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**Article**

**Institutional Fracture in Intellectual Property Law: The Supreme Court Versus Congress**

**Gregory N. Mandel<sup>†</sup>**

Introduction .....	804
I. Supreme Court and Congressional Intellectual Property Activity .....	807
A. Supreme Court Decisions .....	809
1. The Patent Cases .....	811
2. The Trademark Cases .....	818
3. The Copyright Cases .....	820
B. Congress .....	823
1. Trademark Legislation .....	825
2. Copyright Legislation .....	827
3. Trade Secret Legislation .....	828
4. Patent Legislation .....	829
II. Intellectual Property Influences .....	833
A. Congressional Influences .....	833
1. Public Choice .....	834
2. Intellectual Property Subfields .....	839
B. Supreme Court Influences .....	841
1. Legal Reasoning .....	843
2. Justice Ideology .....	845
3. Popular Opinion .....	848
4. Mechanisms of Public Influence .....	854

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<sup>†</sup> Dean & Peter J. Liacouras Professor of Law, Temple University. I am grateful for valuable feedback on earlier drafts of this work from Jane Baron, Kevin Collins, Jim Gibson, Craig Green, Paul Heald, Dave Hoffman, Tim Holbrook, Laura Pedraza-Fariña, David Post, and Matt Sag, and from participants at presentations of this work at the 2016 NYU School of Law Tri-State Region IP Workshop, the 2016 Works in Progress in IP Conference at the University of Washington School of Law, and Yunnan University Law School. I thank Katharine Vengraitis, Diana Joskowicz, Shannon Daniels, and John Basenfelder for their outstanding research assistance on this project. Copyright © 2017 by Gregory N. Mandel.

C. Reevaluating the Supreme Court and Congressional Influences .....	859
III. Normative Implications of Interbranch Conflict .....	863
A. Governmental Efficiency .....	863
B. Majoritarian Democracy .....	865
C. Institutional Competence and Intellectual Property Law .....	868
Conclusion .....	872
Appendix A .....	873
Appendix B .....	879

## INTRODUCTION

Congress and the Supreme Court have been significantly at odds over intellectual property law throughout the early twenty-first century. This institutional fracture is revealed here in an original dataset comprising every Supreme Court decision and statute passed by Congress concerning intellectual property law from 2002 to 2016. Though the divergence between legislative and judicial action has largely slipped below the radar, it speaks volumes about the contemporary political economy of intellectual property law. Analysis of this legal activity also raises questions concerning interbranch separation of powers and majoritarian democracy, questions that spread well beyond intellectual property.

Recent legislative and judicial actions concerning intellectual property law reveal several stark trends. Congress has been remarkably hospitable to stronger intellectual property rights. Congress passed forty-three intellectual property laws during the time period in question. Of those that affected the substantive strength of intellectual property rights, over 80% made rights stronger.<sup>1</sup> These laws made it easier to acquire intellectual property rights, broadened the scope of protection, and strengthened enforcement. The Supreme Court's intellectual property jurisprudence, however, has moved largely in the opposite direction. The Court decided forty-four intellectual property cases from the October 2002–2003 Term through the October 2015–2016 Term, and of those that substantively affected the extent of rights, two-thirds weakened protection.

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1. The use of the terms “stronger” and “weaker” refers solely to the strength (or weakness) of intellectual property rights from the perspective of the intellectual property rights owner. These terms do not indicate that a given law is more or less socially beneficial.

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Differentiating this legislative and judicial action based on intellectual property subfield exposes additional nuance. While Congress has tended to strengthen intellectual property protection in patent, copyright, and trademark law, the Supreme Court has been generally antagonistic toward stronger patent and trademark rights, but highly receptive to increasing copyright protection. This differentiation indicates that the Supreme Court, at least, does not appear to view intellectual property law as a single, unified field.

Most research to date has focused on the activity of one branch of government or in a single intellectual property field. Such approaches miss the insight provided by comparison and differentiation. The instant dataset provides a richer foundation for comprehending relations between the branches and across intellectual property fields, and consequently offers a more robust, empirically supported understanding of governmental intellectual property activity in the modern age. For example, prior commentators have explained the Supreme Court's patent decisions as a reaction to concerns about patent trolls and against the Federal Circuit's perceived excessive protection for patent rights.<sup>2</sup> The instant dataset indicates that these explanations may not tell the full story. Analyzing the pattern of unanimity in the Court's intellectual property decisions underscores that there appears to be something particular about both the patent and the trademark decisions, a pattern that would not result from the traditional patent-specific rationales.

Over the period of study, the Supreme Court issued unanimous opinions in intellectual property cases at a rate almost twice that of its general docket. This difference was not uniform across intellectual property fields. The Supreme Court issued a unanimous decision in a remarkable 81% of patent and trademark cases that substantively affected the strength of intellectual property rights. The Court's rate of unanimity in copyright cases (14%) and in patent and trademark cases that did not substantively affect the strength of intellectual property rights (37.5%) were in line with, or below, the Court's average unanimity rate of about 35% for the rest of its docket during this period.<sup>3</sup> Something has led the Court to reach unanimous agreement in an overwhelming percentage of substantive patent and trademark decisions, but rarely in nonsubstantive decisions in those

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2. See *infra* Part I.A.1.

3. Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 781 (2015).

same fields or in copyright cases. As detailed in this Article, the data reveals several clues concerning what may be causing this disparity.

The recent actions of Congress and the Supreme Court in intellectual property law also provide insight into the ideological, political, and sociological influences that drive legal decision-making in these branches of government. While legislator ideology and constituent interest do not predict congressional intellectual property activity, special interest group influence has greater explanatory power. Similarly, judicial ideology does not appear to drive intellectual property decisions at the Supreme Court, and traditionally conceived legal reasoning does not fare much better. Counterintuitively, popular opinion appears to play a previously unappreciated role in influencing the Supreme Court's intellectual property jurisprudence. The direction of the potential causal relationship between popular opinion and Supreme Court's intellectual property decisions is not entirely clear, but evidence from this study indicates that it is the result of the Justices being a part and parcel of the social dynamics of their lives, as opposed to intentionally shaping their jurisprudence to satisfy popular preferences.<sup>4</sup>

Intellectual property decision-making during this time period thus seems to contradict the conventional view of the appropriate roles of the branches of government in the United States. The Supreme Court, often perceived as the least democratically accountable branch, appears to be significantly affected by popular opinion on intellectual property rights. Congress, the branch of government theoretically most responsive to popular will, has displayed clear countermajoritarian tendencies.

These discrepancies have meaningful consequences for legal efficiency, majoritarian democracy, and the development of intellectual property law. Having two branches of government working at cross purposes can be an inefficient use of scarce government resources. Even more problematic, though the analysis suggests that the Supreme Court may step in to fill some of the gaps created by Congress's failure to represent popular will, this gap-filling does not necessarily satisfy democratic principles. The Supreme Court can produce majoritarian outcomes, but it does not do so through majoritarian processes. This difference between means and ends should not be taken lightly. When the

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4. See generally Craig Green, *Turning the Kaleidoscope: Toward a Theory of Interpreting Precedents*, 94 N.C. L. REV. 379 (2016) (discussing how social context can affect how a court's opinion is interpreted).

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Court cedes to popular will, it may be abdicating its constitutional role of checking Congress and the President. This is a challenge for our constitutional system as it means that no branch is guarding against the potential tyranny of the majority. Such concerns may be less of an issue in intellectual property law than in fundamental rights cases, but the intellectual property cases analyzed here provide fresh evidence that this concern is a real one.

This Article progresses in three parts. Part I develops and analyzes the Supreme Court and congressional legislation dataset. Every Supreme Court decision and every act of legislation by Congress concerning intellectual property law from 2002 to 2016 was coded by multiple independent analysts to classify it as strengthening, weakening, or being neutral with respect to intellectual property rights. Analysis of these data reveal that Congress has uniformly strengthened rights while the Supreme Court has primarily weakened them. Part II examines the reasons for this structure of intellectual property decision-making, and uncovers a somewhat puzzling result: the Supreme Court appears more responsive than Congress to popular opinion concerning intellectual property rights. Part III explores the implications of these results for the future of intellectual property law and its ability to serve desired objectives. The findings have significant implications beyond intellectual property law for the balance of power between the Legislative and Judicial Branches, and for how democracy functions in the United States.

## I. SUPREME COURT AND CONGRESSIONAL INTELLECTUAL PROPERTY ACTIVITY

Though prior scholarship has examined congressional or judicial treatment of particular intellectual property domains individually, little attention has been paid to each branch's approach to intellectual property law globally.<sup>5</sup> The data analysis described in detail below indicates that there was a turning point in the Supreme Court's intellectual property jurisprudence beginning with the October 2002 Term.<sup>6</sup> This turning point is marked both by the degree of attention that the Court directed

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5. *But see* Matthew Sag et al., *Ideology and Exceptionalism in Intellectual Property: An Empirical Study*, 97 CALIF. L. REV. 801, 829–51 (2009) (reporting an empirical study of all Supreme Court intellectual property cases from 1954 to 2006, and commenting on the dearth of scholarship across intellectual property domains).

6. *See infra* Part I.A.

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towards intellectual property cases and by the substance of the Court's decisions in such cases. For this reason, the present study focuses on comparing the Supreme Court's and Congress's intellectual property activity from July 1, 2002 to the present. The time period covered in this study was thus intentionally selected to investigate the recent interbranch intellectual property dissensus.

I constructed a database of every Supreme Court opinion implicating patent, copyright, trademark, or trade secret issues from July 1, 2002 through June 30, 2016. The database entries are the Supreme Court's final decision in each matter; certiorari dispositions are not included. I removed from the database any cases that, though referring to intellectual property law, did not actually decide any intellectual property issue. For example, *Illinois Tool Works, Inc. v. Independent Ink, Inc.* concerned whether there should be a presumption of market power under antitrust law where the product in question is subject to patent protection.<sup>7</sup> Though this case bears a relation to patent protection, its result did not turn on or affect patent law. The final Supreme Court database includes forty-four intellectual property decisions and is summarized in Appendix A.

Using similar methods, I developed a database of every federal statute concerning patent, copyright, trademark, or trade secret rights during the same time period. As with the Supreme Court data, I removed statutes that did not actually affect patent, copyright, trademark, or trade secret doctrine. For example, the Lanham Act is the primary statute providing for Federal trademark protection in the United States.<sup>8</sup> Portions of the Lanham Act regulate nontrademark activities, such as false advertising.<sup>9</sup> Legislation that affected only the false advertising portions of the Lanham Act was excluded from the database. The final dataset includes forty-three legislative entries for the pertinent period and is summarized in Appendix B.<sup>10</sup> The following sections analyze the contours of intellectual property activity in these Supreme Court and congressional datasets.

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7. 547 U.S. 28, 28–29 (2006).

8. 15 U.S.C. §§ 1051–1127 (2012).

9. *Id.* § 1125.

10. As discussed below, these forty-three entries derive from thirty-four acts, some of which affected multiple areas of intellectual property law. *See infra* Part I.B.

## A. SUPREME COURT DECISIONS

The primary variable for analysis is whether a given Supreme Court decision or legislative action strengthened or weakened intellectual property protection. Consistent with prior research in this context, strengthened versus weakened refers to the extent of protection afforded to the intellectual property rights owner.<sup>11</sup> Accordingly, Supreme Court decisions that make it easier to acquire intellectual property rights; broaden the scope of intellectual property protection; make it easier to prove infringement; or strengthen remedies for infringement are all considered to strengthen intellectual property protection. Decisions that have the opposite effects weaken protection.<sup>12</sup>

A number of the Supreme Court decisions are neutral in this regard. Neutral coding can occur for multiple reasons, such as procedural decisions that affect both intellectual property owners and opposing parties in equivalent manners, or decisions that regulate ownership among competing claimants. An example of the former type of neutral decision is *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*<sup>13</sup> This case clarified the proper standard of appellate review for a district court's factual findings made in patent claim construction.<sup>14</sup> The Court held that the standard of review is clear error,<sup>15</sup> a decision that neither strengthened nor weakened intellectual property owner rights

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11. See Sag et al., *supra* note 5, at 828 (coding Supreme Court intellectual property cases based on whether the case was decided in favor of the party asserting the intellectual property right for a study of Justice ideology in intellectual property decisions).

