
Pointless IP

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ABSTRACT. This Essay examines the recent rise of originalist and textualist methods of analysis in the Supreme Court’s intellectual-property jurisprudence. The features and failures of these methods are examined by analyzing their application by the Court within three areas of intellectual-property law. In all three areas, originalism and textualism have led to perplexing and unsatisfactory results.

This trend is grounded in the two methods’ broader deficiencies. Originalism and textualism are attempts to find constraint in the law within a modernist setting in which traditional foundations of objective knowledge and authority have been undermined. Both methods are based on reification, the misguided treatment of either concepts or social relations—both of which are inherently dynamic and human-constructed—as inert objects or things in the world. By treating dynamic legal relations and concepts as objects, originalism and textualism detach the law from purpose, and therefore from both the social reality it is supposed to govern and the human goals it is designed to serve. The failure of legal reification is especially visible in the area of intellectual property because of the intense dynamism of this field. This is due to the fact that intellectual property is the embodiment, in law, of the hyperdynamism of technological innovation that is inherent to capitalism.

Consequently, intellectual-property law functions as a canary in a coal mine. This particular legal field dramatically exposes the inadequacies of originalism and textualism more generally. Addressing these inadequacies requires an alternative, dynamic jurisprudence based on purpose, both in the field of intellectual property and elsewhere in the law.

INTRODUCTION

Intellectual-property doctrine has taken a revanchist turn. Recent intellectual-property cases in the Supreme Court—particularly, those at the intersection of intellectual-property and constitutional law—have relied on originalism to divine authoritative meaning from this nation’s history and tradition of

intellectual-property law.¹ Some lower courts are beginning to follow suit.² Meanwhile, the Supreme Court has embraced originalism's cousin, textualism, which attempts to extract meaning from plain text alone, in some of its intellectual-property decisions over the last decade and a half.³ Alongside these pure instances of originalism and textualism, other major intellectual-property cases have combined elements from both methods in subtler ways, too.⁴ What all these cases have in common might be called a “jurisprudence of stasis”: a legal method based on a search for fixed and stable meaning of intellectual-property concepts and rules, whether in some focal point in the past or in some textual essence.

This Essay analyzes this “static” turn in intellectual-property jurisprudence through three sets of recent Supreme Court cases that reveal the growth and harm of this trend. The argument is fourfold. First, the jurisprudence of stasis is part of a search for stable foundations for legal knowledge in a modernist world where all consensually shared traditional epistemological and metaphysical foundations have lost their power. Second, the search for fixed legal meaning in either history or text leads to reification—the misconception that legal *relations* and legal *concepts*, which are both inherently dynamic, are instead unchanging and inert.⁵ Third, while originalism and textualism are untenable in general exactly because they reify what is dynamic and ever-developing, they are conspicuously inadequate in the field of intellectual property, where they often lead to manifestly unsatisfactory results. Originalist and textualist reasoning in intellectual-property law provides a glaring example of pointless and harmful reification, because intellectual-property doctrine is the embodiment, in legal relations, of the hyperdynamism of technology in a capitalist society. The rigidities of static jurisprudence visibly break asunder when they encounter the inherent dynamism of intellectual property. Fourth, the clear failures of the use of static

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1. See *infra* Section II.A. Since *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 584 U.S. 325 (2018), discussed *infra*, originalism has continued to emerge in recent intellectual-property cases. See, for example, *Vidal v. Elster*, 602 U.S. 286, 296–99 (2024), which analyzes the history of content-based restrictions on trademarks to determine their potential conflict with the First Amendment.
 2. For example, some jurists have applied a soft originalist perspective to analyze questions at the intersection of Article III standing doctrine and intellectual property within the context of claims based on the Digital Millennium Copyright Act. See *Raw Story Media, Inc. v. OpenAI, Inc.*, 756 F. Supp. 3d 1, 6 (S.D.N.Y. 2024); *Intercept Media, Inc. v. OpenAI, Inc.*, 767 F. Supp. 3d 18, 26–27 (S.D.N.Y. 2025).
 3. See *infra* Sections II.B.
 4. See *infra* Section II.C.
 5. See Talha Syed, *Legal Realism and CLS from an LPE Perspective* 23 (Oct. 13, 2023) (unpublished manuscript), <https://ssrn.com/abstract=4601701> [<https://perma.cc/2FVK-8MXJ>] (developing a “*dereification critique* of legal reasoning” (emphasis added)).

jurisprudence within intellectual-property law expose the failures of originalism and textualism more generally and highlight the need for a better alternative: a legal method that dynamically elaborates legal concepts in light of their purpose.

Part I of this Essay provides a brief primer on the distinctive attributes of intellectual-property law. Part II discusses three clusters of Supreme Court cases that embody the recent rise of originalism and textualism in this field – notably, regarding patent and copyright law – as well as these cases’ analytic deficiencies and unfortunate results. Part III analyzes the clash between these analytic methods’ reifying strategies and the animating, dynamic purpose of intellectual-property law, and of law more generally. The Conclusion summarizes the defects of the originalist and textualist turn in intellectual property and offers a preliminary sketch of a purpose-based alternative to it.

I. A HITCHHIKER’S GUIDE TO INTELLECTUAL PROPERTY

Intellectual-property law, like standard property law, governs the social relations between people with respect to various external objects or resources.⁶ These relations consist not of one monolithic form, but of bundles of entitlements that are structured out of four basic building blocks: privileges to use, rights to exclude, immunities from expropriation, and powers to transfer.⁷ The field of intellectual property is distinguished within broader property law in that these relations apply to intangible information goods.⁸ Such goods possess distinctive features that interact with various human interests in a different way from tangible goods. These differences require a distinctive structure of legal governance, in terms of common general principles of intellectual-property law and variations within subfields of intellectual property, based on the distinctive types of information goods they govern.

Three features of information goods play a primary role in unifying the field and distinguishing its features from standard property law: nonrivalry,

6. See Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 20-28 (1913); Anna di Robilant & Talha Syed, *Property’s Building Blocks: Hohfeld in Europe and Beyond*, in WESLEY HOHFELD A CENTURY LATER: EDITED WORK, SELECT PERSONAL PAPERS, AND ORIGINAL COMMENTARIES 223, 225 (Shyamkrishna Balganes, Ted M. Sichelman & Henry E. Smith eds., 2022).

7. di Robilant & Syed, *supra* note 6, at 253. As di Robilant and Syed emphasize, while these building blocks furnish the basic conceptual elements out of which all property architectures are generated, this does not imply any prejudgment as to the existence or shape of any particular entitlement for any given resource – this being a matter of substantive legal-policy analysis sensitive to context and purpose. *Id.* at 239.

8. See Yochai Benkler, *Intellectual Property and the Organization of Information Production*, 22 INT’L REV. L. & ECON. 81, 81-82 (2002); Talha Syed, *Reconstructing Patent Eligibility*, 70 AM. U. L. REV. 1937, 1949 (2021).

nonexcludability, and lack of physical boundaries. Nonrivalry means that the use of a resource by one does not subtract from the like use of the same resource by another.⁹ The upshot of nonrivalry is that the most basic purpose of property law—to govern conflicting desires to use a resource—is largely an absent concern.¹⁰

Nonexcludability means that it is difficult to provide access to a resource to some while preventing access by others.¹¹ This feature of information goods often leads to a low appropriability rate, meaning that creators of such goods can internalize only a small fraction of their social value. This low appropriability rate is the root of various normative problems—most prominently, a difficulty in recouping the cost of creation—that intellectual-property law seeks to address. Such an inability to recoup the costs of creating an information good (incurred, for example, through research and development of an invention, or the expense of producing a motion picture) can lead to underproduction and inequitable compensation to those who create these goods through their effort.¹²

Intellectual property is one strategy for confronting these normative problems. This strategy is based on granting the creators of information goods the legal right to exclude others from using these goods in certain ways. Intellectual-property rights are market-based mechanisms: the legal right to exclude others empowers producers to charge marked-up market prices for information goods and thereby appropriate a greater share of their social value.¹³ The various downsides or “costs” of this rights-based strategy emerge from the fact that the right to exclude inherently compromises the advantages of nonrivalry. These downsides include restrictions on access and use of information goods by both

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9. See RICHARD CORNES & TODD SANDLER, *THE THEORY OF EXTERNALITIES, PUBLIC GOODS AND CLUB GOODS* 8 (2d ed. 1996); Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in NAT'L BUREAU OF ECON. RSCH., *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS* 609, 615 (1962).
 10. Oren Bracha, *Give Us Back Our Tragedy: Nonrivalry in Intellectual Property Law and Policy*, 19 THEORETICAL INQUIRIES L. 633, 638 (2018). This fundamental point is (unsuccessfully) resisted by so called “ex post” theories of intellectual property, whose project is to reintegrate intellectual-property law into standard property theory. See Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J.L. & ECON. 265, 265 (1977); Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 130-32 (2004) (discussing “ex post” theories of intellectual property); see also Bracha, *supra*, at 658-66 (critiquing “ex post” theories’ attempts to deny or bypass nonrivalry of information goods).
 11. See Amy Kapczynski & Talha Syed, *The Continuum of Excludability and the Limits of Patents*, 122 YALE L.J. 1900, 1909 (2013).
 12. Oren Bracha & Talha Syed, *Beyond the Incentive-Access Paradigm? Product Differentiation & Copyright Revisited*, 92 TEX. L. REV. 1841, 1850 (2014) (explaining the appropriability problem related to information goods).
 13. *Id.* at 1852 (describing how intellectual property achieves its purposes by creating pricing power).

consumers and downstream innovators; wasteful races to develop similar innovations triggered by the rents held out by intellectual-property rights; and distortive diversion of investment into protectable information goods and away from other useful social activities whose rate of return is lower than that created by these rents.¹⁴ Put another way, intellectual-property rights sacrifice one of the most attractive features of information goods—nonrivalry—to encourage the creation of these goods in the first place.¹⁵

Information goods' lack of physical boundaries adds another distinctive feature of intellectual-property law. It complicates the ability to craft, manage, and enforce the scope of the rights that the law confers.¹⁶ Unlike property rights in tangible resources, the scope of intellectual-property rights cannot be drawn by reference to physical boundaries of objects, which triggers various alternative legal strategies for doing so that involve their own unique challenges.¹⁷

Just as these aspects of information goods make intellectual property a distinctive legal field, they also shape its internal structural divisions. The various subfields of intellectual property govern different information goods that implicate and interact with various human interests. These subfields, therefore, require different institutional arrangements—or different crafting of the entitlement building blocks of property. The two oldest and most important subfields of intellectual property, to which the cases discussed in this Essay pertain, are patents and copyright.¹⁸ The distinctive information good at the heart of patent law is knowledge of applied technological innovations (inventions), while the focus of copyright is expressive forms (works of authorship).¹⁹

14. See Talha Syed, *Does Pharma Need Patents?*, 134 YALE L.J. 2038, 2057–58 (2025).

15. See Bracha & Syed, *supra* note 12, at 1850.

16. See ALAIN POTTAGE & BRAD SHERMAN, FIGURES OF INVENTION: A HISTORY OF MODERN PATENT LAW 7–11 (2010); Michael J. Madison, *IP Things as Boundary Objects: The Case of the Copyright Work*, 6 LAWS 1, 18 (2017).

17. See Jeanne C. Fromer, *Claiming Intellectual Property*, 76 U. CHI. L. REV. 719, 726–29 (2009) (describing alternative strategies for drawing the scope of property rights in intangible goods through different modes of claiming). While property rights can be drawn with *reference* to the physical boundaries of objects, it is important to emphasize that these objects' boundaries do not automatically or “naturally” determine the scope of the property rights in the objects. This premise is the fallacy of “physicalism.” The scope of a property right is, in all cases, a normative inquiry based on conflicting human interests and the way they interact with the relevant resources. Nevertheless, depending on normative aims, physical boundaries can still serve as a useful reference with respect to which to define the scope of such rights.

18. For an explanation of how the different features of the information goods that are the objects of different intellectual-property rights play a central role in shaping the desired features of these rights, see Syed, *supra* note 8, at 2033–35.

