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THE USE AND ABUSE OF IP AT THE BIRTH OF THE ADMINISTRATIVE STATE

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THE USE AND ABUSE OF IP AT THE BIRTH OF
THE ADMINISTRATIVE STATE

ADAM MOSSOFF[†]

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INTRODUCTION

Since its inception in the Progressive Era, the modern administrative state has functioned in tandem with the three intellectual prop-

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erty doctrines enforced by the federal government—patent, copyright, and trademark law. Although administrative law and these intellectual property doctrines have shared a common provenance—defined, promulgated, and enforced through federal institutions, statutes, and case law—administrative lawyers did not discuss intellectual property, and intellectual property lawyers similarly did not discuss administrative law.¹ Throughout the twentieth century, administrative law and intellectual property law seemed as if they were hermetically sealed off from each other in both theory and practice.

In recent years, the self-imposed segregation between these two legal regimes has finally broken down. In the 1990s, legal scholars began to explore the doctrinal and institutional relationships between patents and the administrative state,² and some patent scholars have since called for a theoretical reframing of patent doctrine “through the lens of regulation.”³ In 1999, the Supreme Court seemed to agree with this growing cadre of academic scholarship, concluding in *Dickinson v. Zurko* that the Administrative Procedure Act applies to the Federal Circuit’s review of the regulations promulgated by the Patent and Trademark Office (PTO).⁴ In its March 2009 decision in *Tafas v. Doll*, the Federal Circuit took another step toward integrating patent law with the administrative state, applying *Chevron* deference to the PTO’s procedural rulemaking.⁵ However, the fractured panel decision virtually guarantees further appellate litigation (both a petition for rehear-

¹ See, e.g., Stuart Minor Benjamin & Arti K. Rai, *Who’s Afraid of the APA? What the Patent System Can Learn from Administrative Law*, 95 GEO. L.J. 269, 270 (2007) (noting that “inattention to administrative law principles has long been a striking feature of the patent system”); John F. Duffy, *The FCC and the Patent System: Progressive Ideals, Jacksonian Realism, and the Technology of Regulation*, 71 U. COLO. L. REV. 1071, 1079 (2000) (observing that “the patent system . . . has been customarily ignored in studies of administrative regulation”); Craig Allen Nard, *Deference, Defiance, and the Useful Arts*, 56 OHIO ST. L.J. 1415, 1420-21 (1995) (observing that “an analysis of the appropriate allocation of interpretive authority between the Federal Circuit and PTO, in the context of patent law, has never fully been performed”).

² See Orin S. Kerr, *Rethinking Patent Law in the Administrative State*, 42 WM. & MARY L. REV. 127, 127 n.1 (2000) (citing sources from the 1990s discussing the PTO as an administrative agency); see also sources cited *supra* note 1.

³ Shubha Ghosh, *Patents and the Regulatory State: Rethinking the Patent Bargain Metaphor After Eldred*, 19 BERKELEY TECH. L.J. 1315, 1388 (2004).

⁴ 527 U.S. 150, 152 (1999).

⁵ *Tafas v. Doll*, No. 08-1352, 2009 WL 723353, at *5 (Fed. Cir. Mar. 20, 2009) (Prost, J.) (“Thus, on review of a procedural rule that has been issued by the USPTO, we will give *Chevron* deference to the USPTO’s interpretation of statutory provisions that relate to the exercise of its delegated authority.”).

ing en banc and a certiorari petition to the Supreme Court).⁶ Regardless of the outcome in the appeals process, there will be substantial litigation on remand as well.⁷

Throughout this doctrinal and scholarly tumult at the recently discovered nexus between patents and the administrative state, the conventional wisdom maintains that administrative law and intellectual property law are two separate legal regimes that were born in separate political epochs and that have evolved as distinct doctrines.⁸ There is a kernel of truth to this standard story. Unlike patents and copyrights, whose protection under federal law began in 1790, the modern administrative state was born in the Progressive Era. In contrast to the limited functions of the federal government in the early years of the American Republic, such as creating private rights in patents and copyrights under a specific enumerated power in the Constitution,⁹ the Progressives took the reigns of government at a time when many people were seeking greater federal involvement in the economic and social conflicts precipitated by the Industrial Revolution.¹⁰ Accordingly, the administrative state first concerned itself with groundbreaking public regulation of industrial and commercial uses

⁶ See *id.* at *17 (Bryson, J., concurring) (rejecting the distinction adopted in Judge Prost's opinion on procedural versus substantive rules and arguing that "it is unnecessary to decide whether deference would be due to the agency's interpretation of its own authority, as we conclude, even without deference, that the agency has authority to issue regulations of the sort issued in this case"); *id.* at *19 (Rader, J., concurring in part and dissenting in part) (arguing that the PTO's rules "are substantive, not procedural," and thus maintaining that the panel should "affirm the district court's conclusion that the PTO exceeded its statutory rulemaking authority").

⁷ See *id.* at *15 (Prost, J.) (acknowledging the "complexity of this case" and identifying five additional legal and factual issues that need to be resolved on remand).

⁸ See Duffy, *supra* note 1, at 1133 ("Unlike the sweeping delegations conferred in the Progressive and New Deal eras, the delegations of governmental power for the patent system were, and still are, extraordinarily narrow."); Kerr, *supra* note 2, at 129 ("The patent system operates not through regulation, but rather through the private law mechanisms of contract, property, and tort.").

⁹ See U.S. CONST. art. I, § 8 ("The Congress shall have power . . . To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.").

¹⁰ See, e.g., JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 7, 16 (1938) (claiming that "the growing interdependence of individuals" requires "that government assume responsibility not merely to maintain ethical levels in the economic relations of the members of society, but to provide for the efficient functioning of the economic processes of the state"); Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 726 (1938) ("It is not, however, the use of ordinary property, nor the property of ordinary or 'natural' persons, that presents today serious problems of adjusting law to new social conditions. Those problems arise in connection with property for power, and therefore primarily in connection with industrial property.").

of land and chattels, imposing new federal regulatory controls on classic common law entitlements in tangible property rights.¹¹

Yet the conventional wisdom is also mistaken, albeit at a more fundamental theoretical level underlying considerations of legal doctrines and institutional design. Although the early administrative state was interested primarily in the regulation of the incidents of tangible property—the functioning of factories and commercial transactions—it achieved this goal on the basis of theoretical work that effected a radical transformation in both constitutional law and property law. The scholars who did the heavy lifting in legal theory to assist the Progressives in crafting the administrative state—legal realists who were committed to the Progressive political agenda—had to reconceptualize the nature of property entitlements as much as they had to reconceptualize the institutional structure and powers of the federal government.¹² As Thomas Merrill and Henry Smith have observed, these legal realists “sought to undermine the notion that property is a natural right, and thereby smooth the way for activist state intervention in regulating and redistributing property.”¹³

It has long gone unnoticed, but intellectual property played a key role in the legal realists’ innovative property theory, as best exemplified in the work of Felix Cohen and Morris Cohen, and in the work of fellow travelers of legal realism, such as Justice Oliver Wendell Holmes, Jr. In their critique of the natural-rights theory of property, these scholars and jurists reframed property into nominalist and positivist terms. Building on Wesley Hohfeld’s conceptual analysis of legal entitlements,¹⁴ they redefined property as a “bundle” of rights with the government’s grant of a right to exclude constituting the essential right that defines a legal entitlement as “property.”

¹¹ See Robert L. Hale, *Rate Making and the Revision of the Property Concept*, 22 COLUM. L. REV. 209, 214-15 (1922) (discussing how “ownership in a manufacturing plant” is controlled under the law); see also Eric R. Claeys, Essay, *Euclid Lives? The Uneasy Legacy of Progressivism in Zoning*, 73 FORDHAM L. REV. 731, 731 (2004) (recounting the standard story that the “Industrial Revolution, growing cities, and motor-powered transportation all created intense land-use conflicts,” which ultimately led to the Supreme Court’s endorsement of zoning as a superior land-use regulatory model).

¹² See generally Eric R. Claeys, *The National Regulatory State in Progressive Political Theory and Twentieth-Century Constitutional Law*, in MODERN AMERICA AND THE LEGACY OF THE FOUNDING 35 (Ronald J. Pestritto & Thomas G. West eds., 2007).

¹³ Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 365 (2001).

¹⁴ See generally Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

This work, however, was not a scholastic investigation into the metaphysics of property, an anathema to the pragmatic legal realists. Rather, this conceptual property theory had doctrinal traction for the burgeoning administrative state: it explained that, as long as a property owner retains the right to exclude, the government may regulate the use and disposition of land and chattels without violating any constitutionally protected property right.¹⁵ In reconceiving property rights in this way, the Cohens and other legal realists relied on intellectual property as their primary doctrinal evidence that property is, at its conceptual core, a right to exclude that is positively granted by the government.

This Article uncovers this long-forgotten theoretical nexus between intellectual property and the birth of the administrative state, revealing an important foundational connection between two legal regimes that many modern scholars and courts have assumed were only recently linked in theory and practice. In doing so, it makes several contributions to the current legal disputes and theoretical analyses of the regulatory status of intellectual property doctrines, particularly patent law. First, as a historical matter, it establishes that the administrative state and intellectual property law share an important theoretical pedigree in legal-realist property theory, affirming anew the twentieth-century refrain that “we are all legal realists now.”¹⁶ Second, this historical insight reveals that current scholarship advancing a regulatory theory of intellectual property rights has substantial support in the theoretical underpinnings of the administrative state.¹⁷ To propose that intellectual property doctrines, such as patents, serve regulatory policy goals is neither as novel nor as radical as many have assumed it to be. Lastly, and perhaps most importantly, this analysis highlights salient theoretical concerns underlying both the administrative state and modern intellectual property law. In using intellectual property in their critique of the natural-rights theory of property, the legal realists made some basic assumptions about the meaning of

¹⁵ See, e.g., *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005) (“A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner’s right to exclude others from entering and using her property—perhaps the most fundamental of all property interests.”); *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (rejecting a takings claim arising from a federal prohibition on the sale of eagle feathers because the “loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim”).

¹⁶ Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 467 (1988) (book review).

¹⁷ See *infra* notes 182-183, 197-202 and accompanying text.

“labor” and “value,” which are central concepts in the natural-rights theory of property. Yet, in important respects, the legal realists defined these terms differently from the natural rights philosophers. In other words, the legal realists failed to critique the property theory of the natural rights philosophers, such as John Locke, and the American jurists and lawyers who translated this theory into practice.¹⁸ This oversight suggests that the legal realists’ theoretical work on property may not have been as successful as the conventional wisdom assumes today.

This Article proceeds in three Parts. First, it explains how the legal realists reconceptualized property into both nominalist and positivist terms—as a bundle of sticks with the state’s grant of a right to exclude as the single essential characteristic that defines this legal entitlement as “property.” It then discusses the legal realists’ justification for this new conception of property, detailing for the first time the exact arguments and evidence used by Felix Cohen and other legal realists to advance their nominalist-positivist property theory.¹⁹ This argument consists primarily of a critique of the labor-based natural-rights theory of property, which, for ease of reference, this Article will refer to as “Lockean property theory.”²⁰

Second, this Article will discuss how the legal realists’ critique of Lockean property theory falls short of its target insofar as it elides an important distinction between value and economic value (i.e., wealth). The balance of Part II will explicate the distinction between these different senses of value and the role that property plays in both defining and securing value to its creators, as set forth in chapter five of John Locke’s *Second Treatise*.²¹ This Part will follow the lead of Felix Cohen and his fellow legal realists in using intellectual property rights, such as trademarks, trade secrets, and patents, to illustrate how the legal realists failed to critique Lockean property theory on its own terms.

Third, and last, this Article will discuss the recent scholarly efforts to reframe intellectual property rights as regulatory entitlements

¹⁸ See *infra* note 145 and accompanying text.

¹⁹ Within extant legal-realist scholarship, Felix Cohen developed the most sophisticated and systemic property theory, which is probably why his work is cited often by modern property scholars. Accordingly, Cohen’s arguments deserve serious consideration as the best representative example of legal-realist property theory.

²⁰ See *infra* notes 86-87 and accompanying text.

²¹ JOHN LOCKE, TWO TREATISES OF GOVERNMENT 285-302 (Peter Laslett ed., Cambridge Univ. Press, student ed. 1988) (1690).

within the administrative state, revealing how these scholars are replicating, unconsciously or otherwise, the theoretical work of early-twentieth-century Progressives and legal realists. This intellectual history is important because it cautions modern intellectual property scholars against repeating the legal realists' errors in assuming that Lockean property theory provides little or no support for intellectual property rights. In fact, the legal realists arguably misused intellectual property in critiquing Lockean property theory. It is an empirical question whether this misuse of intellectual property in the theoretical work underlying the administrative state destabilizes doctrinal or scholarly work today, but this insight is important insofar as it may be implicitly framing "the second-order questions of filling in the details of the system."²²

I. MODERN PROPERTY THEORY

The legal realists are responsible for both the bundle metaphor and its attendant emphasis on the right to exclude in modern American property law.²³ The Progressives found this reconceptualization of property helpful because it made it possible for the modern administrative state to control and restrict various property uses without implicating the constitutional protections of the Takings or Due Process Clauses.²⁴ This was first achieved not by reinterpreting these constitutional provisions but by fundamentally redefining the meaning of "property."²⁵ But how did the legal realists accomplish this jurispru-

²² See Richard A. Epstein, *Intellectual Property: Old Boundaries and New Frontiers*, 76 IND. L.J. 803, 827 (2001) (stating that theoretical accounts of intellectual property help "make sense of the [intellectual property] system in its basic outlines," which then orients scholars and judges toward "a set of guidelines that should help us deal with the second-order questions of filling in the details of the system").

²³ See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (stating that the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property").

²⁴ See, e.g., *Bowles v. Willingham*, 321 U.S. 503, 517 (1944) (upholding federal price control on the housing market and noting that all "forms of regulation[] may reduce the value of the property regulated" but "that does not mean that the regulation is unconstitutional"); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (holding that zoning is a valid regulation of property use that does not violate the Due Process Clause of the Fourteenth Amendment); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (holding a mining regulation to be an unconstitutional taking but noting that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law").

²⁵ See BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 28 (1977) (observing that the bundle conception of property "permits the [lawyer] to escape a

dential transformation in property law? Interestingly, no one has yet answered this question.