12. Consistent with the standard approach applied in analyzing the ideological direction of Supreme Court decisions, whether a given decision strengthened or weakened intellectual property rights was determined based on the net effect on intellectual property law with respect to the issue at hand, not based simply on whether there was a change from the status quo. See, e.g., Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263, 272 (2010) (applying this methodology to code decisions as liberal versus conservative); Isaac Unah et al., *U.S. Supreme Court Justices and Public Mood*, 30 J.L. & POL. 293, 307–10 (2015) (same); *The Supreme Court Database*, WASH. U. L. SCH., [supremecourtdatabase.org](http://supremecourtdatabase.org) (last visited Nov. 5, 2017) (same). Thus, *Eldred v. Ashcroft*, 537 U.S. 186 (2003), is coded as strengthening intellectual property rights because it upheld the Copyright Term Extension Act against a constitutional challenge. As the statutory name implies, the Copyright Term Extension Act extended owner's copyright terms. Though upholding the law effectively maintained the status quo, the Court's decision on the issue before it favored greater protection.

13. 135 S. Ct. 831 (2015).

14. *Id.* at 835.

15. *Id.* at 832.

because sometimes district courts construe patent claims in favor of patentees and other times in favor of alleged infringers.<sup>16</sup> Decisions that neither strengthened nor weakened intellectual property rights were classified as neutral.

Three analysts applied this methodology to independently code each Supreme Court intellectual property decision. There was full coder agreement on approximately 90% of the cases. Where there was not agreement, the coders met for discussion and were able to reach a unanimous agreement in each case.

Overall, the data appears to indicate a Supreme Court that is hostile to intellectual property rights. Of the thirty-four decisions that impacted the substantive strength of intellectual property rights, nearly two-thirds (twenty-two decisions) weakened intellectual property protection.<sup>17</sup> There is only a 6% likelihood of such a disparity arising by chance, assuming equal odds of the Court deciding each case either way.<sup>18</sup> Whether the Supreme Court is selecting cases to weaken rights via the certiorari process *ex ante* or reaching decisions that weaken protection *ex post*, the result on intellectual property law is the same.

This rough quantitative picture tells only part of the story. The many cases that weaken protection might affect intellectual property rights in minor ways, while the few cases that strengthen rights could have a far greater substantive effect. Consequently, the cases need to be analyzed qualitatively as well as quantitatively. In addition, these global statistics conceal significant variation in how the Supreme Court treated different types of intellectual property protection during the period under study. Therefore, the following sections divide and analyze the

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16. In a similar vein, *Board of Trustees of the Leland Stanford Junior University v. Roche Molecular Systems, Inc.* concerned whether an employee of a university receiving government funding could assign the rights in an invention to a third party without the university's consent. 563 U.S. 776, 776–79 (2011). Whether the employee or the university prevailed, the substance and scope of the owner's patent rights would be the same; the case was simply a debate among competing owners. *Id.* at 783.

17. The remaining ten cases were determined to be neutral with respect to affecting the strength of protection.

18. This statistic is the likelihood of the Supreme Court reaching decisions that weaken intellectual property rights in at least twenty-two out of thirty-four cases, assuming a 50% likelihood of each decision weakening rights. The formula for this calculation is  $(m+n)!/(m!x n!)x .5^m x .5^n$ , where  $m$  is the number of decisions weakening rights and  $n$  is the number of decisions strengthening rights. See WOLFRAMALPHA, <https://www.wolframalpha.com> (last visited Nov. 5, 2017) (providing the mathematical formula for such analysis).

Supreme Court's decisions by intellectual property subject matter.<sup>19</sup>

### 1. The Patent Cases

The Supreme Court's twenty-first-century patent jurisprudence has been remarkable, both for the quantity of cases that the Court decided and for the highly consistent nature of those decisions. Over the fifty years from 1952 (when the Patent Act was substantially revised) through 2002 (the start of the present study), the Supreme Court heard an average of less than one patent law case per year.<sup>20</sup> In the past decade, the Court has heard nearly thirty patent cases,<sup>21</sup> almost triple the rate of the previous half-century. For a Supreme Court that hears fewer than ninety cases per year,<sup>22</sup> averaging three patent cases annually is a significant caseload in a single, highly particularized area of the law.

Not only has the Supreme Court recently heard a large number of patent cases, but the Court has predominantly reached holdings that weaken patent owners' rights. Twenty-three of the Supreme Court's twenty-nine patent cases during this time substantively affected patentee rights in a measurable direction.<sup>23</sup>

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19. There is no section on trade secret law as the Supreme Court did not decide any trade secret cases during this period. The Supreme Court decided one case that tangentially involved trade secret rights, but did not implicate trade secret law. *See generally* Taylor v. Sturgell, 553 U.S. 880 (2008) (concerning the preclusive effects of a federal-court judgment in a case that arose out of a challenge to the Federal Aviation Administration's denial of a Freedom of Information Act (FOIA) request based on FOIA's trade secret exemption).

20. *See* John F. Duffy, *The Festo Decision and the Return of the Supreme Court to the Bar of Patents*, 2002 SUP. CT. REV. 273, 275, 294 (2002) (explaining that during the mid-twentieth century the Supreme Court "seemed to lose interest in" patent cases, and that "[f]or the next three decades, the Court averaged barely one patent decision per year"); Mark D. Janis, *Patent Law in the Age of the Invisible Supreme Court*, 2001 ILL. L. REV. 387, 387-88 (2001) (referring to the Supreme Court as having rendered itself "nigh invisible" in patent law from 1982 to 2001, having decided only three substantive patent cases during this period); *Supreme Court Patent Cases*, WRITTEN DESCRIPTION, <https://writtendescription.blogspot.com/p/patents-scotus.html> (last visited Nov. 5, 2017) (listing cases, not all of which are "patent" cases under the pertinent definition here, such as those in which no patent issues were decided).

21. The Court decided twenty-eight patent cases from the October 2006 through October 2015 Terms. *See infra* App. A.

22. LAWRENCE BAUM, *THE SUPREME COURT* 95 (12th ed. 2016); *see also* *The Justices' Caseload*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/justicecaseload.aspx> (last visited Nov. 5, 2017).

23. The remaining patent cases were procedural decisions that did not strengthen or weaken patent rights, disputes concerning patent ownership as

Of these twenty-three cases, eighteen (78%) weakened patent protection. These cases were not focused on obscure or minor attributes of patent law, but often went to the heart of patentability and patent protection. As one measure of impact, the five most cited Supreme Court patent cases of the time period all weakened owner rights.<sup>24</sup>

Several of the Supreme Court's most heavily cited patent decisions concerned patent-eligible subject matter. Patent-eligible subject matter doctrine limits the types of innovation that may qualify for protection under the Patent Act. In a series of four cases over four years, the Court narrowed the scope of patent-eligible subject matter. These cases held that patent applications on methods of hedging losses,<sup>25</sup> methods for exchanging

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among competing entities without effect on the strength of the rights, or decisions that modified patent standards in a way that appears indeterminate as to whether it strengthens or weakens patent protection. *See, e.g.,* Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc., 134 S. Ct. 1744, 1746 (2014) (holding that trial court decisions to award reasonable attorney fees to the prevailing party are reviewed under an abuse-of-discretion standard); *Gunn v. Minton*, 568 U.S. 251, 251–52 (2013) (holding that state courts may have subject matter jurisdiction over a claim of legal malpractice arising from the handling of a patent case); *Bd. of Trs. of the Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.*, 563 U.S. 776, 777 (2011) (holding that a university employee receiving government funding may be able to assign the patent rights without the university's consent, in spite of the Bayh-Dole Act); *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 768 (2011) (permitting “willful blindness” to satisfy the knowledge requirement of induced infringement, but rejecting negligence in general); *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 394–95 (2006) (holding that a party's failure to move for a new trial or judgment as a matter of law after an unfavorable jury verdict prevents the party from seeking a new trial on appeal on the basis of insufficient evidence).

24. This analysis is based on Westlaw's citation tool, which includes citations in cases, court documents, administrative filings, and secondary sources, all as of December 31, 2016. The five most cited patent cases, with citation statistics rounded to the nearest hundred, are: *KSR International Co. v. Teleflex, Inc.*, 550 U.S. 398 (2007) (57,300 citations); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) (12,300 citations); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007) (8700 citations); *Bilski v. Kappos*, 561 U.S. 593 (2010) (7000 citations); and *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 566 U.S. 66 (2012) (5400 citations). Total citation counts can obscure prominence because cases decided longer ago may have more citations due to longevity rather than importance. To control for time since decision, we also examined citation counts based on citations within three years of a given decision. This top-five list is not substantially different, and all cases weaken patent protection: *KSR*, 550 U.S. 398 (31,100 citations); *Alice Corp. v. CLS Bank International*, 134 S. Ct. 2347 (2014) (5900 citations); *Mayo*, 566 U.S. 66 (4800 citations); *MedImmune*, 549 U.S. 118 (3600 citations); and *eBay*, 547 U.S. 388 (3600 citations).

25. *Bilski*, 561 U.S. at 593, 611–12 (holding that a patent application on methods of hedging losses is an abstract idea and not patent eligible).

financial obligations,<sup>26</sup> processes for determining how much of a drug to administer,<sup>27</sup> and isolated and purified DNA sequences<sup>28</sup> were all ineligible subject matter. Each of these patent applications was rejected under Supreme Court doctrine prohibiting the patenting of “laws of nature, physical phenomena, and abstract ideas.”<sup>29</sup> Though this doctrine has been around for decades, the Supreme Court substantially reinvigorated and strengthened its application in these cases.<sup>30</sup> Prior to these decisions, the Court had not denied subject-matter eligibility in over thirty years.<sup>31</sup> As a result of this series of cases, the Court has reduced the patent eligibility of a variety of software and biotechnology product and process innovations.<sup>32</sup>

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26. *Alice*, 134 S. Ct. at 2356 (holding that a patent application on methods for exchanging financial obligations is ineligible subject matter because the concept of intermediated settlement is an abstract idea).

27. *Mayo*, 566 U.S. at 67–69 (holding that a process for determining how much of a drug to administer is ineligible subject matter because the claims are ineligible laws of nature).

28. *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107, 2109 (2013) (holding that isolated and purified DNA sequences are ineligible subject matter because they are a naturally occurring product of nature, but that synthetically created cDNA is patent eligible).

29. *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980).

30. John M. Golden, *Flook Says One Thing, Diehr Says Another: A Need for Housecleaning in the Law of Patentable Subject Matter*, 82 GEO. WASH. L. REV. 1765, 1767–69 (2014); Christopher M. Holman, *Patent Eligibility Post-Myriad: A Reinvigorated Judicial Wildcard of Uncertain Effect*, 82 GEO. WASH. L. REV. 1796, 1808 (2014).

31. *See Parker v. Flook*, 437 U.S. 584, 584 (1978) (holding that a “method for updating alarm limits during catalytic conversion processes” is not subject matter eligible).

32. *Mortg. Grader, Inc. v. First Choice Loan Servs., Inc.*, 811 F.3d 1314, 1322 (Fed. Cir. 2016) (holding that the Supreme Court’s decision in *Alice Corp. v. CLS Bank Int’l*, 134 S. Ct. 2347 (2014) gave “renewed vigor” to arguments against the patent eligibility of computer-implemented process inventions); *Ultramercial, Inc. v. Hulu, L.L.C.*, 772 F.3d 709, 716–17 (Fed. Cir. 2014) (reversing an earlier subject matter decision to hold computer-implemented advertising inventions ineligible in light of *Alice*); Tamsen Valoir, *Who Will Finance Drug Development if Natural Products Are No Longer Patentable?*, 28 INTELL. PROP. & TECH. L.J. 3, 4–7 (2016) (stating concern that *Myriad* and *Mayo* will make it harder to obtain drug patents in the United States); Daniel K. Yarbrough, Note, *After Myriad: Reconsidering the Incentives for Innovation in the Biotech Industry*, 21 MICH. TELECOMM. & TECH. L. REV. 141, 141–55 (2014) (discussing how *Mayo*, *Myriad*, and *Alice* make it harder to get patents in the biotechnology industry).