19. See 35 U.S.C. § 101 (2024); 17 U.S.C. § 102(a) (2024).

Intellectual property is a distinctively modern institutional form. Although its exact beginning date is disputed, the earliest forms of intellectual property—patents and copyright—started assuming their modern form, as individual property rights conferred on producers, only about four hundred years ago.²⁰ These initial forms of intellectual property—forms that were early shifts toward creators’ universal property rights in information—developed gradually out of earlier and very different institutional arrangements, namely, ad hoc commercial privileges.²¹

The eighteenth century was an especially important period in the early break of intellectual property from its premodern antecedents, and its consolidation into distinct legal subfields organized around embryonic concepts of property rights.²² The nineteenth century was an even more fundamentally formative period, during which intellectual-property regimes gradually developed many of the constitutive elements of their modern form as full-fledged universal property rights in commodified information.²³

The discerning reader may have noticed the overlap of this periodization—an early break with traditional institutional forms in the eighteenth century, followed by a formative period in the nineteenth of fuller elaboration and spread—with that of the history of capitalism. This overlap is no coincidence. Intellectual property simply *is* a part of capitalism—that is, an ensemble of social relations distinctive of modernity.²⁴ At capitalism’s heart are generalized markets: the dependence of all human needs on market exchange and the subjection of increasing spheres of social life to market relations.²⁵ The constitutive unit of this system of social relations is the commodity form: the treatment of all human goods as objects of market exchange, reducible to an abstract and uniform measure of market value.²⁶ Intellectual property is this commodity form applied to

20. See, e.g., Max Frumkin, *The Origin of Patents*, 27 J. PAT. OFF. SOC’Y 143, 144–46 (1945); JOSEPH LOEWENSTEIN, *THE AUTHOR’S DUE: PRINTING AND THE PREHISTORY OF COPYRIGHT* 39–40 (2002).

21. For a survey of the extensive literature, see OREN BRACHA, *OWNING IDEAS: THE INTELLECTUAL ORIGINS OF AMERICAN INTELLECTUAL PROPERTY, 1790–1909*, at 12–47 (2016).

22. *Id.* at 3.

23. *Id.*

24. See ELLEN MEIKSINS WOOD, *THE ORIGIN OF CAPITALISM: A LONGER VIEW* 3 (1999); see also Talha Syed, *Law and the Critique of Political Economy*, BALKINIZATION (Sep. 26, 2024), <https://balkin.blogspot.com/2024/09/law-and-critique-of-political-economy.html> [<https://perma.cc/T34F-XH9P>] (describing the aim of the critique of political economy as explaining the “historically-specific social relations of capital” (emphasis added)).

25. SØREN MAU, *MUTE COMPULSION: A MARXIST THEORY OF THE ECONOMIC POWER OF CAPITAL* 13 (2023).

26. See 1 KARL MARX, *CAPITAL* 125 (Ben Fowkes trans., Penguin Books 1990) (1867).

information.²⁷ That is, the rise of intellectual property was an extension of the commodity form to the domain of information. This extension happened not only with respect to consumer information goods, but on the structural level as a constitutive unit—“the capital of the mind”—in the basic infrastructure of the economy and business organization.²⁸

Thus, it is not surprising that the nineteenth century, which was a crucial transformative period in the rise of industrial capitalism, was also a period of formative change in intellectual property. Because contemporary intellectual property is the embodiment of capitalism in the information sphere, just as capitalist social relations are constantly evolving (while retaining their distinctive character), intellectual property is marked by the same dynamism.²⁹ Before I return to intellectual property’s inherent dynamism in Part III, I now turn to how the jurisprudence of stasis has recently plagued intellectual-property law in the Court.

II. THREE CASE STUDIES: STATIC INTELLECTUAL-PROPERTY JURISPRUDENCE

Three lines of recent Supreme Court cases demonstrate the different facets of the jurisprudence of stasis in intellectual property and its failures, both analytic and substantive. First, *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC* is a classically originalist decision.³⁰ Both the majority and the dissent answer the question of whether it is constitutional to administratively review the validity of issued patent rights based on the assumption that these rights have a stable public meaning traceable to the Founding Era.³¹ Second, *Star Athletica, LLC v. Varsity Brands, Inc.*, an exemplar of a strict textualist approach to statutory interpretation, attempts to craft a formal legal framework for copy-rightability of the design of “useful articles” based entirely on a handful of words within the relevant statute.³² Finally, the *Bilski* trio,³³ a group of patent-subject-

27. See Oren Bracha, *The History of Intellectual Property as the History of Capitalism*, 71 CASE W. RES. L. REV. 547, 574 (2020).

28. Michael Zakim, *Intellectual Property in the Age of Capital*, 12 THEORETICAL INQUIRIES L.F. 6, 7 (2011); Bracha, *supra* note 27, at 574–81.

29. See *infra* Section IV.B.

30. 584 U.S. 325 (2018).

31. See *id.* at 340–42; *id.* at 346 (Gorsuch, J., dissenting).

32. See 580 U.S. 405, 414–15 (2017).

33. *Bilski v. Kappos*, 561 U.S. 593 (2010); *Mayo Collaborative Servs. v. Prometheus Lab’ys, Inc.*, 566 U.S. 66 (2012); *Alice Corp. v. CLS Bank Int’l*, 573 U.S. 208 (2014); see also *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576 (2013) (providing a patent-eligibility analysis of the same crop, albeit not discussed in detail here).

matter-eligibility cases, is neither strictly originalist nor textualist but instead embodies a softer, blended version of the two. In the trio, the Court crafts a test for unpatentable subject matter based on an assumption that central concepts in patent law are self-explanatory, with meanings that are fixed by stable historical practice. Together, the cases in this Part illustrate the distinctive features of the jurisprudence of stasis in intellectual property: a search for objective constraints in judicial decision-making, an assumption of inert stability both chronologically and semantically, and an adamant determination to ignore the purpose of the law. They also reveal this jurisprudence's unfortunate result: the development of convoluted and seemingly pointless doctrines that are, in practice, unworkable.

Before proceeding, a brief clarification is necessary. In the analysis below, I use the terms originalism and textualism in a loose and generic sense without differentiating the many varieties of each method.³⁴ This approach is in line with the Court's own tendencies in the cases discussed, where little heed is often paid to these distinctions.³⁵ More importantly, my critique of these methods is aimed not at their specific technical features, but at their general assumptions about the law that are shared widely across their different variants.

A. *Institutions: Administrative Patent Review Through an Originalist Lens*

In *Oil States*, the Court reviewed the constitutionality of inter partes review of issued patents.³⁶ Inter partes review is an administrative procedure that was enacted by a 2011 amendment to the Patent Act.³⁷ It allows third parties to challenge the validity of issued patents and seek revocation of the patentee's rights after they have been granted, based on a limited number of grounds.³⁸ Inter

34. See, e.g., Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 3-12, 26-30 (2015) (discussing different variants of originalism); Jack M. Balkin, *Arguing About the Constitution: The Topics in Constitutional Interpretation*, 33 CONST. COMMENT. 145, 194-200 (2018) (same); Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 279-90 (2020) (discussing different variants of textualism).

35. For example, while the dissent in *Oil States* does invoke "original public meaning," 584 U.S. at 348 (Gorsuch, J., dissenting), the majority relies on an eclectic collection of indications from history and tradition without specifying which original understanding they are supposed to support, whether the Founders' intent, ordinary public meaning in the Founding Era, or some other form of understanding. See *id.* at 340-42. Similarly, all three opinions in *Star Athletica* either expressly claim or silently assume that the relevant legal test can be directly derived solely from the statute's text, without explaining what specific variant of textualism they subscribe to or why. See *infra* text accompanying notes 91-112.

36. *Oil States*, 584 U.S. at 328-29.

37. Leahy-Smith America Invents Act, Pub. L. No. 112-29 §§ 311-319, 125 Stat. 284, 299-305 (2011) (codified as amended at 35 U.S.C. §§ 311-319 (2024)).

38. 35 U.S.C. § 311(b) (2024).

partes reviews are conducted by a quasi-judicial administrative tribunal called the Patent Trial and Appeals Board, members of which are appointed by the Secretary of Commerce.³⁹ This administrative postgrant patent review is one of several procedures Congress has enacted in order to streamline patent litigation, lower the cost of challenging potentially invalid patents, avoid flooding the courts with highly technical cases, and address related, substantive patent policy concerns.⁴⁰ These procedures have also been controversial among many patentees, who claim that the administrative regime is biased against them.⁴¹

The appellant in *Oil States* argued that because inter partes review grants judicial power to non-Article III judges, this form of adjudication is not only biased but unconstitutional.⁴² This challenge required the Court to determine where the patent lay within the binary distinction of the constitutional doctrine of public and private rights. If patents were “private rights,” then their grant and revocation needed to be adjudicated by Article III courts. If, on the other hand, they were “public rights,” Congress could entrust their adjudication to other institutions.⁴³ Strikingly, while the dissent and the majority were in sharp disagreement about the patent right’s nature, both employed a common originalist framework to argue that the nature of the right was determined and fixed two and a half centuries ago.

The majority opinion, written by Justice Thomas, found inter partes review to be a matter of public rights. The opinion relied on the assumption that patent rights have been stable in nature throughout their history. For the *Oil States*

39. *Id.* § 6(b)-(d).

40. See CONG. RSCH. SERV., R44905, INTER PARTES REVIEW OF PATENTS: INNOVATION ISSUES 4, 19-20 (2017) (describing that USPTO’s administrative process, with thousands of patent examiners, leads to few litigated patents and allows the office to focus attention on particularly challenging or significant patents).

41. *Id.* at 20 (providing examples of common patentees’ critiques, such as a “heavily slanted administrative regime,” and the associated costs and time to defend against challenges).

42. *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 584 U.S. 325, 333 (2018). The appellant in *Oil States* also argued that inter partes review violates the Seventh Amendment right to a trial by jury. However, the analysis of this argument was treated as subsidiary to the Article III question, because “when Congress properly assigns a matter to adjudication in a non-Article III tribunal, the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.” *Id.* at 344-45.

43. *Id.* at 334 (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)). The substantive distinction between public and private rights is hazy. Indeed, in *Oil States* the Court itself observed that “[t]his Court has not ‘definitively explained’ the distinction between public and private rights . . . and its precedents applying the public-rights doctrine have ‘not been entirely consistent.’” *Id.* (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 (1982)). It went on to argue, however, that the distinction did not require further clarification for purposes of this decision because inter partes review “falls squarely within the public-rights doctrine.” *Id.*

majority, patents have always been a “grant of a public franchise” and therefore “a matter between ‘the public, who are the grantors, and . . . the patentee.’”⁴⁴ Thomas traced this purportedly inherent nature of patent rights back to the Founding era and, even earlier, to the power of the Privy Council in England to revoke patents.⁴⁵ Since the Crown’s power to revoke patents was “a prominent feature of the English system,” the opinion explains, “it was well understood at the Founding that a patent system could include a practice of granting patents subject to potential cancellation in the executive proceeding of the Privy Council.”⁴⁶ This original understanding of the right, to the majority, established that matters relating to patent grants “‘from their nature’ can be resolved in multiple ways,” including by administrative proceedings outside of Article III courts.⁴⁷

The *Oil States* dissent, written by Justice Gorsuch, provides a mirror image of the majority opinion: the method of analysis is identical, but history itself is reversed. The dissent states that “[t]he Constitution’s original public meaning supplies the key” for distinguishing private and public rights and avers that this public meaning was fully formed by the time of the Founding.⁴⁸ The only thing that flips is that meaning itself. In Gorsuch’s history, while patents had begun as “little more than feudal favors,” both freely issued and freely revokable by the Crown, by the end of the eighteenth century, they had come to be viewed “as a procompetitive means to secure to individuals the fruits of their labor and ingenuity.”⁴⁹ Crown involvement and Privy Council revocation with respect to these private rights had dissolved.⁵⁰ Consequently, American patentees “were thought to ‘hol[d] a property in [their] invention[s] by as good a title as the farmer holds his farm and flock.’”⁵¹ As a result, “it was widely accepted that the government could divest patent owners of their rights only through proceedings before independent judges.”⁵² In the dissent’s telling of the history, the idea that issued

44. *Id.* at 335 (quoting *United States v. Duell*, 172 U.S. 576, 582–83 (1899)).