Within modern property scholarship, some professors simply assume that the legal realists got the better of their historical predecessors.²⁶ Given the sweeping revolution wrought within American law by the legal realists, this assumption is not entirely unjustified.²⁷ Yet it is an assumption all the same. Even for those scholars who do not necessarily agree with legal-realist property theory, no one has yet assessed the actual premises, lines of reasoning, and doctrinal evidence used by Felix Cohen and other legal realists in advancing their new property theory. To date, scholars in both groups have simply described the shift in property theory at the turn of the last century from natural rights philosophy to the realist *mélange* of nominalism, positivism, and pragmatism.²⁸ Even more important, no modern legal scholar has assessed whether Cohen and other legal realists actually succeeded in justifying this conceptual shift in property theory, which has served as one of the supporting pillars of the edifice of the modern administrative state.

The purpose of this Part is to fill this gap in the intellectual history of early-twentieth-century American property theory. First, it will discuss the nominalist and positivist nature of legal-realist property theory, what is referred to by modern legal professionals as the “bundle of sticks” metaphor with its attendant emphasis on the right to exclude as the essential stick that defines a legal entitlement as property. Second, it will discuss for the first time the actual arguments used by the legal realists to justify this shift to the bundle metaphor and the exclusion conception of property, identifying the central role of intellectual property within their theoretical arguments. As such, this Part is descriptive, but it is necessary to set forth the basic outlines of long-forgotten arguments before one can assess whether or not these arguments were successful in justifying the now widely accepted bundle metaphor and exclusion conception of property.

‘literal’ construction of the [Takings] clause that would transform him into an implacable foe of the modern state”).

²⁶ See, e.g., *id.* at 26-29, 98-100 (contrasting the “layman’s” view of property as thing ownership with the lawyer’s “scientific” analysis of property as a “bundle” of legal relations).

²⁷ See Singer, *supra* note 16, at 467 (“All major current schools of thought are, in significant ways, products of legal realism. To some extent, we are all realists now.”).

²⁸ See, e.g., Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CAL. L. REV. 241, 251-60 (1998); Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 372 (2003).

A. *Bundles of Sticks and the Right To Exclude*

A brief foray into modern property theory is necessary to set the background context for identifying the ways in which the legal realists used intellectual property in their conceptual analysis of property. It is not the purpose of this section to provide a comprehensive review of American property theory, which would be impossible to do in a single law journal article, let alone in a single section. What suffices here is a more narrow and defensible insight: the legal realists reconceptualized property entitlements into both nominalist and positivist terms, popularizing within American property law the bundle metaphor and its attendant emphasis on the right to exclude as the essential characteristic of the legal right to property. It is also important to recognize that the legal realists were not interested in property theory as an end in itself. These abstract conceptual moves served the political goal of making property more plastic as a legal and constitutional restraint on the then-nascent administrative state.²⁹

It is widely recognized that modern lawyers employ a nominalist definition of “property.” In their first year of law school, law students learn the modern orthodoxy that “property” refers to an aggregate set of social relations—various rights and obligations between citizens that are bundled together for socially contingent policy reasons.³⁰ Thus, in contrast to the layperson who believes that “property” necessarily refers to a right to use something in the world, lawyers and

²⁹ See Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights*, 85 NOTRE DAME L. REV. (forthcoming 2010) (manuscript at 46-47), available at <http://ssrn.com/abstract=1117999>. Claeys writes,

The Realists . . . needed to revise property conceptual theory for substantive political reasons. The political assumptions informing their conception of social science led them to believe that resource uses could and needed to be managed by experts applying “scientific” conceptions of social efficiency. If the concept “property” is a nominalist term—that is, if “property” refers to “that which the law happens to call property in a particular case”—the term would allow experts to manage particular uses of property in particular resource disputes without needing to worry overmuch that the conceptual structure of property might limit their efforts.

Id. (footnotes omitted).

³⁰ See JESSE DUKEMINIER ET AL., PROPERTY 81 (6th ed. 2006) (defining property as comprising “a number of disparate rights, a ‘bundle’ of them: the right to possess, the right to use, the right to exclude, the right to transfer”); JOSEPH WILLIAM SINGER, PROPERTY LAW, at xxxix, xlix (4th ed. 2006) (noting that “[o]wners of property generally possess a *bundle of entitlements*” and that property theory helps justify the nature and scope of these intricate “social relations”).

judges employ the well-worn metaphor that it comprises only a “bundle of sticks.”³¹

The progenitor of this nominalist “bundle” metaphor was Wesley Hohfeld’s conceptual reconstruction of property into an assortment of rights, privileges, powers, and immunities.³² The legal realists, though, are responsible for giving Hohfeld’s somewhat abstruse terminological analysis its traction within the minds of more practically oriented American lawyers and judges.³³ After legal realism effected its revolution in American law in the early twentieth century, lawyers and judges conceived of property in the nominalist terms of “social relationships”³⁴ or “legal relations.”³⁵ By 1934, Walton Hamilton famously defined property as “a euphonious collocation of letters which serves as a general term for the miscellany of equities that persons hold in the commonwealth.”³⁶

As I and others have often pointed out, Thomas Grey was correct in observing that the legal realists fragmented the “robust unitary conception of ownership into a more shadowy ‘bundle of rights,’”

³¹ Gerald Korngold & Andrew P. Morris, *Introduction: The Story of Property Stories*, in *PROPERTY STORIES* 1 (Gerald Korngold & Andrew P. Morris eds., 2004); see also *United States v. Craft*, 535 U.S. 274, 278 (2002) (“A common idiom describes property as a ‘bundle of sticks’—a collection of individual rights which, in certain combinations, constitute property.”); STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 16-17 (1990) (discussing the “sophisticated conception” of property as a “bundle of ‘sticks’” or a set of legal “relations among persons or other entities with respect to things”).

³² See generally Hohfeld, *supra* note 14.

³³ See, e.g., BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 129 (1928) (“The bundle of power and privileges to which we give the name of ownership is not constant through the ages. The faggots must be put together and rebound from time to time.”).

³⁴ Felix S. Cohen, *Dialogue on Private Property*, 9 *RUTGERS L. REV.* 357, 361-63 (1954); see also 1 RICHARD T. ELY, *PROPERTY AND CONTRACT IN THEIR RELATION TO THE DISTRIBUTION OF WEALTH* 96 (1914) (“The essence of property is in the relations among men arising out of their relations to things.” (emphasis omitted)); ALEXANDER LINDSAY, *ESSAY IN PROPERTY: ITS DUTIES AND RIGHTS* 70 (2d ed. 1922) (“[P]rivate property . . . is a right vested in individuals thought of as set over against one another, and it requires the recognition and protection of society for its existence.”); Hohfeld, *supra* note 14, at 743 (“[T]he supposed single right *in rem* [in property] . . . really involves as many separate and distinct ‘right-duty’ relations as there are persons subject to a duty . . .”).

³⁵ *RESTATEMENT (FIRST) OF PROPERTY* ch. 1, introductory note (1936); see also Arthur L. Corbin (A.L.C.), Comment, *Taxation of Seats on the Stock Exchange*, 31 *YALE L.J.* 429, 429 (1922) (“Our concept of property has shifted . . . ‘[P]roperty’ has ceased to describe any *res*, or object of sense, at all, and has become merely a bundle of legal relations . . .”).

³⁶ Walton H. Hamilton & Irene Till, *Property*, in 11 *ENCYCLOPAEDIA OF THE SOCIAL SCIENCES* 528, 528 (Edwin R.A. Seligman & Alvin Johnson eds., 1937).

which “disintegrated” property as an internally cohesive legal concept.³⁷ Unlike David Hume, who felt that he could safely leave his metaphysical skepticism at his writing desk when he reengaged the ordinary world of human activities,³⁸ the legal realists knew their nominalism concerned a legal concept that was used by everyday lawyers and judges. And, as Hamlet put it, there was the rub: all legal concepts, such as contracts and torts, refer to specified sets of legal relationships. If property was defined tautologically as a collection of legal relationships, then there was nothing to distinguish “property” as a species within the genus of law. If property was to remain a viable and determinate legal concept within the legal realists’ social conception of legal rights, then they had to, in Felix Cohen’s words, “get rid of the confusion of nominalism.”³⁹

Cohen and his legal-realist brethren succeeded in ridding themselves of the disintegrating effects of nominalism by finding refuge in positivism. In this way, they maintained their commitment to the social definition of property, but they recognized that there was one essential social characteristic of property that was not shared with other legal concepts—the state’s grant to a citizen of the right to exclude others.⁴⁰ Felix Cohen thus proffered a new “realistic definition of private property”⁴¹ in his article *Dialogue on Private Property*: “Private

³⁷ Thomas C. Grey, *The Disintegration of Property*, in PROPERTY: NOMOS XXII, at 69, 69 (J. Roland Pennock & John W. Chapman eds., 1980); see also Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597, 1646-47 (2008) (recognizing that the legal realists had an “anti-essentialist focus on the legally constructed and contingent nature of property” that was “predicated on the disintegration of property into constituent elements”); Mossoff, *supra* note 28, at 372-74 (identifying the same point and citing others who have also observed this problem).

³⁸ See DAVID HUME, A TREATISE OF HUMAN NATURE 269 (L.A. Selby-Bigge ed., Oxford University Press 2d ed. 1978) (1793); see also DAVID HUME, ENQUIRIES CONCERNING HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS 160 (L.A. Selby-Bigge ed., Oxford University Press 3d ed. 1975) (1777).

³⁹ Cohen, *supra* note 34, at 378; cf. Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1193 (1999) (“While the modern bundle-of-legal relations metaphor reflects well the possibility of complex relational fragmentation, it gives a weak sense of the ‘thingness’ of private property.”).

⁴⁰ See, e.g., *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 246 (1918) (Holmes, J., dissenting) (asserting that “[p]roperty depends upon exclusion by law from interference”); *id.* at 250 (Brandeis, J., dissenting) (“An essential element of individual property is the legal right to exclude others from enjoying it.”); Hamilton & Till, *supra* note 36, at 536 (“It is incorrect to say that the judiciary protected property; rather they called that property to which they accorded protection.”); Hohfeld, *supra* note 14, at 745-46 (explaining that the right to exclude is the only claim-right constituting the in rem legal relation among citizens known as “property”).

⁴¹ Cohen, *supra* note 34, at 378.

property is a relationship among human beings such that the so-called owner can exclude others from certain activities or permit others to engage in those activities and in either case secure the assistance of the law in carrying out his decision.”⁴²

Cohen’s insight here was hardly novel (and he admitted as much). In his work, Felix Cohen cited his father and fellow legal realist, Morris Cohen, who wrote in the 1920s that “the essence of private property is always the right to exclude others.”⁴³ Justice Oliver Wendell Holmes, Jr., a fellow traveler of the legal realists, had written several decades earlier that the essence of property is that an “owner is allowed to exclude all, and is accountable to no one.”⁴⁴

The claim that the right to exclude is the essential characteristic of the legally protected entitlement known as “property” soon became orthodoxy within modern property theory. By the end of the twentieth century, the Supreme Court confidently asserted that the right to exclude is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”⁴⁵ Thomas Merrill, a leading property scholar, has gone a step further, declaring that “the right to exclude others is more than just ‘one of the most essential’ constituents of property—it is the *sine qua non*.”⁴⁶

It has become commonplace to identify the legal realists as the fountainhead for the nominalist “bundle” metaphor.⁴⁷ This is true, but the legal realists more rightly deserve credit for the positivist claim in American property law that the right to exclude is the essence of the legal entitlement referred to as “property.” This is important insofar as prominent property scholars today critique the legal realists’ “bundle” conception of property,⁴⁸ while at the same time advancing

⁴² *Id.* at 373.

⁴³ Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1927).

⁴⁴ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 246 (1881).

⁴⁵ *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *see also* *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) (“The hallmark of a protected property interest is the right to exclude others.”).

⁴⁶ Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998).

⁴⁷ *See* Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 SEATTLE U. L. REV. 617, 635 (2009) (book review) (“Contemporary property scholars . . . often assume that the ad hoc bundle conception was the only legacy from Realist property scholarship.”); Merrill & Smith, *supra* note 13, at 365 (claiming that the bundle of rights metaphor “became popular among the legal realists in the 1920s and 1930s”).

⁴⁸ *See, e.g.*, Merrill, *supra* note 46, at 737 (“For the Realists, property was not defined by a single right or definitive trilogy of rights. Rather it is a ‘bundle of rights.’ Moreover, this bundle has no fixed core or constituent elements.”).

(apparently without realizing it) the legal realists' exclusion conception of property.⁴⁹ Until the legal realists are recognized as the source of both the bundle metaphor and exclusion conceptions of property, the nexus between realist property theory and modern intellectual property law will remain lost within the record of American legal history.⁵⁰

B. *The Use of IP To Redefine Property in Land*

The legal realists' revolution in property theory, especially in their redefinition of this legal entitlement in terms of the right to exclude, was predicated on a scathing critique of Lockean property theory. Their arguments were very much of the form that, given the logical incoherence of Lockean property theory, their claim that property comprises a state-granted right to exclude wins by default. As has been observed of the legal realists, their arguments were primarily critical—they stood more for what they were not than for what they were.⁵¹

As a result, the legal realists' explanation for the merits of both the bundle metaphor and the exclusion conception of property was a bit thin. On one hand, their positing of the nominalist bundle metaphor often constituted nothing more than a bald assertion.⁵² In an article in the *Yale Law Journal* in 1932, for instance, Hamilton believed it

⁴⁹ See THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY, at v (2007) (claiming that “property at its core entails the right to exclude others from some discrete thing”); Merrill, *supra* note 46, at 754 (asserting that “property means the right to exclude others from valued resources, no more and no less”).

⁵⁰ Cf. Adam Mossoff, *Exclusion and Exclusive Use in Patent Law*, 22 HARV. J.L. & TECH. 321, 360-70 (2009) (identifying a nexus between the legal realists' exclusion conception of property theory and modern patent theory).

⁵¹ See Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1233-34 (1931) (observing that the legal realists were not of one mind on any issue in law or politics); see also NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 69 (1995) (“Realism was more a mood than a movement. That mood was one of dissatisfaction with legal formalism . . .”).