The Supreme Court made it more difficult to acquire and enforce patents in other ways as well. In two of the most significant patent decisions during the period of study,<sup>33</sup> the Court raised the creativity threshold for acquiring a patent and weakened remedies for patent infringement. The central requirement for obtaining a patent is that an invention be nonobvious.<sup>34</sup> A patent applicant must demonstrate that the invention would not have been obvious to a person having ordinary skill in the art at the time the patent application was filed.<sup>35</sup> In *KSR Int'l Co. v. Teleflex, Inc.*, the Court made it harder to establish nonobviousness by expanding the scope of subject matter that is considered obvious in light of existing technology.<sup>36</sup> Subsequent to *KSR*, both the courts and the Patent and Trademark Office (PTO) have been more likely to deny patent protection for an invention by holding that it is obvious.<sup>37</sup>

Similarly, in the context of patent enforcement, *eBay Inc. v. MercExchange, L.L.C.* reversed a century of common patent practice in holding that injunctions should not routinely issue

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33. These are the two most cited patent decisions of the time period. See cases cited *supra* note 24; see also Laura G. Pedraza-Fariña, *Patent Law and the Sociology of Innovation*, 2013 WIS. L. REV. 813, 823 (noting that the “*KSR* decision has been hailed as the ‘most significant patent case in at least a quarter century’” (quoting John F. Duffy, *KSR v. Teleflex: Predictable Reform of Patent Substance and Procedure in the Judiciary*, 106 MICH. L. REV. FIRST IMPRESSIONS 34, 34 (2007), [http://repository.law.umich.edu/mlr\\_fi/vol106/iss1/24](http://repository.law.umich.edu/mlr_fi/vol106/iss1/24))).

34. NONOBVIOUSNESS—THE ULTIMATE CONDITION OF PATENTABILITY 2:101 (John F. Witherspoon ed., 1980); Gregory N. Mandel, *Patently Non-Obvious: Empirical Demonstration that the Hindsight Bias Renders Patent Decisions Irrational*, 67 OHIO ST. L.J. 1391, 1393 (2006).

35. 35 U.S.C. § 103 (2012).

36. 550 U.S. 398 (2007).

37. Gregory N. Mandel, *A Nonobvious Comparison: Nonobviousness Decisions at the PTAB and in the Federal Courts*, 24 TEX. INTELL. PROP. L.J. 403, 428–29 (2016) (collecting studies that demonstrate this differential); Ali Mojibi, *An Empirical Study of the Effect of KSR v. Teleflex on the Federal Circuit's Patent Validity Jurisprudence*, 20 ALB. L.J. SCI. & TECH. 559, 581 (2010) (reporting empirical analysis of nonobviousness decisions which demonstrates that “both the Federal Circuit and District court cases reveal that the courts are more likely to find patents invalid for obviousness as a result of *KSR*”); Jason Rantanen, *The Federal Circuit's New Obviousness Jurisprudence: An Empirical Study*, 16 STAN. TECH. L. REV. 709, 732 (2013) (reporting results of an empirical study finding that “[s]ince *KSR*, patentees and applicants have been less successful on the issue of obviousness”); see also Janice M. Mueller, *Chemicals, Combinations, and “Common Sense”: How the Supreme Court's KSR Decision Is Changing Federal Circuit Obviousness Determinations in Pharmaceutical and Biotechnology Cases*, 35 N. KY. L. REV. 281, 308 (2008) (“After *KSR*, it is unquestionably easier to establish a *prima facie* case of obviousness in the chemical arts.”).

based on a finding of patent infringement.<sup>38</sup> Rather, federal courts are now directed to weigh the more general four-factor test to determine whether an injunction should apply.<sup>39</sup> Prior to *eBay*, prevailing patentees obtained injunctions in nearly every case in which they proved infringement.<sup>40</sup> Subsequent to *eBay*, approximately 27% of infringement verdicts have resulted in damages rewards without an injunction, thereby weakening patent protection.<sup>41</sup>

The Supreme Court did support stronger patent rights in five cases over the pertinent period. Four of these cases, however, concerned narrow issues of relatively minor consequence. In *Bowman v. Monsanto Co.*, the Court held that the patent exhaustion doctrine did not permit a farmer to copy patented soybean seeds through reproductive planting and harvesting.<sup>42</sup> This result had appeared straightforward to most patent practitioners and experts.<sup>43</sup> Second, *Kappos v. Hyatt* concerned the extent of a patent applicant's ability to introduce new evidence, beyond that submitted to the PTO, in district court proceedings challenging the PTO's denial of a patent application.<sup>44</sup> The Court held that patentees were not limited in this regard.<sup>45</sup> Patent applicants, however, rarely challenge PTO denials in district court.<sup>46</sup> Third, in *Commil USA, L.L.C. v. Cisco Systems, Inc.*, the

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38. 547 U.S. 388, 394 (2006).

39. *Id.*

40. Ryan T. Holte, *The Misinterpretation of eBay v. MercExchange and Why: An Analysis of the Case History, Precedent, and Parties*, 18 CHAP. L. REV. 677, 682 (2015).

41. *Id.* (stating that "injunction grants have gone from pre-*eBay* rates of 94%–100% to post-*eBay* rates of 73% for all patent owners and 16% for patentees that do not practice the patents they own."); Christopher B. Seaman, *Permanent Injunctions in Patent Litigation After eBay: An Empirical Study*, 101 IOWA L. REV. 1949, 1982–83 (2016) (reporting that from 2006–2013 injunctions were granted 72.5% of the time).

42. 569 U.S. 278, 281–88 (2013).

43. Li Guo, *Self-Replicating Technologies: Do They Exhaust Patent Rights?*, 18 J. TECH. L. & POL'Y 197, 222–23 (2013); Robert M. Masters et al., *Intellectual Property Outlook: Cases and Trends to Follow in 2013*, MONDAQ, <http://www.mondaq.com/unitedstates/x/221790/Trademark/Intellectual+Property+Outlook+Cases+And+Trends+To+Follow+In+2013> (last updated Feb. 14, 2013); see also Gregory N. Mandel, *The Future of Biotechnology Litigation and Adjudication*, 23 PACE ENV'TL. L. REV. 83 (2006) (discussing patent infringement with respect to genetically modified seed).

44. 566 U.S. 431, 433–34 (2012).

45. *Id.* at 438–39.

46. Mandel, *supra* note 37, at 420 n.91.

Court concluded that an infringer's subjective belief that a patent is invalid is not a defense to an allegation of induced infringement,<sup>47</sup> an issue that arises relatively infrequently. Last, *Halo Electronics, Inc. v. Pulse Electronics, Inc.* held that enhanced damages for willful infringement are available for "egregious" activity "beyond typical infringement," a result that harmonized this standard with Supreme Court decisions concerning the award of attorney's fees in patent litigation.<sup>48</sup>

The most significant case in which the Supreme Court supported stronger patent rights is *Microsoft Corp. v. i4i Ltd. Partnership*,<sup>49</sup> which concerned the statutory presumption of validity of an issued patent.<sup>50</sup> Long-standing precedent held that in order to overcome this presumption of validity, a party challenging a patent must prove invalidity by clear and convincing evidence.<sup>51</sup> *Microsoft Corp.* involved an accused infringer's argument that, at least in certain circumstances, establishing invalidity should only require a preponderance of the evidence.<sup>52</sup> The Supreme Court upheld the clear and convincing evidence standard.<sup>53</sup>

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47. 135 S. Ct. 1920, 1928–30 (2015).

48. 136 S. Ct. 1923, 1935 (2016). None of the preceding four cases has been cited more than 650 times (either in total or within three years of decision), in each case less than one-fifth as often as the heavily cited patent cases discussed earlier. See cases cited *supra* note 24. The latter two were decided relatively recently, so their citation counts may change. *Commil USA, L.L.C. v. Cisco Sys., Inc.*, 135 S. Ct. 1920 (2015), in particular, represents an area the Court has paid significant attention to recently. Timothy R. Holbrook, *The Supreme Court's Quiet Revolution in Induced Patent Infringement*, 91 NOTRE DAME L. REV. 1007, 1008, 1025 (2016).

49. 564 U.S. 91 (2011). *Microsoft Corp. v. i4i Ltd. Partnership* is the ninth most-cited patent decision of the period (4200 citations), and eighth most cited within three years of decision (2700 citations).

50. 35 U.S.C. § 282(a) (2012); *Microsoft Corp.*, 564 U.S. at 100.

51. *Microsoft Corp.*, 564 U.S. at 97–98.

52. *Id.* at 99.

53. *Id.* at 95. That said, experimental evidence suggests that the standard of proof does not significantly influence the outcome of cases. Dorothy K. Kagehiro & W. Clark Stanton, *Legal vs. Quantified Definitions of Standards of Proof*, 9 L. & HUM. BEHAV. 159, 163–73 (1985) (discussing an empirical study finding that different standards of proof produced similar jury verdicts); Mandel, *supra* note 34, at 1437–38 (discussing the presumption of validity and standard of proof in patent law). *But see* Kevin M. Clermont, *Procedure's Magical Number Three: Psychological Bases for Standards of Decision*, 72 CORNELL L. REV. 1115, 1148 (1987) (arguing that each common standard of proof has a distinct psychological meaning).

On balance, the modern Supreme Court has repeatedly demonstrated a penchant for weakening patent protection.<sup>54</sup> This trend in patent decisions presents a significant departure from the Supreme Court's prior patent jurisprudence. A study of Supreme Court intellectual property cases from 1954 to 2006 found that the Court was more likely to reach holdings in favor of the intellectual property owner in patent cases.<sup>55</sup> As the Supreme Court did not decide any patent cases from 2002 to 2005,<sup>56</sup> the combined results indicate that the Supreme Court favored stronger patent rights for the half-century prior to the present study, but has been weakening patent protection subsequently. This shift appears to have been relatively abrupt; the Supreme Court held in favor of strengthening patent protection in all but one of the substantive patent law cases decided in the five years preceding the 2002 Term.<sup>57</sup>

Prior commentators have focused on patent-specific explanations for the Supreme Court's recent patent jurisprudence,

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54. See Peter Lee, *Patent Law and the Two Cultures*, 120 YALE L.J. 2, 45–46 (2010) (discussing how recent Supreme Court decisions have “clearly operated to narrow substantive patent rights”); Peter Lee, *The Supreme Assimilation of Patent Law*, 114 MICH. L. REV. 1413, 1422 (2016) (stating that recent Supreme Court jurisprudence has “reined in patent rights”); Robert J. Rando, *America's Need for Strong, Stable and Sound Intellectual Property Protection and Policies: Why It Really Matters*, FED. LAW., June 2016, at 12–13 (explaining that the Supreme Court's activity in patent cases is viewed by some “as a counter-balance to the perceived Federal Circuit's pro-patent . . . decisions”).

55. Sag et al., *supra* note 5, at 841. As discussed below, this study found the same results for copyright and trademark cases as well. *Id.*

56. See *infra* App. A.

57. See *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 724–25 (2002) (holding that prosecution-history estoppel creates a rebuttable presumption against infringement under the doctrine of equivalents, not an absolute bar); *J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 145 (2001) (holding that plant breeds are utility patent-eligible subject matter); *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 28–30 (1997) (affirming the existence of doctrine of equivalents infringement of patent rights). *Contra Pfaff v. Wells Electronics, Inc.*, 525 U.S. 55, 63 (1998) (holding that the on-sale period that can bar a patent can be triggered before an invention is reduced to practice). In addition, the Court decided a number of patent cases with a “neutral” effect during this period. See *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 829 (2002) (holding that the Federal Circuit lacks jurisdiction in cases in which patent law is only raised in a counterclaim); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691 (1999) (holding that state sovereign immunity rights supersede patent infringement claims); *Dickinson v. Zurko*, 527 U.S. 150, 162 (1999) (holding that the Administrative Procedure Act's “substantial evidence” standard applies to federal court review of PTO fact-finding).

such as the Court reacting against the Federal Circuit expanding patent protection<sup>58</sup> or responding to concerns about patent trolls.<sup>59</sup> Though these rationales may explain some of the case outcomes, several aspects of the dataset indicate that there are broader influences that have not been previously identified. A first piece of evidence from the data is that the Supreme Court's recent tendency towards weakening protection has manifested itself in trademark law as well, subject matter that does not implicate patent troll concerns and which (in these cases) did not arise out of the Federal Circuit.<sup>60</sup>

## 2. The Trademark Cases

Although the Supreme Court has heard only six trademark cases over the past fourteen years, the arc of these decisions is similar to the patent cases.<sup>61</sup> Of the four Supreme Court decisions that affected substantive trademark rights, three of them

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58. John M. Golden, *The Supreme Court as "Prime Percolator": A Prescription for Appellate Review of Questions in Patent Law*, 56 UCLA L. REV. 657, 671 (2009); Timothy R. Holbrook, *Explaining the Supreme Court's Interest in Patent Law*, 3 IP THEORY 62, 72–77 (2013); Lee, *Patent Law and the Two Cultures*, *supra* note 54, at 44.

