

Patents in the Political Branches

JUSTIN BURNAM*

ABSTRACT

The Supreme Court granted certiorari in Oil States Energy Services, LLC v. Greene’s Energy Group, LLC to decide if administrative proceedings called inter partes review (IPR) violate the Separation of Powers by canceling patents in the executive branch rather than in Article III courts.† Whether analyzed under the Supreme Court’s precedents or under originalist theory, IPR survives this constitutional challenge. As a doctrinal matter, IPR satisfies the Supreme Court’s “public rights” exception. As an originalist matter, the Founding Generation understood patents as discretionary privileges—or at most as civil property rights—but not as “core private rights” requiring Article III adjudication. Legislation remains the proper avenue for proponents of strong patent rights to modify IPR to that end.

TABLE OF CONTENTS

INTRODUCTION	560
I. UNDER THE SUPREME COURT’S PUBLIC RIGHTS JURISPRUDENCE, ARTICLE III PERMITS EXECUTIVE BRANCH PATENT CANCELLATION	562
A. <i>The Supreme Court’s Tangled Jurisprudence: The Public Rights Exception</i>	563
B. <i>The Oil States Petitioner’s Arguments Fail Under the Supreme Court’s Precedents</i>	570
II. ARTICLE III PERMITS EXECUTIVE BRANCH PATENT CANCELLATION AS AN ORIGINALIST MATTER	573

* J.D., *cum laude*, Georgetown University Law Center, 2018. The title of this Note pays homage to Professor Caleb Nelson’s *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007). Many thanks to Professors John R. Thomas, Viet D. Dinh, Paul D. Clement, and Irving L. Gornstein for their helpful comments during the drafting process. Many thanks as well to Jessie Appleby, Caleb Redmond, and the staff of the *Georgetown Journal of Law and Public Policy* for further editing suggestions. © 2018, Justin W. Burnam.

† This Note was authored during fall 2017, before the Supreme Court issued its April 24, 2018 opinion in *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365 (2018). In an opinion authored by Justice Thomas and joined by Justices Kennedy, Ginsburg, Breyer, Alito, and Sotomayor, the Court held 7-2 that IPR does not violate Article III. The Court’s majority opinion generally tracks both streams of argument presented in this Note, reasoning both that IPR satisfies the Supreme Court’s public rights exception and that patents were originally understood as discretionary franchises. Justice Breyer filed a concurring opinion joined by Justices Ginsburg and Sotomayor. Justice Gorsuch filed a dissenting opinion joined by Chief Justice Roberts.

A. <i>Blackstone’s “Core Private Rights” Framework Provides the Originalist Test</i>	573
B. <i>Because the Founding Generation Understood Patents as Either Privileges or Statutorily-Created Civil Property Rights, But Not Natural Property Rights, Article III Permits Executive Branch Patent Cancellation</i>	577
1. <i>Historical Sources Indicate that the Founding Generation Understood Patents as Privileges, Not Natural Property Rights—Therefore Not as Core Private Rights</i>	577
2. <i>At Most, The Founding Generation Understood Patents as Civil Property Rights, Not Natural Property Rights—Therefore Not as Core Private Rights</i>	582
III. <i>LEGISLATION PROVIDES THE PROPER AVENUE FOR ACCORDING PATENTS PROTECTION AS PROPERTY RIGHTS</i>	586
CONCLUSION	588

INTRODUCTION

“The notion has somehow gained currency . . . that if something is intensely bad, it must be prohibited by the Constitution.”¹ Justice Scalia’s incredulous observation applies not only to such controversial issues as, for example, the death penalty,² but also to a nearly seven-year-old fixture of the U.S. patent system that opponents have dubbed “death squads, killing property rights.”³ By that characterization, these administrative proceedings—called *inter partes* review (“IPR”)—certainly sound “intensely bad.” Indeed, one major pharmaceutical company recently transferred its patents to a Native American tribe, hoping to insulate the patents from IPR with the tribe’s sovereign immunity.⁴ Proponents of IPR, on the other hand, think some “death squadding” may serve the patent system quite

1. Justice Antonin Scalia, Alexander Meiklejohn Lecture at Brown University: The Idea of the Constitution (April 1991), in *SCALIA SPEAKS* 164 (Christopher J. Scalia & Edward Whelan, eds., 2017).

2. Justice Scalia explained in another speech that “if you are a judge in the United States, deciding whether capital punishment is unconstitutional, it is not your job to resolve the debate” over the policy arguments for and against the death penalty. See Justice Antonin Scalia, The Vocation of a Judge (May 2007), in *SCALIA SPEAKS* 171 (Christopher J. Scalia & Edward Whelan, eds., 2017).

3. This remark reportedly originated with former Federal Circuit chief judge Randall Rader. See Tony Dutra, *Rader Regrets CLS Bank Impasse, Comments on Latest Patent Reform Bill*, BNA PAT. TRADEMARK & COPYRIGHT L. DAILY, Oct. 29, 2013.

4. See Katie Thomas, *How to Protect a Drug Patent? Give It to a Native American Tribe*, N.Y. TIMES (Sep. 8, 2017), <https://www.nytimes.com/2017/09/08/health/allergan-patent-tribe.html>.

well.⁵ This Note takes no position on whether IPR represents a good or bad policy choice. Rather, the Note demonstrates that, both as a matter of precedent and originalism, Article III of the Constitution does not prohibit IPR.

The Constitution of the United States grants Congress the authority to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁶ Pursuant to that authority, Congress enacted legislation which permits patent holders to initiate infringement actions in the federal district courts.⁷ As an affirmative defense, accused infringers may prove a patent invalid—that is, prove that the U.S. Patent and Trademark Office (“USPTO”) mistakenly granted a patent which lacked a requisite feature of patentability.⁸ Traditionally, the executive branch granted patents, and Article III courts decided both questions of infringement and validity.⁹

Congress established IPR in 2011.¹⁰ These adversarial proceedings permit third parties to challenge the validity of issued patents before administrative patent judges sitting as the Patent Trial and Appeal Board (PTAB).¹¹ In 2017, the Supreme Court granted certiorari in *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC* on the question of whether IPR “violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury.”¹² Additionally, the STRONGER Patents Act of 2017—a recently proposed Senate bill—would harmonize several aspects of the IPR scheme with the standards and requirements of district court proceedings.¹³

This Note evaluates the separation of powers question presented in *Oil States* and discusses potential legislative changes to the IPR scheme. Part I concludes that Article III permits executive branch patent cancellation as a matter of

5. Former chief judge of the PTAB James Smith remarked that “[t]o some extent, the purpose of these proceedings is death squads If we weren’t in part doing some ‘death squadding,’ we wouldn’t be doing what the statute calls us to do.” USPTO PAT. PUB. ADVISORY COMMITTEE MEETING, at 129 (Aug. 14, 2014), https://www.uspto.gov/sites/default/files/documents/ppac_transcript_20140814.pdf [<https://perma.cc/79CH-WYPL>].

6. U.S. CONST. art. I, § 8, cl. 8.

7. In their current form, these provisions appear codified at 35 U.S.C. § 271 (2010) (establishing patent infringement actions) and 28 U.S.C. § 1338(a) (2011) (establishing federal court jurisdiction over patent infringement actions).

8. 35 U.S.C. § 282 (2011).

9. Greg Reilly, *The Constitutionality of Administrative Patent Cancellation*, 23 B.U. J. SCI. & TECH. L. 377, 383 (2017).

10. Leahy-Smith Am. Invents Act, Pub. L. No. 112–29, ch. 31, 125 Stat. 284 (2011).

11. *Id.* See also Reilly, *supra* note 9, at 383.

12. *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 137 S. Ct. 2239 (2017); Brief for Petitioner at i, *Oil States Energy Servs., LLC v. Greene’s Energy Group, LLC*, No. 16-712 (2017). The Federal Circuit previously “squarely rejected” a similar challenge in *MCM Portfolio LLC v. Hewlett-Packard Co.*, and denied rehearing en banc in another over two dissents. Reilly, *supra* note 9, at 379; see *Cascades Projection LLC v. Epson Am., Inc.*, 864 F.3d 1309, 1321 (Fed. Cir. 2017); 812 F.3d 1284 (Fed. Cir. 2015).

13. See Support Technology and Research for Our Nation’s Growth and Economic Resilience Patents Act of 2017 (the “STRONGER Patents Act of 2017”), S. 1390, 115th Cong. (2017).

precedent because IPR claims are integrally related to a federal regulatory scheme. To reach this conclusion, the Note delineates the formalist and functionalist lines of reasoning that together comprise the Supreme Court’s “public rights” exception to Article III adjudication. Under that amalgam of legal standards, the *Oil States* respondents have the stronger argument.

Article III also permits executive branch patent cancellation as an originalist matter. Part II delineates an originalist framework for defining the public rights exception. That framework extends the exception only to adjudications not involving Blackstonian “core private rights” of life, liberty, and property. Part II.C applies the originalist framework to patents by asking whether the Founding Generation understood patents to constitute core private rights. The Note answers that question in the negative. Part II.C.1 demonstrates that Founding Era sources tend to show that the Founding Generation viewed patents as privileges, much like the patent privilege that had previously existed in England. Part II.C.2 demonstrates that, although some scholars assert evidence indicating that the Founding Generation understood patents as civil property rights rather than privileges, those scholars—even if correct—have not shown that the Founding Generation understood patents as core private rights. Because no historical evidence shows that the Founding Generation understood patents as core private rights in the Blackstonian sense, Article III permits executive branch patent cancellation as an originalist matter.¹⁴ Finally, Part IV argues that, in light of this Note’s conclusion that IPR passes constitutional muster, legislation like the pending STRONGER Patents Act provides the proper avenue for according patents protection as property rights.

I. UNDER THE SUPREME COURT’S PUBLIC RIGHTS JURISPRUDENCE, ARTICLE III PERMITS EXECUTIVE BRANCH PATENT CANCELLATION

Prior to addressing the constitutional status of *inter partes* review as an originalist matter, this Note first examines the question as a matter of precedent. Addressing that question requires delineating the Court’s complex jurisprudence—a set of multifarious tests derived from a longstanding quarrel between formalist and functionalist justices. The reader may find that the tangled nature of the Court’s doctrine makes the originalist framework outlined in Part II a more desirable approach. Part I.A exegetes the Court’s public rights jurisprudence as relevant to the *Oil States* case, and Part I.B evaluates the *Oil States* parties’ arguments—concluding that Article III permits executive branch patent cancellation as a matter of precedent.