⁵² See CARDOZO, *supra* note 33, at 129 (“The bundle of power and privileges to which we give the name of ownership is not constant through the ages.”); Corbin, *supra* note 35, at 429 (asserting that “‘property’ has ceased to describe any *res*, or object of sense, at all, and has become merely a bundle of legal relations—rights, powers, privileges, immunities”); Hale, *supra* note 11, at 214 (“The right of ownership in a manufacturing plant is, to use Hohfeld’s terms, a *privilege* to operate the plant, plus a *privilege* not to operate it, plus a *right* to keep others from operating it, plus a *power* to acquire all the rights of ownership in the products.”); see also J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 714 (1996) (observing that “[p]roperty is a bundle of rights’ is little more than a slogan” and noting that “[t]here is no real theory that property is a bundle of rights”).

sufficient to criticize a contemporary scholar's analysis of Lockean property theory by simply pointing out that the "pages are barren of a Hohfeldian analysis of the wousin called property into the conglomerate mass of rights, duties, privileges, and immunities which make it up."⁵³

On the other hand, the legal realists' argument that property is essentially the right to exclude (granted and enforced by the state) was a bit more substantive. Of course, even in arguing the positive case for the right to exclude, the legal realists spoke in their characteristically strident rhetoric. At the outset, they rejected the longstanding definition of property in American law: "Property is the exclusive right of possessing, enjoying, and disposing of a thing."⁵⁴ This definition, according to Felix Cohen, represented "the 'thingification' of *property*," which perpetuated a myth that "courts are not *creating* property, but are merely *recognizing* a pre-existent Something."⁵⁵ Cohen dismissed this as "transcendental nonsense,"⁵⁶ which reflected the "metaphysical doctrine of Duns Scotus, William of Occam, and other 14th and 15th century scholastics who held that all reality is tangible and exists in space."⁵⁷

There was a substantive argument behind this bluster, and within it we can identify two separate prongs, although the legal realists did not structure their argument in precisely this way. The first part constituted a conceptual claim about the proper definition of property, and the second part constituted a logical critique of Lockean property theory. The first part of their argument—the conceptual claim that property is essentially the right to exclude—was neither lengthy nor complex. Felix Cohen and other scholars and judges, such as Wesley Hohfeld, Morris Cohen, and Justice Holmes, repeatedly observed that

⁵³ Walton H. Hamilton, *Property—According to Locke*, 41 YALE L.J. 864, 865 (1932) (citing PASCHAL LARKIN, *PROPERTY IN THE EIGHTEENTH CENTURY* (1930)).

⁵⁴ *McKeon v. Bisbee*, 9 Cal. 137, 143 (1858); see also *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (1795) ("[T]he right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man."); *City of Denver v. Bayer*, 2 P. 6, 6-7 (Colo. 1883) ("Property, in its broader and more appropriate sense, is not alone the chattel or the land itself, but the right to freely possess, use, and alienate the same . . ."); *Eaton v. B. C. & M. R.R.*, 51 N.H. 504, 511 (1872) ("Property is the right of any person to possess, use, enjoy, and dispose of a thing." (quoting *Wynhamer v. People*, 13 N.Y. 378, 433 (1856))).

⁵⁵ Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 815 (1935).

⁵⁶ *Id.* at 809.

⁵⁷ Cohen, *supra* note 34, at 361.

the law secured incorporeal entitlements as “property,” such as patents, copyrights, and goodwill.⁵⁸ As such, they maintained that there was simply no basis whatsoever to define property according to physical possession or use of a thing in the real world. Arthur Corbin thus observed, “Our concept of property has shifted; incorporeal rights have become property.”⁵⁹

According to Felix Cohen, the transcendental nonsense in the “thingification of property” was especially clear in light of intellectual property rights, such as a “patent on a chemical process.”⁶⁰ Such a patent was incapable of being physically possessed like land or a fox,⁶¹ but no one denied that patents are legally enforced property rights. Accordingly, patents are property if and only if the state enforces an inventor’s right to exclude others from using the legally protected invention.⁶² If the right to exclude is the single legal relation that defined patents and other intellectual property rights as “property,” *mutatis mutandis*, land and chattels must also be defined by the same essential element of a state-granted right to exclude. QED.

Unlike Justice Holmes and Morris Cohen,⁶³ Felix Cohen did not rest on his laurels with this somewhat simple analytical argument. Cohen further argued that the positivist redefinition of property in terms of the right to exclude also revealed how the “vicious circle inherent in [Lockean property theory] is plain.”⁶⁴ The problem was Lockean property theory’s claim that the law secured the valuable fruits of one’s labors.

In his *Dialogue on Private Property*, Cohen explained that property constitutes the grant of a right to exclude others by the state, and thus any value in something is merely a consequent of creating this legal entitlement—not an antecedent. If it were otherwise, as Felix Cohen

⁵⁸ See Mossoff, *supra* note 50, at 360-65 (discussing the realists’ use of patents and other IP rights to justify the conceptual claim that “property” means only a right to exclude).

⁵⁹ Corbin, *supra* note 35, at 429.

⁶⁰ Cohen, *supra* note 34, at 360.

⁶¹ See *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823) (upholding first possession for claiming land as property); *Pierson v. Post*, 3 Cai. 175 (N.Y. Sup. Ct. 1805) (upholding the rule of capture for claiming property in wild animals).

⁶² Felix Cohen summarized “property in terms of a simple label” as follows: “To the world: Keep off X unless you have my permission, which I may grant or withhold. Signed: Private Citizen. Endorsed: The state.” Cohen, *supra* note 34, at 374 (italics added).

⁶³ See HOLMES, *supra* note 44, at 246; Cohen, *supra* note 43, at 45.

⁶⁴ Cohen, *supra* note 55, at 815.

aply put it, then it would be logically impossible to have valueless property, such as purely personal papers that are meaningful only to their author.⁶⁵ If value inexorably leads to property, it would also be logically impossible to have valuable nonproperty, such as clean air.⁶⁶ Yet no one doubts that personal papers are property and that clean air is not property; neither of these propositions is equivalent to claiming that one can square a circle. Thus, it is undeniable “that not only is there valueless property, but there is also propertyless value.”⁶⁷ Cohen drove the conceptual point home: “in short, property is not wealth.”⁶⁸

In another seminal article, *Transcendental Nonsense and the Functional Approach*, Felix Cohen directly criticized the circular legal reasoning that he believed was inherent in the claim that property arose from the valuable prelegal labor and use of something in the world. Here, Cohen used trademark doctrine to illustrate what he saw as the fundamental illogic of this basic tenet of Lockean property theory.⁶⁹ He first observed that courts increasingly have departed from traditional trademark theory’s concerns about unfair competition and consumer protection, and have instead justified trademark protection according to Lockean property theory.⁷⁰ Cohen was incorrect in his historical claim, as courts had long secured trademarks under Lockean property theory.⁷¹ In 1849, for instance, a New York court issued an injunction on a finding of trademark infringement on the grounds that “the [trademark] owner is robbed of the fruits of the reputation that he had successfully labored to earn.”⁷² Thus, Cohen’s critique had a greater theoretical and historical bite than he even realized.

⁶⁵ Cohen, *supra* note 34, at 363-64.

⁶⁶ *Id.* at 364.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Modern trademark law is conceptually muddled. Cohen recognized that the doctrine is muddled, but he argued that trademarks are classified conceptually as “property” because courts permit trademark owners to obtain “injunctive relief,” which is the *legal remedy* that enforces the *right to exclude*. Cohen, *supra* note 55, at 814. In fact, law and economics now identifies legal entitlements providing for injunctive relief as “property rules.” See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (setting forth the now-famous property rule (injunction) and liability rule (damages) distinction).

⁷⁰ Cohen, *supra* note 55, at 814.

⁷¹ See Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839, 1873-85 (2007).

⁷² *Amoskeag Mfg. Co. v. Spear*, 2 Sand. Ch. 599, 606 (N.Y. Sup. Ct. 1849).

Cohen nonetheless preferred to focus on trademark cases of more recent vintage,⁷³ and he restated the “current legal argument” for protecting trademarks as property rights as follows:

[1] One who by the ingenuity of his advertising or the quality of his product . . . has thereby created a thing of value;

[2] a thing of value is property;

[3] [therefore] the creator of property is entitled to protection against third parties who seek to deprive him of his property.⁷⁴

The circularity, according to Cohen, is in the second premise: a thing of value is property. What makes something potentially valuable is not some characteristic or feature that preexists the law; it is the legal classification of this thing as property—whether it be a trademark, land, a share of stock, or anything else to which a court or legislature attaches a right to exclude. As Justice Holmes pointed out in *INS v. Associated Press*,⁷⁵ in which he dissented from the Court’s decision to extend property protection over valuable news items that were obtained from the labors of a news organization, “[p]roperty, a creation of law, does not arise from value Property depends upon exclusion by law from interference”⁷⁶ In court decisions protecting land, chattels, trademarks, or some other form of exclusive entitlement, the legal realists and their fellow travelers maintained that value is a consequent of the legal classification of something as property, not an antecedent. In saying otherwise, Lockean property theory was incoherent. As English Progressive and property theorist Alexander Lindsay concluded, “[t]he attempt to make the right of property inherent in the individual apart from society is false to the facts of the creation of wealth.”⁷⁷

The legal realists’ arguments about property had a profound impact beyond the confines of straightforward property doctrines, such

⁷³ See Cohen, *supra* note 55, at 815 n.18 (discussing *Am. Agric. Chem. Co. v. Moore*, 17 F.2d 196 (M.D. Ala. 1927)).

⁷⁴ *Id.* at 815. This is a formalized representation of Cohen’s sentence. It could be symbolically presented as $A \rightarrow B, B = C, A, \therefore C$.

⁷⁵ 248 U.S. 215 (1918).

⁷⁶ *Id.* at 246 (Holmes, J., dissenting in part).

⁷⁷ LINDSAY, *supra* note 34, at 70. Lindsay’s work was known to the American legal realists. See, e.g., MORRIS R. COHEN & FELIX S. COHEN, READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 98-99 (1951) (reproducing an excerpt of Lindsay’s *Essay in Property: Its Duties and Rights*, *supra* note 34).

as the estates system and restrictive covenants.⁷⁸ In fact, the legal realists were not interested in property theory as such. Their work was part and parcel of a broader political program that sought to direct the use, development, and disposal of land and chattels through regulatory rules crafted by experts staffing the newly created federal and state administrative agencies.⁷⁹ Politically, the legal realists' argument succeeded, and the administrative state is now a fact of the modern American constitutional order. Theoretically, however, there remains an open question as to whether the legal realists' arguments about the illogic of Lockean property theory succeeded or not, which was the sole argument in favor of their claim to the logical necessity of defining property in terms of the right to exclude. This assessment of the details of legal-realist property theory, including its use of intellectual property, is the purpose of Part II.

II. THE ABUSE OF IP TO REDEFINE PROPERTY IN LAND

The legal realists have been accused of “bombast” and “broad-brushed polemic,”⁸⁰ and Felix Cohen’s accusation that Lockean property theory is “transcendental nonsense” on par with other “transcendental conceptions of God, matter, the Absolute, essence and accident, substance and attribute,”⁸¹ seems to fall within the scope of this criticism. Yet Cohen’s property theory made substantive points, and it was not simply hyperbolic rhetoric. The positivist conception of property as securing only a right to exclude was predicated on the work of Jeremy Bentham and other utilitarian philosophers.⁸² Even

⁷⁸ See, e.g., *Sommer v. Kridel*, 378 A.2d 767, 772-73 (N.J. 1977) (holding that “anti-quoted real property concepts which served as the basis for the pre-existing rule, shall no longer be controlling,” and that “claims must be governed by more modern notions of fairness and equity”); RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.4, § 1.4 cmt. a (2000) (eliminating the distinction between real covenants and equitable servitudes because “much of the 19th century complexity is irrelevant and unnecessary”).

⁷⁹ See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394-95 (1926) (holding that zoning regulations are not arbitrary because “zoning has received much attention at the hands of commissions and experts” and their comprehensive reports “bear every evidence of painstaking consideration”).

⁸⁰ DUXBURY, *supra* note 51, at 112 (referring to Fred Rodell and Thurman Arnold).

⁸¹ Cohen, *supra* note 55, at 826.

⁸² See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 231 (Wilfrid E. Rumble ed., 1995) (1832) (“Every legal right is the creature of positive law.”); JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 113 (C.K. Ogden ed., Richard Hildreth trans., Routledge & Kegan Paul Ltd. 1931) (1864) (“Property and law are born together, and die together. Before laws were made there was no property; take away laws, and prop-

the “bundle” metaphor was first employed several decades before the legal-realist revolution in the 1910s and 1920s.⁸³ The legal realists simply gave the bundle metaphor its theoretical (and doctrinal) traction within American property law. Moreover, Cohen’s functionalist account of the law, from property to jurisdiction to due process, was grounded in the pragmatic philosophy of C.S. Peirce, William James, and John Dewey.⁸⁴ Cohen was certainly standing on the shoulders of these philosophers when he pronounced that “[a]ll concepts that cannot be defined in terms of the elements of actual experience are meaningless.”⁸⁵

The purpose of this Part is to reconsider Felix Cohen’s critique of Lockean property theory, as further supported in the work of other realists, such as Morris Cohen. Since the legal realists’ arguments were principally critical, it is first necessary to set forth a basic outline of Lockean property theory. Given John Locke’s influence in early American politics and law,⁸⁶ his argument for the natural right to property serves nicely as an exemplar of natural rights philosophy. To the extent that some scholars are skeptical of Locke’s actual influence on early American political and legal thought,⁸⁷ his property theory simply serves as an easily recognized proxy for natural-rights property theory generally. Once the framework of Locke’s property theory has

erty ceases.”); *see also* Philbrick, *supra* note 10, at 729 (citing Bentham for the proposition that “property is the creature and dependent of law”).

⁸³ *See* Penner, *supra* note 52, at 713 n.8 (discussing the provenance of the bundle metaphor in the late 1800s).

⁸⁴ *See* Cohen, *supra* note 55, at 826 (advancing a functionalist account of law based in the pragmatic and positivist philosophy “vigorously pressed by C. S. Peirce, James, Dewey, Russell, Whitehead, C. I. Lewis, C. D. Broad, and most recently by the Viennese School, primarily by Wittgenstein and Carnap”).

⁸⁵ *Id.*

⁸⁶ *See* Richard A. Epstein, *No New Property*, 56 BROOK. L. REV. 747, 750 (1990) (observing that American property lawyers are the “inheritors of the Lockean tradition”).