59. See J. Jonas Anderson, *Patent Dialogue*, 92 N.C. L. REV. 1049, 1104 (2014); Dan L. Burk, *On the Sociology of Patenting*, 101 MINN. L. REV. 421, 446 (2016); Lee, *Patent Law and the Two Cultures*, *supra* note 54, at 44. "Patent trolls" is a pejorative term used to refer to a very hard-to-define class of arguably problematic patent litigation by nonpracticing entities.

60. The Federal Circuit does not have jurisdiction over trademark infringement cases, but does hear appeals from trademark registration disputes at the PTO. 28 U.S.C. § 1295 (2012). None of the Supreme Court's trademark cases since 2002 have arisen from the Federal Circuit. See *infra* App. A.

61. Three other decisions sometimes included in lists of Supreme Court trademark cases are excluded from the analysis here because, as discussed above, the Supreme Court decided these cases on the basis of false advertising and antitrust issues. See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (holding that a party has standing to maintain a false advertising claim under the Lanham Act for a commercial injury proximately caused by the defendant's misrepresentation); *POM Wonderful L.L.C. v. Coca-Cola Co.*, 134 S. Ct. 2228, 2234 (2014) (holding that competitors may bring Lanham Act claims alleging unfair competition from false or misleading product descriptions on food and beverage labels regulated by the Federal Food, Drug and Cosmetic Act (FDCA)); *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 201 (2010) (holding that licensing activities for individual teams' intellectual property, conducted through a corporation separate from the teams, constituted concerted action that was not categorically beyond the coverage of section 1 of the Sherman Act).

weakened protection, and these include the decisions that have been the most precedentially significant.<sup>62</sup>

The two most prominent trademark cases decided during this time period were likely *Moseley v. V Secret Catalogue, Inc.*<sup>63</sup> and *Dastar Corp. v. Twentieth Century Fox Film Corp.*<sup>64</sup> In *Moseley*, Victoria's Secret sought to enjoin the Moseleys from using the name "Victor's Little Secret" for a store selling lingerie and adult novelty items.<sup>65</sup> Victoria's Secret argued that the Moseley's use of "Victor's Little Secret" would dilute Victoria's Secret's brand.<sup>66</sup> The district court and circuit court held that the two names were sufficiently similar such that Victor's Little Secret would dilute Victoria's Secret brand through tarnishment.<sup>67</sup> The Supreme Court reversed, holding that dilution requires proof of "actual dilution," not simply the possibility or probability of dilution.<sup>68</sup> This result weakened protection by making dilution more difficult to prove for trademark owners.<sup>69</sup>

In *Dastar Corp. v. Twentieth Century Fox Film Corp.*, the Court prevented Fox from asserting trademark rights in a television series whose copyright protection had lapsed.<sup>70</sup> Fox owned

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62. The most cited trademark cases of the time period according to Westlaw's citation tool, as of December 31, 2016, are *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), and *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003), both in total citations (4400 citations and 2500 citations, respectively) and in citations within three years of decision (1100 citations and 1000 citations, respectively). See also Tom W. Bell, *Misunderestimating Dastar: How the Supreme Court Unwittingly Revolutionized Copyright Preemption*, 65 MD. L. REV. 206, 226 (2006) (discussing the import of *Dastar*); Krista F. Holt & Scot A. Duvall, *Chasing Moseley's Ghost: Dilution Surveys Under the Trademark Dilution Revision Act*, 98 TRADEMARK REP. 1311, 1311 (2008) (stating that *Moseley* was a landmark decision); Greg Lastowka, *Trademark's Daemons*, 48 HOUS. L. REV. 779, 811 (2011) (noting that *Moseley* is one of the most prominent examples of trademark dilution law). Two of the Supreme Court trademark decisions concerned procedural issues that did not strengthen or weaken substantive trademark protection. *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1305 (2015) (holding that trademark issues adjudicated by the Trademark Trial and Appeal Board preclude a party from arguing the same issues before a district court); *Hana Fin., Inc. v. Hana Bank*, 135 S. Ct. 907, 911 (2015) (holding that whether two trademarks can be tacked for priority purposes is a question of fact for the jury).

63. 537 U.S. 418 (2003).

64. 539 U.S. 23 (2003).

65. *Moseley*, 537 U.S. at 418.

66. *Id.*

67. *Id.* at 425.

68. *Id.* at 433.

69. *Id.* at 434. This holding would be quickly reversed by Congress. See *infra* Part I.B.1.

70. 539 U.S. 23, 23–24 (2003).

the copyright to Dwight D. Eisenhower's book *Crusade in Europe* and to a derivative television series of the same name.<sup>71</sup> The copyright on the book was renewed, but the copyright on the television series was not and lapsed in 1977.<sup>72</sup> Dastar purchased copies of the television series, edited them, repackaged them, and sold them under the title *World War II Campaigns in Europe*. Unable to state a copyright claim against Dastar's work because the television series had entered the public domain, Fox argued that Dastar's work violated Fox's trademark rights because Dastar was passing off the work of others as its own.<sup>73</sup> The Supreme Court unanimously held that once a work enters the public domain anyone can use it, with or without attribution to the author, and that trademark law cannot be used to make an end run around lapsed copyright protection.<sup>74</sup>

The Court also weakened trademark owner rights in *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, holding that asserting a fair-use defense in trademark infringement litigation did not place the burden of negating any likelihood of confusion on the defendant.<sup>75</sup> The sole trademark case of the period of study in which the Supreme Court strengthened owner rights was *Already, L.L.C. v. Nike, Inc.*, in which the Court held that a trademark owner's covenant not to sue a defendant deprived the Court of Article III jurisdiction over the defendant's action to invalidate the trademark.<sup>76</sup>

Though the decisions are relatively few in number, the modern Supreme Court has demonstrated a proclivity for weakening trademark protection. As with patent law, this trend is contrary to how the Supreme Court had decided trademark cases for the half-century prior to the present study.<sup>77</sup>

### 3. The Copyright Cases

In contrast to the patent and trademark decisions, the Supreme Court has been highly receptive to copyright owners' claims over the past fourteen years. The Court has decided nine copyright cases in this time, strengthening protection in six of them and reaching neutral conclusions in two others. All four of

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71. *Id.* at 25–26.

72. *Id.* at 26.

73. *Id.* at 27.

74. *Id.* at 37–38.

75. 543 U.S. 111, 124 (2004).

76. 568 U.S. 85, 85–86 (2013).

77. Sag et al., *supra* note 5, at 841.

the Court's most cited copyright decisions reinforced protection.<sup>78</sup> This penchant for strengthening copyright protection is consistent with the Court's prior copyright jurisprudence.<sup>79</sup>

The landmark copyright decision of the period is likely *Eldred v. Ashcroft*, which upheld the Copyright Term Extension Act against challenges based on both the Intellectual Property Clause and the First Amendment of the Constitution.<sup>80</sup> The challengers claimed that the Act's extension of already existing copyright terms exceeded Congress's power under the Intellectual Property Clause, which authorizes copyrights "for limited Times" in order to "promote the Progress" of "Science and the useful Arts."<sup>81</sup> The Court held that such an extension was within Congress's authority.<sup>82</sup> In concert with *Eldred*, the Supreme Court held in *Golan v. Holder* that Congress did not violate the Intellectual Property Clause by restoring copyright protection to certain foreign works that were previously in the public domain.<sup>83</sup>

The Supreme Court issued a number of other decisions during this period that supported stronger copyright owner rights. For example, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.* concerned the potential liability of peer-to-peer Internet file-sharing companies for copyright infringing activity by their users.<sup>84</sup> The plaintiffs were a consortium of twenty-eight large entertainment companies. The Court held that an entity that distributes "a device with the object of promoting its use to infringe copyright . . . is liable for the resulting acts of infringement by third parties."<sup>85</sup> The decision was a substantial victory for the entertainment companies, and led to the shutdown of the Grokster website.<sup>86</sup>

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78. The most cited copyright cases, with both total and three-year citation data as of December 31, 2016, are: *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (6200 citations total; 1700 at three years); *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (3500 citations total; 1000 at three years); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010) (3200 citations total; 1900 at three years); and *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014) (1100 citations total; 1100 at three years).

79. Sag et al., *supra* note 5, at 841.

80. 537 U.S. 186, 187–90 (2003).

81. *Id.* at 193.

82. *Id.* at 222.

83. 565 U.S. 302, 307–08 (2012).

84. 545 U.S. 913 (2005).

85. *Id.* at 914.

86. Galen Hancock, Note, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.: Inducing Infringement and Secondary Copyright Liability*, 21 BERKELEY

The sole copyright decision in the past fourteen years that limited copyright owners' protection was *Kirtsaeng v. John Wiley & Sons, Inc.*<sup>87</sup> *Kirtsaeng* involved copyright law's first sale doctrine, which permits a party to sell a legally acquired copy of a copyrighted work without violating the copyright owner's exclusive right to distribute the work.<sup>88</sup> This doctrine allows a person who buys a physical copy of a book or work of art to resell it without infringing the copyright owner's right to distribute.<sup>89</sup> The Court held that the first sale doctrine applies to works that had been lawfully made or acquired abroad, effectively permitting the importation of copyrighted works that are legally acquired outside the United States.<sup>90</sup>

In summary, the Supreme Court's recent intellectual property jurisprudence has been doctrinally divided. This difference indicates that the Supreme Court does not appear to view intellectual property as a unitary field.<sup>91</sup> The Court has heavily favored intellectual property owners in its copyright cases, while significantly weakening intellectual property protection in patent and trademark decisions. Each of these trends has been consistent over the time period in question, even as there has been turnover among five of the nine Supreme Court Justices.<sup>92</sup> Before attempting to explain these trends, the following sections consider congressional activity during this same period.

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TECH. L.J. 189, 189 (2006); GROKSTER, <http://www.grokster.com> (last visited Nov. 5, 2017).

87. 568 U.S. 519 (2013).

88. *Id.* at 1354–55.

89. Shyamkrishna Balganesh & Gideon Parchomovsky, *Equity's Unstated Domain: The Role of Equity in Shaping Copyright Law*, 163 U. PA. L. REV. 1859, 1879 (2015).

90. *Kirtsaeng*, 568 U.S. at 523.

91. *Cf.* Jeanne C. Fromer, *A Psychology of Intellectual Property*, 104 NW. U. L. REV. 1441, 1442–43 (2010) (suggesting that “patent and copyright law have more in common” than usually recognized); Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1799–1814 (2007) (comparing patent and copyright law from a variety of perspectives).

92. Chief Justice John G. Roberts, Jr. was appointed to the vacancy left by Chief Justice William H. Rehnquist in 2005; Justice Samuel A. Alito, Jr. was appointed to the vacancy left by Justice Sandra Day O'Connor in 2006; Justice Sonia Sotomayor was appointed to the vacancy left by David H. Souter in 2009; Justice Elena Kagan was appointed to the vacancy left by Justice John Paul Stevens in 2010; and Justice Scalia died in February 2016 and was replaced by Justice Neil M. Gorsuch in 2017. *Justices 1789 to Present*, SUPREME COURT OF THE UNITED STATES, [http://www.supremecourt.gov/about/members\\_text.aspx](http://www.supremecourt.gov/about/members_text.aspx) (last visited Nov. 5, 2017).

## B. CONGRESS

A reality of modern politics is that the United States Congress rarely passes legislation.<sup>93</sup> When Congress does take action in intellectual property law, such legislation since the beginning of the twenty-first century has overwhelmingly tended to strengthen intellectual property owners' rights.

Congress enacted thirty-four statutes that modified intellectual property laws in the past fourteen years. Several of these statutes impacted multiple areas of intellectual property law (most commonly affecting both patent law and trademark law in relation to the PTO). Such multi-domain statutes were coded as multiple entries in the database, yielding a total of forty-three intellectual property legislative actions.