14. This Note analyzes only the Article III separation of powers issue raised by *Oil States*, not the corollary issue invoking the Seventh Amendment right to a jury trial. For a detailed discussion of the Seventh Amendment question, see Mark A. Lemley, *Why Do Juries Decide If Patents Are Valid?*, 99 VA. L. REV. 1673, 1674 (2013).

A. The Supreme Court's Tangled Jurisprudence: The Public Rights Exception

Before evaluating the *Oil States* parties' arguments, this Note traces the development of the Court's Article III jurisprudence—in particular, the “public rights” exception to Article III under which *Oil States* arises. This exception provides that Congress may delegate some adjudications to non-Article III tribunals. In its current form, the exception at least permits non-Article III adjudications involving the government as a party, or between private parties for claims deriving from federal statutory schemes or claims integrally related to furthering an expert government agency's limited regulatory objective.¹⁵ The Court has also applied a case-by-case balancing test that weighs the burden on Article III values against Congress's purposes for choosing non-Article III adjudication.¹⁶

Article III of the United States Constitution vests the federal judicial power in “one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”¹⁷ Article III also confines the judicial power to cases and controversies, and secures for the judges of the federal courts life tenure and salaries that do not diminish.¹⁸ These protections serve to maintain the judicial branch's independence by insulating judges from the pressures of the political branches. However, Congress has historically also created “legislative courts”—that is, courts with judges lacking these protections—even though “[t]he Constitution nowhere makes reference to legislative courts.”¹⁹ Despite their lack of textual basis in the Constitution, legislative courts appeared early in the Founding Era. Indeed, Chief Justice John Marshall coined the term “legislative courts” in in an 1828 opinion,²⁰ and the First Congress in 1789 arguably established the first legislative court when it gave the Treasury Department authority to resolve veterans' claims and customs disputes.²¹ Legislative courts, then, have operated as historical exceptions to Article III's facially “straightforward and uncomplicated” confinement of the judicial power to judges with tenure and salary protections.²²

The Court has long struggled to define the limits of these exceptions—an endeavor “productive of much confusion and controversy.”²³ Four categories of cases susceptible to constitutionally permissible non-Article III adjudication have

15. *Stern v. Marshall*, 564 U.S. 462, 490 (2011).

16. See *Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568, 593–94 (1985); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986).

17. U.S. CONST. art. III, § 1.

18. U.S. CONST. art. III, §§ 1–2.

19. *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962) (internal quotations omitted).

20. *Id.* at 544 (discussing Chief Justice Marshall's opinion in *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. 511 (1828)); *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 93 (1982) (White, J., dissenting) (“Not only did [Chief Justice John Marshall] create the concept, but at the same time he started the theoretical controversy that has ever since surrounded the concept . . .”).

21. Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 919 (1988).

22. *Northern Pipeline*, 458 U.S. at 92 (White, J., dissenting).

23. *Glidden*, 370 U.S. at 534 (Harlan, J., concurring).

emerged: territorial courts, military courts, courts adjudicating “public rights,” and adjuncts to Article III courts.²⁴ Many scholars have noted that, “[u]nfortunately, these general Article III standards are far from a model of clarity.”²⁵

The Court first announced the public rights exception in 1855 when it opined in *Murray’s Lessee v. Hoboken Land & Improvement Co.* that Congress could not “withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty,” as distinguished from “matters, involving public rights . . . which are susceptible of judicial determination, but which [C]ongress may or may not bring within the cognizance of the courts”²⁶ In *Crowell v. Benson*, the Court subsequently read *Murray’s Lessee* as identifying controversies “arising between the government and others” as the core conception of public rights.²⁷ While non-Article III courts had previously only adjudicated such public rights cases, *Crowell* allowed a non-Article III court to adjudicate a private rights case so long as an Article III court provided de novo review of jurisdictional facts.²⁸ A plurality sought to limit the exception to matters arising between the government and private parties in the Court’s 1982 *Northern Pipeline* decision, but the Court subsequently broadened the exception to include certain disputes between private parties soon after in *Union Carbide*.²⁹ The divided *Northern Pipeline* decision set up two competing approaches to defining the scope of the public rights exception: a formalist approach—taken by the plurality—and a functionalist approach—taken by the dissent. These two camps persist today, and will likely clash once more in *Oil States*.

Northern Pipeline examined whether the congressionally-assigned broad jurisdiction of an Article I bankruptcy court violated Article III.³⁰ The bankruptcy court heard “a wide variety” of claims related to bankruptcy proceedings, including both state law and federal law claims.³¹ The claim in *Northern Pipeline*, for example, involved recovery of damages for breach of contract, misrepresentation, coercion, and duress.³² No party in *Northern Pipeline* contested that these bankruptcy judges lacked Article III’s constitutionally guaranteed protections.³³

The *Northern Pipeline* plurality rejected the argument that bankruptcy law qualifies as a “specialized area[] having particularized needs and warranting

24. See *Northern Pipeline*, 458 U.S. at 64–67, 77 (delineating first three exceptions and discussing additional “adjunct” exception).

25. E.g., Reilly, *supra* note 9, at 392.

26. 59 U.S. 272, 284 (1855).

27. See 285 U.S. 22, 50 (1932) (internal quotations omitted).

28. See *id.* at 63.

29. Compare *Northern Pipeline*, 458 U.S. at 69 (“a matter of public rights must at a minimum arise ‘between the government and others.’”) (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)) with *Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568, 586 (1985) (“Insofar as appellees interpret [*Bakelite*] and *Crowell* as establishing that the right to an Article III forum is absolute unless the Federal Government is a party of record, we cannot agree.”).

30. 458 U.S. at 52.

31. *Id.* at 54.

32. *Id.* at 56.

33. *Id.* at 60.

distinctive treatment”—a test the Court had previously applied when justifying a territorial court in *Palmore*.³⁴ The plurality reasoned that *Palmore*'s “specialized areas” language referred to geographic areas, not specialized legal issues.³⁵ The argument in favor of creating a legislative court justified only by the presence of a specialized legal issue, the Court reasoned, essentially posited that Congress “may create courts free of [Article III’s] requirements whenever it finds that course expedient.”³⁶ This argument, the plurality observed, “provides no limiting principle.”³⁷ While *Northern Pipeline*'s plurality rejected this “specialization” theory, the theory would appear again in future cases and ultimately become—at least implicitly—part of the Court’s test for the public rights exception.

Rather than permitting legislative courts for specialized legal issues, the formalist *Northern Pipeline* plurality identified the permissible categories of legislative courts as “three narrow situations”: territorial courts, military courts, and courts that adjudicate public rights.³⁸ *Northern Pipeline* defined these categories by way of a historical analysis,³⁹ reasoning that “the literal command of Art. III . . . must be interpreted in light of the historical context in which the Constitution was written, and of the structural imperatives of the Constitution as a whole.”⁴⁰ The plurality recognized that its precedents had not “definitively explained” the public rights exception, and declined to offer its own comprehensive definition—opining only that public rights matters “must at a minimum arise between the government and others.”⁴¹ In contrast, the plurality defined private rights matters as “the liability of one individual to another.”⁴² Such private disputes “lie at the core of the historically recognized judicial power,” while only public rights “may be removed from Art. III courts and delegated to legislative courts . . .”⁴³ The plurality determined that adjudication of bankruptcy-related state law claims—such as the contract damages claim—were private rights cases.⁴⁴ After explaining *Crowell* as a circumstance in which an Article I court acted as an “adjunct” to an Article III court, and after finding no analogous Article III supervision over the bankruptcy court, *Northern Pipeline*'s plurality determined that the bankruptcy court could not adjudicate the state law claims consistent with Article III.⁴⁵

34. *Id.* at 62 (discussing language from *Palmore v. United States*, 411 U.S. 389, 408 (1973)).

35. *Id.* at 76.

36. *Id.* at 73.

37. *Id.*

38. *Id.* at 63–67.

39. *Id.* at 68 n.20 (“[T]he rationale for the public-rights line of cases lies not in political theory, but rather in Congress’ and this Court’s understanding of what power was reserved to the Judiciary by the Constitution as a matter of historical fact.”).

40. *Id.* at 64.

41. *Id.* at 69 (internal quotations omitted).

42. *Id.* at 69–70 (internal quotations omitted).

43. *Id.* at 70 (citing *Atlas Roofing Co. v. Occupational Safety and Health Review Comm’n*, 430 U.S. 442, 450 n.7 (1977); *Crowell v. Benson*, 285 U.S. 22, 50–51 (1932)).

44. *Id.* at 71–72.

45. *See id.* at 78–87.

Justice Rehnquist concurred with the plurality. He would have provided even less definition to the Court's legislative courts jurisprudence—which he acknowledged “do[es] not admit of easy synthesis.”⁴⁶ Justice Rehnquist preferred to decide the constitutional question on narrow grounds in an area of law brimming with “frequently arcane distinctions and confusing precedents.”⁴⁷ Because the defendant alleged “breach of contract, misrepresentation, and other counts which are the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,” the public rights exception—however defined—could not include the claims at issue.⁴⁸

In dissent, Justice White rebuked the plurality for creating “an artificial structure” that “lacks coherence,” and instead reverted to a pragmatic approach that later functionalist justices would adopt.⁴⁹ Justice White saw “no difference in principle between the work that Congress may assign to an Art. I court and that which the Constitution assigns to Art. III courts.”⁵⁰ His approach measured “the burden on Art. III values” against “the values Congress hopes to serve through the use of Art. I. courts.”⁵¹ For example, Justice White would count a legislative court that provides Article III appellate review as less burdensome on Article III values than one which does not.⁵² In Justice White's view, “the very fact of extreme specialization may be enough . . . to justify the creation of a legislative court.”⁵³ Though he failed to convince a majority in *Northern Pipeline*, Justice White's reasoning was later reflected in the majority's functionalist approaches in two succeeding cases decided within the next four years: *Union Carbide* and *Schor*, which both “disavowed” *Northern Pipeline*'s formalism.⁵⁴

Union Carbide determined that Congress could select binding arbitration with only limited judicial review for resolving compensation claims arising under an administrative pesticide registration scheme.⁵⁵ Declining to provide an “absolute construction of Article III,” the Court acknowledged only the narrow, fact-specific ground of agreement in *Northern Pipeline* and rejected the plurality's

46. *Id.* at 91 (Rehnquist, J., concurring).