⁸⁷ *See, e.g.*, David L. Wardle, *Reason to Ratify: The Influence of John Locke’s Religious Beliefs on the Creation and Adoption of the United States Constitution*, 26 SEATTLE U. L. REV. 291, 297 (2002) (“Locke’s influence on the Constitution was not as strong in the actual substance and form of the document as that of Montesquieu; rather, it was more indirect, creating an atmosphere in early America conducive to its creation and adoption.”); *see also* GARRY WILLS, *INVENTING AMERICA: JEFFERSON’S DECLARATION OF INDEPENDENCE 171-75* (1978) (arguing that Locke had little to no influence in the actual writing of the Declaration of Independence); Jason F. Robinson, *Book Review: Gerber’s To Secure These Rights*, 12 J.L. & POL. 123, 132-33 (1996) (“Since the mid-1960s, historians have challenged the prevailing Lockean interpretation of the American founding, arguing that the American revolutionaries were concerned less with individual rights and limited government than with the cultivation of a virtuous, public-spirited citizenry willing to sacrifice individual self interest for the greater public good.”).

been set up, it can then serve as the foil against which to evaluate its critique by Felix Cohen and other legal realists.

A. *Lockean Property Theory: Labor, Value, and Property*

John Locke articulated his famous and influential version of the labor theory of property in chapter five of the *Second Treatise*. In the theory's bare-bones outline,⁸⁸ Locke first proposes that "*Labour*, in the Beginning, *gave a Right of Property*, where-ever any one was pleased to employ it, upon what was common."⁸⁹ Locke then argues that "'tis *Labour* indeed that *puts the difference of value* on every thing."⁹⁰ The premises of the argument are clear: value is necessarily created by labor, as this term is defined by Locke,⁹¹ and labor is the necessary and sufficient condition for creating property in the state of nature.⁹² The creation of value therefore is a necessary element in the creation of a property right deserving of protection under the law in civil society. The legal implication of Lockean property theory is inescapable: if the purpose of the state is to secure property rights,⁹³ then the law should secure as property the valuable products and services created by original laborers. As Justice William Patterson wrote in *Vanhorne's Lessee v. Dorrance* in 1798, "[n]o man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry."⁹⁴

⁸⁸ The specifics of Locke's property theory will be explicated in greater detail at the relevant points in assessing Felix Cohen's critique. See, e.g., *infra* notes 147-160 and accompanying text (discussing how "labor" refers to "production" in Locke's property theory).

⁸⁹ LOCKE, *supra* note 21, at 299. In his famous mixing-labor argument for property, Locke claims "[t]he *labour* that was mine, removing [things] out of that common state they were in, hath *fixed* my *Property* in them." *Id.* at 289.

⁹⁰ *Id.* at 296.

⁹¹ See Adam Mossoff, *Locke's Labor Lost*, 9 U. CHI. L. SCH. ROUNDTABLE 155 (2002) (discussing Locke's thick notion of "labor" in his theory of property); see also STEPHEN BUCKLE, *NATURAL LAW AND THE THEORY OF PROPERTY* 151 (1991) ("The doctrine of the origin of property through labor will not properly be understood if it is not recognized that Locke thinks of labour as a rational (or purposeful), value-creating activity.").

⁹² See LOCKE, *supra* note 21, at 292 ("The Measure of Property, Nature has well set, by the Extent of Mens['] *Labour* . . .").

⁹³ See *id.* at 350 (observing that people "joyn [sic] in Society . . . for the mutual Preservation of their Lives, Liberties and Estates, which I call by the general Name, *Property*").

⁹⁴ *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (1795).

The impact of Locke's property theory on early Americans was tremendous. One illustrative example is James Madison's 1792 essay, aptly titled *Property*.⁹⁵ In this short essay, published in the *National Gazette*, Madison argued that "property" is sometimes used in a strictly legal sense, referring to "a man's land, or merchandize, or money," but that this term also has a "larger and juster meaning, [in which] it embraces every thing to which a man may attach a *value* and have a right."⁹⁶ Madison thus condemned any government action that "violates [individuals'] property, in their actual possessions [or] in the labor that acquires their daily subsistence."⁹⁷ In the Founding Era and in the Antebellum Era, Madison was not alone among American political and legal scholars in his commitment to Lockean property theory.⁹⁸

Beyond political tracts and legal treatises, jurists in the nineteenth century often employed Lockean property theory to define the meaning of property within American law. Justice David Brewer explained in a speech at Yale Law School that "[p]roperty is as certainly destroyed when the use of that which is the subject of property is taken away . . . for that which gives value to property, is its capacity for use."⁹⁹ Several years earlier, the New York Court of Appeals announced in *In re Jacobs* that "[p]roperty . . . has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived."¹⁰⁰ This was not dicta, as the *Jacobs* Court used this restatement of Lockean property theory to invalidate a regulation prohibiting cigar manufacturing in tenement houses, concluding that the regulation deprived the tenants of their constitutional due process rights.¹⁰¹ As the Pennsylvania Supreme Court similarly observed in 1823, "property, without the power of use and disposition, is an empty sound."¹⁰²

⁹⁵ James Madison, *Property*, NAT'L GAZETTE, Mar. 29, 1792, reprinted in JAMES MADISON, WRITINGS 515 (Jack N. Rakove ed., 1999).

⁹⁶ *Id.* at 515 (emphasis added).

⁹⁷ *Id.* at 517.

⁹⁸ See Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 137 (1990) ("The broad conception of property found in Madison's essay, and implicit in the writings of others in the Founding Era, is not an aberration in intellectual history."); see also Mossoff, *supra* note 28, at 404-07 (same).

⁹⁹ D.J. Brewer, Justice, U.S. Supreme Court, Protection of Private Property from Public Attack, Address at the Yale Law School Graduation Ceremony (June 23, 1891), as reprinted in 10 GREEN BAG 2D 495, 501 (2007).

¹⁰⁰ *In re Jacobs*, 98 N.Y. 98, 105 (1885).

¹⁰¹ *Id.* at 115.

¹⁰² *In re Flintham's Appeal*, 11 Serg. & Rawle 16, 23 (Pa. 1824) (Duncan, J.).

B. Lockean Property Theory and Intellectual Property

As is clear from the previous Section, Lockean property theory was not a theoretical boogeyman invented by Felix Cohen and other legal realists to make their positivist conception of property seem reasonable by comparison. Throughout the nineteenth century, courts employed Lockean property theory to justify the protection of property rights, especially the new forms of intellectual property that were coming into existence as a result of the Industrial Revolution. For instance, in 1868 in *Peabody v. Norfolk*, the Supreme Judicial Court of Massachusetts became the first American court to hold that trade secrets should be protected as property.¹⁰³ According to the *Peabody* court, the reason for its decision was simply a matter of treating like cases alike:

If a man establishes a business and makes it valuable by his skill and attention, the good will of that business is recognized by the law as property. If he adopts and publicly uses a trade mark, he has a remedy, either at law or in equity, against those who undertake to use it without his permission.¹⁰⁴

Since the valuable labor that created a trade secret was no different in kind from the valuable labor that created good will or trademarks, there was no reason that the courts should not protect trade secrets as the property rights of their creators. In 1984 in *Ruckelshaus v. Monsanto Co.*, the United States Supreme Court continued this long tradition of relying on Lockean property theory to justify the legal protection of trade secrets as property—explicitly citing John Locke for the proposition that property arises from “labour and invention.”¹⁰⁵

The *Monsanto* Court’s reference to “invention” was not happenstance. The *Peabody* court had similarly invoked patented inventions as exemplars of valuable property already secured under the law.¹⁰⁶ Throughout the nineteenth century, courts often justified the protection of patents under the Lockean principle that the state should secure to people the fruits of their labors; in patent cases, it was the

¹⁰³ 98 Mass. 452, 458 (1868).

¹⁰⁴ *Id.* at 457.

¹⁰⁵ 467 U.S. 986, 1003 (1984) (citing JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 14-26 (J.W. Gough ed., 1946) (1690)).

¹⁰⁶ *Peabody*, 98 Mass. at 457-58.

fruits of *inventive* labors.¹⁰⁷ Nineteenth-century courts similarly invoked Lockean property theory to justify protecting patents as constitutional private property under the Takings Clause.¹⁰⁸

It should be unsurprising, then, that one finds Chancellor James Kent, in his influential *Commentaries on American Law*, classifying both copyrights and patents as property obtained through “[o]riginal [a]cquisition by [i]ntellectual [l]abor.”¹⁰⁹ Chancellor Kent observed that “[i]t is just that [authors and inventors] should enjoy the pecuniary profits resulting from mental as well as bodily labor.”¹¹⁰ In 1824, Daniel Webster proposed a bill that would make it possible for foreign inventors to apply for United States patents, declaring in his floor speech in the House of Representatives:

And, at this time of day, and before this Assembly, . . . he need not argue that the right of the inventor is a high property; it is the fruit of his mind—it belongs to him more than any other property—he does not inherit it—he takes it by no man’s gift—it peculiarly belongs to him, and he ought to be protected in the enjoyment of it.¹¹¹

Webster repeated this argument throughout his life. It is notable that he explicitly invoked it in 1852 in his last court appearance, in which he successfully represented Charles Goodyear (the inventor of vulcanized rubber) in Goodyear’s patent infringement lawsuit against Horace Day.¹¹² Webster won the day for Goodyear with an explicit appeal to Lockean property theory to justify Goodyear’s patent rights, proclaiming that “[i]nvention, as a right of property, stands higher than inheritance or devise, *because it is personal earning*. It is more like acquisitions by the original right of nature. In all these there is an effort of mind as well as muscular strength.”¹¹³ In ruling in favor of

¹⁰⁷ See Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Historical Context*, 92 CORNELL L. REV. 953, 992-93 (2007).

¹⁰⁸ See Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. REV. 689, 700-07 (2007).

¹⁰⁹ 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 474 (O.W. Holmes, Jr. ed., 12th ed., Little, Brown, and Co. 1873) (1826).

¹¹⁰ *Id.*

¹¹¹ 41 ANNALS OF CONG. 934 (1824). Even the congressmen who disagreed with Webster’s specific legislative proposal, such as Representative Buchanan, found common cause with Webster that the law should secure “the property which an inventor has in that which is the product of his own genius.” *Id.* at 936.

¹¹² CHARLES SLACK, NOBLE OBSESSION: CHARLES GOODYEAR, THOMAS HANCOCK, AND THE RACE TO UNLOCK THE GREATEST INDUSTRIAL SECRET OF THE NINETEENTH CENTURY 182-88 (2002).

¹¹³ *Argument in the Goodyear Rubber Case*, in 15 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 437, 438 (Edward Everett ed., 1903).

Goodyear, Circuit Justice Grier and District Judge Dickerson found Webster's argument compelling because they and other jurists agreed with the Lockean principle that the patent laws secure an inventor's right to "enjoy the fruits of his invention."¹¹⁴ Beyond employing these positive aspects of the normative rhetoric of Lockean property theory, nineteenth-century courts also identified patent infringers as "pirates" who stole from inventors the valuable fruits of their labors—their profits.¹¹⁵

C. *Value and Property: Antecedents and Consequents*

All of this suggests that Felix Cohen and the legal realists were justified in thinking that they had to take down Lockean property theory in order to claim that their new nominalist-positivist conception of property won by default. James Kent, Daniel Webster, and nineteenth-century courts all employed Lockean property theory to justify protecting intellectual property on the grounds that the law should secure preexisting valuable fruits of inventive labors. Cohen's claim that Lockean property theory is "viciously circular," although illustrated with early-twentieth-century case law, applies with equal force to the nineteenth-century legislatures, lawyers, and courts who readily invoked Lockean property theory as well.¹¹⁶

¹¹⁴ *Hawes v. Gage*, 11 F. Cas. 867, 867 (C.C.N.D.N.Y. 1871) (No. 6237); *see also* *Birdsall v. McDonald*, 3 F. Cas. 441, 444 (C.C.N.D. Ohio 1874) (No. 1434) ("Patent laws are founded on the policy of giving to [inventors] remuneration for the fruits, enjoyed by others, of their labor and their genius."); *Middletown Tool Co. v. Judd*, 17 F. Cas. 276, 278 (C.C.D. Conn. 1867) (No. 9536) (recognizing that the patent laws secure even "the fruit of a very small amount of inventive skill"); *Clark Patent Steam & Fire Regulator Co. v. Copeland*, 5 F. Cas. 987, 988 (C.C.S.D.N.Y. 1862) (No. 2866) ("Congress has wisely provided by law that inventors shall exclusively enjoy, for a limited season, the fruits of their inventions."); *Davoll v. Brown*, 7 F. Cas. 197, 199 (C.C.D. Mass. 1845) (No. 3662) (explaining that the law "protect[s] intellectual property, the labors of the mind, productions and interests as much a man's own, and as much the fruit of his honest industry, as the wheat he cultivates, or the flocks he rears"); *Brooks v. Bicknell*, 4 F. Cas. 247, 251 (C.C.D. Ohio 1843) (No. 1944) (stating that "a man should be secured in the fruits of his ingenuity and labor" and that "it seems difficult to draw a distinction between the fruits of mental and physical labor"); *McKeever v. United States*, 14 Ct. Cl. 396, 420 (1878) (quoting an unnamed constitutional commentator that the Copyright and Patent Clause in Article I, Section 8, secures to authors and inventors "a natural right to the fruits of mental labor").

¹¹⁵ *See* Mossoff, *supra* note 107, at 993 n.193 (listing cases in which infringers are identified as "pirates").

¹¹⁶ *See supra* notes 69-77 and accompanying text (explaining Cohen's view of Lockean theory as circular).

In particular, the *Peabody* court's use of Lockean property theory to justify the protection of trade secrets—property owned only by commercial firms engaged in the manufacture and sale of products or services in the market—seems to buttress Cohen's critique, not undermine it. Cohen could point out that a trade secret is valuable only because its owner may obtain an injunction from a court, which is what makes it possible for a trade secret owner to demand money from others for permission to use the information. Without this threat of an injunction—a state sanction enforcing a right to exclude others from the information—no one would feel compelled to pay for a trade secret. The result would be that a trade secret would be no more valuable than anything else that is denied exclusive protection by the state, such as the generic words that courts safeguard from the attempts by commercial firms to trademark.¹¹⁷

Yet the safe harbor for generic terms in trademark law highlights an important difference between trademarks and the information typically secured in trade secrets or patents. In using trademark doctrine to argue that Lockean property theory is conceptually incoherent, Cohen chose his doctrinal example well, as it does seem at first blush that it is only a court's decision to protect a trademark as “property” that makes the trademarked term economically valuable. “Cola” is an unfettered word that is free to be used by all; but for a single court decision, though, it would have joined “Coke” as the valuable and exclusive property of the Coca-Cola Company.¹¹⁸ The same can be said for “brassiere,”¹¹⁹ but not “Wonderbra.”¹²⁰ In 1999, a federal court held that “hog” was a freely usable generic term, rejecting Harley-Davidson's attempt at claiming it as a trademark for its motorcycles.¹²¹ But for that court decision, the economic value of the word “hog” would have skyrocketed, as Harley-Davidson would have enforced its right to exclude others from using the term. In denying Harley-Davidson's claim to trademark protection for “hog,” the court effectively valued this word at a market price of zero.