Utilizing the same methodology described above,<sup>94</sup> three coders classified each legislative action as strengthening intellectual property rights, weakening intellectual property rights, or being neutral with respect to such rights. Initial agreement exceeded 90%, and all discrepancies were resolved by discussion and research concerning the legislation in question.<sup>95</sup> Though

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93. Mark A. Graber, *Belling the Partisan Cats: Preliminary Thoughts on Identifying and Mending a Dysfunctional Constitution*, 94 B.U. L. REV. 611, 642–43 (2014); Michael J. Teter, *Gridlock, Legislative Supremacy, and the Problem of Arbitrary Inaction*, 88 NOTRE DAME L. REV. 2217, 2218 (2013); Amanda Terkel, *112th Congress Set to Become Most Unproductive Since 1940s*, HUFFINGTON POST (Dec. 28, 2012), [http://www.huffingtonpost.com/2012/12/28/congress-unproductive\\_n\\_2371387.html](http://www.huffingtonpost.com/2012/12/28/congress-unproductive_n_2371387.html). See generally Kenneth A. Shepsle, *Dysfunctional Congress?*, 89 B.U. L. REV. 371, 371, 373 (2009) (discussing several aspects of congressional dysfunction).

94. *Supra* Part I.A.

95. The coders disagreed about how to categorize two of the substantive legislative acts. The first was the Webcaster Settlement Act of 2008, which permits Internet radio stations and streaming services to negotiate rates directly with record companies. Pub. L. No. 110-435, 122 Stat. 4974. One coder initially concluded that this law weakened the rights of sound recording copyright owners because they were no longer bound by the rates established by Copyright Royalty Judges and could instead negotiate with SoundExchange (statutorily authorized to represent all sound recording copyright owners). Two coders identified the law as neutral because it simply placed Internet radio stations and streaming services in the same position as small webcasters had been under the Small Webcaster Settlement Act of 2002. Pub. L. No. 107-321, 116 Stat. 2780. After further research, this law was classified as neutral based on the reasoning above and because the National Association of Broadcasters, the body representing the sound-recording copyright owners, had negotiated the Small Webcaster Settlement Act and did not object to the Webcaster Settlement Act of 2008. Peter DiCola & Matthew Sag, *An Information-Gathering Approach to Copyright Policy*, 34 CARDOZO L. REV. 173, 235–36 (2012); see also *NAB Statement on Senate Passage of Webcaster Settlement Act*, NAT'L ASS'N. OF BROADCASTERS (Oct. 1, 2008), <http://www.nab.org/documents/newsroom/pressRelease>

certain of the statutes included multiple provisions, each was considered as a unitary whole for analysis because each statute is passed as a single legislative act.<sup>96</sup>

At first glance, forty-three legislative acts may sound like a surprisingly high level of activity, but many of these acts were administrative or procedural in nature, with a neutral effect on intellectual property rights. Examples include laws concerning internal organization at the PTO and the Copyright Office,<sup>97</sup> statutes that transferred authority to appoint administrative patent and trademark judges,<sup>98</sup> and laws that extended sunset provisions.<sup>99</sup> Removing these laws from the dataset leaves twenty

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.asp?id=1672. The second law that coders initially differed on was the Trademark Dilution Revision Act of 2006. Pub. L. No. 109-312, 120 Stat. 1730 (codified in scattered sections of 15 U.S.C.). Two coders classified this as strengthening trademark protection because the legislation was passed specifically to overturn the U.S. Supreme Court decision in *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003), to clarify that a trademark owner need only establish a likelihood of dilution to support a dilution claim. The third coder believed the statute was indeterminate because, in addition to the strengthening effects already noted, the law also clarifies that trademark dilution only applies to nationally recognized famous marks, not famous marks recognized in a niche market. After further research, the law was classified as strengthening protection based on Congress's clear intent in passing the act to strengthen dilution protection in light of *Moseley*. Deborah R. Gerhardt, *Consumer Investment in Trademarks*, 88 N.C. L. REV. 427, 486-87 (2010); Jessica Silbey, *The Mythical Beginnings of Intellectual Property*, 15 GEO. MASON L. REV. 319, 377-78 (2008).

96. Under this approach the legislative acts, just like the Supreme Court decisions, are individually of differing import. Though this approach precludes certain types of statistical analysis, it maintains fidelity to actual legislative practice and permits the holistic analysis provided here.

97. See, e.g., Act of Jan. 14, 2013, Pub. L. No. 112-274, 126 Stat. 2456 (making administrative and funding revisions to PTO funding requirements to make all patent fees available for expenses relating to patent processing and to permit patent and trademark fees to be used interchangeably to cover proportionate shares of the PTO's administrative costs); United States Capitol Police Administrative Technical Corrections Act of 2009, Pub. L. No. 111-145, 124 Stat. 49 (authorizing the Director of the PTO to reorganize funds in certain ways and subject to certain conditions); Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341 (replacing the copyright royalty arbitration process with three permanent Copyright Royalty Judges appointed by the Librarian of Congress); An Act to improve the United States Code, Pub. L. No. 108-178, 117 Stat. 2637 (2003) (codifying certain PTO powers and duties).

98. Act of Aug. 12, 2008, Pub. L. No. 110-313, 122 Stat. 3014 (transferring authority to appoint administrative patent and trademark judges from the Director of the PTO to the Secretary of Commerce).

99. See, e.g., STELA Reauthorization Act of 2014, Pub. L. No. 113-200, 128 Stat. 2059 (reauthorizing the satellite carrier distant broadcast signal license passed in 2010 for five additional years); Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-175, 124 Stat. 1218 (reauthorizing the satellite carrier distant broadcast signal license passed in 2004 for five additional

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congressional acts of legislation over the past fourteen years that substantively impacted intellectual property owners' rights.

Seventeen of these twenty substantive changes to statutory intellectual property law made intellectual property rights easier to acquire, broader, or stronger. The only two laws that weakened intellectual property rights were of very minor significance. The final statute was likely the most significant piece of intellectual property legislation during the period, the Leahy-Smith America Invents Act,<sup>100</sup> a statute which made a variety of changes that both strengthened and weakened protection. The odds of obtaining such lopsided legislative results by chance, assuming equal likelihood of strengthening or weakening protection, are less than 1%.<sup>101</sup>

Congressional intellectual property action in the first part of the twenty-first century has dominantly strengthened intellectual property protection. Unlike contemporary Supreme Court decisions, Congress's legislation has been relatively consistent across the intellectual property domains. Nevertheless, analyzing the statutes by field provides a more nuanced understanding of congressional action, as the following sections detail.

### 1. Trademark Legislation

Trademark law provides an easy context in which to begin because all seven of the substantive pieces of trademark legislation during this period strengthened owner rights. The most significant trademark law enacted since 2002 was the Trademark Dilution Revision Act of 2006.<sup>102</sup> This statute overrode the aforementioned Supreme Court decision in *Moseley v. V Secret Catalogue, Inc.*<sup>103</sup> Recall that in *Moseley*, the Supreme Court weakened protection by holding that trademark owners must prove

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years); Temporary Extension Act of 2010, Pub. L. No. 111-144, 124 Stat. 42 (extending through March 28, 2010, the moratorium on copyright liability for certain subscribers of satellite TV by amending the Communications Act of 1934); Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, 118 Stat. 3393 (extending copyright provisions to allow television companies to provide distant network signals to subscribers who cannot receive broadcast network television signals via over-the-air television antennas).

100. Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified in scattered sections of 35 U.S.C.).

101. See WOLFRAMALPHA, *supra* note 18.

102. Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, 120 Stat. 1730.

103. Trademark Dilution Revision Act § 2; *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003); see discussion *supra* Part I.A.2.

actual dilution rather than only a likelihood of dilution.<sup>104</sup> The Trademark Dilution Revision Act provides that likelihood of dilution is the standard for an owner of a famous mark to establish dilution,<sup>105</sup> making it easier for the owners of famous marks to support a cause of action for dilution.<sup>106</sup>

Another significant trademark statute was the Prioritizing Resources and Organization for Intellectual Property Act of 2008.<sup>107</sup> This law prohibited the transshipment or exportation of counterfeit goods and services as violations of trademark law.<sup>108</sup> The law also amended trademark seizure provisions to broaden protective order requirements and increased the damages available for the use of counterfeit trademarks.<sup>109</sup> All of these provisions strengthened trademark owners' rights. The Trade Facilitation and Trade Enforcement Act of 2015 similarly strengthened trademark rights and enforcement in the context of the import and export of infringing goods.<sup>110</sup>

The four other trademark laws passed in this period were of more modest import. The Trademark Technical and Conforming Amendment Act of 2010 lets trademark owners cure certain registration deficiencies.<sup>111</sup> The Intellectual Property Protection and Courts Amendments Act of 2004 made it easier for trademark owners to prove willful infringement in relation to domain names.<sup>112</sup> The 21st Century Department of Justice Appropriations Authorization Act implemented the Madrid Protocol, which enables trademark owners who register with the national office of one country to have trademarks registered in all participating

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104. *Moseley*, 537 U.S. at 433.

105. Trademark Dilution Revision Act § 2.

106. As discussed above, the Trademark Dilution Revision Act also clarified the meaning of a famous mark, providing that a mark must be recognizable by a member of the general public to be considered famous. 15 U.S.C. § 1125 (2012). See *supra* text accompanying note 95.

107. Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256.

108. *Id.* § 205.

109. *Id.* §§ 102, 104.

110. Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, 130 Stat. 122 (2016).

111. Trademark Technical and Conforming Amendment Act of 2010, Pub. L. No. 111-146, 124 Stat. 66.

112. Intellectual Property Protection and Courts Amendments Act of 2004, Pub. L. No. 108-482, §§ 202-03, 118 Stat. 3912, 3916-17.

countries.<sup>113</sup> And lastly, the Collectible Coin Protection Act enhanced trademark owners' rights in connection with unauthorized, trademark-infringing collectibles.<sup>114</sup> All seven trademark statutes that affected substantive rights in the last fourteen years strengthened trademark protection.

## 2. Copyright Legislation

Twenty-first-century copyright legislation also has been relatively uniform. Congress passed eight substantive copyright statutes during this time, and six of these strengthened protection. For example, the Trade Facilitation and Trade Enforcement Act of 2015 strengthened copyright protection and enforcement in relation to the import and export of copyright infringing works.<sup>115</sup> The Family Entertainment and Copyright Act increased copyright infringement penalties to target the unauthorized early release of movies or software and the filming of movies by audience members in movie theaters.<sup>116</sup> The Prioritizing Resources and Organization for Intellectual Property Act of 2008 expanded copyright owners' rights in several manners, such as providing a safe harbor for copyright registrations that contain inaccurate information, allowing courts to impound various records while an infringement action is pending, and deeming unauthorized export (not just import) of phonorecord copies to be copyright infringement.<sup>117</sup> Other legislation strengthened copyright protection for vessel design,<sup>118</sup> phonorecords,<sup>119</sup> and fraudulent online activity.<sup>120</sup>

The two copyright statutes that weakened protection did so in a narrow context: clarifying that particular educational uses of copyrighted material are exempt from copyright infringement

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113. 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, §§ 13401–03, 116 Stat. 1758, 1913, 1920 (2002).

114. Collectible Coin Protection Act, Pub. L. No. 113-288, 128 Stat. 3281 (2014).

115. Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, 130 Stat. 122 (2016).

116. Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, 119 Stat. 218.

117. Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, §§ 101–02, 105, 122 Stat. 4256, 4257–59.

118. Vessel Hull Design Protection Amendments of 2008, Pub. L. No. 110-434, 122 Stat. 4972.

119. Copyright Cleanup, Clarification, and Corrections Act of 2010, Pub. L. No. 111-295, § 5, 124 Stat. 3180, 1381.

120. Fraudulent Online Identity Sanctions Act, Pub. L. No. 108-482, §§ 201–05, 118 Stat. 3912, 3916–18.

liability. The Individuals with Disabilities Education Improvement Act of 2004 (IDEA) establishes that copyright protection does not bar a publisher of instructional materials used in elementary or secondary schools from creating and distributing certain instructional materials specified by IDEA, as long as they are used within limitations established under IDEA.<sup>121</sup> Similarly, the 21st Century Department of Justice Appropriations Authorization Act extended a copyright liability exemption for instructional broadcasting for the purpose of digital distance learning and distance education.<sup>122</sup>

Overall, Congress has expanded copyright protection across several domains substantially more than it has limited protection in particularized educational contexts.

### 3. Trade Secret Legislation

Historically, trade secret law was primarily state law, but Congress recently enacted the Defend Trade Secrets Act, which created a private federal cause of action for trade secret misappropriation for the first time.<sup>123</sup> In addition to implementing standard trade secret protection in federal law, the Act included a new provision allowing trade secret owners to seek an order *ex parte* to seize allegedly stolen trade secret information from a defendant's possession "in extraordinary circumstances" to prevent further dissemination.<sup>124</sup>

Prior to the Defend Trade Secrets Act, the Economic Espionage Act of 1996 provided certain federal trade secret protections, but limited enforcement authority to the Attorney General.<sup>125</sup> Congress twice previously amended the Economic Espionage Act during the time period under consideration. The Theft of Trade Secrets Clarification Act of 2012 expanded the Economic Espionage Act to prohibit the theft of trade secrets taken for intended (not just actual) use and broaden the definition of a trade secret under federal law to include information related to services (not just information related to products).<sup>126</sup>

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121. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, 118 Stat. 2647, 2807–08.