47. *Id.* at 90 (Rehnquist, J., concurring).

48. *Id.* (Rehnquist, J., concurring). Because Justice Rehnquist's concurrence provided the Court's narrowest ground of agreement, Justice Burger could encapsulate the Court's holding as “limited to the proposition . . . that a traditional state common-law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law, must, absent the consent of the litigants, be heard by an [Article III] court.” *Id.* at 92 (1982) (Burger, J., concurring) (internal quotations omitted).

49. *Id.* at 94, 112–14 (White, J., dissenting).

50. *Id.* at 113. Holding otherwise, Justice White opined, would require overruling many precedents—and “[i]t is too late to go back that far; too late to return to the simplicity of the principle pronounced in Art. III and defended so vigorously and persuasively by Hamilton in *The Federalist* Nos. 78–82.” *Id.*

51. *Id.* at 115.

52. *Id.*

53. *Id.* at 118.

54. Reilly, *supra* note 9, at 397; see *Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568 (1985); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986).

55. 473 U.S. at 571.

“bright line test.”⁵⁶ Like Justice White’s *Northern Pipeline* dissent, *Union Carbide* emphasized that *Crowell* itself “rejected a formalistic or abstract Article III inquiry” and instead looked “not to mere matters of form but to the substance of what is required.”⁵⁷ The Court interpreted *Crowell* to mean that “practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.”⁵⁸

The *Union Carbide* Court therefore rejected the *Northern Pipeline* plurality’s determination that the public rights exception was limited to disputes involving the government as a party, because such a limitation would throw into doubt “many quasi-adjudicative [agency] activities . . . involving claims between individuals.”⁵⁹ Instead, the Court held that Congress may, when “acting for a valid legislative purpose pursuant to its constitutional powers under Article I,” create “a seemingly ‘private’ right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.”⁶⁰ Because Congress created the compensation claim at issue in *Union Carbide*—unlike the state law contract claims in *Northern Pipeline*—and because the compensation claim did not replace a common law right—unlike the administrative scheme in *Crowell*—the compensation claim did not require Article III adjudication.⁶¹ *Union Carbide* marks the first iteration of the Court’s precedents bestowing public rights status on private claims “closely integrated” into regulatory schemes—the prong of the Court’s current Article III doctrine that permits executive branch patent cancellation under this Note’s evaluation in Part I.B.

The *Schor* Court one year later applied a case-by-case inquiry to decide that an administrative body could rule on state law counterclaims related to its adjudication of reparations cases.⁶² *Schor* reasoned that although “formalistic and unbending rules” might lend coherence to an intractable area of law, such rules might also “unduly constrict Congress’ ability to take needed and innovative action.”⁶³ Rather than drawing a distinction between adjuncts and legislative courts as *Northern Pipeline* had, *Schor* instituted a non-exhaustive balancing test that

56. *Id.* at 583. Justices Brennan, Marshall, and Blackmun concurred, opining that they instead would have reached the same result under the *Northern Pipeline* plurality’s approach. *See id.* at 594 (Brennan, J., concurring).

57. *Id.* at 586 (quoting *Crowell v. Benson*, 285 U.S. 22, 53 (1932)).

58. *Id.* at 587.

59. *Id.*

60. *Id.* at 593–94.

61. *Id.* at 584.

62. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 857 (1986). Although *Schor* determined that the parties had consented to administrative resolution of the counterclaim, and opined that consent can temper constitutional tensions, it nonetheless reasoned that “parties cannot by consent cure the constitutional difficulty” when the case raises structural concerns threatening the integrity of “the constitutional system of checks and balances” rather than just concerns about individual protections. *Id.* at 849–51.

63. *Id.* at 851.

incorporates factors underlying both categories.⁶⁴ The test asks courts to consider: (1) “the extent to which the essential attributes of judicial power are reserved to Article III courts,” (2) “the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts,” (3) “the origins and importance of the right to be adjudicated,” and (4) “the concerns that drove Congress to depart from the requirements of Article III.”⁶⁵

Schor emphasized that, like the agency in *Crowell* and unlike the bankruptcy courts in *Northern Pipeline*, the agency in *Schor* dealt only with a “particularized area of law.”⁶⁶ Additionally, like the *Crowell* agency and unlike the *Northern Pipeline* bankruptcy court, only district courts could enforce the *Schor* agency’s orders—providing Article III oversight that lessened the burden on Article III values.⁶⁷ Third, the Court explained that the agency’s adjudication of the state law counterclaim was only “incidental to” and “completely dependent upon” its adjudication of the federally-created reparations claim—limiting the agency adjudication to a claim arising out of the same transaction or occurrence as the reparations claim.⁶⁸ *Schor* decided that Article III did not compel such a “degree of prophylaxis” as to frustrate Congress’s purpose to furnish, in *Crowell*’s words, a “prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact . . . peculiarly suited to examination and determination by an administrative agency specially assigned to that task.”⁶⁹

The dissenters in *Union Carbide* and *Schor* maintained that a formalist approach should govern.⁷⁰ Willing only to recognize the *Northern Pipeline* plurality’s “long-established exceptions,” the dissenters opposed any “further erosion of Article III’s mandate” beyond those exceptions that history compelled them to accept.⁷¹ Saturating their opinion with the Federalist’s warnings against “[t]he accumulation of all powers, Legislative, Executive, and Judiciary, in the same hands,” the *Schor* dissenters admonished the majority for violating the separation of powers in the interest of legislative convenience, pointing out that the Constitution’s structural limits necessarily must frustrate to some degree the expedience with which the coordinate branches can carry out their constitutional

64. *See id.*

65. *Id.* (citing *Union Carbide*, 473 U.S. at 587) (internal quotations omitted).

66. *Id.* at 852.

67. *Id.*

68. *Id.* at 856.

69. *Id.* (quoting *Crowell v. Benson*, 285 U.S. 22, 46 (1932)).

70. *Id.* at 859 (Brennan, J., dissenting). For an additional critique of *Union Carbide*’s and *Schor*’s functionalism, see Justice Scalia’s dissent in *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989). Justice Scalia opined, “I do not think one can preserve a system of separation of powers on the basis of such intuitive judgments regarding ‘practical effects,’ no more with regard to the assigned functions of the courts . . . than with regard to the assigned functions of the Executive.” *Id.* at 70 (citing *Morrison v. Olson*, 487 U.S. 654, 708–712 (1988) (Scalia, J., dissenting)). He further opines that “[t]his central feature of the Constitution must be anchored in rules, not set adrift in some multifaceted ‘balancing test.’” *Id.*

71. *Schor*, 478 U.S. at 859 (Brennan, J., dissenting).

roles.⁷² Legislative goals of convenience and expediency, the dissenters concluded, provide reason to cabin, rather than expand, the Court's public rights exception.⁷³

After *Union Carbide* and *Schor*, a majority in *Stern* held that a bankruptcy court had no constitutional authority to enter final judgment on a common law tort claim.⁷⁴ Although *Stern* accepted that *Union Carbide* and *Schor* extended the public rights exception beyond cases involving the government as a party, *Stern* limited this expansion to "cases in which the claim at issue derives from a federal regulatory scheme, or in which resolution of the claim by an expert government agency is deemed essential to a limited regulatory objective within the agency's authority."⁷⁵ According to *Stern*, the exception remains limited to claims "integrally related to particular federal government action."⁷⁶

Stern concluded that the tort claim at issue did not "fall within any of the varied formulations of the public rights exception."⁷⁷ The claim did it fall into *Northern Pipeline's* historical exceptions and, unlike the administrative pesticide dispute in *Union Carbide*, the claim did not "flow from a federal statutory scheme."⁷⁸ Unlike the state counterclaim in *Schor*, the claim in *Stern* did not "completely depend[] upon" adjudication of a "claim created by federal law."⁷⁹ Further, the *Stern* bankruptcy court, unlike the tribunals in *Crowell*, *Union Carbide*, and *Schor*, reached claims well outside one "particularized area of the law."⁸⁰ And, unlike in *Crowell* and *Schor*, in which Congress permissibly instituted an "expert and inexpensive method for dealing with a class of questions of fact . . . particularly suited" to agency resolution, Article III judges remain the experts qualified to resolve common law tort claims.⁸¹

Stern involved "the entry of a final, binding judgment by a court with broad substantive jurisdiction, on a common law cause of action, when the action neither derives from nor depends upon any agency regulatory regime."⁸² Congress

72. *Id.* at 859–60 (Brennan, J., dissenting) (quoting THE FEDERALIST NO. 46, at 334 (James Madison) (H. Dawson ed., 1876)).

73. *See id.* at 863 (Brennan, J., dissenting) ("Article III's prophylactic protections were intended to prevent just this sort of abdication to claims of legislative convenience.").

74. *Stern v. Marshall*, 564 U.S. 462, 469 (2011).

75. *Id.* at 490.

76. *Id.* at 490–92. *Stern* contrasted the *Union Carbide* and *Schor* claims with a quintessentially common-law, fraudulent conveyance claim that a bankruptcy court could not constitutionally adjudicate in *Granfinanciera*. *Id.* (citing *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 54–55 (1989) ("If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court.")).

77. *Id.* at 493.

78. *Id.*

79. *Id.* (internal quotations omitted).

80. *Id.* (quoting *Crowell v. Benson*, 285 U.S. 22, 46 (1932)).

81. *Id.* at 494.