45. *Id.* at 340–41. The Privy Council was at the time the main advisor to the Crown and was charged with managing many affairs related to the royal prerogative. Thus, in modern terms, the Privy Council was part of the Executive and its power to revoke patents was exercised by the executive branch. See generally E. Wyndham Hulme, *Privy Council Law and Practice of Letters Patent for Invention from the Restoration to 1794*, 33 L.Q. REV. 63 (1917) (discussing the role of the Privy Council in early English patent practice by examining the historical records).

46. *Oil States*, 584 U.S. at 341.

47. *Id.* at 342 (quoting *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929)).

48. *Id.* at 348 (Gorsuch, J., dissenting).

49. *Id.* at 350.

50. *Id.* at 351–52.

51. *Id.* at 353 (quoting *Hovey v. Henry*, 12 F. Cas. 603, 604 (C.C.D. Mass. 1846) (No. 6742)) (alterations in original).

52. *Id.*

patents were private property rights, reviewable by courts alone, was set in stone at the Founding and has “held firm for most of our history.”⁵³ The vise-like strength of this history renders administrative revocation of patent rights a violation of the Constitution, as understood both in 1787 and today.

The two historical accounts are so diametrically opposed that one of them must be wrong. In fact, they both are. The majority and dissent alike present distorted visions of the historical development of patents produced by a shared house of mirrors. Far from having a settled institutional form, patents were in a state of deep flux at the end of the eighteenth century. Far from a period of stability, the nineteenth century was a period of profound change for patents.

The emergence of the modern patent from the beginning of the seventeenth century to the end of the nineteenth century was in line with a historical process that Karl Polanyi described as “The Great Transformation”; in this case, specifically, the transformation was of privileges into universal legal rights.⁵⁴ Historically, patents were privileges—granted for a range of subject matter, including, but not limited to, technological innovations—and granting them was an overtly political act. The Crown exercised its discretionary and plenary power to confer on specific individuals these tailored monopolies (as well as other privileges), justifying them through ad hoc judgments that the privileges would promote the public good.⁵⁵ During the political upheavals of the seventeenth century in England, the common law and the 1624 Statute of Monopolies placed restrictions on the royal prerogative to issue such grants and began differentiating invention patents as a distinct category of royal monopoly grants.⁵⁶ However, notwithstanding de facto trends of standardization, the basic institutional form

53. *Id.*

54. See KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 71-157, 231-34 (Beacon Press 2d ed. 2001) (1944); Oren Bracha, *The Commodification of Patents 1600-1836: How Patents Became Rights and Why We Should Care*, 38 *LOY. L.A. L. REV.* 177, 180 (2004) (discussing patents’ transformation from privileges into rights).

55. See Bracha, *supra* note 54, at 183-91.

56. See Statute of Monopolies 1623, 21 Jac. 1 c. 3; see also Bracha, *supra* note 54, at 194-200 (explaining the structure of the Statute of Monopolies and the early common law relating to patent grants). The “political upheavals” referred to are the struggle between the monarchy and Parliament, which represented the interests of the newly rising bourgeoisie; the ensuing English Civil War; and the social disruptions that came with them. The aspect of these events most relevant for the transformation of patents was the gradual decline of an absolutist view of monarchic power and the rise of a new ideological position that subjected the Crown to constraints and established rights for members of the middle class. See MARK KISHLANSKY, *A MONARCHY TRANSFORMED: BRITAIN 1603-1714*, at 98-100 (1996); HAROLD G. FOX, *MONOPOLIES AND PATENTS: A STUDY OF THE HISTORY AND FUTURE OF THE PATENT MONOPOLY* 92-112 (1947).

of patent grants as privileges persisted.⁵⁷ The American colonies continued in this tradition, developing their own variant of ad hoc legislative privilege grants for technological inventions.⁵⁸ After American independence, the same institutional form persisted on the state level, even as a new ideological justification for patents as property rights that encourage economic productivity began to take hold.⁵⁹

Thus, the first federal patent regime emerged at a time of flux.⁶⁰ Bureaucratic inertia drifted toward standardization, and ideological appeals to property rights gathered force, but patents remained privilege grants. The early U.S. patent system reflected this fluidity. The Intellectual Property Clause of the Constitution, while referring to the rights of inventors, did not create patent rights but simply conferred power on Congress and demarcated its limits.⁶¹ The first patent regime, created by statute in 1790, was a generalized republican version of the familiar privilege system in which Americans were steeped.⁶² Some today still anachronistically describe this 1790 regime as having been an examination system, in which applicants were entitled to a patent as a matter of right once a bureaucratic arm of the state examined and certified that the invention satisfied a uniform set of requirements.⁶³ In reality, the 1790 statutory scheme followed the traditional privilege pattern by vesting the so-called “Patent Board” with plenary and discretionary power to issue patents when it judged that such grants would serve the public good, as long as certain obligatory requirements, such as novelty of the invention and its proper disclosure in writing, were satisfied.⁶⁴

The privilege scheme fell out of favor only gradually. Initially, this happened through a steadily widening rift between the formal legal scheme and actual practice. During the short, three-year life of the first patent regime, practical and ideological pressures pushed practice toward standardization.⁶⁵ Despite its

57. While patents formally remained ad hoc privilege grants, in practice, their terms as well as the circumstances under which they were granted grew increasingly uniform. Bracha, *supra* note 54, at 201.

58. See BRACHA, *supra* note 21, at 25-28.

59. *Id.* at 28-31.

60. See BRACHA, *supra* note 21, at 49-51.

61. U.S. CONST. art. I, § 8, cl. 8; BRACHA, *supra* note 21, at 50.

62. See Patent Act of 1790, ch. 7, 1 Stat. 109 (repealed 1793); Bracha, *supra* note 54, at 222.

63. Bracha, *supra* note 27, at 559-61.

64. *Id.* at 561; Bracha, *supra* note 54, at 219 n.245, 221-22.

65. Kara W. Swanson, *Making Patents: Patent Administration, 1790-1860*, 71 CASE W. RES. L. REV. 777, 785-92 (2020) (describing the evolution of patent-board practices from 1790 to 1793). Swanson notes that, despite “limited information available” from the period, “there are hints that Jefferson and his colleagues . . . began to develop practices nudging the discretionary privilege model of patents toward something more like rights.” *Id.* at 785-86.

plenary power, the Board's actual work quickly evolved to focus on ascertaining the standard legal requirements for patentability, such as the novelty of the invention, rather than evaluating the social impact of specific inventions.⁶⁶ It was a period of deep institutional ambiguity: while the formal regime was still rooted in the privilege tradition, the actual practice of the Board was shifting toward a rights framework.⁶⁷

This gradual shift explains what some commentators see as a “strange” development following the rapid collapse of the 1790 regime.⁶⁸ Beginning in 1793, when a new statute eliminated the Board, and for almost a half century afterward, the United States moved to a registration system under which patents were issued on demand, subject only to the satisfaction of minimal formalities.⁶⁹ In this system, the center of gravity for determining the validity of patent grants migrated to the courts. These institutions tended to impose greater standardization and focus on certifying substantive patentability requirements, rather than evaluating the social value of inventions. Nevertheless, even during this period, the process of change was gradual. It involved competing approaches of some judges who saw their role as limited to certifying that the requirements for the issuance of a patent as a matter of right were met, and of others who still echoed the privilege understanding of patents by reviewing the social value of the inventions they covered.⁷⁰ Thus, the registration era was, in fact, not a strange anomaly, but an intermediary stage in the transition of patents from ad hoc privileges to universal rights.⁷¹

The 1836 Patent Act, which created the nation's first real examination system, was a crucial moment in this process.⁷² The new regime marked a clearer shift toward a patent-rights framework. This system was born out of Jacksonian hostility to special privileges and a congressional conviction that there was “no better way of measuring out appropriate rewards for useful inventions, than, by a general law, to secure to all descriptions of persons, without discrimination, the exclusive use and sale, for a given period, of the thing invented.”⁷³ Through this

66. Bracha, *supra* note 54, at 225-26.

67. *Id.* at 226-27.

68. Frank D. Prager, *Examination of Inventions from the Middle Ages to 1836*, 46 J. PAT. OFF. SOC'Y 268, 289 (1964).

69. See Patent Act of 1793, ch. 11, 1 Stat. 318 (repealed 1836).

70. Bracha, *supra* note 54, at 229-35.

71. See Bracha, *supra* note 27, at 562.

72. Patent Act of 1836, ch. 357, 5 Stat. 117.

73. JOHN RUGGLES, SELECT COMMITTEE REPORT ON THE STATE AND CONDITION OF THE PATENT OFFICE, S. DOC. NO. 24-338 (1836), reprinted in *1836 Senate Committee Report*, 18 J. PAT. OFF. SOC'Y 853, 855 (1936).

rising formal-equality understanding, patents fully became rights in the modern sense: standard entitlements conferred universally upon satisfaction of uniform conditions and leaving all evaluation of social value to markets.⁷⁴ However, this shift did not entail eliminating the Executive's involvement in patent grants. On the contrary, the 1836 Act created the Patent Office as a subdivision of the State Department, with a corps of examiners and a fixed procedure, an early harbinger of the administrative state.⁷⁵

Even more fundamentally, on the conceptual level, the full transformation of patents into rights and their growing bureaucratization went hand in hand. As a staunch supporter of this new outlook explained in the magazine *Scientific American* in 1852, "Give us broad, just, and workable laws . . . none of your special systems, where favors are sought for and obtained by particular parties in a particular manner."⁷⁶ The goal of bureaucratic examination was to produce exactly such universal rights through an administrative system in which "[w]e care not who the applicant is, let him be Jew or Gentile" — a system that certifies standard requirements, generates secure titles, and puts all on formally equal footing to obtain their reward through the market.⁷⁷

By the end of the nineteenth century, the conversion of patents into property rights was complete, and all traces of the old privilege system were gone. However, far from declining, the patent bureaucracy expanded, and its central role became integral to the new practice and concept of patents as rights. The volume of applications that the Patent Office handled multiplied, necessitating rapid growth.⁷⁸ Increasingly, the Office hired legal professionals and formalized its procedures.⁷⁹ Patent jurisprudence came to be focused on the text of the claims in patent documents, which delimited the conferred rights.⁸⁰ The bureaucratic process of producing these texts through interaction between examiners and professional drafters of claims came to be seen as a core feature of the patent property system: a process of bureaucratic rationality based on "accuracy,

74. Bracha, *supra* note 54, at 239.

75. Patent Act of 1836, ch. 357, § 7, 5 Stat. 117, 119–20; see BRACHA, *supra* note 21, at 209–10.

76. *Government Reward for Discoveries*, SCI. AM., Mar 27, 1852, at 221.

77. *Patent Office, and Reform of the Patent Laws*, SCI. AM., June 22, 1850, at 317.

78. CHRISTOPHER BEAUCHAMP, *INVENTED BY LAW: ALEXANDER GRAHAM BELL AND THE PATENT THAT CHANGED AMERICA* 21 (2015).

79. See Kara W. Swanson, *The Emergence of the Professional Patent Practitioner*, 50 TECH. & CULTURE 519, 525–26 (2009).

80. See BRACHA, *supra* note 21, at 300–06; Kara W. Swanson, *Authoring an Invention: Patent Production in the Nineteenth-Century United States*, in MAKING AND UNMAKING INTELLECTUAL PROPERTY: CREATIVE PRODUCTION IN LEGAL AND CULTURAL PERSPECTIVE 41, 46–47 (Mario Biagioli, Peter Jaszi & Martha Woodmansee eds., 2011).

precision, and care.”⁸¹ In line with this process, the patent bureaucracy came to be seen as “an organized system, with well-settled rules,”⁸² which produced formalized claims of ownership that were “examined, scrutinized, limited, and made to conform” to uniform requirements.⁸³

The actual history of patents makes the attempts in *Oil States* to determine the nature of the right through divining a stable meaning of patents – whether throughout U.S. history, or even at the exact moment of the Founding – a hopeless venture. There was no stable institutional structure and understanding of these rights, either at the Founding or in the preceding period. The picture is one of deep transformation. Within this dynamic development, private property rights and administrative involvement were not seen as opposite alternatives. Rather, as patents gradually assumed the institutional form of modern property, an inherent and constitutive element of this form – both in practice and conceptually – was deep administrative involvement in validating the rights and defining their scope.