¹¹⁷ 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 12:1 (4th ed. 2008) (discussing the rule that firms are prohibited from claiming trademark protection for generic terms).

¹¹⁸ See *Dixi-Cola Labs., Inc. v. Coca-Cola Co.*, 117 F.2d 352 (4th Cir. 1941).

¹¹⁹ See *Charles R. De Bevoise Co. v. H. & W. Co.*, 60 A. 407 (N.J. Ch. 1905).

¹²⁰ “Wonderbra” is a trademark owned by Canadelle Limited Partnership of Canada, a wholly owned subsidiary of HanesBrands Inc.

¹²¹ *Harley-Davidson, Inc. v. Grottanelli*, 164 F.3d 806 (2d Cir. 1999).

The court decisions concerning “cola,” “brassiere,” and “hog” seem to exemplify Cohen’s argument against Lockean property theory: the value in something is a consequent of a court’s decision to protect something as property, not an antecedent. Accordingly, the only thing a court does in a property case is decide whether to grant a right to exclude—i.e., whether to provide a plaintiff with an injunctive remedy. The court makes this decision on the basis of pragmatic policy concerns about the economic and social consequences of such a decision, not on the basis of any “transcendental” claims about preceding labor and its valuable “fruits.” The value follows logically *from* the grant of the right to exclude according to Cohen, it does not exist *before* this exclusive grant.

Cohen’s trademark example thus seems plausible (more on this later).¹²² The problem, however, is that his argument is not solely about trademarks, it is a general argument about the nature of property as such. Trademarks are Cohen’s only example for his general theoretical argument that Lockean property theory is viciously circular in its justification for securing property rights under the law. In sum, Cohen views Lockean property theory as begging the question of whether to grant a right to exclude on the basis of the value in the presumptive property at issue. It is not value, Cohen argues, that leads to property; it is a grant of the right to exclude that leads to value.

Trade secrets and patented inventions, however, reveal the initial cracks in Cohen’s critique. Although there are doctrinal differences between trade secrets and patents, this is a distinction without a difference for purposes of the analysis here. The reason is that inventions, regardless of how they are legally protected, would be valuable even if there were no legal system that protected them. In fact, the protection of inventions as property under the patent laws is a relatively modern phenomenon. The Anglo-American patent system’s provenance reaches back only several hundred years, to Parliament’s enactment of the Statute of Monopolies in 1623.¹²³ Before that, the first institutionalized legal protection of information is found in the exclusive privileges afforded to craft knowledge in the guild system of fifteenth-century Venice.¹²⁴ Trade secret doctrine is of

¹²² See *infra* Section II.D.

¹²³ See Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550–1800*, 52 HASTINGS L.J. 1255, 1270-76 (2001).

¹²⁴ See Craig Allen Nard & Andrew P. Morriss, *Constitutionalizing Patents: From Venice to Philadelphia*, 2 REV. L. & ECON. 223, 233-58 (2006).

even more recent vintage: there was no American trade secret doctrine until the *Peabody* decision in 1868.¹²⁵

Prior to the 1623 Statute of Monopolies, the federal statutes enacted under the Copyright and Patent Clause in the 1787 Federal Constitution, and the *Peabody* decision in 1868, there was no standardized institutional protection of property rights in new products or processes within the Anglo-American legal system, either as patented inventions or as trade secrets. Yet new ideas and technologies were extremely valuable to many people throughout history before such express legal property protections were established. The wheel, sailing ships, and plows, to name just a few early inventions, were valuable contributions to the progress of human civilization long before the legal innovations of the eighteenth and nineteenth centuries.

Modern patent theory, as informed by law and economics, understands and embraces this fact. The economic analysis of patent law assumes as one of its basic foundational premises that an invention's value preexists its legal classification as property in the patent system. Ironically, modern patent scholars do so by adopting Cohen's functionalist account in advancing a utilitarian justification for intellectual property.¹²⁶ As such, patent scholars today are wont to point out that the patent system incentivizes inventive activity by preventing third parties from free-riding on an inventor's labors in creating a new technology or product.¹²⁷ The concept of free-riding presupposes that a value preexists this free-riding behavior; otherwise, a third party would not be interested in free-riding. Thus, the policy problem is relatively straightforward: inventors know that they will create a valuable invention and that people will exploit the "public good" aspect of the idea by copying it freely. The patent system corrects this "market failure" by securing the exclusive rights of use and disposition in an

¹²⁵ See *supra* notes 103-104 and accompanying text. To this day, England refuses to recognize trade secrets as property, protecting them instead under various contract and tort doctrines. See generally ALLISON COLEMAN, THE LEGAL PROTECTION OF TRADE SECRETS 8-9 (1992).

¹²⁶ See, e.g., Dennis D. Crouch, *The Patent Lottery: Exploiting Behavioral Economics for the Common Good*, 16 GEO. MASON L. REV. 141, 141 (2008) ("[O]ur patent system is built primarily on assumptions about how incentives operate.").

¹²⁷ See WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 18-20 (2003) (discussing how "the public-good character of intellectual property . . . can make it difficult to prevent misappropriation and to exclude free riders" and thus "[u]nless there is power to exclude, the incentive to create intellectual property in the first place may be impaired").

invention.¹²⁸ In this way, an inventor can prevent third parties from stealing the fruits of his inventive labors, as nineteenth-century courts so eloquently and succinctly phrased this policy concern.¹²⁹

More important, a free rider is not necessarily motivated by commercial profit in the marketplace. Although patent infringement often entails such motivations, the problem of free-riding applies to all intellectual property. In the copyright context, the typical problem is not that a third party wants to *sell* a book written by an author, but rather that people will want to *read* a book, given its value to them. Without the copyright system, people will pursue such aesthetic, cultural, and other personal values without any qualms—copying the book and stealing the fruits of the labors of the author. The problem, according to modern intellectual property theory, is that an author understands this beforehand, and thus an author will decide not to labor in writing a book in the first place.

In this way, the concept of free-riding challenges Cohen's argument that value is a consequent, and not an antecedent, of a decision to secure something as property. In its typical formulation, free-riding entails deriving economic value from another's efforts,¹³⁰ which presupposes economic value before a court's decision in a lawsuit that officially gives "property rule" protection to one of the (future) entitlement owners. But as the copyright situation discussed above makes clear, free-riding entails the pursuit of noneconomic values as well. Law and economics scholars often quantify such "subjective values" as variables in their analyses of legal doctrine, such as accounting for the personal value in living in one's family home.¹³¹ But these are at best rough proxies because such values are not truly fungible. This point has long been understood in common law property doctrine, which consistently awards injunctions, such as specific performance in conveyances of real property, as a default remedy.¹³² Unsurprisingly, patents, and by implication, copyrights, have also long been deemed uniquely valuable to their owners, and thus specific performance is

¹²⁸ See Mossoff, *supra* note 50, at 349-60.

¹²⁹ See *supra* notes 114-115 and accompanying text.

¹³⁰ See Lloyd Cohen, *Holdouts and Free Riders*, 20 J. LEGAL STUD. 351 (1991).

¹³¹ See, e.g., Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 995-1002.

¹³² See E. ALLAN FARNSWORTH, CONTRACTS § 12.4, at 768 (3d ed. 1999) ("Only for land, which English courts regarded with particular esteem, was a general exception made [in remedies for breach of contract], on the ground that each parcel of land was 'unique' so money damages were inadequate.").

also a default remedy in legal disputes concerning conveyances of these intellectual property rights.¹³³

This is not a knock-down argument, however, to which Felix Cohen would not have a response. Cohen would remind us that he does not argue that value exists if and only if something is designated as property. He identifies air, for example, as something that is extremely valuable and that is not designated as “property” under the law.¹³⁴ In this respect, Cohen is not attacking a straw man in his critique of Lockean property theory. He distinguishes between the concepts of property and value, recognizing that one does not necessarily lead to the other. As Cohen rightly points out, “not only is there valueless property, but there is also propertyless value.”¹³⁵

Yet if value is a consequence of designating something as property, then how can Cohen account for such things as valueless property? If there is a grant of a right to exclude to an entitlement owner, then it seems that its value should always follow as a result, as the newly designated “property owner” will extract value by requiring others to pay him for access. Not so, Cohen would respond. Although Cohen does not explicitly discuss this issue in his work on property, it is easy to see his answer to this question. The question confuses a necessary condition with a sufficient condition. Cohen argues that the creation of a right to exclude is a *necessary* condition for value to exist in property, such as a trademark, but it is not sufficient. There must also be a market for the now exclusive thing—i.e., people who are willing to pay money to entice the property owner to relinquish his right to exclude. If there is no market, such as in Cohen’s example of personal papers,¹³⁶ then there is no value in the objects designated as property.

The same could be said of trademarks. A term is only valuable as a trademark, even if its owner is granted a right to exclude, if it represents a successful product in the marketplace. “Coke” is a valuable trademark today. “Woolworth” is not. Woolworth was once one of the largest retailers in the United States, but the company went bankrupt and shuttered all of its stores in 1997. Thus, the designation of some-

¹³³ See, e.g., *Conway v. White*, 9 F.2d 863, 866 (2d Cir. 1925) (“It is of course well-settled law that a contract to sell or transfer a patented right, like a contract to sell real estate, may be specifically enforced. The reason is that there is no accurate measure of damages, and a pecuniary payment is inadequate relief.”).

¹³⁴ Cohen, *supra* note 34, at 364.

¹³⁵ *Id.*

¹³⁶ See *supra* notes 65-67 and accompanying text.

thing as property is necessary for it to be valuable, but it is not sufficient. This logical insight is captured nicely in Cohen's pithy remark that "property is not wealth."¹³⁷

Given Cohen's responses to the critique of his claim that Lockean property theory is engaging in circular reasoning, it is evident that the problem is not in the logical form of his argument. The issue of whether value, *B*, is a consequent of property, *A*, in a conditional proposition—stated in symbolic logic as $A \rightarrow B, A, \therefore B$ —is dependent on the specific sense that Cohen attributes to the variable representing "value," *B*. In other words, Cohen rightly believes that value is a consequent of a property designation because he defines this term in a specific way that logically compels him to this conclusion. This is the topic of the next Section.

D. *Value and Wealth: Genus and Species*

Felix Cohen's succinct summary of his analysis of the relationship between value and property—"property is not wealth"—reveals the fundamental error in his critique of Lockean property theory. Of course, the philosophical analysis of "value" is a complex epistemological and ethical issue that has been debated for as long as philosophy has existed in western civilization.¹³⁸ A short section cannot do justice to the breadth and scope of the philosophical study of this subject, but such a comprehensive account is not necessary for the purposes of this Article. It is sufficient to identify the way in which Cohen's critique of Lockean property theory falls short of its mark. Accordingly, it is necessary to explain only that Cohen uses "value" in a very narrow sense—as a synonym for wealth—and that this is not the same sense of this term as is used in Lockean property theory. This Section will thus explicate these different conceptions of "value," revealing how Cohen misused intellectual property in his critique of Lockean property theory.

Cohen does not specifically define value, but his criticism of Lockean property theory for failing to account for the existence of both "valueless property" and "propertyless value" reveals his conceptual commitments.¹³⁹ In this argument, he subtly shifts from using the

¹³⁷ Cohen, *supra* note 34, at 364.

¹³⁸ See, e.g., W.T. JONES, *THE CLASSICAL MIND* 153 (2d ed. 1970) (explaining that the goal of Plato's moral philosophy was to "show that values are objective facts about the universe and that knowledge of them is possible").

¹³⁹ See *supra* notes 65-68 and accompanying text.

term “value” to his conclusion that “property is not wealth.”¹⁴⁰ In other words, Cohen believes that “value” is synonymous with “wealth” (i.e., economic value). This sense of “value” is implicit in his use of trademark doctrine, as he assumes that the value in the trademark is its economic value to its owner. In fact, the value must be economic, because if there were no profit at stake, a commercial firm would not expend the money—the transaction costs, in economists’ parlance—to obtain a court order that enforces its property right in a trademark.

This observation that Cohen has a very narrow concept of value exposes a crucial mistake in his critique of Lockean property theory. Cohen assumes that his definition of value as “economic value” or “wealth” is the same definition used by Locke and his fellow natural-rights philosophers, scholars, and jurists. But this is a mistaken assumption, and it undermines his claim to have proven the inherent illogic of Lockean property theory, at least as an alternative to Cohen’s positivist conception of property as securing only a right to exclude.

In their intellectual context, nineteenth-century courts and legislators were not guilty of employing viciously circular rhetoric when they used Lockean property theory to justify legal protection of property and intellectual property. To the contrary, they were identifying that inventions produced through human ingenuity and labor, such as railroad-car airbrakes,¹⁴¹ vulcanized rubber,¹⁴² sewing machines,¹⁴³ or incandescent lightbulbs,¹⁴⁴ were valuable to human life regardless of whether they were mass produced and sold in a highly developed commercial economy. They were valuable because they made both life and happiness possible, as the production of such goods is what makes it possible for humans to live and flourish.¹⁴⁵

The nineteenth-century courts and legislators learned this point directly from Locke,¹⁴⁶ whose “mixing labor” metaphor was an almost

¹⁴⁰ Cohen, *supra* note 34, at 364.

¹⁴¹ U.S. Patent No. 360,070 (filed Nov. 19, 1886) (issued Mar. 29, 1887).

¹⁴² U.S. Patent No. 3,633 (issued June 15, 1844).

¹⁴³ U.S. Patent No. 4,750 (issued Sept. 10, 1846).

¹⁴⁴ U.S. Patent No. 223,898 (filed Nov. 4, 1878) (issued Jan. 27, 1880).

¹⁴⁵ The following four paragraphs are based on the author’s arguments in *Locke’s Labor Lost*, *supra* note 91, at 159-61.