82. *Id.* at 495.

could not remove that exercise of judicial power “simply by deeming it part of some amorphous ‘public right.’”⁸³ However, *Stern* foresaw “instances in which the distinction between public and private rights—at least as framed by some of [the Court’s] recent cases—fails to provide concrete guidance as to whether, for example, a particular agency can adjudicate legal issues under a substantive regulatory scheme.”⁸⁴ Though *Stern* did not present one of those difficult cases, and declined to “express any view on how the doctrine might apply” to one, *Oil States* does present such a case.⁸⁵

B. *The Oil States Petitioner’s Arguments Fail Under the Supreme Court’s Precedents*

Judge Harold Leventhal once quipped that citing legislative history can feel like “looking over a crowd and picking out your friends.”⁸⁶ Citing the Court’s precedents on either side of the *Oil States* issue might evoke a similar feeling of uneasy selectivity. The Court’s compendious line of cases in this arena provides substantial ammunition for both parties in *Oil States*, as each attempts to draw a different line to demarcate the public rights exception. Part I.B concludes that, because *Stern* incorporated *Union Carbide’s* and *Schor’s* expansion of the public rights exception to claims between private parties that derive from federal statutory schemes and claims integrally related to furthering an expert government agency’s limited regulatory objective, the *Oil States* petitioners fail to show that Article III precludes executive branch patent cancellation.

Almost a year after *Oil States Energy Services, LLC* sued *Greene’s Energy Group, LLC* for infringing its patent in federal district court, *Greene’s* filed an IPR alleging that prior art anticipated *Oil States’* patent, rendering the patent invalid.⁸⁷ The PTAB rejected the district court’s claim construction, which *Greene’s* concedes would have required concluding that the alleged prior art did not anticipate *Oil States’* patent claims.⁸⁸ Instead, the PTAB “[a]cknowledged that the district court came to a different conclusion” but nevertheless held *Oil States’* patent invalid as anticipated by prior art.⁸⁹ The Federal Circuit

83. *Id.* at 494–95. Deeming it a “public right,” *Stern* reasoned, would transform Article III “from the guardian of individual liberty and separation of powers we have long recognized into mere wishful thinking.” *Id.*

84. *Id.* at 494.

85. *See id.*

86. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983).

87. Brief for Petitioner, *supra* note 12, at 12; Petition for IPR of ‘053 Patent, *Greene’s Energy Grp., LLC v. Oil States Energy Servs., LLC*, No. IPR2014-00216 (P.T.A.B. Dec. 3, 2013), Paper 1 [hereinafter *Oil States* IPR Paper 1]. *Oil States’* asserted patent covered “apparatuses and methods of protecting wellhead equipment from the pressures and abrasion involved in the hydraulic fracturing of oil wells.” Brief for the Petitioner, *supra* note 12, at 11.

88. Brief for the Petitioner, *supra* note 12, at 12–13 (citing Record of Oral Hearing at 14–15, *Greene’s Energy Grp., LLC v. Oil States Energy Servs., LLC*, No. IPR2014-00216 (P.T.A.B. Dec. 3, 2013), Paper 52 [hereinafter *Oil States* IPR Paper 52]).

89. *Id.* (citing *Oil States* IPR Paper 52 at 5, 14, 29, 36).

“summarily affirmed the [PTAB] without issuing an opinion.”⁹⁰ The Supreme Court granted certiorari.⁹¹

Although Oil States can show that patent infringement suits have a long history of adjudication in Article III courts, and that IPR likely constitutes a dispute between private parties rather than a dispute involving the government as a party, Oil States fails to convincingly overcome the Court’s post-*Northern Pipeline* doctrinal expansion—a defect that Greene’s persuasively exposes. Oil States’ argument nonetheless has conceptual force: IPR “wrests patent-validity cases from federal courts and entrusts them to administrative-agency employees, who decide questions of law that Article III reserves to judges.”⁹² To support its assertion that patents by nature constitute private rights, Oil States argues that English courts “traditionally tried” questions of patent validity, which “usually arose in response to an infringement action . . . brought in the courts of law or the Court of Chancery.” Regardless of whether a matter historically arose in law or chancery, Oil States argues, patent validity falls into *Murray’s Lessee’s* Article III category of “a suit at the common law, or in equity, or admiralty.”⁹³ Invoking Justice Rehnquist’s *Northern Pipeline* concurrence, Oil States asserts that patent infringement suits and corollary infringement determinations constitute “the stuff of the traditional actions at common law tried by the courts at Westminster in 1789.”⁹⁴

Greene’s contests Oil States’ historical claims about the private property nature of patents. According to Greene’s view of history, “[i]n the Sixteenth–Eighteenth Centuries in England, patents were royal grants of privilege, not common law rights, and originally, the Crown could grant patents for invention as well as royal prerogatives for goods or businesses.”⁹⁵ In Part II, this Note finds persuasive the evidence supporting Greene’s view that patents constituted privileges rather than private property rights—although some historical evidence supports each position.

Oil States also emphasizes the line drawn in *Northern Pipeline* that confines the public rights exception to suits involving the government as a party, arguing that the PTAB “adjudicate[s] disputes between private parties over private-property rights.”⁹⁶ Oil States may succeed on this front, but the Court no longer draws the bright *Northern Pipeline* line that Oil States invokes. Even if Oil States correctly characterizes patents as private property rights, and correctly characterizes IPR as a proceeding between private parties, Oil States must reckon with *Union Carbide*, *Schor*, and *Stern*, which include claims “essential to a limited regulatory

90. *Id.* at 13–14.

91. *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 137 S. Ct. 2239 (2017).

92. Brief for the Petitioner, *supra* note 12, at 14.

93. *Id.* at 16 (quoting *Stern v. Marshall*, 564 U.S. 463, 484 (2011)).

94. *Id.* at 15 (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring)) (internal quotations omitted).

95. Brief for Respondent at 44, *Oil States Energy Servs., LLC v. Greene’s Energy Group*, No. 16-712 (2017) (citing *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 847 (2015) (Thomas, J., dissenting)); Lemley, *supra* note 14, at 1680–81).

96. Brief for Petitioner, *supra* note 12, at 16–17.

objective . . . integrally related to particular federal government action” within the public rights exception⁹⁷ Oil States fails to show that patent validity claims do not satisfy that public rights category.⁹⁸

Greene’s convincingly argues that IPR claims derive from a federal regulatory scheme—patent examination and grant—and that resolution of IPR claims further an expert government agency’s limited regulatory objective—assuring validity of extant patents. In doing so, Greene’s correctly points out that the public rights doctrine can apply to disputes between private parties, emphasizing that the Court has “eschewed bright-line tests in determining whether a given congressional delegation of adjudicative functions to a non-Article III body is within its powers.”⁹⁹ Oil States answers by essentially confining *Union Carbide* and *Schor* to their facts—contending that, while those cases involved rights “critical to a specific regulatory obligation enforceable through an action *aside* from the adjudication itself,” IPR “does not follow from a governmental enforcement effort, does not regulate private conduct, [and] does not follow from any public obligations borne by patent owners.”¹⁰⁰ *Stern*, however, did not limit *Union Carbide* or *Schor* quite that narrowly—so the Court would have to further circumscribe those functionalist opinions in order for Oil States’ theory to succeed.

In addition to showing that IPR satisfies the “integrally related” prong of *Union Carbide* and *Schor* as modified by *Stern*, Greene’s can also appeal to the Court’s frequent language of agency specialization.¹⁰¹ Although the Court never expressly legitimated Justice White’s contention in *Northern Pipeline* that “extreme specialization” on its own may justify Article I adjudication,¹⁰² *Stern*’s language of “expert government agency” adjudication when discussing the “integrally related” exception inherited from *Union Carbide* and *Schor* indicates that highly specialized proceedings—like patent validity determinations—tend to populate this category of public rights.¹⁰³

Had *Stern* overruled rather than incorporated *Union Carbide*’s and *Schor*’s reformulation of the public rights doctrine to include disputes between private parties, Oil States would have a more persuasive claim. To invalidate IPR as inconsistent with Article III, the Court will have to return to *Northern Pipeline*’s exclusion of disputes between private parties from the public rights exception—or else further limit *Union Carbide* and *Schor* to their facts. Otherwise, IPR likely qualifies as a proceeding “integrally related to particular Federal Government action”: granting federally-derived patent rights subject to statutory patentability

97. *Id.* at 27 (quoting *Stern*, 564 U.S. at 490–91).

98. *See id.*

99. Brief for Respondent, *supra* note 95, at 28–29.

100. Brief for Petitioner, *supra* note 12, at 37.

101. Brief for Respondent, *supra* note 95, at 29–30 (citing *Stern*, 564 U.S. at 494).

102. *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 118 (1982) (White, J., dissenting).

103. *See Stern*, 564 U.S. at 490.

standards.¹⁰⁴ IPR therefore passes constitutional muster under the Court's most recent version of the public rights exception.

II. ARTICLE III PERMITS EXECUTIVE BRANCH PATENT CANCELLATION AS AN ORIGINALIST MATTER

Both the Court's formalist and functionalist opinions have endeavored to safeguard the Article III power from incursion by the other branches, though allowing legislative courts in different measure. Both approaches grapple with this line-drawing problem by making various distinctions based on historical and policy grounds, but neither camp draws a definitive line.¹⁰⁵ This Note takes *Oil States* as an opportunity to crystallize a principled distinction between private and public rights by delineating an originalist framework grounded in the Blackstonian natural rights philosophy widely understood during the Founding Era. The Note then illustrates that framework by applying it to the IPR proceedings at issue in *Oil States*.

Part II.A establishes the originalist framework, which requires Article III adjudication only for rights that the Founding Generation understood as "core private rights"—that is, natural rights in the Lockean sense. Part II.B concludes that Article III permits executive branch patent cancellation because, as a historical matter, the Founding Generation did not understand patents as natural rights. Rather, the available historical sources indicate that the Founding Generation most likely understood patents as privileges—as it understood the preexisting English patent system. At most, the Founding Generation understood patents as civil property rights created by statute, which nonetheless do not amount to natural rights requiring Article III adjudication.