Once the mirage of a fixed meaning of patents dissolves, the remaining alternative is to ask not what patents have always been since the Founding era, but what they have become. The way to answer the question of the constitutionality of administrative inter partes review is not by appeal to an illusory, unchanged nature of patents as property rights or franchise grants, but rather an inquiry about the purpose of this legal regime. One must inquire about the purpose of administrative-review proceedings within the modern framework of patents and how it interacts with any plausible purpose of the distinction in Article III jurisprudence between private and public rights. As will be discussed further in the Conclusion, understanding *purpose* is necessary not just to understand the meaning of patents, but also the meaning of all intellectual-property law, and indeed all law in general.

B. Imagine: A Textualist Approach to Copyright’s Useful-Article Doctrine

Star Athletica – a challenge to the copyrightability of a stripes and chevrons design of a cheerleader uniform – highlights the mode of textualist statutory analysis that is originalist constitutional analysis’s twin.⁸⁴ The decision was an attempt by the Supreme Court to craft a workable legal test for the application

81. *Merrill v. Yeomans*, 94 U.S. 568, 573 (1876).

82. *Id.*

83. *Keystone Bridge Co. v. Phx. Iron Co.*, 95 U.S. 274, 278 (1877).

84. *Star Athletica, LLC v. Varsity Brands, Inc.*, 580 U.S. 405 (2017).

of the “useful-article doctrine” in copyright law.⁸⁵ The useful-article doctrine governs the applicability of copyright to aesthetic features of industrial design, such as the pleasing shape of a cellphone or ornamental aspects of a belt buckle.⁸⁶ In charting the extent to which such elements can be copyrightable subject matter, the Copyright Act states:

[T]he design of a useful article . . . shall be considered a [copyrightable] pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.⁸⁷

How to separate the aesthetic and functional aspects of a useful article — particularly where these features of the relevant product are physically inseparable — has troubled federal courts for decades.⁸⁸ The challenge produced many elusive legal formulas and inconsistencies in the case law.⁸⁹ In *Star Athletica*, the Court rode in for the rescue, aiming to announce, once and for all, a clear and workable separability test.⁹⁰

The result was dismal.⁹¹ The case produced three opinions — a majority, a dissent, and a concurrence. Each is thoroughly textualist, purporting to derive

85. See 17 U.S.C. § 101 (2024) (defining a “useful article” and “pictorial, graphic, and sculptural works”).

86. See *id.* (defining “pictorial, graphic, and sculptural works” as including “works of artistic craftsmanship” and “the design of a useful article”).

87. *Id.*

88. See MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2A.08[A][1] (Matthew Bender ed., rev. ed. 2016) (describing “A Host of Challenges” faced by courts in this area).

89. See *id.* § 2A.08[B][2].

90. There is some disagreement between the opinions regarding which specific elements of the design the respondent sought to protect via copyright. The majority and concurrence assume that protection is claimed only in the two-dimensional graphic design of shapes and colors. See *Star Athletica, LLC v. Varsity Brands, Inc.*, 580 U.S. 405, 419 (2017); *id.* at 426 (Ginsburg, J., concurring). In contrast, the dissent concludes that the claim is in the graphic design as arranged with the cut and shape of the garment. *Id.* at 448 (Breyer, J., dissenting).

91. See, e.g., NIMMER & NIMMER, *supra* note 88, § 2A.08[B][7][e] (expressing disappointment that “so little has been resolved” in the decision and observing that “the deeper one digs, the more mushy the soil becomes”); Christopher Buccafusco & Jeanne C. Fromer, *Forgetting Functionality*, 166 U. PA. L. REV. ONLINE 119, 121 (2017) (admitting to being “deeply flummoxed” as to how to apply the test); Rebecca Tushnet, *Shoveling a Path After Star Athletica*, 66 UCLA L. REV. 1216, 1216 (2019) (“Unfortunately, the decision announced only abstract principles that manage to be both internally inconsistent and generally unhelpful.”); Peter. S. Menell & Daniel Yablon, *Star Athletica’s Fissure in the Intellectual Property Functionality Landscape*, 166 U. PA. L. REV. 137, 144 (2017) (“[T]he Supreme Court unwittingly cast a cloud over the intellectual property system.”).

its legal analysis directly from the plain text of the statute. And each is more perplexing than the next. It appears that the decision left the useful-article doctrine in even greater shambles than before.⁹²

The majority opinion, written by Justice Thomas, expressly disregards any analysis of the statute's purpose, stating that the Court must "begin and end our inquiry with the text," and taking pleasure in rejecting any perspective on the doctrine informed by the purpose or legislative history of the Copyright Act.⁹³ From this inquiry emerged a two-pronged test for extending copyright protection to the design features of useful articles.⁹⁴ To be copyrightable, the feature must be one that "can be perceived as a two- or three-dimensional work of art separate from the useful article," and that "would qualify as a protectable pictorial, graphic, or sculptural work either on its own or in some other medium if imagined separately from the useful article."⁹⁵

The exact reasoning that led the majority to its test is not entirely clear because the opinion offers very little such reasoning. The opinion appears to assume that the two-pronged test simply follows inevitably from parts of the statutory text. It associates the first prong of the test with an "identification requirement" found in the statutory language that requires the existence of pictorial, graphic, or sculptural features that "can be identified separately from" the utilitarian aspects of a useful article.⁹⁶ The second prong of the test is then associated with an "independent-existence" requirement based on the statutory language that requires that the features "are capable of existing independently of, the utilitarian aspects of the article."⁹⁷ Other than adding two weak supporting arguments to this explanation, the majority seems to have heeded its own advice to begin and end any reasoning with the text.⁹⁸

92. See, e.g., Collier N. Curran, *Sense and Separability: Clarifying Star Athletica Amongst Lower Court Confusion*, 48 COLUM. J.L. & ARTS 87, 97-100 (2024) (observing that "lower courts have struggled to find . . . clarity in their own separability analyses" in the wake of *Star Athletica* and surveying areas of discrepancies and confusion in the case law); *Silvertop Assocs. Inc. v. Kangaroo Mfg. Inc.*, 931 F.3d 215, 221-22 (3d Cir. 2019) (finding the design and size of a full-body banana costume to be copyrightable, but not its placement of cutouts for limbs, by applying the *Star Athletica* test with little principled analysis).

93. *Star Athletica*, 580 U.S. at 414, 422.

94. *Id.* at 414.

95. *Id.* at 424.

96. *Id.* at 414.

97. *Id.* at 411, 414.

98. The first supporting argument by the majority is that the test is confirmed by the statute as a whole. The argument is based on juxtaposing the definition of a useful article in Section 101 with Section 113(a), which clarifies that copyright owners have the right to reproduce their work in any kind of article, whether useful or not. See *id.* at 415. The support this argument provides for the majority's test is weak. That the Copyright Act allows an owner to exclude

The fatal flaw of the majority's test is not primarily that it is elusive or subjective in application. It is that the test is completely unworkable in principle. As the dissent points out, any aesthetic feature can be "imagined" as a separate pictorial or sculptural work, especially when embedded in some other medium.⁹⁹ The shape of a canoe or chainsaw blades can be easily imagined as sculptural works when embodied in marble.¹⁰⁰ Thus, contrary to the entire logic of the doctrine, a test that was supposed to provide guidance on when aesthetic features of useful articles are protectable, if taken to its logical extreme, leads to the conclusion that all such features are always protectable.¹⁰¹

The dissent, written by Justice Breyer, sharply criticizes the Court, and then crafts its own version of the "imagine" test. Like the Court, the dissent apparently derives its test directly from the text—specifically, the statutory language that requires aesthetic features to be such that they can be "identified separately" from the utilitarian aspects.¹⁰² The dissent is not strictly textual in the formal sense, as its reasoning draws on sources external to the statutory text, such as legislative history and Copyright Office materials.¹⁰³ However, it suffers from the same methodological flaws as Justice Thomas's textualism. The dissent bases its legal test solely on the text of the statute, albeit interpreting this text through a wider contextual lens. It engages with extratextual sources only to better reveal

others from reproducing otherwise protectable works in useful articles does not lead to the majority's separability test more than it does any other test. The second supporting argument simply invokes the language of prior precedents and similarly worded Copyright Office regulations. *See id.* at 415-17. As with the first supporting argument, this language does not naturally or necessarily lead to the two-part test the majority crafts.

99. *Id.* at 444 (Breyer, J., dissenting) ("[V]irtually any industrial design can be thought of separately as a 'work of art.'"); *see also* Tushnet, *supra* note 91, at 1223 ("Although [the design of an automotive floor liner] is functional . . . it is also understandable as a two-dimensional design if abstracted from its context But put that way, how could any object fail to have aesthetic qualities if imagined separately from its function?").
100. The Court notes that one could not claim a copyright in a useful article by creating a replica in some other medium, for example by creating a cardboard model of a car. *Star Athletica*, 580 U.S. at 415. As the dissent points out, the point of this example is not that the sculptural model would create protection in the design of the actual car, but rather that the possibility of making such a model demonstrates that the design features of the car, as well as virtually any design features of any useful article, can easily satisfy the Court's "imagine" test. *Id.* at 444 (Breyer, J., dissenting).
101. Since the whole purpose of the useful-article doctrine is to distinguish between unprotectable utilitarian and protectable aesthetic features, the more likely scenario is that the Court's test would not be taken seriously by lower courts but rather would be bypassed either by various distinctions or through arbitrary application of the "imagine" test to specific cases.
102. *See Star Athletica*, 580 U.S. at 439.
103. *See id.* at 440, 442.

meaning supposedly hidden in the text itself, rather than to consider the broader purpose of the law.¹⁰⁴

This mode of analysis is similar to that of the majority, resulting in a similar, albeit revised, test. Justice Breyer's alternate test consists of "two exercises, one physical, one mental."¹⁰⁵ First, one must inquire about physical separability—whether the design features can "be physically removed from the article" without impairing its function—in which case the feature is protectable.¹⁰⁶ Second, one must engage in an adjusted version of the majority's "imagine" exercise.¹⁰⁷ One must try to "conceive of the design features separately without replicating a picture of the utilitarian object," an exercise that, if successful, leads to the conclusion of conceptual separability and copyrightability of the relevant features.¹⁰⁸

Breyer's amended test is an improvement. It attempts to take seriously the basic logic of the doctrine by adopting some criterion that can render some aesthetic features of useful articles protectable while denying copyright to others. However, it fails to consider or explain why its criterion is the correct one for the distinction—or at all plausible in the first place. The added element that gives some bite to the imagine test—the qualification of not mentally replicating an image of the useful article—is a Ptolemaic epicycle. It is an ad hoc, unprincipled adjustment of the conceptual apparatus designed to ensure plausible results. As such, the adjustment, as the majority points out, generates confounding and seemingly baseless outcomes in some cases.¹⁰⁹ These are, however, just symptoms. Their underlying cause is yet another version of a puzzling imagine test, now adjusted ad hoc to generate somewhat better results.

The short concurrence by Justice Ginsburg takes yet another path. This path seems to be a form of implied textualism: Ginsburg's doctrinal analysis discusses the text of several statutory provisions and little else.¹¹⁰ According to Ginsburg, the case did not require an application of the separability test at all "because the

¹⁰⁴. This feature of the dissent is true notwithstanding its discussion of copyright policies, a discussion that remains general and detached from the formulation of the specific separability test. See *id.* at 445-47 (describing copyright as a balancing act between social benefits and costs).

¹⁰⁵. *Id.* at 440. More accurately, both exercises are *conceptual*, while one of them involves a mental analysis of a hypothetical physical exercise.