¹⁴⁶ The study of Locke and other natural law philosophers was fundamental to a legal education in the early American Republic. See 1 DAVID HOFFMAN, A COURSE OF LEGAL STUDY 59-63 (2d ed. 1836) (identifying texts by Aristotle, Cicero, Seneca, Grotius, Puffendorf, Locke, and others as essential subjects of study in a legal education); Louis D. Brandeis, *The Harvard Law School*, 1 GREEN BAG 10, 14 (1889) (discuss-

poetic turn of phrase referring to the normative function of *production* within Locke's natural law moral philosophy.¹⁴⁷ Throughout chapter five of the *Second Treatise*, when Locke gives illustrative examples of what mixing labor means in creating property, this metaphor repeatedly exemplifies productive activities. Accordingly, mixing labor represents the acts of gathering nuts, growing vegetables and fruits, mining ore, killing a deer, catching fish, hunting a hare, cultivating land for farming, sewing clothes, baking bread, felling timber, and, last but certainly not least, fermenting wine.¹⁴⁸ "Nature and the Earth furnished only the almost worthless Materials," writes Locke, and it is these that "Industry . . . made use of" in creating all manner of items used by people.¹⁴⁹

It is important to recognize that, for Locke, all of these productive activities occur in the state of nature—before the evolution of money and the creation of a commercial economy that values such products in terms of financial wealth. In fact, Locke uses these examples of mixing labor in the *Second Treatise* to make a normative claim, not a political or economic claim, about the moral status of such activities. His point is that production is a *moral activity*, because the natural law requires that man be "*bound to preserve himself*, and not to quit his Station wilfully."¹⁵⁰ According to Locke, each individual's basic moral obligation is self-preservation, and, once this condition is met, to preserve the rest of mankind as well. If it is a moral obligation to preserve oneself, then it follows as a corollary that the means of this preservation is a moral virtue. For mankind, the means of survival are produced goods, such as shelter, clothing, and food. Labor is the means by which each individual fulfills his fundamental moral obligation because it is labor—production—that creates the products necessary for him to live.

ing Justice Joseph Story's appointment as a professor at Harvard Law School in 1829 to teach, among other subjects, a course in "The Law of Nature"), *reprinted in* 11 GREEN BAG 2D 483, 489-90 (2008); James Kent, A Lecture, Introductory to a Course of Law Lectures in Columbia College (Feb. 2, 1824), *in* THE LEGAL MIND IN AMERICA 92, 100-01 (Perry Miller ed., 1962) (identifying "the learned Grotius," as well as "Puffendorf, Barbeyrac, Bynkershoek, Burlamaqui, Wolfius, Vattel, Heineccius, Montesquieu, Rutherford, and Martens," as the scholars whom law students should study in preparing for a career in the law (italics omitted)).

¹⁴⁷ See LOCKE, *supra* note 21, at 288 ("Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*.").

¹⁴⁸ *Id.* at 286-91, 294-300.

¹⁴⁹ *Id.* at 298 (emphasis omitted).

¹⁵⁰ *Id.* at 271.

The conclusion that the mixing-labor metaphor is simply Locke taking poetic license in referring to production is not based only on an inference from the natural law framework of the *Second Treatise*. Locke consistently used the term “labor” throughout his writings to refer to productive activities. In a short essay written in 1693, aptly titled *Labour*, Locke uses this term to refer only to those productive activities “[b]y which all mankind might be supplied with what the real necessities and conveniency of life demand.”¹⁵¹ Labor has a similar meaning in Locke’s writings on education.¹⁵²

It is only after one has identified the production-based meaning of Locke’s mixing-labor metaphor within the context of his natural law ethics that it is possible to understand why Locke argues for the labor theory of value as an essential element of his theory of property. And it is at this important juncture that Felix Cohen’s assumption that value means wealth leads Cohen astray in his critique. Locke is adamant in making the case “that of the *Products* of the Earth useful to the Life of Man 9/10 are the *effects of labour*,”¹⁵³ which he demonstrates by pointing out the almost self-evident fact that the products of one acre of farmland, such as “Straw, Bran, Bread, [and] . . . Wheat,” are worth more than that same acre of land lying fallow.¹⁵⁴ The sole difference in value between food and fallow land “is all the Effect of Labour.”¹⁵⁵ As Locke explains, it is “*Labour* then which *puts the greatest part of Value upon Land*,” and “’tis to that we owe the greatest part of all its useful *Products*.”¹⁵⁶ The labor that underlies the creation of property is the same labor that creates valuable products, because mixing labor means production.¹⁵⁷

¹⁵¹ JOHN LOCKE, *Labour* (1693), reprinted in POLITICAL ESSAYS 326, 328 (Mark Goldie ed., 1997).

¹⁵² JOHN LOCKE, *Of the Conduct of the Understanding, in SOME THOUGHTS CONCERNING EDUCATION AND OF THE CONDUCT OF THE UNDERSTANDING* 163, 215 (Ruth W. Grant & Nathan Tarcov eds., 1996); see also JOHN LOCKE, *Some Thoughts Concerning Reading and Study for a Gentleman* (1703), reprinted in SOME THOUGHTS CONCERNING EDUCATION AND OF THE CONDUCT OF THE UNDERSTANDING, *supra*, at 348.¹⁵³ LOCKE, *supra* note 21, at 296.

¹⁵⁴ *Id.* at 298.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ This also suggests that labor creates the conditions by which men can rise above subsistence-level living in the state of nature and thereby transcend the “enough and as good” proviso on original acquisition. See, e.g., *id.* at 294 (“[H]e who appropriates land to himself by his labour, does not lessen but increase the common stock of mankind.”).

In this context, the act of mixing labor to produce new goods, which is necessary to satisfy the obligation of the natural law of self-preservation, logically and temporally precedes the creation of a market economy in which people engage in commercial transactions. Consistent with classical and early-seventeenth-century natural law philosophers,¹⁵⁸ Locke explicitly recognizes that mixing labor (production) occurs before commercial transactions; money is only an agreed-upon medium of exchange representing the value in items previously produced by an individual.¹⁵⁹ As Locke deftly observes, “Gold and Silver . . . has its *value* only from the consent of Men, whereof Labour yet makes, in great part, *the measure*, it is plain”¹⁶⁰

However, a person who has produced something, such as picking acorns and cooking them, may use this item without a market transaction occurring at all. A lone individual stranded on a desert island would engage in mixing labor to produce the wares necessary to live, such as creating food, clothing, and shelter, in the precise manner set forth in Lockean property theory. According to Locke, this person has produced valuable products, which is exactly what the natural law would command him to do. Value is defined here by reference to the requirements of self-preservation—what is required for this person to survive is of value to him. In this context, there is no creation of wealth because there is no market in which this individual can trade his goods with other people using a medium of exchange. In Lockean property theory, the market is a consequent of production—not an antecedent.

In critiquing Locke’s genetic argument for the descriptive and normative foundations of property—the act of production rooted in a basic moral duty to preserve oneself—Felix Cohen presupposes the existence of a complex industrial economy and an advanced legal system. He thus ends up using the same linguistic terms as does Locke, especially “value,” but he defines these terms differently from Locke

¹⁵⁸ See 1 HUGO GROTIUS, DE JURE PRAEDAE COMMETARIUS [COMMENTARY ON THE LAW OF PRIZE AND BOOTY] 227-28 (Gwladys L. Williams & Walter H. Zeydel trans., Oxford University Press 1950) (1604) (agreeing with Horace, Cicero, and Seneca that in the early stages of the state of nature “there were no commercial transactions”); see also *id.* at 230 (“At a subsequent stage in the evolution of property, . . . commerce began to be widely practised.”).

¹⁵⁹ See LOCKE, *supra* note 21, at 300-01 (recognizing that, after producing the items necessary to live, “thus *came in the use of Money*, some lasting thing that Men might keep without spoiling, and that by mutual consent Men would take in exchange for the truly useful”).

¹⁶⁰ *Id.* at 301-02.

and the American legal professionals who implemented Lockean property theory in the eighteenth and nineteenth centuries. In defining value in terms of wealth in his critique of Lockean property theory, which clearly uses a different sense of this term, Cohen's argument falls flat.¹⁶¹

This discussion of Lockean property theory should not be misconstrued. Locke's concepts of labor and value are not the only ones that may be compared to Felix Cohen's property theory, nor is Locke's theory necessarily the best. Locke's property theory, though, is especially useful for two reasons, the first historical and the second conceptual. First, within the early years of the American Republic, Locke's property theory was the best known property theory and the most influential in shaping American property law.¹⁶² American lawyers and judges in the eighteenth and nineteenth centuries were well acquainted with Lockean property theory, or at least they were well acquainted with the secondary sources that reflected its influences, such as William Blackstone's *Commentaries* or *Cato's Letters*.¹⁶³ Accordingly, it is important to understand Lockean property theory in order to grasp the

¹⁶¹ This is a rhetorical move that has a long pedigree in intellectual debate. In fact, Locke has no grounds to complain, because he uses this technique in the *First Treatise* against his own seventeenth-century antagonist, Robert Filmer, a proponent of the political theory of the divine right of kings. See Peter Laslett, *Introduction to LOCKE*, *supra* note 21, at 69 ("Not only did Locke refuse to meet Filmer on his own ground, and fail to recognize the full strength, antiquity and importance of the patriarchal tradition, he persistently ignored the searching counter-criticisms which are the strength of Filmer's case." (footnote omitted)).

¹⁶² See JAMES L. HUSTON, *SECURING THE FRUITS OF LABOR* 17 (1998) ("[T]he American Revolution was virtually built on the labor theory of property/value."); Underkuffler, *supra* note 98, at 133-42 (discussing the substantial influence of Locke's conception of property on early American property jurisprudence).

¹⁶³ See DANIEL J. BOORSTIN, *Preface to the Beacon Press Edition of THE MYSTERIOUS SCIENCE OF THE LAW* (Beacon Press 1958) (1941) ("In the history of American institutions, no other book—except the Bible—has played so great a role as Blackstone's *Commentaries on the Laws of England*."); CLINTON ROSSITER, *SEEDTIME OF THE REPUBLIC* 141 (1953) ("No one can spend any time in the newspapers, library inventories, and pamphlets of colonial America without realizing that *Cato's Letters* rather than Locke's *Civil Government* was the most popular, quotable, esteemed source of political ideas in the colonial period."). The influence of Locke on *Cato's Letters* is undeniable. See 1 JOHN TRENCHARD & THOMAS GORDON, *CATO'S LETTERS* 427 (Ronald Hamowy ed., 1995) (Letter No. 62, Jan. 20, 1721) ("By liberty, I understand the power which every man has over his own actions, and his right to enjoy the fruit of his labour, art, and industry And thus . . . every man is sole lord and arbiter of his own private actions and property."). The same is true of Blackstone. See generally 1 WILLIAM BLACKSTONE, *COMMENTARIES* *1-115 (citing Grotius, Pufendorf, and Locke repeatedly in discussing how natural rights, including property, arise in the state of nature and how society is formed to secure these rights).

intellectual context in which the *Peabody* Court, Daniel Webster, and other nineteenth-century legal professionals repeatedly claimed that the law should secure to inventors the “fruits of their labors.”¹⁶⁴

Second, Lockean property theory, because it is so well known, serves ideally to explain the important conceptual distinction between value and wealth that is elided by Cohen. Economic value is only one species of value; it is the value of an item or service as quantified in a market according to an agreed-upon medium of exchange. This is not the only type of value. In terms of Locke’s moral philosophy, at least in the basic framework that he sets forth in the *Second Treatise*, Locke defines value as something that serves the requirements of human life as required by the natural law. One can easily find other senses of value, such as in the recent work of Judge Richard Posner. Judge Posner originally agreed with Cohen that value meant wealth, as Posner once famously argued that wealth maximization was the only appropriate normative metric in legal analysis.¹⁶⁵ By the 1990s, however, Judge Posner abandoned this claim, developing a more general pragmatic theory of law¹⁶⁶ that recognizes that there are values in political and legal institutions beyond simply counting dollars.¹⁶⁷ There are even more general definitions of value, such as Ayn Rand’s definition of this concept in her metaethics as “that which one acts to gain and/or keep.”¹⁶⁸ As philosopher Tara Smith has explained, Rand concludes that it is when one chooses to obtain and keep values in accord with human nature that values become moral values.¹⁶⁹ Moreover, similar to Locke’s explanation of the evolution of money, Rand

¹⁶⁴ See *supra* note 114 and accompanying text.

¹⁶⁵ See generally Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

¹⁶⁶ See generally RICHARD A. POSNER, *OVERCOMING LAW* 11 (1995) (defining his pragmatic theory of law as “practical, instrumental, forward-looking, activist, empirical, skeptical, antidogmatic, [and] experimental”).

¹⁶⁷ See Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 14-15 (1996) (discussing myriad normative questions raised by a life sentence of a sixteen-year-old for the sale of a single marijuana cigarette); see also Martha Minow, *Religion and the Burden of Proof: Posner’s Economics and Pragmatism in Metz v. Leininger*, 120 HARV. L. REV. 1175, 1176-79 (2007) (describing the “overlap” in the domains of pragmatism and economics, and how the latter now serves the former in Posner’s mature theory of adjudication).

¹⁶⁸ AYN RAND, *The Objectivist Ethics*, in *THE VIRTUE OF SELFISHNESS* 13, 15 (1964).

¹⁶⁹ See TARA SMITH, *VARIABLE VALUES* ch. 4 (2000).

predicates economic value on the existence of previously produced valuable goods.¹⁷⁰

Simply put, the normative concept of “value” is broader than the economic concept of value (wealth). In critiquing Lockean property theory as “viciously circular,” Cohen is conflating this distinction between a genus and one of its species; in this case, it is the distinction between value and specific types of value, such as moral value, personal value, aesthetic value, economic value, or others. Cohen would have us count dollars as the only conceivable measure of value in property theory. This is exactly what Cohen means when he says that the value in a trademark necessarily follows from a court’s decision to enforce the trademark as a property right by granting to its designated owner the right to exclude others—an injunction.¹⁷¹ As a result, Cohen hastily dismisses Lockean property theory on the grounds that “property is not wealth,”¹⁷² because it is only possible for wealth to be generated after a state’s creation of a property right in a citizen.

In holding Lockean property theory accountable to this materialistic conception of value as wealth, Cohen ironically commits the same metaphysical mistake of which he accuses earlier theories of property. In short, Cohen assumes the “thingification” of value.¹⁷³ In Cohen’s sense, values are only discernable things—dollars. Thus, there is “valueless property,” such as personal papers, because no one is willing to pay for them, just as there is “propertyless value,” such as air, because people are willing to pay for clean air (through taxes or other legal or market mechanisms). It is surprising that Cohen assumes the “thingification” of value in a scathing critique of Lockean property theory for its alleged “thingification” of property.