A. Blackstone's "Core Private Rights" Framework Provides the Originalist Test

To evaluate the constitutionality of current IPR proceedings and propose the limits of a constitutionally permissible PTAB, this Note first establishes a principled conception of a legislative court by deriving the proper limits of the public rights exception. While the Court must begin with two points of reference for deciding the *Oil States* inquiry—the Constitution's text and the Court's tangled jurisprudence—this Note seeks an answer grounded in first principles by applying

104. *Id.* For additional analyses of the doctrinal question, see Reilly, *supra* note 9, at 409 (concluding that Article III permits IPR). For doctrinal arguments to the opposite conclusion, see Michael I. Rothwell, *After MCM, A Second Look: Article I Invalidation of Issued Patents for Intellectual Property Still Likely Unconstitutional After Stern v. Marshall*, 18 N.C.J.L. & TECH. ON. 1 (2017); Michael Rothwell, *Patents and Public Rights: The Questionable Constitutionality of Patents Before Article I Tribunals After Stern v. Marshall*, 13 N.C. J. L. & TECH. 287 (2012).

105. Reilly, *supra* note 9, at 397 ("Identifying the line between when adjudication constitutionally can be assigned to non-Article III tribunals and when it cannot is exceedingly difficult.").

an originalist methodology.¹⁰⁶ The *Oil States* petition raises an objective question: What does the Constitution require? The answer demands “a delicate exercise in constitutional interpretation.”¹⁰⁷ This Note looks to the Constitution’s text and primary sources to conclude that the public rights exception should only apply when the dispute does not involve “core private rights”—that is, natural rights of life, liberty, and property as understood during the Founding Era.

Article III’s text reposes the judicial power of the United States in judges with salary protections and life tenure, and does not expressly indicate any exceptions to this rule.¹⁰⁸ A textually literal interpretation of Article III would require that “the only federal tribunals that can be assigned to resolve justiciable controversies are “[A]rticle III courts,’ whose judges enjoy the safeguards of life tenure and undiminished salary.”¹⁰⁹ But, as pointed out in Part I.A., the very first Congress provided for administrative adjudications in the Treasury department—indicating that the Founding Generation did not understand Article III’s terms to preclude all adjudication outside Article III courts.¹¹⁰ While the creation of non-Article III tribunals during the first Congress indicates that the Founding Generation did not understand the Constitution to require Article III judges for all adjudications, other sources from the Founding Era shed light on what that generation did understand it to require.

Article III’s salary and tenure protections derive from a “longstanding Anglo-American tradition of an independent Judiciary” that predated even the Declaration of Independence.¹¹¹ Sir William Blackstone identified the earliest English statutes providing salary and tenure protections for judges as measures taken “to maintain both the dignity and independence of the judges.”¹¹² The Declaration of Independence reflected vehement objection to the Crown’s revocation of these protections in the colonies, listing it as one of many grievances against the King: “He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”¹¹³ Article III’s protections appear in the Constitution as the consummation of the Declaration signers’ decision to right these abuses.

106. This Note seeks the original understanding of the Founding Generation—that is, the Note employs “original public meaning” originalism—rather than searching for the original intent of the framers. See, e.g., Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. Law Research Paper No. 07-24, 2008), <http://ssrn.com/abstract=1120244>.

107. *Northern Pipeline*, 458 U.S. at 62 (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)).

108. U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

109. Fallon, *supra* note 21, at 919.

110. *Id.*

111. *United States v. Will*, 449 U.S. 200, 217 (1980).

112. 1 WILLIAM BLACKSTONE, COMMENTARIES *267.

113. THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

To the signers of the Declaration, just Government existed to “secure” certain “unalienable rights.”¹¹⁴ The Founding Generation understood government’s purpose as protection of these natural rights,¹¹⁵ and Article III’s tenure and salary protections operate as one component of the design to do so by maintaining the judiciary’s independence. According to Hamilton, “[n]ext to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, a power over a man’s subsistence amounts to a power over his will.”¹¹⁶ A judiciary independent of control by the legislative or executive branches ensures that the government performs its essential function: securing the natural rights of the governed. The question of which rights the Founding Generation afforded these protections, however, demands historical inquiry.

Early American lawyers distinguished between “‘core’ private rights”—which “Lockean tradition associated with the natural rights that individuals would enjoy even in the absence of political society” from “mere ‘privileges’ or ‘franchises’ (which public authorities had created purely for reasons of public policy and which had no counterpart in the Lockean state of nature).”¹¹⁷ Blackstone divided these private rights into three major categories:

- (1) the right of personal security, which encompassed a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation; (2) the right of personal liberty, which entailed freedom from imprisonment or restraint, unless by due course of law; and (3) the right of private property, which involved the free use, enjoyment, and disposal of all [one’s] acquisitions.¹¹⁸

114. *Id.* para. 2.

115. See 1 BLACKSTONE, *supra* note 112, at *124 (explaining that “the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse, which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals.”); see generally Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 915 (1993) (explaining that “large numbers of Americans spoke about government, liberty and constitutional law on the basis of some shared assumptions about natural rights and the state of nature.”).

116. THE FEDERALIST NO. 79, at 491 (H. Lodge ed., 1888) (Alexander Hamilton).

117. Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 567 (2007) (citing JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 6 (C.B. Macpherson ed., Hackett Publ’g Co. 1980) (1690)). Nelson provides a robust defense of the “core private rights” framework, explaining that Blackstone’s “traditional taxonomy of legal interests upon which the government might act . . . was absolutely central to American legal thought both at the time of the Founding and throughout the nineteenth century.” *Id.* at 566.

118. *Id.* at 567 (internal citations and quotations omitted). Blackstone delineates these three categories at 4 BLACKSTONE, *supra* note 112, at *128–40.

Privileges and franchises, on the other hand, “originated with the state rather than the individual”¹¹⁹ and belonged to “the whole community, considered as a community, in its social aggregate capacity.”¹²⁰ While the executive and legislative powers controlled privileges and franchises, “direct and adverse action against someone’s core private rights” required the judicial power.¹²¹ Perhaps, had the Court maintained the distinction between core private rights and privileges, the Court’s Article III jurisprudence would not have proliferated into the complex amalgam of standards that it has become.

Conceptualizing rights through Blackstone’s categories, the Founding Generation understood that adjudication of “core private rights”—that is, natural rights of life, liberty, and property—belonged to the judicial branch. They declared independence from England to secure these “unalienable rights,”¹²² and instituted an independent judiciary to protect them. The public rights exception to Article III’s requirements embraces all but core private rights of life, liberty, and property, and applies in cases of “privileges” and “franchises.” The nature of the right adjudicated, rather than the identity of the parties, therefore, defines the limits of the public rights exception.¹²³

Although Justice Scalia’s *Granfinanciera* concurrence delineates a principled sovereign immunity rationale for why legislative courts may decide matters to which the government is a party, that rationale does not preclude legislative courts from deciding other matters not involving the government as a party.¹²⁴ There, Justice Scalia explained the centrality to *Murray’s Lessee* of “waiver of sovereign immunity as a means of converting a subject which, though its resolution involved a ‘judicial act,’ could not be brought before the courts, into the stuff of an Article III ‘judicial controversy.’”¹²⁵ He then explained that such waiver “can only be implicated, of course, in suits where the Government is a party.”¹²⁶

While Justice Scalia correctly remarked that the Court had expanded on *Northern Pipeline’s* test with *Union Carbide* and *Schor* “by sheer force of [its] office” rather than by identifying “a discrete category of ‘judicial acts’ which, at the time the Constitution was adopted, were not thought to implicate a ‘judicial

119. Nelson, *supra* note 117, at 566.

120. 4 BLACKSTONE, *supra* note 112, at *5.

121. Nelson, *supra* note 117, at 571–72. The early existence of territorial courts and military courts that adjudicated core private rights does not necessarily belie this distinction, for early judicial opinions distinguished territorial courts as those that exercised “judicial power of a particular territory” rather than of “the whole United States,” and “the nineteenth-century Supreme Court understood Article III to address only the civilian judicial power.” *See id.* at 576.

122. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

123. *See* Nelson, *supra* note 117, at 613 (observing that “Modern scholars tend to downplay the idea that the need for ‘judicial’ involvement in particular adjudications depends on the nature of the legal interests being adjudicated”).

124. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 68 (1989) (Scalia, J., concurring).

125. *Id.*

126. *Id.*

controversy,” his concurrence does not rule out the possibility of public rights disputes between private parties.¹²⁷ Because the doctrine of waiver of sovereign immunity justifies legislative adjudication for one category of matters—those arising between the government and others—but does not necessarily limit legislative courts to only those matters, the sovereign immunity doctrine does not limit the originalist conception of public rights to matters involving the government as a party.¹²⁸ Rather, the nature of the right at issue delimits the public rights exception.¹²⁹ The proper originalist inquiry asks whether the Founding Generation understood the right at issue to have “core private” status as a natural right to either life, liberty, or property.

B. Because the Founding Generation Understood Patents as Either Privileges or Statutorily-Created Civil Property Rights, But Not Natural Property Rights, Article III Permits Executive Branch Patent Cancellation

Whether executive-branch patent cancellation violates Article III depends on whether patents constitute property rights in the Blackstonian natural rights sense. If they do not, then the PTAB may cancel patents under the public rights exception as a legislative court. If they do, then patent rights amount to core private rights outside the public rights exception and require Article III adjudicators. Parts II.B.1 and II.B.2 conclude that, based on available historical sources, the Founding Generation either considered patents privileges or civil property rights. Either way, Article III permits executive-branch patent cancellation under the core private rights framework.

1. Historical Sources Indicate that the Founding Generation Understood Patents as Privileges, Not Natural Property Rights—Therefore Not as Core Private Rights

Historical evidence tends to support the view that the Founding Generation understood patents as “privileges” granted by the government—that is, as limited monopolies granted to incentivize innovation, rather than as natural property rights. This evidence includes English statutory and case law, Blackstone’s writings, and Founding Era writings of James Madison, Thomas Jefferson, and Levi Lincoln Sr. If the Founding Generation understood patents as grants of privilege rather than natural rights—as this evidence tends to indicate—then patents do not qualify as core private rights and Article III permits executive branch patent cancellation.

127. *See id.* at 69.

128. Nelson has argued that, consistent with the Blackstonian framework, the basis for permitting legislative courts to adjudicate claims of private parties against the government lies in the Founding Generation’s understanding that such claims “implicated the public’s ownership of money in the Treasury,” to which a given individual does not have a “core private” property right. *See Nelson, supra* note 117, at 583.