¹⁰⁶. *Id.*

¹⁰⁷. *Id.*

¹⁰⁸. *Id.*

¹⁰⁹. See *id.* at 418-19 (majority opinion) (discussing some puzzling results produced by the dissent's test in specific cases, such as a design that tracks the shape of a guitar, or even a painting that tracks the shape of a fresco on which it is painted).

¹¹⁰. See *id.* at 425-27 (Ginsburg, J., concurring).

designs at issue are not designs *of* useful articles.”¹¹¹ Instead, the designs are “themselves copyrightable pictorial or graphic works *reproduced on* useful articles.”¹¹² In simple terms, the concurrence argued that the uniforms’ designs are much like a preexisting, standalone pictorial work (for example, a cartoon image of Bart Simpson) that is then “*reproduced on* useful articles” (for example, a print of Bart Simpson on a T-shirt).¹¹³ The Copyright Act gives the copyright owner the right to exclude the reproduction of such standalone works in or on useful articles, and such reproduction, in itself, does not make the work a part of the useful article.¹¹⁴ Just like the Bart Simpson print, the design was never part of the useful article, and therefore, it is not subject to the separability test.

Justice Ginsburg’s opinion, however, provides no insight into how to distinguish between standalone works that are merely reproduced in or on a useful article, and those that are an essential part of it.¹¹⁵ For example, what distinguishes the Bart Simpson print reproduced on a T-shirt, which Ginsburg presumably would consider copyrightable, from a blueprint of an intricate machine that is then reproduced “in” a working embodiment of that machine, which Ginsburg presumably would not? The troubling difficulty is that any aesthetic feature of a useful article can start its life as a standalone pictorial or sculptural work and only then be reproduced on or in a useful article. A design embodied in shoes may originate in a diagram, and an innovative engine shape can originate in a sculptural model.¹¹⁶ How should one separate the sheep of standalone works that are merely reproduced in or on a useful article, from the goats of aesthetic designs of useful articles? The concurrence offers deafening silence as an answer.

The three opinions in *Star Athletica* represent three variants of textualism: overt (by the majority), silent (by the concurrence), and despite itself (by the dissent). Each tries to derive a workable legal test to a challenging doctrinal question by discovering it in the text of the statute alone. Again, the Court relies on a false assumption of constancy. The originalism animating *Oil States* falls prey to a false assumption of historical constancy—the premise that institutions and their social understanding are fixed and stable both in a particular moment and

111. *Id.* at 425.

112. *Id.*

113. *Id.*

114. See 17 U.S.C. § 113(a) (2024) (providing that “the exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work . . . includes the right to reproduce the work in or on any kind of article, whether useful or otherwise”).

115. I bracket here the question of whether Justice Ginsburg’s analysis reaches the correct result in the instant case. This issue largely turns on a disputed characterization of the exact subject matter in which copyright protection was sought. See *supra* note 90.

116. See *Star Athletica*, 580 U.S. at 442–43 (Breyer, J., dissenting).

over time. In contrast, *Star Athletica*'s textualism succumbs to a false assumption of semantic constancy—the notion that fixed meaning is hidden within a text and must be simply uncovered from it. All three opinions in the case reach perplexing results because each prioritizes form over function. They refuse to engage with the useful-article doctrine dynamically—to treat its proper understanding not as a fixed meaning that is hidden in and must be recovered from texts, but as a concept that requires development and elaboration in light of its underlying purpose.¹¹⁷ While the majority is the only one to expressly reject the relevance of purpose, all three opinions studiously avoid appealing to the purpose of the useful-article doctrine and of the statutory text on separability.¹¹⁸

The rigid textualism of *Star Athletica* is a particularly bitter irony in a case where the statutory text itself expressly declares the purpose of the rule embodied in it: guaranteeing, in the specific context of industrial design, that copyright protection extends only to the proper subject matter of this field—expressive rather than functional aspects.¹¹⁹ As the statute puts it, immediately prior to stating the separability test, the animating principle is that industrial design (“works of artistic craftsmanship”) should only fall within the domain of copyright “insofar as their form but not their mechanical or utilitarian aspects are concerned.”¹²⁰

C. *Abstractions: Soft Textualism and Originalism in Patent Subject-Matter-Eligibility Law*

The third line of cases pertains to the Court's reinvigoration of subject-matter-eligibility principles for patents.¹²¹ The reasoning of these decisions embodies, in a loose fashion, the core assumptions of originalism and textualism: the

117. See Buccafusco & Fromer, *supra* note 91, at 122 (referring to the Court's “absolute neglect of the critical issue of functionality”).

118. See *Star Athletica*, 580 U.S. at 422–23 (majority opinion); *id.* at 425–27 (Ginsburg, J., concurring); *id.* at 439–40 (Breyer, J., dissenting) (discussing legislative history in order to divine Congress's intended definition of the relevant limitations on the copyrightability of the designs of useful articles, but not its intended aims).

119. See Buccafusco & Fromer, *supra* note 91, at 126 (explaining that “the court should examine the use of the design in the claimed medium and decide whether or not it is functional” and that the “Supreme Court did not address the essential issues of functionality in *Star Athletica*, impairing its statutory analysis and ultimately its decision”); Menell & Yablon, *supra* note 91, at 144 (observing that the decision “did not forthrightly address the functionality elephant in the useful article room”).

120. 17 U.S.C. § 101 (2024) (defining “pictorial, graphic, and sculptural works”).

121. See *Bilski v. Kappos*, 561 U.S. 593, 601 (2010); *Mayo Collaborative Servs. v. Prometheus Lab'ys, Inc.*, 566 U.S. 66, 70 (2012); *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208, 224 (2014).

constancy of legal institutions across time and the fixity of the meaning of laws, as hidden within legal texts.

More formal originalist or textualist methods are absent from these cases because there is no text, either constitutional or statutory, whose meaning is to be discovered in public understanding or plain words. Since the 1790 Patent Act, the patent statutes have remained silent on what subject matter is *not* patentable, despite stating what subject matter *is* patentable.¹²² However, from the outset of the modern Anglo-American patent system, English and American courts developed principles of subject-matter eligibility that have become part and parcel of patent jurisprudence.¹²³ Three categories of unpatentable subject matter have emerged: natural principles, natural phenomena, and abstract ideas.¹²⁴

For decades after the 1981 case *Diamond v. Diehr*, which held that under certain conditions, computer programs can be patentable subject matter,¹²⁵ the Supreme Court remained silent on subject-matter eligibility. It left doctrinal development in the hands of the Federal Circuit, which was established in 1982 and given exclusive appellate jurisdiction over patent-law cases from federal district courts.¹²⁶ During this time, the eligibility doctrine was plagued by erosion, instability, and opacity to the extent that some doubted whether any subject-matter bar to patentability should exist or even *did* exist.¹²⁷ Then, in the 2010s, the Supreme Court reentered the arena with the aim of reaffirming and clarifying the doctrine, beginning with *Bilski v. Kappos*.¹²⁸ As in *Oil States* and *Star Athletica*, the results were highly problematic.

In the new vintage of decisions, the Court developed a novel two-step test for patent eligibility, known as the *Alice* test. The test is applied to patent

122. Compare Patent Act of 1790, ch. 7, § 1, 1 Stat. 109, 109-12 (repealed 1793) (describing as patentable “any new and useful art, machine, manufacture or composition of matter, or any new and useful improvement on any art, machine, manufacture or composition of matter, not known or used before the application”), with Patent Act of 1952, ch. 950, § 101, 66 Stat. 792, 797 (codified at 35 U.S.C. § 101) (“[A]ny new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.”).

123. See BRACHA, *supra* note 21, at 261-73; Christopher Beauchamp, *Patenting Nature: A Problem of History*, 16 STAN. TECH. L. REV. 257, 266-71 (2013).

124. See *Bilski*, 561 U.S. at 601 (citing *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980)).

125. 450 U.S. 175, 192-93 (1981).

126. See Arthur J. Gajarsa & Lawrence P. Cogswell, III, *The Federal Circuit and the Supreme Court*, 55 AM. U. L. REV. 821, 822 (2006).

127. See, e.g., Michael Risch, *Everything Is Patentable*, 75 TENN. L. REV. 591, 591 (2008); John F. Duffy, *Rules and Standards on the Forefront of Patentability*, 51 WM. & MARY L. REV. 609, 622-23 (2009); Kristen Osenga, *Ants, Elephant Guns, and Statutory Subject Matter*, 39 ARIZ. ST. L.J. 1087, 1114-17 (2007).

128. 561 U.S. 593 (2010).

claims — the written text in which patentees define the scope of their rights. First, a court must “determine whether the claims at issue are directed” to subject matter in one of the three patent-ineligible categories.¹²⁹ If so, the court must then determine whether the claim involves an “inventive concept,” such that the additional elements of the claim “‘transform the nature of the claim’ into a patent-eligible” one, rather than leaving the claim as a clever attempt to patent the ineligible subject matter itself.¹³⁰ The claim is only patent eligible if it contains such an “inventive concept.”¹³¹

Readers who struggle to understand what exactly the *Alice* test requires can take comfort in not being alone. There is widespread agreement among a sea of commentators that the new patent-eligibility test is hard to understand, provides little guidance, and leaves the law in a state of incoherence and disarray.¹³² David Kappos, the former head of the Patent and Trademark Office, described the state of the doctrine in the wake of the *Bilski* decision as “a real mess,” and mused that one “could actually use much stronger language.”¹³³

The reason for the legal test’s poor performance is its meager substance. It is nearly an empty tautology.¹³⁴ The test simply mandates asking whether the claimed subject matter is within one of the unpatentable subject-matter categories and then whether enough was added to transform it into a concrete invention. In the absence of further guidance on what constitutes an inventive concept, it left “enshrouded in mystery” what subject matter falls within the three ineligible categories, why it would fall within them, and what constitutes an “inventive step” allowing it to become eligible.¹³⁵ What little guidance exists within

129. *Alice Corp. v. CLS Bank Int’l*, 573 U.S. 208, 217 (2014).

130. *Id.* at 217–18 (quoting *Mayo Collaborative Servs. v. Prometheus Lab’ys, Inc.*, 566 U.S. 66, 72, 78 (2012)).

131. *Id.*

132. See, e.g., Syed *supra* note 8, at 1940 (“Everyone now knows there is an *Alice* two-step test, but no one knows quite what it means.”); Peter S. Menell, *Forty Years of Wondering in the Wilderness and No Closer to the Promised Land: Bilski’s Superficial Textualism and the Missed Opportunity to Return Patent Law to Its Technology Mooring*, 63 STAN. L. REV. 1289, 1291–92 (2011); Christopher M. Holman, *Editorial: In Myriad the Supreme Court Has, Once Again, Increased the Uncertainty of U.S. Patent Law*, 32 BIOTECHNOLOGY L. REP. 289, 289 (2013); David O. Taylor, *Patent Eligibility and Investment*, 41 CARDOZO L. REV. 2019, 2023 (2020).

133. Ryan Davis, *Kappos Calls for Abolition of Section 101 of Patent Act*, LAW360 (Apr. 12, 2016, 4:32 PM EDT), <https://www.law360.com/articles/783604/kappos-calls-for-abolition-of-section-101-of-patent-act> [<https://perma.cc/F7XK-AEL3>].

134. See Menell, *supra* note 132, at 1292 (“What the patent community needed was a coherent manual for navigating the boundaries of patentable subject matter. What it got was noncommittal, hypertextual, incoherent rambling.”).