This does not mean that Cohen is incorrect that there is value, even economic value, arising from the state’s official legal classification of something as “property.” As a result of this formal legal declaration, a property owner will receive the protection of a state’s legal institutions, such as police and the courts. This leads to the benefits of a legal system that clearly defines property rights and respects the rule of law in enforcing these rights: certainty and determinacy. This

¹⁷⁰ See Ayn Rand, *What is Capitalism?*, in CAPITALISM: THE UNKNOWN IDEAL 11, 26 (1967) (“The economic value of a man’s work is determined, on a free market, by a single principle: by the voluntary consent of those who are willing to trade him their work or products in return.”).

¹⁷¹ See *supra* notes 73-77 and accompanying text.

¹⁷² See *supra* notes 67-68 and accompanying text.

¹⁷³ See *supra* note 55 and accompanying text.

breeds predictability, and predictability breeds stability, and stability in legal entitlements fosters well-functioning markets, which produce more wealth, which leads to the evolution of more diffuse types of property, such as industrial plants, airplanes, trade secrets, and patented biotech inventions. In fact, Locke agrees with Cohen on this point, as the lack of certainty in the state of nature concerning the security of one's life and possessions is one of the precipitating factors for people to quit their "Executive Power" and to create a civil society and government.¹⁷⁴ Even more important for Locke, the protection of property rights in civil society makes a market system of exchange possible.¹⁷⁵ On this issue—the economic benefits directly flowing from the express classification of something as "property" within a formal legal system—Cohen and Locke are on common ground.

Cohen's mistake, though, in conflating wealth with value leads him ultimately to conflate the *effective* certainty in property rights achieved through their legal protection with the *existence* of property rights as such. Yet property exists in many different contexts in which such complete legal and economic certainty does not, and may never, exist. A commodities market is probably the most sophisticated example in which uncertainty in the future existence of property is priced through a market mechanism. This is admittedly not a compelling counterexample, because a modern commodities market exists within a background framework of property and contract law. But there are also numerous examples of property existing outside of any formal legal system, such as the famous lobster gangs of Maine, which developed their own property system given the government's refusal to apply legal property concepts to the ocean.¹⁷⁶ There are also the equally famous Shasta County cattle ranchers in Northern California, who chose to "opt out" of the formal legal system by creating their own property norms among members of their community.¹⁷⁷ Lastly, there are the numerous black markets that have existed throughout human history in which exchanges of products have occurred in the absence of any formal legal right to exclude and, in the case of the

¹⁷⁴ LOCKE, *supra* note 21, at 325 (emphasis omitted).

¹⁷⁵ *See id.* at 301 (observing that the creation of large cattle ranches in America would not occur "where [one] had no hopes of Commerce with other Parts of the World, to draw *Money* to him by the Sale of the Product").

¹⁷⁶ *See generally* JAMES M. ACHESON, *THE LOBSTER GANGS OF MAINE* (1988).

¹⁷⁷ *See* ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

former communist states in Eastern Europe, where there were express legal pronouncements to the contrary.

In all of these circumstances, individuals are creating, transferring, and using valuable products or services. The value in these products or services exists without any official grant of a right to exclude, and sometimes in the face of contrary legal pronouncements, such as in the communist-era black markets. If one is uncomfortable with the metaethical analysis of Locke or other philosophers, then the objective existence of products or services that are produced by people, either for personal consumption or for trade in non-legally sanctioned exchanges, is empirical evidence that value is not synonymous with wealth. It further confirms the closely related error in confusing the effective certainty provided by an official legal enforcement of a property right, which then generates further wealth-maximizing uses of this property, with the existence of the value itself.

In sum, Cohen misused intellectual property in critiquing Lockean property theory. Although not attacking a straw man *per se*, Cohen's influential scholarship did not address the actual property theory developed by Locke and his fellow natural rights philosophers. Cohen used patents and copyrights to ground his conceptual claim that all property rights are defined by a right to exclude granted by the state, and he further used trademarks to paint a picture of Lockean property theory as "viciously circular."¹⁷⁸ In both instances, there was a surprising dearth of actual substantive argument for his conceptual and jurisprudential claims. Notably, Locke and his heirs in American property and intellectual property law did not share with Cohen this narrow definition of value as wealth. In advancing his "realistic definition of private property,"¹⁷⁹ Cohen fired a tremendous broadside at Lockean property theory, and missed.

It would be an error, though, to repeat the legal realists' assumption that a theoretical position wins by default on the grounds that an alternative theory has been shown to be inadequate or incoherent. The preceding philosophical analysis does not establish the soundness of Lockean property theory as it applies to real property or intellectual property, but rather it identifies only how Felix Cohen's critique failed to hit its mark. There may be a valid justification for the nominalist-positivist conception of property that lies outside the work of Cohen and the legal realists, but that is beyond the scope of our pre-

¹⁷⁸ See *supra* notes 69-76 and accompanying text.

¹⁷⁹ See *supra* notes 41-42 and accompanying text.

sent inquiry. The point here is simply that the legal realists did not succeed in proving that Lockean property theory was inadequate or incoherent. This intellectual history serves as an important cautionary tale for modern intellectual property scholars seeking to build upon the work of the Progressives and legal realists within the twenty-first-century administrative state.

III. PROGRESSIVISM, INTELLECTUAL PROPERTY, AND THE ADMINISTRATIVE STATE

Lawyers engaged in twenty-first-century legal battles over the doctrinal requirements of patent protection or the institutional status of the PTO within the administrative state may find such philosophical disputation to be excessively airy and indeterminate. This may be true, but, as shown above, some of these modern legal disputes, as well as the utilitarian and functionalist policies brought to bear in these legal contests, were born of these same philosophical arguments. Within modern intellectual property scholarship, court briefs, and legislative committee reports, one can hear the echoes of the legal realists' call for a purely functionalist account of legal entitlements serving regulatory goals.

Lawyers and legal scholars seem unable to hear these theoretical resonances today. Perhaps this is due to the fact that the Progressives and legal realists succeeded in their political and legal efforts, and we now live and work within an administrative state that regulates both tangible and intangible property rights. Thus, almost a century after the Progressive Era, legal professionals simply accept the administrative state and its corresponding political and legal artifacts as basic and undeniable facts of modern American political life.¹⁸⁰ This may explain why modern property scholars have never reviewed or analyzed the exact premises and reasoning used by the legal realists to effect their revolution in property theory. Even in my own past scholarship, it has seemed sufficient merely to note the shift in political and legal theory in the Progressive Era and then move on to other theoretical or doctrinal concerns.¹⁸¹

¹⁸⁰ *But see* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) ("The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution." (footnote omitted)).

¹⁸¹ *See, e.g.*, Mossoff, *supra* note 108, at 711-24.

Yet the use and abuse of intellectual property by the legal realists at the birth of the administrative state should not be studied by only legal historians or philosophers. There are at least two reasons why this topic should be of interest to lawyers and legal scholars today. First, scholars working to integrate the patent system within the legal and institutional framework of the administrative state are not writing on a blank slate. To the extent that Arti Rai argues that the PTO should be treated more on par with other administrative agencies creating and enforcing federal regulations,¹⁸² or that Shubha Ghosh believes that patent law writ large is simply a species of federal regulatory policy,¹⁸³ the legal realists foreshadowed their scholarship in many respects.

In fact, Felix Cohen did not simply critique Lockean property theory as illogical and conceptually incoherent. Ultimately, Cohen argued that a court decision invoking Lockean property theory “is simply economic prejudice masquerading in the cloak of legal logic.”¹⁸⁴ This followed from Cohen’s belief that, in granting a right to exclude to the creator of a trademark, courts are *creating* wealth by granting coercive power to one citizen (the trademark owner) to exclude his fellow citizens from something in society (via a court injunction). After a court decision upholding a trademark as property, if the trademark owner’s fellow citizens wish to use the mark, then they can do so only with the owner’s permission, which is now backed by the coercive power of the state.¹⁸⁵ This permission is usually forthcoming—at a price.

In enforcing trademarks as property rights, Cohen concluded that courts are using Lockean property theory and its “viciously circular” premise about preexisting value to mask that their decisions “create

¹⁸² See Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 COLUM. L. REV. 1035, 1075 (2003) (“A policy of deference to PTO fact finding in the context of patent denials may also discipline any institutional tendency that the Federal Circuit has towards pro-patent bias.”). To be fair, Professor Rai highlights some policy concerns with treating the PTO exactly on par with other administrative agencies, *see id.* at 1132-33, but her criticisms here are entirely contingent insofar as they are based on the PTO’s current institutional structure. Thus, for instance, her concern that the PTO has not hired any economists to assist it with cost-benefit analysis of its rule changes, *see id.* at 1133, can be addressed with appropriate legislation from Congress.

¹⁸³ See Ghosh, *supra* note 3, at 1388 (“Just as securities regulation is designed to promote investment in securities markets, so too should regulatory patent law . . . be designed to promote trust in the process of innovation in new technologies.”).

¹⁸⁴ Cohen, *supra* note 55, at 817.

¹⁸⁵ See generally Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

and distribute a new source of economic wealth or power.”¹⁸⁶ The trademark owner’s coercive power to exclude others did not preexist a court’s determining that the trademark is “property” and then ordering an injunction. If a court then justifies the economic value resulting from this right to exclude—the wealth and power now wielded by the trademark owner—as a reason for defining the entitlement as property in the first place, the reasoning is truly circular. Identifying this descriptive fact was only part of their project, as the legal realists also identified the normative function of this circularity: it rationalized creating sovereign power in corporations and other commercial interests, who then profit by the permission they charge to laborers and consumers for relinquishing their right to exclude.¹⁸⁷

Although Felix Cohen and his fellow legal realists were primarily concerned with the social and economic impact of the new capital and labor markets arising from the Industrial Revolution, their policy arguments foretold the twenty-first-century battle over intellectual property. One merely needs to replace the Progressives’ and legal realists’ policy concerns about “wealth” and “economic prejudice” with modern intellectual property scholars’ policy concerns about “innovation” and “culture,” and one finds striking parallels in the respective policy arguments. For instance, when Professor Rai criticizes the Federal Circuit’s formalist jurisprudence, arguing that “the Federal Circuit’s decisionmaking reflects not so much simple formalism as a policy of high patent protection masquerading as formalism,”¹⁸⁸ one hears the clear echoes of Cohen’s criticism of traditional trademark doctrine as “simpl[e] economic prejudice masquerading in the cloak of legal logic.”¹⁸⁹

Furthermore, some of the political or institutional goals of the early-twentieth-century legal realists and early-twenty-first-century in-

¹⁸⁶ Cohen, *supra* note 55, at 816.

¹⁸⁷ See Cohen, *supra* note 43, at 12 (“The character of property as sovereign power compelling service and obedience may be obscured for us in a commercial economy by the fiction of the so-called labor contract as a free bargain and by the frequency with which service is rendered indirectly through a money payment.”); Hamilton, *supra* note 53, at 877 (“The coming of industrialism left its impact upon the words of Locke. It separated the laborer from the instruments of production, articulated establishments into an industrial system, and enabled a capitalistic ownership to come into the repute of a personalized property. . . . [T]he property of the Reports is not a proprietary thing; it is rather a shibboleth in whose name the domain of business enterprise has enjoyed a limited immunity from the supervision of the state.”).

¹⁸⁸ Rai, *supra* note 182, at 1110.

¹⁸⁹ Cohen, *supra* note 55, at 817.

tellectual property scholars parallel each other in striking ways. The arguments of Felix Cohen and other legal realists concerning the definition and jurisprudential foundation of property were offered in service of the Progressives in crafting the modern administrative state. As then-former President Theodore Roosevelt famously proclaimed in his 1910 speech, *The New Nationalism*, “every man holds his property subject to the general right of the community to regulate its use to whatever degree the public welfare may require it,” which included, among other things, “the right to regulate the terms and conditions of labor, which is the chief element of wealth, directly in the interest of the common good.”¹⁹⁰ In 1910, such a proclamation was anything but settled political or legal doctrine,¹⁹¹ contrary to Roosevelt’s assertion that “[t]he right to regulate the use of wealth in the public interest is universally admitted.”¹⁹² Thus, Roosevelt concluded his speech with a rousing call for action: “The prime problem of our nation is to get the right type of good citizenship, and, to get it, we must have progress, and our public men must be genuinely progressive.”¹⁹³ The subsequent theoretical work in both property and constitutional law provided the justification for implementing such “genuinely progressive” measures.

Many scholars and historians of the administrative state focus on the big constitutional law issues, such as the nondelegation doctrine,¹⁹⁴

¹⁹⁰ Theodore Roosevelt, *The New Nationalism*, Speech Delivered in Osawatomie, Kansas (Aug. 31, 1910), in THEODORE ROOSEVELT, AN AMERICAN MIND 139, 146 (Mario R. DiNunzio ed., 1994).

¹⁹¹ See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating labor regulation in the baking industry).

¹⁹² Roosevelt, *supra* note 190, at 146.

¹⁹³ *Id.* at 149; see also Cohen, *supra* note 43, at 30 (asserting that “we need a certain liberal insight into the more intangible desires of the human heart” in order to “promote a better communal life”).

¹⁹⁴ Compare Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 332 (2002) (“Sophisticated academics can decry the naivety of a bench, bar, and public that stubbornly cling to a model that legal events have long since left behind, but to abandon openly the nondelegation doctrine is to abandon openly a substantial portion of the foundation of American representative government.”), with Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 494 (1987) (“A general revival of the nondelegation doctrine would also be a mistake in light of a range of considerations: good reasons support the delegation of discretion, standards can be extrapolated from seemingly vague statutes, judicial administration of a nondelegation principle would be both difficult and intrusive, and surrogate safeguards are available.” (footnotes omitted)).

and it often seems that property law issues receive short shrift.¹⁹⁵ But the property issues have been just as important. When municipalities began to introduce zoning regulations in the 1920s, for instance, they sometimes met resistance from landowners and other interest groups. This occurred in New Haven, Connecticut, and, as one historical study reports,

over time, local advocates of urban planning, armed with *theories* of the “City Beautiful” movement, . . . came to dominate the discussion of land use controls, and the actual conditions of the city became increasingly irrelevant. Outside consultants educated residents on the *theoretical superiority* of zoned to unzoned land use, and in 1924 the mayor chided his fellow citizens for failing to adopt the *progressive policies* already enacted by more enlightened neighbors.¹⁹⁶

As a result, the study notes that “[i]n 1926, despite the presence of sophisticated patterns of coordinated land use, New Haven passed its first zoning ordinance.”¹⁹⁷ The theoretical arguments helped democratically accountable political elites make the case for adopting a regulatory regime for controlling the use and disposition of land. Within a few decades of President Roosevelt’s call for more “genuinely progressive” policies, the basic structure of the modern administrative state had been erected, with the help of legal scholars and lawyers doing work in both constitutional and property law.