129. Nelson, *supra* note 117, at 571–72.

The preexisting English patent system provides one reference point for the Founding Generation's understanding of patents, and supports the view that the Founding Generation understood patents as privileges. In the English system, the Crown gave monopoly privileges "to engage in a new trade or craft" to "persons responsible for introducing it into the state."¹³⁰ The privilege "consisted of a temporary and exclusive right to exploit the subject matter, either invention or importation, covered by the grant."¹³¹ This Note examines primary sources of English law supporting that view—that the English system "known to the Framers involved privileges rather than property rights as such."¹³²

The English invention patent system at the time of the American Founding derived from the Statute of Monopolies of 1623, which generally prohibited monopolies but made an exception for invention patents of limited term.¹³³ This statute expressly referred to invention patents as privileges, exempting from the statute's prohibitions "any letters patents and grants of privilege for the term of fourteen years or under . . . of the sole working or making of any manner of new manufactures within this realm to the true and first inventor."¹³⁴ The Crown granted invention patents within the meaning of this statute by royal prerogative, not as natural rights. Indeed, Blackstone explains that the Statute of Monopolies "allows a royal patent of privilege to be granted for fourteen years to any inventor of a new manufacture, for the sole working or making of the same; by virtue whereof a temporary property becomes vested in the patentee."¹³⁵ Blackstone's use of the words "privilege" and "allows" further indicates that the Crown issued patents as privileges at its own discretion, rather than under obligation of Natural Law.

That English patents were revoked by royal decree rather than exclusively in courts further establishes that the English system granted patents as discretionary privileges, not natural rights. The Crown canceled patents through a body of advisors called the Privy Council or, when approved by the King's attorney general, in a proceeding initiated in court by a writ of *scire facias*.¹³⁶ One 1851 English treatise summarizes the historic function of this writ as "a warning given to the defendant . . . to appear in court and . . . show any cause . . . why execution should

130. Edward C. Walterscheid, *The Nature of the Intellectual Property Clause: A Study in Historical Perspective (Part I)*, 83 J. PAT. & TRADEMARK OFF. SOC'Y 763, 777 (2001).

131. *Id.*

132. *Id.*

133. Statute of Monopolies 1623, 21 James I, c. 3, §§ 1–14 (Eng.).

134. *Id.* § 6. For a discussion of the events leading up to enactment of this statute—especially, abusive granting of monopolies by the Crown—see Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550-1800*, 52 HASTINGS L.J. 1255, 1272 (2001).

135. 2 BLACKSTONE, *supra* note 112, at *406.

136. See Lemley, *supra* note 14, at 1682–83. Lemley explains that these writs "require[ed] the owner of the patent to appear in court and defend the patent, lest the court issue an order to the Crown revoking the patent." *Id.* at 1683. For a detailed discussion of the Privy Council's control over patent grants after the enactment of the Statute of Monopolies, see Mossoff, *supra* note 134, at 1276.

not issue on the judgment or record against him.”¹³⁷ The treatise further explains that “[i]f a patent be void for any of the reasons . . . sufficient to invalidate the grant, the Queen . . . may have a *scire facias* to repeal her own grant.”¹³⁸ This writ “lies at the suit of the Queen,” although an individual “may of right petition the Queen for leave to use her name in a writ of *scire facias*.”¹³⁹ Even court proceedings to cancel patents, therefore, required royal approval—further establishing the discretionary nature of English patent privileges.

Copyrights, by contrast, enjoyed English common law status. Contrasting English treatment of patents with English treatment of copyrights shows two distinct categories that the Founding Generation would have had in mind when setting up the early American patent system. The English court in *Millar v. Taylor*, for example, granting that “the law of England, with respect to all personal property, had its grand foundation in natural law,” determined in 1769 that copyright was a common law right.¹⁴⁰ In doing so, the *Millar* court dismissed the question of whether invention patents—in the court’s example, “Mr. Harrison’s time-piece”—constituted a common law right on the same sweat-of-the-brow natural law theory successfully advanced about English copyright: “might not [a patent proprietor] insist upon the same arguments, the same chain of reasoning, the same foundation of moral right, for property in his invention, as an author can for his?”¹⁴¹ When distinguishing this hypothetical, the English court expressly called patents a privilege: “And yet we all know, whenever a machine is published, (be it ever so useful and ingenious,) the inventor has no right to it, but only by patent; which can only give him a temporary privilege.”¹⁴² The Founding Generation, therefore, operated against the English law’s background distinction between discretionary patent privileges and common law rights to copyright. While the Founding Generation remained free to part company with the English tradition at the framing, available evidence indicates that the Founding Generation continued to understand copyrights and patents as categorically different kinds of rights.

The Framers affirmatively contemplated both patent and copyright protection in the “Progress Clause” of Article I, Section 8, Clause 8, which grants Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹⁴³ Unfortunately, sources concerning inclusion of this

137. THOMAS CAMPBELL FOSTER, A TREATISE ON THE WRIT OF SCIRE FACIAS 2 (1851).

138. *Id.* at 245–46.

139. *Id.* at 246.

140. *Millar v Taylor*, 98 Eng. Rep. 201, 229 (1769). See also Edward C. Walterscheid, *Inherent or Created Rights: Early Views on the Intellectual Property Clause*, 19 HAMLINE L. REV. 81, 84–85 (1995). Walterscheid explains that, under *Millar*, this common law right persisted regardless of the enactment in 1710 of the Statute of Anne, which governed enforcement of copyrights. *Id.* at 85 (citing Statute of Anne, 1710, 8 Anne, ch. 19, §§ 1–11 (Eng.)).

141. 98 Eng. Rep. at 232.

142. *Id.* For discussion of a similar distinction that appears in the 1774 English case *Dondaldson v. Beckett*, 98 Eng. Rep. 257 (1774) (U.K.), see Walterscheid, *supra* note 140, at 84–85.

143. U.S. CONST. art. I, § 8, cl. 8.

clause provide little evidence of the Framers' conception of patent rights. In both the Constitutional Convention and the state ratifying conventions, "the issue . . . seems never to have been a point of contention."¹⁴⁴ Indeed, "[n]o delegate to the Constitutional Convention has left any record concerning the interpretation or meaning placed on the intellectual property clause by the delegates themselves."¹⁴⁵ Due to the dearth of Convention statements interpreting this clause, the principal sources for determining whether the Founding Generation departed from the English "patent privilege" tradition consist of the clause's language itself and words penned by James Madison, Levi Lincoln Sr., and Thomas Jefferson.

The Progress Clause's language of "securing" at first glance appears to signal natural law theory—supporting an inference that the rights referenced in the clause—of both authors and inventors—preexist government. The Declaration of Independence, after all, frames the purpose of Government as *securing* "unalienable rights."¹⁴⁶ But although lack of an English common law precedent does not rule out the possibility that the Founding Generation understood the Constitution to recognize a previously unrecognized common law or natural right to a patent, the available historical sources from Madison, Levi Lincoln, and Jefferson indicate that the Founding Generation believed patents remained privileges in the early United States. Madison's notes on the Constitutional Convention, for example, tend to demonstrate an understanding of the different categories that patents and copyrights occupied under English law. Madison records in those notes that he advocated for the committee of detail to give Congress the power "[t]o secure to literary authors their copy rights for a limited time."¹⁴⁷ He reports also that Charles Pinckney similarly proposed that the legislature have the power "[t]o secure to Authors exclusive rights for a certain time."¹⁴⁸ These two statements, using the word "secure," comport with Madison's and Pinckney's likely understanding of the status of preexisting English copyrights securable under common law, and contrast with Pinckney's use of the word "grant" when proposing the power "[t]o grant patents for useful inventions" immediately prior to proposing the power to "secure" copyrights.¹⁴⁹ Use of "grant" when referring to patents and "secure" when referring to copyrights indicates an Early American understanding of the historical English bifurcation of these rights into categories of privilege and right, respectively.

144. Walterscheid, *supra* note 140, at 92. As Walterscheid points out, the few references to the clause that occurred in state ratifying conventions concerned copyrights, not patents. *See id.* at 91.

145. *Id.* at 92; *see also* Arthur H. Seidel, *The Constitution and a Standard of Patentability*, 48 J. PAT. OFF. SOC'Y 1, 10 (1966) ("No historical writings or events have been found analyzing [the first phrase of Clause 8] . . .").

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

147. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 477 (W.W. Norton & Company 1987).

148. *Id.* at 478.

149. *Id.*; *see also* Walterscheid, *supra* note 140, at 95–96 (discussing the bearing of Madison's and Pinckney's comments on the interpretation of the progress clause).

Madison's and Pinckney's proposals occurred on August 18, 1787, but by September 5—before reaching the Committee of Style—the constitutional text used the word “securing” to modify both the rights of “Authors” and “Inventors.”¹⁵⁰ The Framers may have employed this language as an aesthetic choice, implementing “the ‘balanced style’ of composition much favored in the eighteenth century,”¹⁵¹ but no primary sources explain the reason for this syntactic consolidation. Discussion of patents as privileges in other sources, however, undermines the view that the framers intentionally applied “securing” to accord “Inventors” natural rights. For example, when discussing the Progress Clause of the newly-ratified Constitution in a letter to Thomas Jefferson, Madison expressly called patents privileges when he rhetorically asked “[w]ould it not suffice to reserve in all cases a right to the Public to abolish the privilege at a price to be specified in the grant of it?”¹⁵²

Additional support for the view that the Founding Generation understood patents as privileges comes from Thomas Jefferson's Attorney General, Levi Lincoln Sr., and from Jefferson himself. Lincoln authored a legal opinion in 1802 determining that foreigners did not enjoy patent protection afforded to U.S. citizens.¹⁵³ In doing so, Lincoln expressly called patents privileges: “The privilege is a monopoly in derogation of common right, and . . . ought not to be extended to foreigners.”¹⁵⁴

Additionally, Thomas Jefferson framed patents as privileges and expressly disavowed any natural patent right in an 1813 letter to Isaac McPherson—a letter notably relied on at length in the Supreme Court's landmark *Graham v. John Deere* opinion.¹⁵⁵ In the letter, Jefferson opined that the free spread of ideas “seems to have been peculiarly and benevolently designed by nature, . . . like fire, expansible over all space . . . and like the air . . . incapable of confinement or exclusive appropriation.”¹⁵⁶ Consequently, Jefferson opined that “[i]nventions then cannot, in nature, be a subject of property.”¹⁵⁷ From these words, the *Graham* court reasonably concluded that Jefferson “rejected a natural-rights theory in intellectual property rights and clearly recognized the social and

150. Compare 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 321 (Max Farrand ed., 1937) with *id.* at 505.

151. See Walterscheid, *supra* note 140, at 93.

152. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788) (on file at *Founders Online*, National Archives) <https://founders.archives.gov/documents/Madison/01-11-02-0218> [<https://perma.cc/G8BL-ZLFV>].