135. Syed, *supra* note 8, at 1940.

the decisions is limited to ad hoc reasoning and aphorisms about why specific added elements do not salvage ineligible claims.¹³⁶

The source of the strange impoverishment of the *Alice* test is its implied reliance on originalist and textualist assumptions. The reasoning of the *Bilski* trio sounds in originalism, as it assumes a stable meaning of the categories of unpatentable subject matter that remains constant through time. Partly responsible for this assumption is the Court's insistence on pretending to reconcile two centuries of irreconcilable precedents created at different times and under conflicting views.¹³⁷ However, the assumption of chronological constancy goes even deeper. The *Bilski* trio seems to take for granted that the unpatentable-subject-matter categories have uniform and unchanging public meanings. The Court appears to believe that what is considered a "principle of nature" today is what has always been understood to be a principle of nature.¹³⁸ The historical record is different. From the early days of the U.S. patent system, there was broad agreement that natural principles cannot be owned, while *application* of natural principles (which, on some level, is the essence of all inventions) forms the proper subject matter of patents.¹³⁹ And yet, this shared premise was always accompanied by sharp and widespread disagreement about what each of these two categories—natural principles versus their application—meant or included.¹⁴⁰ This discord existed both at particular moments and even more so across time, as yesterday's obvious "natural principles" became today's ownable applications.¹⁴¹

¹³⁶. See, e.g., *Bilski v. Kappos*, 561 U.S. 593, 609-12 (2015); *Mayo Collaborative Servs. v. Prometheus Labs, Inc.*, 566 U.S. 66, 77-80 (2012); *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208, 221-26 (2014).

¹³⁷. See John M. Golden, *Flook Says One Thing, Diehr Says Another: A Need for Housecleaning in the Law of Patentable Subject Matter*, 82 GEO. WASH. L. REV. 1765, 1779-83 (2014) (discussing and explaining the Court's "efforts to paper over conflicting aspects of its precedents" in the area of patent subject-matter eligibility).

¹³⁸. See *Mayo Collaborative*, 566 U.S. at 80-85.

¹³⁹. See BRACHA, *supra* note 21, at 271-72.

¹⁴⁰. *Id.* at 261-73, 283-84.

¹⁴¹. *Id.* at 284-97. One striking example is the legal treatment of Samuel Morse's telegraph patent and Alexander Graham Bell's telephone patent. In 1853, the Supreme Court invalidated Morse's broadest patent claim as an attempt to claim natural principles. *O'Reilly v. Morse*, 56 U.S. 62, 113-14, 120 (1853). Thirty-five years later, the Court upheld Bell's broadest claim against a subject-matter challenge. *Dolbear v. Am. Bell Tell. Co. (The Telephone Cases)*, 126 U.S. 1, 534-35 (1888); see also BRACHA, *supra* note 21, at 291-97 (describing Bell Telephone Company's journey to "build a national empire on the foundation of a broad patent" and the ensuing litigation in *The Telephone Cases*); BEAUCHAMP, *supra* note 78, at 58-86 (same).

Similarly, as noted by other scholars, the opinions of the *Bilski* trio are marked by “a superficial textual wilderness.”¹⁴² The analysis appears to silently assume that a fixed meaning of rich legal concepts such as “abstract ideas,” “natural phenomena,” or “processes,” is simply hidden in the textual labels. One needs only to look hard enough at this text, perhaps with a glance at a dictionary, and the meaning shall be discovered.¹⁴³ However, as will be discussed in the next Part, the reality is that these are purposive concepts. They were created and used to serve certain human aims within the social spheres of science and technology that they govern. As a result, the meanings of these concepts are not stable objects hidden in texts, but dynamic human constructs that can only be understood through the dynamic exercise of purposive elaboration. The one thing that the new subject-matter eligibility decisions lack is any such purposive analysis.¹⁴⁴

III. INTELLECTUAL-PROPERTY DYNAMISM

What is going on here? The Roberts Court has repeatedly set out to craft coherent and clear doctrine in crucial areas of intellectual property. Time and again, its decisions in the field have instead resulted in poor reasoning, confused and opaque doctrine, and sometimes undesirable normative outcomes. The consistent factor in these failures is the Court’s originalist and textualist methods.

¹⁴². Menell, *supra* note 132, at 1291.

¹⁴³. Most of the Supreme Court’s recent patentability decisions make this textualist assumption silently. The exception is Justice Thomas’s opinion in *Bilski*, which flaunts it as a battle standard. See *Bilski v. Kappos*, 561 U.S. 593, 603 (2015) (“In patent law, as in all statutory construction, ‘[u]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.’” (alteration in original) (quoting *Diamond v. Diehr*, 450 U.S. 175, 182 (1981))). Compare this with the concurrence by Justice Stevens, which observes that the Court’s textualist approach “would render § 101 almost comical.” *Id.* at 624 (Stevens, J., concurring).

¹⁴⁴. At times, one finds some discussion of the overall aim of the doctrine in this area as being to prevent private control of the basic building blocks of scientific and technological innovation. See, e.g., *Mayo Collaborative Servs. v. Prometheus Lab’ys, Inc.*, 566 U.S. 66, 71 (2012) (explaining that categories of unpatentable subject matter cover the “basic tools of scientific and technological work” and that “monopolization of those tools through the grant of a patent might tend to impede innovation more than it would tend to promote it”). However, such observations remain general and detached, never attempting to further elaborate the meaning of the concrete, ineligible subject-matter categories in light of a more substantive and specific account of the purpose of each. See Syed, *supra* note 8, at 1960 (“[T]he courts have also expressed a plausible set of embryonic functionality concerns – of seeking to ensure that patents only obtain in ‘applied’ knowledge, and remain free and clear of ‘basic’ building blocks – but have given such concerns only intermittent, often inchoate and one-sided articulation, and in any case have not followed through on them doctrinally.”).

Oil States's originalism results in two conflicting accounts of the original and supposedly unchanged understanding of patents. The focus of both accounts on discovering the true and clear meaning of patents at the Founding puts them out of touch with the actual development of patents, either at that moment or over their longer history. At the same time, both accounts fail to consider either the point of the bureaucratic property system of patents as it developed or this system's interaction with Article III jurisprudence's own purposes in separating public and private rights. What is offered instead is two competing just-so stories. Both distort the history of patents, and neither provides any basis for future substantive development of this area of law.

Star Athletica's insistence on discovering the correct meaning of the separability test in the statutory text alone leads to three opinions that are each blind to what the concepts in the text set out to achieve. The purpose of the distinction between separable aesthetic features and those that are inseparable from utilitarian ones – to ensure that copyright only protects its proper subject matter of expressive forms rather than functional elements – completely disappears from the picture. The result is competing but equally perplexing tests that require future courts to engage in speculative mental exercises of the imagination. Courts are left with little meaningful understanding of what the doctrine is and how to apply it, other than through hunches and unprincipled, ad hoc analogies.¹⁴⁵

The *Bilski* trio is based on a softer blend of both of the above assumptions: that the meaning of unpatentable subject-matter categories has been fixed in public understanding from the beginning of American law and throughout the centuries, and that textual labels carry latent within them this self-evident meaning. The result is an extremely rigid legal formula for the patentability test, bordering on being tautological. This framework also fails to sufficiently connect the test to the substantive aims of the law of subject-matter eligibility. Unsurprisingly, the effect of the *Alice* test is similar to that of *Star Athletica*: courts have been left with little guidance on how to apply the doctrine, consequently forcing them to manipulate the *Alice* test's formalities in an ad hoc and undisciplined manner.¹⁴⁶

^{145.} See, e.g., *Silvertop Assocs. v. Kangaroo Mfg.*, 931 F.3d 215, 222 (3d Cir. 2019).

^{146.} One commentator, quoting former Chief Judge Michel of the Court of Appeals for the Federal Circuit, described the effect of the two-prong patentability test on lower courts as requiring them to apply a rule that is “unpredictable and impossible to administer in a coherent consistent way.” Kristen Osenga, *Institutional Design for Innovation: A Radical Proposal for Addressing § 101 Patent-Eligible Subject Matter*, 68 AM. U. L. REV. 1191, 1193 (2019); see also Golden, *supra* note 137, at 1765 (observing that the result of the Court's recent patentability decisions “has been uncertainty about the subject-matter eligibility of broad swaths of key kinds of modern innovation”).

The pattern is clear. The search for fixed meanings in either plain text or history crowds out any attempt to understand what the law is about and what it is designed to achieve. The result is a deficient legal doctrine both normatively and in the doctrine's ability to guide future application or development. Are there deeper causes to this dynamic of the jurisprudence of stasis? Does the spectacular magnitude of its failure in these cases have anything to do with the setting of intellectual property?

This Part argues that the failures of the jurisprudence of stasis are rooted in a futile search for objective foundations to law in fixed sources of legal knowledge, sources that supposedly do not require any consideration of the substantive human aims the law is designed to achieve. This search leads to misconstruing legal relations as inert, while they are, in fact, dynamic and ever developing, as a matter of both social reality and its human understanding. The Court's use of these methods is pervasive in the modern era. However, the utilization of the methods within intellectual property is particularly prone to exposing their failures with crisp clarity. The Court's intellectual-property decisions clash directly with the distinctive dynamism of the field of intellectual property in a capitalist society, thereby highlighting the weaknesses of the jurisprudence of stasis more generally.

A. *Two Reifications*

The unfortunate results of the Court's intellectual-property decisions are traceable to their analytic methods. Originalism and textualism are the law's response to what Morton J. Horwitz has called "the destabilizing force of modernism."¹⁴⁷ Modernism has undermined many established sources of foundational meaning and truth: religion, nature, tradition, and universal reason.¹⁴⁸ By causing and revealing an absence of an objective foundation on which to ground knowledge, it has left in its wake both epistemic and normative crises of authority.¹⁴⁹ In American law, this crisis has been particularly severe after a series of devastating attacks by legal realism and its progeny on legal formalism's claim to

147. Morton J. Horwitz, *Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 32, 32 (1993).

148. See generally JURGEN HABERMAS, *THE PHILOSOPHICAL DISCOURSE OF MODERNITY: TWELVE LECTURES* (Frederick Lawrence trans., Polity Press 1987) (1985) (discussing the philosophical critique of reason in modernity and offering a reconstruction).

149. See HANNAH ARENDT, *BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT* 91 (2006) (observing that "a constant, ever-widening and -deepening crisis of authority has accompanied the development of the modern world").

neutrality.¹⁵⁰ These attacks brought to the surface, with urgency, a concern pervasive in American legal culture: that law is no different from politics.¹⁵¹

There appear to be two possible reactions to the modernist crisis of authority in law: embrace disintegration (also known as “indeterminacy”) or find some fixed “external” object in which to ground a stable meaning of law. The former reaction is that of mainstream Critical Legal Studies.¹⁵² Textualism and originalism are of the latter kind.¹⁵³ Put another way, they are the outgrowth of a desperate search for constraint, for a method in which there is a fixed and unchanging thing “out there” that is “the law.” And that is precisely their fatal flaw: reification.

Reification is the misguided treatment of something that is dynamic and developing as a “thing” or a fixed object in the world.¹⁵⁴ The concept is key in critical theory’s analysis of capitalist society. It first arose in Karl Marx’s discussion of the fetishism of commodities—the way in which capitalism makes the value of commodities appear to be a relation between the objects themselves, thereby obscuring the dynamic social relations between people that constitute this value.¹⁵⁵

Later theorists, most importantly Georg Lukács, expanded the concept to all aspects of social life in capitalism.¹⁵⁶ Once the social relations of production are reified by the ever-expanding commodity form, human life itself and all of its facets become subject to the same logic of misconceiving dynamic human relations and powers as features of static, natural objects.¹⁵⁷ For example, Lukács

150. See, e.g., DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE* 79–92 (1998).

151. See Stephen M. Feldman, *The Politics of the Law—Politics Dichotomy*, 33 *BYU J. PUB. L.* 15, 21–27 (2019) (surveying the history of the law-politics dichotomy in American legal culture).

152. For an analysis and critique of this approach to law and the centrality of the idea of indeterminacy within it, see Syed, *supra* note 5, at 10–13, 22–24.

153. See Horwitz, *supra* note 147, at 35. To be sure, originalism and textualism arose as effective instruments in a reactionary campaign to dismantle decades of progressive law. See Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 *FORDHAM L. REV.* 545, 554–61 (2006); Yochai Benkler, *Structure and Legitimation in Capitalism: Law, Power, and Justice in Market Society* 87 (Oct. 26, 2023) (unpublished manuscript), <https://ssrn.com/abstract=4614192> [<https://perma.cc/R4EB-CNJ2>]. The point emphasized here, however, is that these methods were effective for this purpose and enjoyed a broad appeal because they appear to provide a foundational, objective source of authority.