122. 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 13301, 116 Stat. 1758, 1910–13 (2002).

123. Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, § 2(b)(1), 130 Stat. 376, 376 (codified as amended at 18 U.S.C. § 1836 (2012)).

124. *Id.* § 2(b)(2)(A)(i).

125. 18 U.S.C. §§ 1831–1839.

126. Theft of Trade Secrets Clarification Act of 2012, Pub. L. No. 112-236, 126 Stat. 1627.

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The Foreign and Economic Espionage Penalty Enhancement Act of 2012 increased the fines available as penalties for economic espionage.<sup>127</sup> All three congressional acts concerning trade secret law passed during the period of study strengthened trade secret protection.

#### 4. Patent Legislation

Congress has passed just three statutes in the last fourteen years that substantively impact patentee rights. Two of these strengthened patent protection. The third, the Leahy-Smith America Invents Act (AIA), is the most complex and substantial intellectual property statute passed since the turn of the century.

The AIA cannot be simply characterized as either strengthening or weakening patent protection because the statute revised the Patent Act in several manners that do not directly interact with each other. Most famously, the AIA shifts the United States from a first-to-invent patent system (under which the law generally awarded a patent to the first person to invent an invention) to a first-to-file patent system (under which the law generally awards a patent to the first inventor to file a patent application).<sup>128</sup> These changes in priority generally do not strengthen or weaken patent protection; they simply determine who among competing inventors is entitled to a patent.<sup>129</sup> Some commentators perceive this shift as favoring sophisticated, industrial inventors over individual, less well-funded inventors in a race to the patent office.<sup>130</sup>

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127. Foreign and Economic Espionage Penalty Enhancement Act of 2012, Pub. L. No. 112-269, §2(a), 126 Stat. 2442, 2442.

128. Leahy-Smith America Invents Act, Pub. L. No. 112-29, § 3, 125 Stat. 284, 285 (2011); David S. Abrams & R. Polk Wagner, *Poisoning the Next Apple? The America Invents Act and Individual Inventors*, 65 STAN. L. REV. 517, 519–20 (2013); Jason Rantanen, Lee Petherbridge, & Jay P. Kesau, *Debate, America Invents, More or Less?*, 160 U. PA. L. REV. ONLINE 229, 230–31 (2012), [http://scholarship.law.upenn.edu/penn\\_law\\_review\\_online/vol160/iss1/3](http://scholarship.law.upenn.edu/penn_law_review_online/vol160/iss1/3).

129. Leahy-Smith America Invents Act § 3; Abrams & Wagner, *supra* note 128; Mark A. Lemley & Colleen V. Chien, *Are the U.S. Patent Priority Rules Really Necessary?*, 54 HASTINGS L.J. 1299, 1313 (2003); Rantanen et al., *supra* note 128, at 230.

130. Andrew L. Sharp, *Misguided Patent Reform: The Questionable Constitutionality of First-to-File*, 84 U. COLO. L. REV. 1227, 1236 (2013); *see also* Abrams & Wagner, *supra* note 128, at 559 (reporting the results of a study which indicated “a significant decline in patenting by individual inventors relative to larger entities that is caused by the change in Canadian patent law from a first-to-invent to first-to-file priority rule”).

The AIA made several other changes to the Patent Act, some of which weakened protection. The AIA revised the system for asking the PTO to reconsider the issuance of a patent in internal administrative proceedings.<sup>131</sup> These changes generally weaken patent rights because they create a less-expensive venue in which third parties can challenge issued patents.<sup>132</sup> The AIA also essentially eliminated patents on methods of reducing or avoiding tax liability and provided certain prior user rights for entities that had been using an invention for more than a year before another inventor filed for a patent.<sup>133</sup> Each of these changes limits ownership rights.

Conversely, the AIA strengthened patent protection in certain regards. To obtain a patent an inventor must disclose not only how to make and use the subject invention, but also the best mode for practicing the invention.<sup>134</sup> The AIA retains the best mode requirement in form, but eliminates failure to disclose best mode as an invalidity defense in infringement litigation, a change that is decidedly pro-patentee.<sup>135</sup> The AIA made additional changes that benefited patent owners, such as proscribing the ability of private parties to bring false marking lawsuits and broadening a limitation on the ability of prior work by a research team to render later innovation by the team obvious due to personnel changes.<sup>136</sup>

Overall, the AIA contains many provisions that weaken patent rights and others that strengthen protection. The legislative history of the act sheds light on the complex, mixed bag nature of the law. The AIA had a tortuous and heavily negotiated legislative history.<sup>137</sup> The first version of the bill that eventually became the AIA was introduced in the House of Representatives in

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131. Leahy-Smith America Invents Act § 6.

132. Robert L. Stoll, *Maintaining Post-Grant Review Estoppel in the America Invents Act Revisited: A Call for Legislative Restraint*, 23 FED. CIR. B.J. 15, 16 (2013) (explaining that Congress intended post-grant review to be a “quick and cost effective alternative to litigation” (quoting H.R. REP. NO. 112-98, pt. 1, at 48 (2011))); Jeff Kettle, *Congress Giveth and Taketh Away: A Look at Section 18 of the America Invents Act and the Review of Business Method Patents*, 94 J. PAT. & TRADEMARK OFF. SOC’Y 201, 203 (2012) (explaining that post-grant review was meant to provide a quicker and cheaper avenue to litigation).

133. 35 U.S.C. § 273 (2012); Leahy-Smith America Invents Act § 14; 35 U.S.C. § 102.

134. 35 U.S.C. § 112(a).

135. *Id.* §§ 112(a), 282(b)(3)(a).

136. *Id.* §§ 102(c), 292.

137. See Joe Matal, *A Guide to the Legislative History of the America Invents Act: Part I of II*, 21 FED. CIR. B.J. 435 (2012) [hereinafter Matal, *Part I*]; see also

2005.<sup>138</sup> A similar bill was introduced in the Senate in 2006.<sup>139</sup> Though committee hearings were held, neither piece of legislation advanced.<sup>140</sup> In 2007, parallel bills were introduced in the Senate and House that would have significantly weakened patent protection. These bills had strong support in Congress and from many powerful industry players in the information technology and computer fields.<sup>141</sup> The bills were also highly controversial and encountered significant pushback, generally led by the pharmaceutical and biotechnology sectors.<sup>142</sup> The alignment of powerful industries on opposite sides of the patent reform debate led to a several-year dance in which new bills were introduced in Congress every year, each successively watered down in an effort to find common ground.<sup>143</sup>

Because a number of the AIA's provisions have a clear substantive impact on patent law, it would be inappropriate to classify the AIA as neutral with respect to patent rights. But it is also hard to say that it definitively either strengthens or weakens patent rights overall. Its net impact will only be seen over time and will depend significantly on how courts interpret its provisions.

The two other substantive patent laws enacted since 2002 are easier to classify. The Cooperative Research and Technology Enhancement (CREATE) Act of 2004 amended federal patent law so that a shift in research team membership would not allow

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DAN L. BURK & MARK A. LEMLEY, *THE PATENT CRISIS AND HOW THE COURTS CAN SOLVE IT* 100–02 (2009). See generally Joe Matal, *A Guide to the Legislative History of the America Invents Act: Part II of II*, 21 FED. CIR. B.J. 539 (2012) [hereinafter Matal, *Part II*] (detailing the legislative history of AIA provisions that only apply after a patent has been issued).

138. H.R. 2795, 109th Cong. (1st sess. 2005); Matal, *Part I, supra* note 137, at 438.

139. S. 3818, 109th Cong. (2d sess. 2006); Matal, *Part I, supra* note 137, at 439.

140. See Matal, *Part I, supra* note 137, at 438–39.

141. BURK & LEMLEY, *supra* note 137, at 101–02; Jonas Anderson, *Congress as a Catalyst of Patent Reform at the Federal Circuit*, 63 AM. U. L. REV. 961, 982–84 (2014); Xuan-Thao Nguyen, *Dynamic Federalism and Patent Law Reform*, 85 IND. L.J. 449, 469–71 (2010).

142. BURK & LEMLEY, *supra* note 137, at 101–02; Christopher M. Holman, *Biotechnology's Prescription for Patent Reform*, 5 J. MARSHALL REV. INTELL. PROP. L. 318, 318, 325 (2006); Stephen B. Maebius, *2007 Patent Reform Bill: Will It Benefit Nanotechnology?*, 4 NANOTECHNOLOGY L. & BUS. 171, 173–74 (2007).

143. Liza Vertinsky, *Comparing Alternative Institutional Paths to Patent Reform*, 61 ALA. L. REV. 501, 526–27 (2010); see Matal, *Part I, supra* note 137, at 439–47.

an earlier team's work to render a later team's work obvious.<sup>144</sup> The goal of the CREATE Act was to promote cooperative research by protecting patent rights for group innovation.<sup>145</sup> The second law is the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, which included several modest changes to the Hatch-Waxman Act provisions of the Federal Food, Drug, and Cosmetic Act.<sup>146</sup> These revisions require companies seeking to produce a generic version of a patented pharmaceutical to submit more detailed information and to notify the brand-name patent owner sooner.<sup>147</sup>

Two of the three patent laws passed during the period in question thus strengthened patent rights, and the third made a number of changes with mixed effects on patent protection. Across intellectual property law, the twenty substantive laws enacted by Congress over the past fourteen years overwhelmingly tended to strengthen intellectual property protection. This trend was true both generally and in each of the intellectual property domains.

The quantitative and qualitative data analysis provided here depicts two extremes of Congress–Supreme Court interaction: copyright law, in which the branches are in accord, and patent and trademark law, in which the branches appear deeply divided. The division in patent and trademark law cannot be dismissed as the Court simply interpreting federal statutes because a significant number of the decisions that weaken protection involve changes to judge-made law rather than statutory interpretation.<sup>148</sup> In addition, if the Court were simply interpreting statutes in accordance with Congress's intended meaning, we would expect a roughly even split between strengthening and weakening decisions. There is no reason to expect that any lack of clarity

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144. Cooperative Research and Technology Enhancement (CREATE) Act of 2004, Pub. L. No. 108-453, § 2, 118 Stat. 3596, 3596.

145. *See id.*

146. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066.

147. *Id.* § 1112. The Act also contains a provision that allows generic version applicants to make a counterclaim in patent infringement lawsuits to require patent owners to remove certain inappropriately listed patents from the Orange Book, a list of patents associated with approved drug products. *Id.* § 1101. Based on research, this provision was deemed to be less significant than the patent-strengthening provisions. Natalie M. Derzko, *The Impact of Recent Reforms of the Hatch-Waxman Scheme on Orange Book Strategic Behavior and Pharmaceutical Innovation*, 45 IDEA 165, 233–49 (2005).

148. The four patent eligible subject matter cases provide clear examples, as do several of the other cases discussed in the text above. *See generally* App. A.

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in statutory terms should be biased in one direction, and certainly no reason such a bias would appear in patent and trademark legislation, but not in copyright law.

While Congress spent the first part of the twenty-first century almost exclusively strengthening intellectual property protection, the Supreme Court has been pushing nearly as strongly in the opposite direction for patent and trademark protection. The disagreement between these branches of government that explicitly bubbled to the fore in one trademark case appears to underscore a far deeper divide.<sup>149</sup> Understanding the reasons for this interbranch divide is the subject of the next part.

## II. INTELLECTUAL PROPERTY INFLUENCES

The stark divergence between the Supreme Court's and Congress's perspectives on intellectual property law raises important questions concerning why these branches of government appear to view the law through such strikingly different lenses, and which branch might have the better view of the law. Part II of this Article seeks to answer the former question, turning to various models of institutional influence to generate hypotheses about why the two branches may be behaving in different manners. Part III of the Article tackles the latter, normative question, discussing insights that can be drawn concerning which branch is more likely to produce socially desirable intellectual property law and what the institutional fracture means for governmental function more broadly.