153. 1 Op. Att'y. Gen. 110, http://press-pubs.uchicago.edu/founders/documents/a1_8_8s10.html [<https://perma.cc/X634-WCAQ>].

154. *Id.*

155. See *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 8 (1966). For an argument that the *Graham* court perpetuated a mythical “Jeffersonian story of patent law” incorrectly assuming that patents remained privileges in the Founding Era, see Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Historical Context*, 92 CORNELL L. REV. 953, 955 (2007).

156. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in 13 THE WRITINGS OF THOMAS JEFFERSON 326, 333–34 (Andrew A. Lipscomb ed., 1903).

157. *Id.*

economic rationale of the patent system,” which provided “a reward, an inducement, to bring forth new knowledge” and did not “secure to the inventor his natural right in his discoveries.”¹⁵⁸ Given the well-established “privilege” nature of patents in the English system, along with primary sources signaling both the Founding Generation’s understanding of that system and no intention to depart from it, patents likely remained privileges rather than became property rights during the Founding Era.

Concluding that the Founding Generation viewed patents as privileges entails that—as an originalist matter—Article III allows the executive branch to cancel patents because only rights understood by the Founding Generation as core private rights require Article III adjudicators. In a recent dissent regarding an issue of patent claim construction, Justice Thomas properly applied the core private rights framework to patents—the same threshold inquiry that an originalist resolution of *Oil States* requires. Justice Thomas concluded in that case, *Teva*, that the Founding Generation understood patents as privileges—and therefore, as public rights.¹⁵⁹ Recognizing the distinction between “core private rights” and “privileges or franchises,”¹⁶⁰ he observed that “the English common law placed patents squarely in the final category, as franchises that ‘depend upon express legislation,’ and ‘hath [their] essence by positive municipal law’” rather than in the “core private rights” category.¹⁶¹ Although *Teva* involved claim construction issues rather than legislative courts issues, Thomas’s reasoning reached the threshold historical question antecedent to the question of executive branch patent cancellation. This Note completes the analysis, concluding that the PTAB may cancel patents as a legislative court under the public rights exception as an originalist matter because the Founding Generation likely viewed patents as privileges rather than natural rights.

2. At Most, The Founding Generation Understood Patents as Civil Property Rights, Not Natural Property Rights—Therefore Not as Core Private Rights

Some historical evidence challenges the general scholarly consensus that the Founding Generation understood patents as privileges. That evidence, marshaled principally by Professor Adam Mossoff, plausibly indicates that the Founding

158. See 383 U.S. at 8–9.

159. *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 848 n.2 (2015) (Thomas, J., dissenting). Justice Thomas has briefly engaged in similar “core private rights” reasoning in two other recent dissents. See *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1965 (2015) (Thomas, J., dissenting); *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S. Ct. 1293, 1316 (2015) (Thomas, J., dissenting); see also Brian Lipshutz, *Justice Thomas and the Originalist Turn in Administrative Law*, 125 YALE L.J. FORUM 94, 99 (2015); Elbert Lin, *At the Front of the Train: Justice Thomas Reexamines the Administrative State*, 127 YALE L.J. FORUM 182, 188 (2017). For example, Justice Thomas concludes in his *B & B Hardware* dissent that “[t]o the extent that administrative agencies could, consistent with the Constitution, function as courts, they might only be able to do so with respect to claims involving public or quasi-private rights.” 135 S. Ct. at 1316 (2015).

160. *Teva*, 135 S. Ct. at 848 n.2 (2015) (Thomas, J., dissenting) (internal quotations omitted).

161. *Id.* (quoting 7 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 479 n.7, 480 n.4, 497 (1926)).

Generation understood patents as statutorily guaranteed civil property rights, rather than as privileges granted at the discretion of the government. This Note argues in Part II.C.2 that, even if correct, Mossoff's "civil property rights" thesis does not change the originalist conclusion that Article III permits executive branch patent cancellation because, under the core private rights theory, only deprivations of natural rights preexisting government—as opposed to government-created civil rights—require Article III adjudication. Historical evidence that the Founding Generation understood patents as civil property rights, therefore, does not supply an originalist ground for contending that Article III precludes executive branch patent cancellation.

Professor Greg Reilly crisply encapsulates the problem with reasoning from the "civil property rights" thesis to a conclusion that IPR violates Article III: "[s] imply because something could be described as private property for other purposes does not make it a private right incapable of agency adjudication under Article III."¹⁶² Although Reilly does not apply the core private rights framework that this Note applies, his statement also rings true under this Note's framework: just because a civil right resembles a natural right does not make it one. This Note briefly outlines the "civil property rights" thesis and then explains that, even if correct as a historical matter, that thesis does not entail that Article III precludes executive branch patent cancellation as an originalist matter.

Mossoff contends that the facile distinction between rights and privileges fails to account for the multiple context-dependent uses of the word "privilege" during the Founding Era. According to Mossoff, "'privilege' referred to several distinct types of legal rights secured to individuals in civil society," including "a civil right justified by natural rights philosophy."¹⁶³ The term's meaning, then, depended on context.¹⁶⁴ Mossoff argues that ignoring the term's alternate meaning "requires one to conclude that Blackstone, Washington, Madison, Hamilton, and Chief Justice Marshall viewed rights of property conveyance and contract as specially conferred grants from the government lacking any basis in moral or legal right."¹⁶⁵ Such a theory, he argues, would also require concluding that "Justice Washington thought the same of the right to vote," and that "William Penn and other American colonists similarly viewed constitutional rights, such as the rights of confrontation and self-representation in court, as specially conferred grants by the government, because they referred to such rights as 'privileges' in their state constitutions."¹⁶⁶ By arguing that Founding Era sources used the word "privilege" to reference rights more durable than discretionary government grants, Mossoff contends that arguments hinging only on the use of the word "privilege" in early sources are inconclusive.

162. Reilly, *supra* note 9, at 405.

163. Mossoff, *supra* note 155, at 958, 968.

164. *Id.* at 968.

165. *Id.* at 976.

166. *Id.*

By arguing for a flexible definition of the word “privilege” during the Founding Era, Mossoff can argue that, even though James Madison called patents privileges in a letter to Jefferson, Madison may have nonetheless viewed patents as civil property rights.¹⁶⁷ For example, Madison argued in Federalist 43 for the inclusion of the Progress Clause in the Constitution by analogizing to English common law copyright. To justify the copyright portion of the clause, Madison declared that “[t]he copy right of authors has been solemnly adjudged in Great Britain to be a right at common law.”¹⁶⁸ Madison did not invoke a similar common law basis for invention patents, but did analogize to copyrights by arguing that “[t]he right to useful inventions, seems with equal reason to belong to the inventors.”¹⁶⁹ This statement may indicate that the Founding Generation intended to create patent property rights by statute analogous to copyrights deriving from English common law.¹⁷⁰

Mossoff asserts that early American patent law “should be construed in the same historical context as other constitutional and legal doctrines of the eighteenth and nineteenth centuries.”¹⁷¹ Particularly, according to the natural rights philosophy that shaped the intellectual thought of the Founding Era.¹⁷² Consequently, he argues that early American courts treated patents as “civil rights in property,” as evidenced by “reliance on property case law and rhetoric in patent cases, the development of legal presumptions favoring a liberal interpretation of both the patent statutes and patents, and . . . the judicial recognition of additional rights beyond those expressly provided in the patent statutes.”¹⁷³ Under that theory, Madison’s analogical justification could explain the Constitution’s use of “securing” for both types of rights in the Progress Clause: the framers gave Congress the power to secure a preexisting common law right to copyright, and also gave Congress the power to statutorily protect—and thereby secure—an analogous intellectual property right by enacting patent legislation.

But justifying patent rights by analogy to natural property rights or common law copyright fails to satisfy this Note’s originalist framework because mere resemblance to common law copyright does not establish the Founding Generation’s original understanding of patents as natural property rights. Justice Thomas’s recent dissents in *Teva* and *B&B Hardware*, although not directly addressing the question

167. See Letter from James Madison to Thomas Jefferson, *supra* note 152.

168. THE FEDERALIST NO. 43, at 288 (Jacob E. Cooke ed., Wesleyan University Press 1961).

169. *Id.*

170. *Id.*

171. Mossoff, *supra* note 155, at 976.

172. *Id.* at 969 n.70 (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 894 (2d ed. 1988) (“Natural law philosophy [was] current at the time the Constitution was written”); Randy E. Barnett, *Are Enumerated Constitutional Rights the Only Rights We Have? The Case of Associational Freedom*, 10 HARV. J. L. & PUB. POL’Y 101, 102–06 (1987); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549 (2003); Hamburger, *supra* note 115; Carl F. Stychin, *The Commentaries of Chancellor James Kent and the Development of an American Common Law*, 37 AM. J. LEGAL HIST. 440 (1993)).