154. See GEORG LUKÁCS, *HISTORY AND CLASS CONSCIOUSNESS: STUDIES IN MARXIST DIALECTICS* 83–110 (Rodney Livingstone trans., MIT Press 1994) (1923) (discussing the “[p]henomenon of [r]eification”).

155. See MARX, *supra* note 26, at 163–77.

156. LUKÁCS, *supra* note 154, at 83–110.

157. *Id.* at 85 (observing that when the commodity form becomes constitutive of society, “the commodity structure . . . penetrate[s] society in all its aspects and . . . remould[s] it in its own

saw modern bureaucracy as a clear case of reification spreading beyond the sphere of commodity exchange.¹⁵⁸ Bureaucracy, he argued, reduces people to abstract officials and cases and relies on formal, calculable procedures and rules, thereby eliminating all qualitative and personal factors.¹⁵⁹ As a result, modern bureaucratic practice makes complex human relations appear as if they were natural objects controlled by their own rules of “ghostly objectivity,” while human purposes and conflicts drop from view.¹⁶⁰ Indeed, not only social relations but also human thinking itself becomes reified when people come to experience it as dominated by immutable external constraints rather than as human-made and changeable.¹⁶¹ For both social relations and human thought, the two central elements of reification are first, misconceiving something that is humanly created as part of the natural order of nonhuman objects, and second, misconceiving something that is dynamic and changing as static and fixed. The upshot is that reification produces false naturalization, thingification, and denial of human agency. The social order and human thought are the province of human agency and are subject to change by people in the service of their needs and goals. When reified, however, both appear to be natural or external objects that place fixed constraints on human agency.

As in other fields of human society, reification is pervasive in law.¹⁶² All forms of legal formalism involve reification because they reduce the law to manipulation of certain verbal and logical forms that operate as constraints supposedly independent of either human shaping of concepts or social realities.¹⁶³ Textualism and originalism are different brands of legal formalism in this broad sense.

image”); Yochai Benkler & Talha Syed, *Reconstructing Class Analysis*, 4 J.L. & POL. ECON. 731, 742 (2024) (observing that “the ceaseless expansion of exchange value for its own sake subjects human needs and powers, human relations, and the Earth to ever more extensive and intensive instrumental quantification”).

¹⁵⁸. LUKÁCS, *supra* note 154, at 98.

¹⁵⁹. *Id.* at 99 (discussing “the way in which objectively all issues are subjected to an increasingly formal and standardised treatment and in which there is an ever-increasing remoteness from the qualitative and material essence of the ‘things’ to which bureaucratic activity pertains”).

¹⁶⁰. *Id.* at 100.

¹⁶¹. *See id.* (observing that “[t]he transformation of the commodity relation into a thing . . . stamps its imprint upon the whole consciousness of man”).

¹⁶². *Id.* at 96–97; Douglas Litowitz, *Reification in Law and Legal Theory*, 9 S. CAL. INTERDISC. L.J. 401, 427 (2000); Syed, *supra* note 5, at 23 (arguing that pervasive mistakes of both legal formalism and many of its critics “amount to a *mystification of authority* and a *reification of meaning*” and that breaking up with these mistakes requires us to “reconstruct a *dereification critique* of legal reasoning”) (emphases added).

¹⁶³. *See* Syed, *supra* note 5, at 24 (identifying fetishism of parchment—to mystify authority—and reification of words—to ossify meaning—as the twin pillars of formalism).

They involve the two kinds of reifications, that of social relations and that of human thought (or semantic concepts).¹⁶⁴

Textualism reifies by focusing on the text, a set of signifiers, and purporting to discover in it fixed, “plain” meanings through various technical procedures.¹⁶⁵ In doing so, it holds that these signifiers are the law itself. The trouble is that what matters is not the signifiers themselves (“text”) but the concepts they represent. And concepts are never given, nor do they lie hidden, readymade, and waiting to be discovered. Concepts are human instruments for making sense of the world, and as such, they are always dynamically *forged in relation to other concepts*.¹⁶⁶ Legal concepts exist to shape and govern human behavior in society to achieve certain desired purposes. Because of this, elaborating the law’s meaning requires developing its concepts in light of their purposes—the desired human goals they are meant to achieve. Textualism’s reification is a search for fixed essences in signifiers plucked from a supposed “heaven of legal concepts,” when what is needed is dynamic development of concepts guided by purpose as applied to specific contexts.¹⁶⁷

Originalism is often understood as a theory of communicative meaning. It argues that the meaning of legal concepts is determined by reference to its understanding by a particular audience at a specific time.¹⁶⁸ To that extent, originalism, like textualism, reifies legal concepts. Although this manner of reification of concepts is not identical—originalism freezes meaning by privileging one possible understanding based on its proximity to the concept’s initial elaboration, rather than claiming to find meaning in texts alone—it is subject to a similar critique.¹⁶⁹ Distinctly, however, originalist analysis often does not emphasize past semantic meanings but rather focuses on past enacted social relations. The meaning of a particular legal concept is often inferred not so much from what the Founding generation said but rather from how they behaved. In cases such as *Oil States*, where there is no specific legal text whose disambiguation would

^{164.} *Id.* at 22, 26 n.21.

^{165.} Signifiers are arbitrary forms of objects—such as sounds, letters, graphic symbols—that in union with a signified—that is, a concept—constitute meaningful signs. See DANIEL CHANDLER, SEMIOTICS: THE BASICS 13–14 (2d ed. 2007).

^{166.} See FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS 65 (Charles Bally & Albert Sechehaye eds., Wade Baskin trans., 1959) (1916); Syed, *supra* note 5, at 23.

^{167.} Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809 (1935).

^{168.} See Solum, *supra* note 34, at 2 (arguing that “meaning is determined by the original communicative context and linguistic facts at the time of writing”).

^{169.} Laying aside all difficulties with uncovering singular public meaning, the main problem is that it is not clear *why* one should give sole and absolute priority to original public meaning in elaborating legal concepts.

direct the Court's result, the original meaning is derived directly from how people enacted in their social lives specific legal relations – namely, patents.¹⁷⁰ This brand of originalism consequently reifies not concepts, but social relations. Legal relations – a subset of social relations – are viewed as fixed essences that are constant across time.¹⁷¹ However, social relations, including legal relations (or institutions), are inherently dynamic. They develop and change over time. Treating social relations as fixed objects blinds the Court to the wisdom of the adage that “[t]he life of the law” is “experience,” rather than “logic.”¹⁷² It detaches the law from the actual, dynamic, and developing social relations that it is supposed to shape.¹⁷³

What connects the failure of both reifications – that of concepts and that of social relations – is their total disregard of purpose. Purpose is the linchpin holding together the enterprise of the elaboration of law as social relations designed to achieve social human ends. Purpose is what directs the dynamic forging of legal concepts in a particular context without unspooling their meaning into indeterminacy.¹⁷⁴ Purpose is also the guide that allows for meaningful connections between the elaboration of legal concepts and ever-changing social relations.¹⁷⁵

Without purpose to guide it, legal analysis – whether in the originalist or textualist vein – not only results in poor normative outcomes but also becomes pointless itself. For what is the point of finding the meaning of law, either in essences assumed to be hidden in texts or in social relations postulated to be inert, if neither source has anything to do with achieving the human purposes the law is designed to obtain?

B. The Legal Relations of Technological Dynamism

What does intellectual property have to do with all of this? Is there a reason why the failure of the jurisprudence of stasis embodied in originalist and

170. *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 584 U.S. 325, 333 (2018).

171. Legal relations are a subset of social relations. I use the term “social relations” to mean structured patterns in which people relate to each other through mutually constitutive roles. See Syed, *supra* note 5, at 33. The subset of legal relations is marked by its distinctive structure of correlative entitlement/disentitlement pairs with respect to competing human interests. See *id.* See generally Hohfeld, *supra* note 6 (analyzing the fundamental jural relations – rights, duties, privileges, no-rights, powers, liabilities, immunities, and disabilities – and emphasizing their correlative and opposite structure as the building blocks of all legal relations).

172. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (2nd ed. 1909) (1881).

173. This claim was the main critique of formalism by the school of “sociological jurisprudence.” See Syed, *supra* note 5, at 4–5.

174. Syed, *supra* note 5, at 29.

175. *Id.* at 39–41.

textualist reifications is so manifestly monumental in this area of the law? Many years ago, Horwitz argued that the nineteenth-century rise of “intangible forms of wealth,” protectable by intellectual property, challenged the “physicalist” conception of property that dominated classical legal thought and ultimately hurried the collapse of that mode of legal thinking.¹⁷⁶

Today, intellectual property poses an analogous challenge to the Roberts Court’s fixation on originalism and textualism. The reason is that intellectual property is the embodiment in legal form of the social relations of information innovation, relations which take on a particularly dynamic shape in capitalism.¹⁷⁷ The connection between technological dynamism in capitalism and the dynamism of intellectual-property law is most readily apparent in the area of patents because this field is about property rights in applied technological knowledge. However, the point is also applicable to copyright law and its distinct subject matter of expression, where capitalism’s profit drive is equally at work. Even in this area where technological information itself is not the object of property, technological dynamism propelled by the profit drive is at play: new technologies constantly create new forms and outlets for expression, open up new markets, cultivate new demand, and disrupt established business models.¹⁷⁸ Consider, for example, the new vistas, economic disruptions, and deep social challenges—indeed, challenges to the very concepts of art and creation—brought about by the recent rise of expression-producing artificial intelligence.¹⁷⁹ The hyperdynamism of technological innovation, intensively germane to intellectual property, lays bare the failings of reifying concepts and social relations. The wooden legal reasoning of the jurisprudence of stasis and the banishment of purpose from the Court’s intellectual-property cases, when applied to the rapidly changing social relations to which intellectual-property law pertains, generate results that are not only undesirable, but often perplexing.

Rapid technological innovation is a uniquely modern phenomenon that marks a sharp discontinuity with earlier human history.¹⁸⁰ This dynamism is

176. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 145 (1991).

177. The discussion here of technological dynamism in capitalism and intellectual property draws heavily on conversations with Talha Syed. The responsibility for its content is mine alone.

178. See, e.g., PAUL GOLDSTEIN, *COPYRIGHT’S HIGHWAY: FROM THE PRINTING PRESS TO THE CLOUD* 22-23 (2d ed. 2019).

179. See, e.g., Eric Reinhart, *The Trouble with AI Art Isn’t Just Lack of Originality. It’s Something Far Bigger*, *GUARDIAN* (May 20, 2025, 8:00 AM EDT), <https://www.theguardian.com/commentisfree/2025/may/20/ai-art-concerns-originality-connection> [https://perma.cc/T698-V85E].

180. The consensus in the economic-history literature is that there has been a sharp acceleration in the rate of technological innovation roughly around the Industrial Revolution, a point which is often conveyed using a hockey-stick-shaped graph that shows the massive spike in global

unique to the historically specific moment of capitalism exactly because the engine that drives rapid innovation is distinctive to capitalist social relations. Unlike other historical periods, technological development in capitalism is intense, sustained, and structurally necessary. The structural imperative to innovate arises from the distinctive features of the system's generalized market relations, wherein firms compete to survive, with the sole aim of generating profit for its own sake.¹⁸¹ There is consequently constant pressure to develop new innovations that reduce cost, increase productivity, satisfy human needs, and create new ones.¹⁸² In this race, obtaining an innovative edge promises increased profits through temporary rents and compels other firms to catch up or perish.¹⁸³ At the same time, markets are increasingly “disembedded” from any social goal other than profit maximization, thereby removing any constraint on the drive to innovate.¹⁸⁴

The resultant dynamic is intense technological innovation marked not by smooth progression and equilibrium but by discontinuities and cycles of “creative destruction,” wherein new technologies and the systems built around them dramatically displace their predecessors.¹⁸⁵ Because these dynamics are driven by the structural imperative to increase private profit via rents, there is no guarantee that the technological innovation it spurs consistently increases overall well-being, and even less so the attainment of other social goals.¹⁸⁶

This distinctly capitalist, intense technological dynamism is mirrored in the field of intellectual property, which embodies in legal relations these same social dynamics. In modern society, this field has become the primary legal relation by which innovators internalize the value of their informational innovations through market prices.¹⁸⁷ The result is constant and intense pressure on intellectual-property law to evolve so that producers can appropriate the value of

productivity beginning in the nineteenth century. See, e.g., JOEL MOKYR, *THE LEVER OF RICHES* 14-15 (1990); Joel Mokyr, *Hockey-Stick Economics: Robert Fogel, the Escape from Hunger and Premature Death, 1700-2100*, 46 *TECH. & CULTURE* 613, 614 (2005); Deirdre N. McCloskey, *Tunzelmann, Schumpeter, and the Hockey Stick*, 42 *RSCH. POL'Y* 1706, 1706 (2013).