### A. CONGRESSIONAL INFLUENCES

The comparison of intellectual property lawmaking in the Supreme Court and Congress provides a useful case study on judicial and legislative activity because the divergence presents clear evidence that the different branches of government are influenced by different mechanisms. The mechanisms that influence Congress and the Supreme Court have been studied by political scientists, legal scholars, and other experts, but it is rarely possible to draw strong conclusions because most examples concern only one branch and there are always varied causal factors.<sup>150</sup> Governmental decision-making is difficult to parse, and

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149. See *supra* Parts I.A.2, I.B.1 (discussing Congress's enactment of the Trademark Dilution Revision Act to override the Supreme Court's decision in *Moseley v. V Secret Catalogue*, 537 U.S. 418 (2003)).

150. See, e.g., Ittai Bar-Siman-Tov, *Lawmakers as Lawbreakers*, 52 WM. & MARY L. REV. 805, 828 (2010); Benjamin G. Bishin, *Constituency Influence in*

this Article does not claim to have a definitive answer, but the existence of different outcomes provides the possibility of being able to draw causal hypotheses.<sup>151</sup> Section II.A analyzes apparent influences on Congress's intellectual property decision-making, followed by Section II.B analyzing such influences on the Supreme Court.<sup>152</sup>

### 1. Public Choice

Analyzing legislative influences on intellectual property law can pick up precisely where the discussion of the data in Part I left off—with the AIA. As the analysis above described, industry interests played a significant role in shaping the AIA.<sup>153</sup> Certain large companies and industry organizations were the primary drivers who initiated the AIA bills in an effort to weaken patent protection; conversely, contrary industry entities pushed back against early versions of the bills in an effort to maintain the status quo or strengthen patent rights where possible.<sup>154</sup> At first

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*Congress: Does Subconstituency Matter?*, 25 LEGIS. STUD. Q. 389, 404–06 (2000); Jack Knight, *Are Empiricists Asking the Right Questions About Judicial Decisionmaking?*, 58 DUKE L.J. 1531, 1534–35 (2009); Jeffrey A. Segal & Chad Westerland, *The Supreme Court, Congress, and Judicial Review*, 83 N.C. L. REV. 1323, 1351–52 (2005).

151. Gregory Mitchell, *Empirical Legal Scholarship as Scientific Dialogue*, 83 N.C. L. REV. 167, 199 (2004); see David C. Donald, *Law in Regression? Impacts of Quantitative Research on Law and Regulation*, 2015 COLUM. BUS. L. REV. 520, 527 (2015).

152. Both Congress and the Court, of course, are made up of individual members. Any analysis, such as those herein, examining influences on these bodies necessarily does so in a holistic manner. Just as we speak of the Constitution's Framers' intent in a broad sense, recognizing that it can be formally deconstructed, it is useful to consider what actions and influences appear to be affecting other governmental bodies as a whole, even while realizing that the manner of influence is complex and actually takes place on an individual level. See, e.g., Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1491–92 (2001) (reporting study results that indicate that "Justices are individual human beings whose particular behavior is not reducible to simple models"); Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 270–329 (2005) (discussing a variety of political, individual, and institutional influences on judicial decision-making); Garrick B. Pursley, *Preemption in Congress*, 71 OHIO ST. L.J. 511, 555, 558–59, 577 (2010) (discussing the interaction between individual legislator motivations and institutional decision-making in Congress). See generally JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1997) (discussing the difficulty of determining original intent with respect to the Constitution).

153. See discussion *supra* Part I.B.4.

154. BURK & LEMLEY, *supra* note 137; Nguyen, *supra* note 141. See generally Vertinsky, *supra* note 143, at 526 (describing industry efforts to influence intellectual property legislation).

glance it might appear surprising that even though the centerpiece of the AIA—shifting the United States to a first-to-file patent system—was largely uncontroversial, it still took over six years to pass the legislation.<sup>155</sup> In reality, these provisions were less controversial because this change was viewed by institutional parties on both sides of the debate as benefiting established companies.<sup>156</sup> The wealthy industry leaders who were often in bitter opposition with respect to strengthening or weakening various patent provisions were unified on a legal change that was mutually beneficial to established companies at the potential cost to individual inventors and smaller companies. The lack of controversy among the major entities concerning first-to-file highlights that passage of the AIA was guided significantly by established, connected industry interests. This history is consistent with standard models of public choice theory.<sup>157</sup>

In their seminal work on legislative decision-making and public choice, Professors Daniel Farber and Philip Frickey characterize legislative conduct as influenced by constituent interest, legislator ideology, and special interest groups.<sup>158</sup> The relative weights of these three factors depend on the context and nature of particular legislation.<sup>159</sup> Under an idealized view of Congress's role in the federal government, ideology and constituent interest are valid and appropriate bases for legislative action, while special interest group influences are not necessarily so. Farber and Frickey reason from this proposition to argue that courts analyzing legislative action should therefore respect legislative policy decisions, but also attempt "to mitigate undue interest group influence."<sup>160</sup>

Many authors have built upon this work, trying to identify and evaluate the contexts in which special interest groups hold the greatest sway.<sup>161</sup> Special interest groups appear to be the most powerful when trying to influence legislation that benefits a small, concentrated group, but whose costs or other negative

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155. Matal, *Part I*, *supra* note 137, at 435–36.

156. *See, e.g.*, Sharp, *supra* note 130.

157. *See* MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY 3–62 (1997) (collecting a variety of literature concerning public choice and special interest group influence).

158. Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 900–01 (1987).

159. *Id.* at 901.

160. *Id.*

161. *See generally* STEARNS, *supra* note 157 (collecting a variety of literature concerning public choice and special interest group influence).

effects are widely distributed.<sup>162</sup> Special interest groups also appear better able to block detrimental legislation from being enacted than they are at getting beneficial laws passed.<sup>163</sup>

This conceptual understanding of public choice theory and special interest group influence on legislation dovetails quite strikingly with intellectual property law. Under Farber and Frickey's tripartite model of legislator influence, two of the three prongs would be expected to have relatively minor influence in most intellectual property contexts. Studies indicate that people tend not to have strongly-held opinions about intellectual property law and that intellectual property law is not high on most people's radar.<sup>164</sup> For these reasons, general constituent pressures and legislator ideology would be expected to produce only minor influences on legislator preferences concerning intellectual property laws. The legislative history of the AIA appears to bear this out. While special interest groups were heavily invested in the debates, there was little public interest.<sup>165</sup> The AIA represents the most significant piece of intellectual property legislation enacted this century. Most other intellectual property legislation received little to no public attention. The lack of strongly held ideological positions about intellectual property law on the part of most legislators, and limited constituent attention, leaves special interest groups to play an outsized role in intellectual property legislation.

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162. Robert P. Merges, *One Hundred Years of Solicitude: Intellectual Property Law, 1900–2000*, 88 CALIF. L. REV. 2187, 2236 (2000); see Vertinsky, *supra* note 143, at 527–28; see also Frank B. Cross, Essay, *The Judiciary and Public Choice*, 50 HASTINGS L.J. 355, 372 (1999) (“Indeed, there is reason to believe that special interests are at their most influential when it comes to blocking beneficial government action (rather than creating undesirable government action).”); Farber & Frickey, *supra* note 158, at 906 (stating that interest groups “often exercise more power when they block legislation than when they support it”).

163. Vertinsky, *supra* note 143, at 527–28; Cross, *supra* note 162; see Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 64 (1991); Peter L. Kahn, *The Politics of Unregulation: Public Choice and Limits on Government*, 75 CORNELL L. REV. 280, 284–85 (1990).

164. Gregory N. Mandel et al., *Intellectual Property Law's Plagiarism Fallacy*, 2015 BYU L. REV. 915, 951–56 (2015); see also OFFICE FOR HARMONIZATION IN THE INTERNAL MARKET, *THE EUROPEAN CITIZENS AND INTELLECTUAL PROPERTY: PERCEPTIONS, AWARENESS AND BEHAVIOUR* (2013). Intellectual property attorney opinions differ from lay public opinion. Gregory N. Mandel, *What Is IP for? Experiments in Lay and Expert Perceptions*, 90 ST. JOHN'S L. REV. 659 (2016).

165. See generally Matal, *Part II*, *supra* note 137 (detailing the history of the AIA).

Exacerbating this dynamic, many intellectual property laws concern rights benefiting relatively few, concentrated groups (intellectual property owners) at the expense of diffuse, uncoordinated individuals (intellectual property users). Accordingly, the political and economic structure of intellectual property law makes it an area ripe for special interest influence.<sup>166</sup> Even on matters of limited popular attention and diffuse public interest, however, Congress is still meant to have the public's interest in mind. Low public awareness and knowledge does not mean that Congress can abdicate its role as the representative of the people; rather, it may be precisely in such circumstances where this responsibility is greatest.<sup>167</sup>

Several authors have specifically identified special interest rent-seeking as the driving force behind particular intellectual property legislation, from the movie and music industries to various technological fields.<sup>168</sup> As a result, content and creation industries have often lobbied successfully to expand intellectual property protection in the copyright, trademark, and patent law contexts.<sup>169</sup> The Sonny Bono Copyright Term Extension Act, which extended the term of copyright protection prospectively and retrospectively, has been specifically identified as “a classic instance of almost pure rent-seeking legislation” resulting from the asymmetry in lobbying power between special interest intellectual property owners and the diffuse public interest.<sup>170</sup> The Federal Trademark Dilution Act<sup>171</sup> and the Anticybersquatting Consumer Protection Act<sup>172</sup> also have been identified as specific

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166. WILLIAM M. LANDES & RICHARD A. POSNER, *THE POLITICAL ECONOMY OF INTELLECTUAL PROPERTY LAW* 14 (2004); Merges, *supra* note 162; Viva R. Moffat, *Mutant Copyrights and Backdoor Patents: The Problem of Overlapping Intellectual Property Protection*, 19 BERKELEY TECH. L.J. 1473, 1496–97 (2004).

167. See generally Andrew W. Neidhardt, *The Federalist View of Right-to-Work Laws*, 18 U. PA. J.L. & SOC. CHANGE 251, 264–65 (2015) (discussing the role representative groups play in advocating for citizens' interests in the context of complex legislation); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1266–71 (2009) (discussing political accountability in the context of issues where the public is largely uninformed).

168. William M. Landes & Richard A. Posner, *An Empirical Analysis of the Patent Court*, 71 U. CHI. L. REV. 111, 112 (2004); Merges, *supra* note 162; Moffat, *supra* note 166, at 1497. See generally Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 860–61 (1987) (discussing the influence of interest groups on the legislative process).

169. See LANDES & POSNER, *supra* note 166; Merges, *supra* note 162.

170. Merges, *supra* note 162, at 2236–37; see also Moffat, *supra* note 166, at 1497.

171. 15 U.S.C. § 1125(c) (2012).

172. *Id.* § 1125(d).

instances of trademark owner industry lobbying efforts.<sup>173</sup> Similarly, but in a very different context, the establishment of the Federal Circuit in 1982 was considered by some to be the result of successful special interest group efforts.<sup>174</sup>

Professors Jay Kesan and Andres Gallo studied the legislative efforts of different industry groups during the AIA legislative process and concluded that industry lobbyists “have a strong influence on the voting behavior of congresspersons, and they have a real influence on the direction of patent reform.”<sup>175</sup> Based on analysis of congressional voting records on an earlier version of the AIA, the authors found that voting correlated with contributions from various patent law interests and concluded, “Congress does not have a point of view independent from the stakeholders in the patent system. Rather, [voting] . . . reflect[s] the participation and preferences of major stakeholders, such as the information technology industry, the pharmaceutical industry, the law associations, and the manufacturing sector.”<sup>176</sup>

These examples appear to confirm the public choice model and explain why twenty-first-century intellectual property legislation has tended to accommodate owner interests and strengthen intellectual property rights. That substantive intellectual property legislation was successfully enacted twenty times in fourteen years is particularly notable, given that Congress passes few laws and that special interest groups are identified as being at their strongest in blocking undesirable legislation.<sup>177</sup> In intellectual property law, special interests have been powerful enough to not only prevent what they view as problematic laws, but to proactively get stronger laws passed.

Intellectual property interests have consistently achieved this success even as the dominant political parties have shifted over time. During the first part of the period under study, Re-

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173. MALLA POLLACK, CORPORATE COUNSEL'S GUIDE TO TRADEMARK LAW § 10:2 (2017) (referring to the Federal Trademark Dilution Act of 1995 as largely being considered a result of lobbying efforts by the International Trademark Association); Suzanna Sherry, *Irresponsibility Breeds Contempt*, 6 GREEN BAG 2D 47, 53 (2002) (discussing lobbying efforts of trademark owners leading to the Anticybersquatting Consumer Protection Act).