Similarly, in response to the vast technological and legal changes that have wrought hard-fought policy debates in recent years in copyright and patent law, some intellectual property scholars have sought to reframe intellectual property entitlements into more explicit regulatory terms. Siva Vaidhyanathan has proclaimed that “[c]opyright should be about policy, not property,”¹⁹⁸ and Tom Bell has explicitly

¹⁹⁵ In modern scholarship, one oft-cited text discussing the intersection of property and constitutional law is Bruce Ackerman’s *Private Property and the Constitution*, *supra* note 25, but its omnipresence in law journal footnotes is a testament to its status as one of the few monographs on this topic. Since its publication, a few more scholars have addressed the topic and have engaged Professor Ackerman. See generally JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* (3d ed. 2008); RICHARD A. EPSTEIN, *SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL PROTECTION FOR PRIVATE PROPERTY* (2008); RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

¹⁹⁶ Andrew J. Cappel, Note, *A Walk Along Willow: Patterns of Land Use Coordination in Pre-Zoning New Haven (1870–1926)*, 101 *YALE L.J.* 617, 635 (1991) (emphases added) (footnotes omitted).

¹⁹⁷ *Id.* at 634.

¹⁹⁸ SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* 15 (2001). He has argued else-

characterized copyright as welfare for authors.¹⁹⁹ The institutional implications of such theoretical moves are fairly straightforward, as best exemplified in Pamela Samuelson's call for a "New Deal" in copyright.²⁰⁰ Mark Lemley has also argued that "treating intellectual property as a form of government subsidy is more likely to get people to understand the tradeoffs involved than treating it as real property."²⁰¹ In converting such ideas into practical, real-world terms, Stuart Benjamin and Arti Rai have recently proposed that the federal government institute a "centralized innovation regulator" whose authority would extend over all federal intellectual property doctrines and related legal fields affecting innovation, such as environmental policy.²⁰² Further illustrating the institutional implications of their theoretical work, Professors Lemley, Rai, and other scholars joined as amici in support of the PTO's successful claim to *Chevron* deference in *Tafas v. Doll*.²⁰³

Given these striking parallels in both policy arguments and institutional goals, it may be fair to identify these intellectual property scholars as twenty-first-century Progressives, replicating in our new high-tech world the arguments of the early-twentieth-century legal realists who promoted the Progressive political agenda. This is not a criticism. Whether Progressivism and legal realism are normatively appealing is a subject well beyond the scope of this Article. The point here is solely a descriptive identification: there is a deep intellectual history to the modern scholars proposing that intellectual property doctrines be reframed—theoretically, institutionally, and doctrinally—into a regulatory policy framework. It is only possible to identify this in-

where that "[c]opyright is not about 'property' as commonly understood. It is a specific state-granted monopoly issued for particular policy reasons." Siva Vaidhyanathan, *Copyright as Cudgel*, CHRON. HIGHER EDUC., Aug. 2, 2002, at B7, B9, available at <http://chronicle.com/free/v48/i47/47b00701.htm>.

¹⁹⁹ See Tom W. Bell, *Authors' Welfare: Copyright as a Statutory Mechanism for Redistributing Rights*, 69 BROOK. L. REV. 229 (2003).

²⁰⁰ See Pamela Samuelson, *Toward a "New Deal" for Copyright in the Information Age*, 100 MICH. L. REV. 1488 (2002) (book review).

²⁰¹ Mark Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1032 (2005).

²⁰² See Stuart Minor Benjamin & Arti K. Rai, *Fixing Innovation Policy: A Structural Perspective*, 77 GEO. WASH. L. REV. (forthcoming 2009) (manuscript at 105-07), available at <http://ssrn.com/abstract=1259850>.

²⁰³ See Brief for Intellectual Property, Administrative Law, and Public Health Professors as Amici Curiae Supporting Defendants at 2-4, *Tafas v. Dudas*, 541 F. Supp. 2d 805 (E.D. Va. 2008) (No. 07-0846), *rev'd sub nom.* *Tafas v. Doll*, No. 08-1352, 2009 WL 723353 (Fed. Cir. Mar. 20, 2009).

tellectual history, though, if one recognizes the central role of intellectual property in the legal realists' theoretical work on property in land.

This identification also highlights some concerns in legal-realist property theory underlying the administrative state, which leads to the second reason that this intellectual history is important and relevant to today's legal disputes. Felix Cohen's failure to respond directly to Lockean property theory on its own terms left a substantial gap in the theoretical support of the administrative state. His critique of Lockean property theory constituted the substance of Cohen's justification for his positivist claim that property is a right to exclude granted by the state.²⁰⁴ Of course, this does not mean that Lockean property theory wins by default, which would simply repeat the mistaken premise in the work of Cohen and the other legal realists. Moreover, it is tantamount to tilting at windmills to suggest that this is a sufficient reason by itself to question the continued existence of the administrative state. These are certainly not the lessons offered here.

This exposé of the failure of legal-realist property scholarship in service of the administrative state simply portends some cautionary tales for modern scholars advancing similar regulatory theories or institutional models of intellectual property. As a preliminary matter, intellectual property scholars should be careful not to assume uncritically that the theoretical foundations of the administrative state are solid enough to serve as an Archimedean point from which they may shift intellectual property doctrines toward a regulatory entitlement model. To do so would risk bootstrapping policy arguments from mistaken conventional wisdom about the success of legal-realist property scholarship.

More important, intellectual property scholars should be careful in using this conventional wisdom, because its mistaken provenance has spawned surprisingly procrustean characterizations of Lockean property theory within modern academic scholarship. This has occurred in modern philosophical treatments of Lockean property theory, such as in Robert Nozick's and Jeremy Waldron's misplaced linguistic critique of Locke's mixing-labor metaphor.²⁰⁵ It has also seeped into property scholarship, which often repeats the post-legal realist conventional wisdom that Lockean property theory was phi-

²⁰⁴ See *supra* Section II.B.

²⁰⁵ See Mossoff, *supra* note 91, at 156-63 (discussing Waldron's and Nozick's misunderstanding of Locke's property theory).

losophically formalistic and legally indeterminate.²⁰⁶ Lastly, it has influenced some modern intellectual property scholarship, which has advanced the surprising claim that intellectual property rights are, at best, statutory exemptions from Lockean property theory, or, at worst, incompatible with it.²⁰⁷ The echoes of legal-realist property theory are heard not just in the substantive content of modern policy arguments, but also in the very ways in which modern scholars structure their arguments and frame their descriptive and conceptual priors.

As discussed in Part II, it was neither an accident nor simply a matter of rhetoric in the service of rent-seeking interest groups that nineteenth-century courts and legislatures found Lockean property theory to be an appropriate theoretical framework to explain and justify intellectual property rights. But to recognize why this was the case and how this “conversion” from theory to practice occurred,²⁰⁸ one has to do so from within their intellectual context. All too often, our modern utilitarian-positivist context precludes us from grasping the basic normative and legal concepts that nineteenth-century legal scholars and jurists took for granted, given their shared natural rights premises.²⁰⁹

²⁰⁶ See, e.g., Gregory S. Alexander, Commentary, *The Ambiguous Work of “Natural Property Rights,”* 9 U. PA. J. CONST. L. 477, 478-81 (2007) (restating the postrealist critique of natural property rights theory as “indeterminate” and “ambiguous”); Abraham Bell & Gideon Parchomovsky, *Reconfiguring Property in Three Dimensions*, 75 U. CHI. L. REV. 1015, 1023 (2008) (asserting that in legal doctrine, “the surface attractiveness of the Blackstonian ideal breaks down” as the conception of property, because “providing a single owner with absolute dominion over a thing often proves unreachable, leaving owners and the policymakers the challenge of maximizing property value”); Amnon Lehari, *Mixing Property*, 38 SETON HALL L. REV. 137, 211 (2008) (“As Carol Rose has demonstrated, even William Blackstone’s famous depiction of private property as endowing absolute rights was more wishful thinking than a depiction of the doctrinal reality of his time—an anxiety-relieving rhetoric of clarity uttered against a complex background of overlapping interests and mixed societal values.”).

²⁰⁷ See Liam Séamus O’Melinn, *Software and Shovels: How the Intellectual Property Revolution is Undermining Traditional Concepts of Property*, 76 U. CIN. L. REV. 143, 148 (2007) (claiming that “Locke’s theory does not accord with either copyright or patent law”); cf. Tom W. Bell, *Indelicate Imbalancing in Copyright and Patent Law*, in COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE 1, 4 (Adam Thierer & Clyde Wayne Crews Jr. eds., 2002) (“More pointedly, copyright and patent protection contradicts Locke’s justification of property.”).

²⁰⁸ See Hamilton, *supra* note 53, at 875 (foreshadowing modern criticism of Lockean property theory for being indeterminate given that “[t]he conversion of the prophetic narrative of a neocanonist into a chronicle of the emergence of a legal institution is no automatic task”).

²⁰⁹ See, e.g., Mossoff, *supra* note 107, at 967-76 (identifying modern scholars’ misunderstanding of the natural rights term of art “privilege” as it was used in antiquarian legal texts).

This problem is even more pressing because it goes beyond understanding basic concepts in historical texts that are situated within a bygone intellectual context, such as “labor” or “value.” Scholars have even mischaracterized John Locke’s property theory when it is directly accessible to modern readers. Contrary to claims by modern scholars that Locke did not endorse intellectual property,²¹⁰ Locke explicitly recognized that his property theory justified intellectual property. Toward the end of chapter five of the *Second Treatise*, Locke identifies “Inventions and Arts” as labors that “had improved the conveniences of Life” and that exemplified his insight that “Man (by being the Master of himself, and *Proprietor of his own Person*, and the Actions of *Labour* of it) had still in himself *the great Foundation of Property*.”²¹¹ Moreover, Locke explicitly endorsed copyright as the “property” of authors,²¹² and he even proposed an amendment to the Bill for Regulating Printing, proposed in Parliament in 1695, in order “[t]o secure the author’s property in his copy, or his to whom he has transferred it.”²¹³

Such words make clear the direct lineage between Lockean property theory and nineteenth-century American jurisprudence justifying patents, copyrights, and other forms of intellectual property as the rightful property of their creators.²¹⁴ This intellectual history can no longer be dismissed as having been effectively repudiated by the legal realists. This is particularly pressing when intellectual property scholars presume this conventional wisdom in advancing the new twenty-first-century functionalist account of legal entitlements—intellectual property rights as regulatory entitlements.

²¹⁰ See, e.g., RONAN DEAZLEY, *RETHINKING COPYRIGHT* 144 n.32 (2006) (“Locke himself did not consider his theory of property extended to intellectual properties such as copyrights and patents.”); Lior Zemer, *The Making of a New Copyright Lockean*, 29 HARV. J.L. & PUB. POL’Y 891, 894 (2006) (describing how copyright scholars “claim that Locke does not, either in the *Two Treatises* or elsewhere, address the issues of the intellectual commons, intellectual property in general, or copyright in particular”).

²¹¹ LOCKE, *supra* note 21, at 298-99.

²¹² JOHN LOCKE, *Liberty of the Press*, reprinted in *SOME THOUGHTS CONCERNING EDUCATION AND OF THE CONDUCT OF THE UNDERSTANDING*, *supra* note 151, at 329, 337; see also Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993, 1012 (2006) (discussing the memorandum in which Locke makes this argument).

²¹³ LOCKE, *supra* note 212, at 338.

²¹⁴ See *supra* Section II.B.

CONCLUSION

This Article seeks to uncover the ways in which the legal realists used intellectual property to revolutionize property theory in land when they began assembling the theoretical arguments for the modern administrative state. This historical analysis is especially relevant today, and not just because, as John Duffy puts it, “[t]he most interesting questions are the most fundamental.”²¹⁵ It is important given the increased scholarly interest in the relationship between the administrative state and intellectual property, particularly patent law. The institutional and doctrinal questions raised in *Tafas v. Doll* and in other recent court battles²¹⁶ are proliferating, as is the scholarship analyzing patents and other intellectual property rights within a regulatory framework.

Yet many scholars and lawyers remain unaware of the central role of intellectual property within the legal-realist property theory that underlies the administrative state. Perhaps this is the case because the legal realists succeeded in their work. The one-two punch of their nominalist bundle metaphor and their positivist exclusion conception of property soon became orthodoxy within property scholarship and among political elites. This helped justify the modern administrative state because it made property sufficiently plastic to permit the regulation of its use and disposition by myriad state and federal regulatory agencies. By the mid-twentieth century, the administrative state was firmly cemented into the American political system, as Americans no longer lived with what legal realist Walton Hamilton referred to as the “imminent hazards to life, liberty, and property” caused by “unplanned and undirected industrialism.”²¹⁷ It is not a coincidence that, at the same time as the establishment of the modern administrative state, Charles Reich could safely assert as incontrovertible truth that “[p]roperty is not a natural right but a deliberate construction by society.”²¹⁸

These two propositions—the evolution of the administrative state and the nominalist-positivist revolution in property theory—were deeply intertwined in the scholarship of the legal realists working in

²¹⁵ Duffy, *supra* note 1, at 1071.

²¹⁶ See, e.g., *Zoltek Corp. v. United States*, 442 F.3d 1345, 1352 (Fed. Cir. 2006) (holding that patents are not constitutional private property within the ambit of the Takings Clause because “patent rights are a creature of federal law”).

²¹⁷ Hamilton, *supra* note 53, at 880.

²¹⁸ Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964).

the Progressive Era. At the heart of this theoretical work was intellectual property. This insight does not by itself settle any particular institutional or legal question concerning the relationship between the administrative state and intellectual property, but that does not mean that this intellectual history is an idle academic inquiry. The legal realists spawned a conventional wisdom concerning the inherent conceptual incoherence of Lockean property theory and the success of the positivist exclusion conception of property. This conventional wisdom is all too often taken for granted within modern intellectual property scholarship, which frequently assumes incorrectly that intellectual property and Lockean property theory are, at best, strange bedfellows, and, at worst, outright adversaries. As such, this intellectual history contains important lessons for scholars seeking to bring the legal realists' arguments full circle in integrating the administrative state with intellectual property doctrines.