173. *Id.* at 990.

of executive branch patent cancellation, make arguments nonetheless applicable to the question. For example, despite recognizing similarities between patents and deeds to land when determining whether to interpret patents like statutes or deeds, Justice Thomas concluded in *Teva* that “no matter how closely a franchise resembles some ‘core’ private right, it does not follow that it must be subject to the same rules of judicial interpretation as its counterpart.”¹⁷⁴ Likewise, resemblance of patents to natural property rights does not require according patents the Article III treatment accorded to natural property rights. Conversely, because trademarks do have a historical natural rights pedigree (and not just resemblance to one), issues of trademark cancellation “might be of a type that must be decided by ‘Article III judges in Article III courts.’”¹⁷⁵ Unlike executive branch patent cancellation, executive branch trademark cancellation “may deprive a trademark holder of the opportunity to have a core private right adjudicated in an Article III court,” and “may effect a transfer of a core attribute of the judicial power to an executive agency.”¹⁷⁶

Even though the Founding Generation may have conceptualized patents as property rights analogous to common law natural rights to land or chattels, that conclusion does not mean that the Founding Generation understood patents to actually enjoy natural rights status. Mossoff indicates that James Madison defended patent protection by appealing to natural law principles, but freely admits that Madison did not actually make “a legal argument that patent rights were secured at common law—an argument that he surely understood as false—but rather he was justifying these civil rights with the same labor-desert policy justifying the common law (natural right) in copyright.”¹⁷⁷ Mossoff at most has shown that natural rights philosophy provided the intellectual impetus for federal creation of a civil property right—not that the Founding Generation understood patents to protect natural property rights preexisting government.

Similarly, even if “[p]atent law has a historic kinship to common-law trespass,” and even if courts historically have discussed patent litigation with trespass terminology, as some have observed, patent actions are at best “closely linked to actions at common law.”¹⁷⁸ As Reilly correctly observes, “[p]atent rights are rights created by federal statute that exist solely by the grace of Congress,” and “[i]nventors have no inherent or ‘natural’ right to exclusive control of their

174. *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 848 (2015) (Thomas, J., dissenting).

175. *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1317 (2015) (Thomas, J., dissenting) (quoting *Stern v. Marshall*, 564 U.S. 462, 484 (2011)). Justice Thomas postulated in *B & B Hardware* that although “[t]rademark registration under the Lanham Act has the characteristics of a quasi-private right,” the right to “adopt and exclusively use a trademark appears to be a private property right” such that the “whole system of trade-mark property and the civil remedies for its protection existed long anterior to that act.” *Id.*

176. *Id.*

177. Mossoff, *supra* note 155, at 982–83.

178. See Brief for Professor Dmitry Karshedt as Amicus Curiae Supporting Petitioner, *Oil States Energy Services, LLC, v. Greene’s Energy Group, LLC*, 2017 WL 3888204 (Aug. 31, 2017) (No. 16-712).

inventions, nor is there any inherent or natural set of rights for when a patent must issue or what rights it must provide.”¹⁷⁹

Reasoning that IPR is unconstitutional because the Founding Generation understood patents as federally-created civil property rights would require an originalist reason for thinking that the Founding Generation understood the Constitution to require Article III’s protections not only for natural rights, but also for federally-created rights that have resemblance to—but not actual status as—natural property rights. Applying the Founding Generation’s Blackstonian understanding of legal rights, which at least Justice Thomas seems to have embraced, this Note concludes that, regardless of whether the Founding Generation understood patents as civil property rights or privileges, IPR passes constitutional muster as an originalist matter because the historical record does not show that the Founding Generation understood patents as natural property rights.

Finally, this Note’s conclusion—that non-Article III tribunals may cancel patent rights—does not entail that non-Article III tribunals may also adjudicate patent infringement actions. While proceedings determining patent validity do not require Article III adjudicators because the only rights at issue—patent rights—are not core private rights, patent infringement actions impinge on the core private rights of accused infringers: a patentee asserting infringement seeks to exclude the accused infringer from making, using, offering to sell, selling, and importing products.¹⁸⁰ Patent infringement actions, therefore, may implicate core private rights of liberty and property that IPR does not touch.¹⁸¹ While originalism permits executive branch patent cancellation, originalism likely still mandates judicial branch patent infringement actions.

III. LEGISLATION PROVIDES THE PROPER AVENUE FOR ACCORDING PATENTS PROTECTION AS PROPERTY RIGHTS

Many of the arguments raised against *inter partes* review “are simply irrelevant to the constitutional challenges being made.”¹⁸² These arguments primarily include complaints about the perceived unfairness “that patentees are subject to different standards of proof, presumptions, and claim construction standards” in IPR than in district courts.¹⁸³ These issues implicate “policy choices made by Congress, the Patent Office, and/or the courts, without constitutional salience under Article III.”¹⁸⁴

Even though IPR does not violate the separation of powers as a matter of precedent, and even though IPR does not violate the separation of powers as an

179. Reilly, *supra* note 9, at 404.

180. See 35 U.S.C. § 271 (2010).

181. For an argument that patent infringement suits do not require jury trials, see Lemley, *supra* note 14.

182. Reilly, *supra* note 9, at 391.

183. *Id.*

184. *Id.* at 391–92.

originalist matter, stakeholders remain free to advocate that Congress treat patents like core private rights. Mossoff has indicated that James Madison made that argument during the Founding Era by analogy to common law copyright.¹⁸⁵ Professor Richard Epstein makes it today: “Substantial gains . . . can emerge from the protection of writings and inventions” because patents constitute “a form of new property that honors the old verities that lie at the root of a common law system of property rights.”¹⁸⁶ Part IV suggests that, rather than seeking constitutional invalidation of IPR, advocates for strong patent rights can create the desired changes through legislation. As an example, this Note explains several such changes currently featured in a pending Senate bill titled the “Support Technology and Research for Our Nation’s Growth and Economic Resilience Patents Act of 2017” (STRONGER Act).¹⁸⁷

In its findings section, the STRONGER Act cites benefits of strong “patent property rights” to U.S. innovation.¹⁸⁸ Strong patents, it explains, incentivize invention, lead to medical and other technological improvements, provide business opportunities for small companies, encourage financial investment in innovation, and generate jobs.¹⁸⁹ The STRONGER Act makes major modifications to the IPR scheme, including modifications with regard to claim construction, burden of proof, standing, initiation of review by the director, reviewability of institution decisions, parallel proceedings, and relationship to federal court validity determinations.¹⁹⁰ If passed, this bill would remove several of the features of IPR that critics view as weakening patent rights.

First, the STRONGER Act would harmonize the PTAB’s claim construction standard with the *Phillips* standard employed in federal courts by requiring the PTAB to construe each challenged claim in accordance with “the ordinary and customary meaning of the claim as understood by a person having ordinary skill in the art to which the claimed invention pertains,” and “the prosecution history pertaining to the patent.”¹⁹¹ This measure would replace the PTAB’s “broadest reasonable interpretation” standard blessed by the Supreme Court in *Cuozzo*, which renders patent claims more vulnerable to invalidation by IPR.¹⁹² Further, for claims already construed in civil actions involving the patent owner, the STRONGER Act would require the PTAB to consider claim constructions

185. Mossoff, *supra* note 155, at 981 (arguing that “the fulcrum of the justification of patents in The Federalist No. 43 is Madison’s claim that patents are justified ‘with equal reason’ as common law copyrights”).

186. Richard A. Epstein, *No New Property*, 56 BROOK. L. REV. 747, 756 (1990).

187. Support Technology and Research for Our Nation’s Growth and Economic Resilience Patents Act of 2017 (the “STRONGER Patents Act of 2017”), S. 1390, 115th Cong. (2017).

188. *Id.* § 101.

189. *Id.*

190. *See id.* §§ 101–02.

191. *Id.* § 102. For the Federal Circuit’s claim construction standard, see *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312–13 (Fed. Cir. 2005).

192. *See Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2142 (2016).

already made by courts—a change that would likely have saved the patent at issue in *Oil States* from invalidation during the PTAB proceeding below.¹⁹³

Second, the STRONGER Act harmonizes evidentiary standards between the federal courts and the PTAB. While federal courts accord patent claims a presumption of validity and assess validity under a clear and convincing evidence standard, the PTAB does not. Instead, the PTAB assesses validity under a preponderance of the evidence framework—making patents more vulnerable to invalidation by IPR.¹⁹⁴ The STRONGER Act requires the PTAB to accord claims the presumption of validity, and imposes a clear and convincing evidence standard—imposing a higher evidentiary bar on challengers seeking to invalidate patents.¹⁹⁵ The Act additionally narrows the PTAB’s standing requirements so that only a person sued for or charged with infringement of the patent, or a real party in interest or privity with that person, may challenge a patent by filing an IPR—making patents less vulnerable to repeated attack.¹⁹⁶

The STRONGER Act includes several other measures that lessen the likelihood that a given patent will have to endure serial IPR attacks. For example, the Act precludes the USPTO Director from instituting an IPR for a claim already challenged in a previously instituted IPR, and makes determinations to not institute an IPR final and non-appealable.¹⁹⁷ The Act additionally prevents petitioners from subsequently filing IPRs on grounds they “raised or reasonably could have raised” in a previous IPR, unless a patent owner charges the petitioner with infringing additional patent claims since the first IPR.¹⁹⁸ Further, the Act classifies the real party in interest as any person that makes a financial contribution to the IPR on behalf of the petitioner, estopping such contributors from subsequently filing their own IPRs.¹⁹⁹ The proposed STRONGER Act legislation, or similar future iterations, provides a way for advocates of strong patent property protections to secure them—albeit without constitutional necessity.

CONCLUSION

Both precedent and originalism permit executive branch patent cancellation. Because *inter partes* review claims concern federally-created rights and qualify as claims integrally related to an expert government agency’s limited regulatory objective, IPR comports with the Court’s current conception of the “public rights” exception. Because historical sources counsel against categorizing patents as one of the “core private rights” that the Founding Generation instituted the independent judiciary to protect, IPR comports with the originalist framework.

193. See Brief for Petitioner at 12–13, *Oil States Energy Servs., LLC v. Greene’s Energy Group, LLC*, No. 16-712 (2017) (citing *Oil States* IPR Paper 52, *supra* note 88, at 14–15).

194. See *Cuozzo*, 136 S. Ct. at 2142.

195. See S. 1390, 115th Cong. § 102 (2017).

196. See *id.*

197. *Id.*

198. *Id.*

199. *Id.*

Evidence that the Founding Generation understood patents as privileges indicates that patents do not constitute “core private rights,” and the alternative “civil property rights” thesis—even if true—does not make the necessary “core private rights” showing either. While the Founding Generation may have seen a resemblance between patent rights and natural rights, the Founding Generation did not actually understand patents as natural rights. If the Supreme Court upholds IPR, as this Note asserts it should, stakeholders may freely persuade Congress that patents deserve the same protections afforded natural property rights rather than the death penalty.