181. See Tony Smith, *Technological Change in Capitalism: Some Marxian Themes*, 34 *CAMBRIDGE J. ECON.* 203, 205-06 (2010) (observing that in the “historically specific” moment of capitalism, “[t]echnology is first and foremost a means to capital's end, valorisation”).

182. MARX, *supra* note 26, at 434-35; Benkler & Syed, *supra* note 157, at 742-43.

183. JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 81-106 (2008); Benkler, *supra* note 153, at 10.

184. POLANYI, *supra* note 54, at xxiv.

185. SCHUMPETER, *supra* note 183, at 81-86.

186. Smith, *supra* note 181, at 211; Benkler & Syed, *supra* note 157, at 743.

187. Oren Bracha & Talha Syed, *A Law and Political Economy of Intellectual Property*, 103 *TEX. L. REV.* 1403, 1422 (2025).

their technological innovation.¹⁸⁸ Dynamic change is thus the very heart of intellectual-property law, which is the law of technological dynamism in a capitalist society.

The upshot of intellectual-property dynamism is deep incompatibility with the jurisprudence of stasis on two different levels. One level pertains specifically to originalism. This method of analysis conflicts with the modern character of intellectual-property law as the commodified form of information goods. During the Founding era, intellectual property still bore many of the vestiges of its earlier institutional form as privileges. It was only by the late nineteenth century, parallel to the development of industrial capitalism, that intellectual property assumed its fully commodified form, supporting a full-fledged, market-based regime of rights.¹⁸⁹ Between these periods, the character of intellectual property underwent not only an expansion, but also a deep metamorphosis.¹⁹⁰ Patents and copyrights were one set of legal relations in 1790 and quite another in 1890.¹⁹¹ Consequently, intellectual property dramatically brings to the surface a general difficulty of originalism. Regardless of the normative value of the method's result, its analysis is based on a world incommensurable with our own.¹⁹² It defies reason to extrapolate from what Americans said and how they behaved in regard to patents in 1790, when they were still embedded in a hybridized system of privileges and rights, in order to determine what patents are today, when they govern and form a vastly different system of fully market-oriented, rights-based, bureaucratic property relations.¹⁹³

The second level of incompatibility afflicts both originalist and textualist flavors of static jurisprudence. The dynamism of intellectual property creates an ever-growing gulf between reified versions of the law and the social relations to which the law pertains. While this gulf is not unique to intellectual property—in fact, it is the most fatal flaw of reified legal reasoning in general—the intense dynamism of the field exposes it in a dramatic fashion. The failing goes well beyond the familiar and frequent problem of technology-specific legal rules

188. *Id.* at 1423.

189. See *supra* text accompanying notes 24–28.

190. See BRACHA, *supra* note 21, at 3–4.

191. See Bracha, *supra* note 54, at 218. See generally Oren Bracha, *The Ideology of Authorship Revisited: Authors, Markets, and Liberal Values in Early American Copyright*, 118 YALE L.J. 186 (2008) (arguing that authorship ideology became gradually embedded in copyright doctrine in the nineteenth century).

192. See ERWIN CHEMERINSKY, *WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM* 115–38 (2022) (discussing originalism's “Modernity Problem”).

193. Bracha, *supra* note 27, at 559–63.

rendered obsolete by technological change.¹⁹⁴ Instead, it amounts to a fundamental disconnect between law and the social relations to which it applies.

For example, in the context of the useful-article doctrine, to understand how to separate the aesthetic and utilitarian features of a consumer product, one must resort to purpose and changing social context. To analyze this legal distinction, one must have some idea of the developing practices of industrial design, what the law attempts to achieve with respect to them through the distinction, and why it seeks to deny protection to utilitarian features. The same is true with respect to patent's subject-matter-eligibility doctrine, particularly the question of what distinguishes unpatentable "natural principles" from patentable inventions. To meaningfully answer this question, one must have some notion of modern realities of research and development—which are vastly different than those of, say, 1800—and how they relate to patent law's animating goal of allowing ownership of some kind of knowledge pertaining to the physical and natural world but not of other kinds. Such inquiries cannot be undertaken by searching for answers hidden in reified texts or social practices assumed to be frozen in time. As illustrated by the Court's recent intellectual-property jurisprudence, one ignores these caveats at the risk of producing both questionable results and incoherent and nebulous legal reasoning.¹⁹⁵

As noted by Horwitz three decades ago, intellectual property undermined one legal fallacy, physicalism, by illuminating the fact that all property is a social rather than physical relation. Now, the field may destabilize other legal fallacies, too. The absurd results that emerge from applying originalism and textualism to intellectual-property law illustrate, with striking clarity, the fundamental error of these methods of analysis. The intense dynamism of the law of intellectual property is exceptional in degree, not in kind. All law governs evolving social relations. As such, its concepts require dynamic elaboration, not discovery in inert text or frozen social practice. In this way, intellectual property may act as a sensitive seismograph; because of its inherent dynamism, it is often the field to indicate most dramatically the failures of all strategies of legal reification, writ large.

194. Two infamous examples of courts' static interpretation of legal rules in the context of new technologies that then rendered the rules obsolete are *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, 18 (1908), which held that the reproduction of copyrighted musical works in player piano rolls was noninfringing, and *Olmstead v. United States*, 277 U.S. 438, 464 (1928), holding that phone wiretapping does not violate the Fourth Amendment. *White-Smith* was quickly superseded by statute. See Copyright Act of 1909, ch. 320, § 1(e), 35 Stat. 1075, 1075 (repealed 1976). *Olmstead* wreaked havoc on Fourth Amendment jurisprudence for decades until overruled. See *Katz v. United States*, 389 U.S. 347, 353 (1967).

195. See *supra* Sections II.B-C.

CONCLUSION: TOWARD A JURISPRUDENCE OF PURPOSE

I have argued that the recent vintage of Supreme Court originalist and textualist decisions in intellectual property exposes the inadequacy of these methods. Originalism and textualism are untenable attempts at legal reification of concepts and social relations that are inherently dynamic. Intellectual-property law floods the failures of these methods with bright diagnostic light. It does so because it embodies in legal relations the intense technological dynamism of capitalism, a dynamism which clashes conspicuously with the stagnationist frame of the two methods. The general turn to originalism and textualism is a response in law to the modernist crisis – a desperate search for constraint in a world where all foundational grounding of knowledge has been swept away. The failure of these methods may appear to leave as the only alternative the other common response to the modernist crisis, espoused by mainstream Critical Legal Studies: embrace legal indeterminacy and concede that law is no different from politics.¹⁹⁶ That would be a mistake. Indeterminacy offers a poor substitute for reification, and it is precisely the terror of its dark cloud that further fuels the turn to originalism and textualism.

Is there a viable alternative to the polarities of reification and indeterminacy? What would the analysis of the cases that have been discussed in this Essay look like under such an alternative? It is impossible to develop adequately here an alternative approach and its application. However, it is possible to offer a preliminary sketch of the direction they should take.

Such an alternative methodology follows directly from this Essay's critique of the jurisprudence of stasis. Originalism and textualism fail because they reify. They take as given and fixed, either in text or some historical fact, the meaning of legal rules.¹⁹⁷ What matters, however, is not text or words, but the concepts they embody, which are not pregiven objects, but tools for human thinking that are always constructed to serve human purposes.¹⁹⁸ As such, the meaning of concepts is not fixed and contained, but is always fluid and shaped dynamically in relation to other concepts, in light of the purpose at hand.¹⁹⁹ In the case of law, the purpose is the shaping and governance of social life to serve desirable human

196. See Syed, *supra* note 5, at 11-12 (glossing Critical Legal Studies' indeterminacy critique and its two main subtypes).

197. In the discussion here I put aside a prior and even more fundamental way in which originalism and textualism reify – that is, they mystify the authority of legal sources as pregiven and taken for granted, requiring no explanation or supporting purpose. See *id.* at 24-26.

198. See *id.* at 44.

199. See *supra* text accompanying notes 166-167.

goals and interests through the distinctive forms of legal relations.²⁰⁰ It follows that the method of applying and giving meaning to legal sources should be based, not on trying to discover the fixed meaning of texts, but on dynamically developing the concepts embodied in them. This elaboration should be sensitive to the internal concerns and distinctive institutional tools of the relevant field as well as mindful of the area of social life it governs.²⁰¹

To bring this abstract sketch down to earth, consider how this kind of analysis should look with respect to each of the cases discussed in this Essay. To analyze *Oil States*'s question of whether inter partes review is constitutionally permissible under Article III, one would first have to provide an account, not of what patents have always been, but of what they have become. Specifically, one would need an account of modern patents as a system of property rights that features a robust administrative component, a relatively secure title, and a predictable scope. One would then need to develop an account of the purpose of administrative patent-review proceedings within this system. Next, one would need to incorporate a distinct, plausible account of the purpose of Article III jurisprudence, including its ban on certain nonjudicial decision-making, and how the distinction between private and public rights should be understood in light of this purpose.²⁰² Finally, the two accounts would have to be combined to evaluate the permissibility of administrative inter partes review.

The separability test at the heart of *Star Athletica* should be fashioned by reference to copyright's basic subject-matter concepts, their application to the modern field of industrial design, and the purpose of the useful-article doctrine as derived from such principles. Here, the purpose of the doctrine is rather clear, not to mention expressly stated in the statute: to create a filter that ensures that copyright protection is applied only to the subject matter for which it was designed (expressive forms) and not to functional elements.²⁰³ The conceptual contours of the separability test should be drawn by reference to this purpose, as well as the context of modern industrial design, where the different kinds of subject matter are often closely entangled, rather than on the basis of strange mental exercises of the imagination.²⁰⁴

Finally, to make sense of the unpatentable subject-matter categories at issue in the *Bilski* trio, one must have an account of the purpose of these categories.

200. See *supra* note 171.

201. For an outline of such a framework for analysis of the field of property, see Syed, *supra* note 5, at 30-40.

202. See, e.g., John M. Golden & Thomas H. Lee, *Congressional Power, Public Rights, and Non-Article III Adjudication*, 98 NOTRE DAME L. REV. 1113, 1117 (2023).

203. 17 U.S.C. § 101 (2024) (defining "pictorial, graphic, and sculptural works").

204. See Buccafusco & Fromer, *supra* note 91, at 125-26.

This analysis would need to be richer and more illuminating than the general allusions offered in the trio to the need to keep free the basic building blocks of scientific and technological innovation.²⁰⁵ One would need to develop an account of the modern social system of technological research and development. From this account, one would have to reason which activities within this system are best supported by marked-up market prices via property rights, which should rely on other sources of financing, and why. One would then take a step back to conceptualize the categories of unpatentable subject matter and the overarching patent-eligibility test, then use this functional analysis to ensure that the final test tracks the channeling purpose of the subject-matter-eligibility doctrine.²⁰⁶

The recent textualist and originalist turn in intellectual property is not good news for the field. As reflected in the poor results of the cases discussed in this Essay, intellectual-property law will not be well served by extensive use of these methods. However, these failures may serve a useful purpose: that of a canary in a coalmine. The stark failure of the jurisprudence of stasis in this area, due to its direct clash with intellectual-property law's dynamism, should be taken as a warning against the rise of this jurisprudence elsewhere in the law.

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205. See *supra* note 144.

206. For an impressive execution of providing such an account of patent-eligibility doctrine, see Syed, *supra* note 8, at 1946-49.