this is the same as the old rules for hunting wild animals).

to reconsider established rules of law.<sup>433</sup> It has not, however, limited the rules that were once established by the formal practices of our history or their formal application to the facts.

The closing of the forms of action purportedly took law reform out of judicial review.<sup>434</sup> Accordingly, legal scholars have cited *numerus clausus*<sup>435</sup> and announced that we should not fear an expansion of legally accepted property rights, despite the rise of positivism. Property rights in intangibles and the positivist movement would be a limited one, by this very principle. However, the result seems to have been quite the opposite. Positivism is the legal norm, and property rights in intangibles are being claimed with a renewed fervor. And now, without the help of an open ended formality like trespass on the case—which formally allowed a court to consider for example how a property right is created in wild animals—courts may be unable to review whether an intangible property claim has been properly brought. Requiring honesty in intangible property creation, allocation and valuation will take at the least, a minimum amount of formalism in requiring plaintiffs to plead “honest” property claims, or to call out dishonest property claims. Disputes like the one in *Pierson v. Post* about the nature of property rights in a wild fox should be heard in court regarding intangibles. Otherwise, the nature of intangibles will be decided by old rules that do not fit and the information age will continue to binge on the over-allocation, over-creation and over-valuation of intangibles.

### CONCLUSION: APPLYING THE TRUTH TO

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<sup>433</sup> BAKER, *supra* note 12, at 61 (“[T]he posthumous rule of the forms of action has tended towards a tyranny which in life they were never permitted. The categories of legal thought were closed in 1832 [in England], and where once the law might have developed through the recognition of new writs it is now left at the mercy of commissions and an overworked parliament. Law reform is no longer subject to judicial review [in England].”).

<sup>434</sup> *Id.*

<sup>435</sup> Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 19 (2000) (“The numerus clausus is probably at its weakest in the area of intellectual property.”).

## INTANGIBLES

The concept of property envisioned by the framers and embodied in our constitution was necessarily physical property. Thus the Constitutional provisions that protect our property and security need not usher in a positivist conception of property without a heightened scrutiny standard that requires some connection to physical property. A standard of honesty seems up to the job and should be applied to intangibles by the Court before it allocates the color of property. The Court seems an ideal place to adjudicate the truth of a matter and it should not shy away from its duty to do so.

The effects of this policy on markets for physical property, intangibles valued accurately by real property backing and honest business practices will be minimal to none. Only dishonest practices that pull value out of nowhere, or that depend on the winds of chance for payout, will be removed from the property regime. They may continue to subsist under contract law provided they do not untruthfully hold themselves out to be trading in a form of property. But they will no longer get the implicit approval conferred by the attribution of property through the judicial branch.

It may seem subtle at first, but the de-cloaking of dishonest creation, valuation, and allocation of intangible property rights will make them much less mobile. Contracts that include intangibles that are not cloaked in property would not be subject to buyer's remorse.<sup>436</sup> Instead they would be subjected to contract law's good faith and fair dealing requirements.<sup>437</sup> The result if a violation is found would be to set the parties back to their original position had the contract been fair and honest. This would be much more

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<sup>436</sup> *Sherwood v. Walker*, 66 Mich. 568, 577, 33 N.W. 919, 923 (1887); *Wood v. Boynton*, 64 Wis. 265, 25 N.W. 42, 44 (1885).

<sup>437</sup> U.C.C. § 2-103(b) ("Good faith' in the case of a merchant means *honesty in fact* and the observance of reasonable commercial standards of fair dealing in the trade.") (emphasis added).

desirable than the current default of buyer and seller's remorse regarding intangible property transfers.<sup>438</sup>

Such a policy would preserve the judiciary and the credibility of the U.S. government in general. Imbuing intangibles with the attribute of property is risky because it implies judicial approval of market practices. The members of the other branches of government cannot expect to underwrite too many liars and scandals without risking peaceful overthrow by their constituents during election time. The politics involved therein demand that the judiciary settle a safe distance from the fray.

Furthermore, our continued credibility on the world's stage depends on a closer eye on marketplace honesty and fairness. All cultures and all nations recognize lying as an undesirable if not outright unacceptable character trait in a business partner. The current trend of underwriting property regimes that aid American corporations in the non-truthful creation, valuation, and allocation of intangible property is a sure way to destroy our credibility on the international market.

The Supreme Court and all lawmakers should continue to recognize information as an inherently public good, and freedom and equality as a baseline for the future of IP regulation and regulation of intangible property in general. In order to achieve this, the Court should adopt a conception of honesty in creation, allocation and valuation of intangible property. Reclaiming a principle of honesty will ensure that market failures are staved off and will protect a continued growth to the American economy and the middle class. Furthermore it will safeguard American business abroad from being branded dishonest and thus not trusted. Whether we see Jay Gatsby or Robin Hood as a greater evil is irrelevant. Everyone, including the founders and framers of the U.S. Constitution,<sup>439</sup> has agreed that dishonesty is disfavored, destructive

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<sup>438</sup> Hunt, *supra* note 31, at 713 ("Fraud inevitably increases during a bubble."), and at 743 (describing ways a court can rescind "bubble contracts.").

<sup>439</sup> THE FEDERALIST NO. 78 (Alexander Hamilton) ("It is a rule not enjoined upon the courts by legislative provision, but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the

and an obstruction to the administration of justice. Thus, subjecting claims of intangible property to a standard of honesty as a matter of formal procedure in court is in the best interest of everyone.

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law."), *available at* [http://thomas.loc.gov/home/histdox/fed\\_78.html](http://thomas.loc.gov/home/histdox/fed_78.html). *See also* THE FEDERALIST NO. 1 (Alexander Hamilton) ("In the course of the preceding observations, I have had an eye, my fellow-citizens, to putting you upon your guard against all attempts, from whatever quarter, to influence your decision in a matter of the utmost moment to your welfare, by any impressions other than those which may result from the evidence of truth.") *available at* [http://thomas.loc.gov/home/histdox/fed\\_01.html](http://thomas.loc.gov/home/histdox/fed_01.html); THE FEDERALIST NO. 2 (John Jay) ("Whatever may be the arguments or inducements which have wrought this change in the sentiments and declarations of these gentlemen, it certainly would not be wise in the people at large to adopt these new political tenets without being fully convinced that they are founded in truth and sound policy.") *available at* [http://thomas.loc.gov/home/histdox/fed\\_02.html](http://thomas.loc.gov/home/histdox/fed_02.html); THE FEDERALIST NO. 10 (James Madison) ("The instability, injustice, and confusion introduced into the public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished.") *available at* [http://thomas.loc.gov/home/histdox/fed\\_10.html](http://thomas.loc.gov/home/histdox/fed_10.html); THE FEDERALIST NO. 85 (Alexander Hamilton) ("The perpetual changes which have been rung upon the wealthy, the well-born, and the great, have been such as to inspire the disgust of all sensible men. And the unwarrantable concealments and misrepresentations which have been in various ways practiced to keep the truth from the public eye, have been of a nature to demand the reprobation of all honest men.") *available at* [http://thomas.loc.gov/home/histdox/fed\\_85.html](http://thomas.loc.gov/home/histdox/fed_85.html).