174. Moffat, *supra* note 166, at 1498; Landes & Posner, *supra* note 168.

175. Jay P. Kesan & Andres A. Gallo, *The Political Economy of the Patent System*, 87 N.C. L. REV. 1341, 1385 (2009).

176. *Id.* at 1413.

177. See Vertinsky, *supra* note 143 (discussing role of special interest groups in patent legislation).

publican George W. Bush was President and Republicans controlled a majority of seats in the House of Representatives and in the Senate.<sup>178</sup> In a later two-year block during the period, Democrat Barack Obama was President and Democrats controlled both chambers of Congress.<sup>179</sup> At other times, control of the Legislative and Executive Branches was split among the parties in various ways.<sup>180</sup> In each of these time periods, Congress enacted legislation strengthening intellectual property rights. This fact both demonstrates the strength of special interests in pursuing intellectual property legislation and underscores the point that intellectual property tends not to have a strong ideological bearing.

## 2. Intellectual Property Subfields

Several authors have noted the almost uniform success of copyright- and trademark-industry lobbying efforts, in contrast to a more mixed record for patent-industry interests.<sup>181</sup> One explanation for this difference is that copyright- and trademark-industry actors tend to be more uniform in preferring stronger intellectual property protection, so there usually is no powerful industry player to push back.<sup>182</sup>

Patent industry interests, on the other hand, are often more diffuse when it comes to their patent law preferences, which may partially explain why less patent legislation was passed during the period of study than copyright and trademark legislation. While most copyright- and trademark-industry entities benefit from stronger intellectual property protection in relation to their consumers, patent practice functions differently.<sup>183</sup> Many patent-industry entities both produce intellectual property themselves and also consume other owners' intellectual property in

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178. *Party Divisions of the House of Representatives*, HISTORY, ART & ARCHIVES U.S. HOUSE OF REPRESENTATIVES, <http://history.house.gov/Institution/Party-Divisions/Party-Divisions> (last visited Nov. 5, 2017); *Party Division in the Senate, 1789–Present*, U.S. SENATE, <https://www.senate.gov/history/partydiv.htm> (last visited Nov. 5, 2017).

179. HISTORY, ART & ARCHIVES U.S. HOUSE OF REPRESENTATIVES, *supra* note 178; U.S. SENATE, *supra* note 178.

180. HISTORY, ART & ARCHIVES U.S. HOUSE OF REPRESENTATIVES, *supra* note 178; U.S. SENATE, *supra* note 178.

181. Litman, *supra* note 168, at 871; Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 448 (2002).

182. Kesan & Gallo, *supra* note 175, at 1413; Litman, *supra* note 168, at 872–74; Liu, *supra* note 181.

183. Kesan & Gallo, *supra* note 175, at 1370.

order to bring products to market.<sup>184</sup> As a result, patent-industry entities are more likely to end up on the opposite sides of intellectual property debates, depending on the particular industry context and whether a specific firm or industry innovates itself or utilizes the innovation of others.<sup>185</sup> This is what took place with the debates over the AIA discussed above.<sup>186</sup>

All of that being said, the copyright and trademark tide in Congress may be turning. The Stop Online Piracy Act<sup>187</sup> (SOPA) and PROTECT IP Act<sup>188</sup> (PIPA) were the House and Senate versions, respectively, of bills designed to thwart the widespread availability of movies, music, and other media on the Internet in violation of copyright law.<sup>189</sup> These bills were supported by major media lobbies, including the Motion Picture Association of America and the Recording Industry Association of America, as well as by the United States Chamber of Commerce.<sup>190</sup> SOPA and PIPA would have penalized or prohibited Internet search engines and web payment sites from providing access or payment to websites that distribute material in violation of federal copyright laws.<sup>191</sup>

Initially, SOPA and PIPA had widespread, bipartisan congressional support.<sup>192</sup> In December 2011, however, a collection of technology and Internet companies, including Google, Facebook, Amazon, and Wikipedia, came out in strong opposition based on

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184. Jonathan M. Barnett, *Property As Process: How Innovation Markets Select Innovation Regimes*, 119 YALE L.J. 384, 390 (2009); Mark A. Lemley, *Ten Things to Do About Patent Holdup of Standards (And One Not to)*, 48 B.C. L. REV. 149, 151 (2007); Gregory N. Mandel, *Proxy Signals: Capturing Private Information for Public Benefit*, 90 WASH. U. L. REV. 1, 36 (2012).

185. Barnett, *supra* note 184, at 388; Kesan & Gallo, *supra* note 175, at 1351–53; Mandel, *supra* note 184, at 24.

186. See *supra* Part I.B.4.

187. Stop Online Piracy Act, H.R. 3261, 112th Cong. (1st Sess. 2011).

188. Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act of 2011, S. 968, 112th Cong. (1st Sess. 2011).

189. Michael A. Carrier, *SOPA, PIPA, ACTA, TPP: An Alphabet Soup of Innovation-Stifling Copyright Legislation and Agreements*, 11 NW. J. TECH. & INTEL. PROP. 21, 21–23 (2013); Yafit Lev-Aretz, *Copyright Lawmaking and Public Choice: From Legislative Battles to Private Ordering*, 27 HARV. J.L. & TECH. 203, 220–21 (2013); Sepehr Shahshahani, *The Nirvana Fallacy in Fair Use Reform*, 16 MINN. J.L. SCI. & TECH. 273, 314 (2015).

190. Lev-Aretz, *supra* note 189, at 244.

191. H.R. 3261, 112th Cong. §§ 102(c)(1), (c)(2)(A)(i), (c)(2)(B)–(C)(i), (c)(4)(A) (1st Sess. 2011); S. 968, 112th Cong. §§ 3(d)(1), (d)(2)(C)–(D), (e)(1) (1st Sess. 2011).

192. Jonathan Weisman, *After an Online Firestorm, Congress Shelves Antipiracy Bills*, N.Y. TIMES, Jan. 20, 2012, at B6; Edward Wyatt, *Lines Drawn on Antipiracy Bills*, N.Y. TIMES, Dec. 14, 2011, at B1.

concerns about Internet censorship and stifling online innovation.<sup>193</sup> Congressional leaders were taken aback by the groundswell of public opposition to SOPA and PIPA, and indefinitely postponed action on the legislation.<sup>194</sup> Though the response against SOPA and PIPA was coordinated by certain concentrated industry interests, it also depended heavily for its success on the numerous, diffusely affected members of the public that the industry players were able to mobilize. After regularly passing intellectual property legislation in the decade leading up to the SOPA and PIPA debates, the only intellectual property legislation that Congress has passed subsequently which strengthened owners' rights was in the trade secret context.

Empirical evidence, historical analysis, and public choice theory converge on a relatively convincing argument that twenty-first-century intellectual property legislation has been significantly driven by special interest groups.<sup>195</sup> This story appears to track legislative efforts in copyright, trademark, trade secret, and patent law, in each case leading to legislation with consistently stronger protection for intellectual property rights. As noted above, the unidirectional nature of legislative change in intellectual property law may now be shifting. The AIA debates uncovered widely disparate positions on patent protection across different industries, and the failure of SOPA and PIPA speaks to the rise of other industry players who are pressing against certain copyright expansions. Even with this transformation, congressional legislative activity on intellectual property still appears largely driven by special interest efforts; these interests, however, may be less uniform in their preferences than they were previously.

#### B. SUPREME COURT INFLUENCES

The substantial difference in the course of intellectual property activity between the Supreme Court and Congress over the past fourteen years strongly indicates that different factors are influencing the different branches' decision-making.<sup>196</sup> This is

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193. Wyatt, *supra* note 192, at B6; Jenna Wortham, *A Political Coming of Age for the Tech Industry*, N.Y. TIMES, Jan. 17, 2012, at A1.

194. Weisman, *supra* note 192.

195. This is not to deny that such influences also operated prior to this period, as much of the evidence indicates.

196. It is also true that Congress and the Supreme Court have different abilities to set their own agendas. Congress can pass legislation on any matter that passes constitutional muster, while the Supreme Court is limited to deciding

not surprising. Congress is made up of a large number of popularly elected representatives who serve for limited terms, have a strong desire to get reelected, and can come from any background.<sup>197</sup> The Supreme Court consists of nine Justices appointed for life, and though there is no constitutional requirement as such, all Supreme Court Justices have been trained in the law, and there has not been a Supreme Court justice who did not graduate from law school in over seventy years.<sup>198</sup> Even more narrowly, nearly every Justice who served during the time period in question was appointed from a federal circuit court of appeals.<sup>199</sup>

Studies of Supreme Court decision-making tend to divide the basis for decisions into three broad categories of influence: legal reasoning, justice ideology, and popular opinion.<sup>200</sup> These categories are generalizations and certainly not the only way to conceptualize Supreme Court decisions, but they provide a useful framework for discussion. These influences are not mutually exclusive, and can operate to varying degrees on different issues and with different Justices.<sup>201</sup> Exploring these influences in relation to intellectual property decisions yields several insights.

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cases or controversies that are presented to it. U.S. CONST. art. I, § 8; *id.* art. III, § 2. See generally *Marbury v. Madison*, 5 U.S. 137 (1803). Given the number of appeals seeking certiorari to the Supreme Court and the Court's ability to choose which cases it will grant certiorari in, however, the Court does have substantial agenda-setting authority. Epstein & Martin, *supra* note 12, at 399; Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1718 (2000) ("[T]he power to decide what to decide . . . enables the Court to set its own agenda.").

197. Kareem Crayton, *Legislative Politics and the Politics of Legislatures*, 14 ELECTION L.J. 241, 244 (2015); Alan L. Feld, *Congress and the Legislative Web of Trust*, 81 B.U. L. REV. 349, 350 (2001); Cristina M. Rodríguez, *Constraint Through Delegation: The Case of Executive Control Over Immigration Policy*, 59 DUKE L.J. 1787, 1804–05 (2010).

198. *Frequently Asked Questions*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/faq.aspx> (Oct. 27, 2015).

199. See *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/about/biographies.aspx> (last visited Nov. 5, 2017). Justice Kagan is the only justice who served during the period of study that was not previously an appellate judge. *Id.*

200. Christopher J. Casillas et al., *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM. J. POL. SCI. 74, 86 (2011); Epstein & Martin, *supra* note 12, at 396, 404; Sag et al., *supra* note 5, at 802; Unah et al., *supra* note 12, at 299.

201. Cross & Nelson, *supra* note 152, at 1491–92; Epstein & Martin, *supra* note 12, at 405. Certainly, for example, litigation is not free from special interest group influence and advantage. See generally Marc Galanter, *Why the "Have"*

### 1. Legal Reasoning

Though deductive legal reasoning based on legal rules may be a traditional and common lay perception of Supreme Court decision-making, it is implausible to attribute all intellectual property decisions to such analysis.<sup>202</sup> Many Supreme Court intellectual property cases raise novel issues and cannot be framed as being decided based solely, or even primarily, on reasoning from binding legal authority.<sup>203</sup> For example, as discussed above, four of the most high-profile patent cases during the period of study concerned patent-eligible subject matter.<sup>204</sup> Doctrinally, each of these decisions turned on whether a particular invention fell within a judicially created exception to patent eligibility for “abstract ideas, physical phenomena, and laws of nature.”<sup>205</sup> One would be hard-pressed to find a concrete legal basis for this rule, let alone the particular contours of the rule, in the Patent Act.<sup>206</sup> Instead, this doctrine was created by the Court, and some of it was elaborated for the first time in these cases.<sup>207</sup> The original judicial interpretation that guides the subject matter decisions cannot be attributed to deductive reasoning from prior legal

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*Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

202. Shyamkrishna Balganesh, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543, 1552 (2010); Sag et al., *supra* note 5, at 810–11.

203. See William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. LEGAL ANALYSIS 775, 789, 823 (2009) (making this point about novelty with respect to cases in general).

204. See *Alice Corp. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014); *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 (2013); *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289 (2012); *Bilski v. Kappos*, 561 U.S. 593 (2010).

205. *Supra* Part I.A.1 (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980)).

206. Some attribute the basis of the subject-matter-exception doctrine to the simple use of the word “invention” in section 101 of the Patent Act. Dan L. Burk, *The Curious Incident of the Supreme Court in Myriad Genetics*, 90 NOTRE DAME L. REV. 505, 514, 524 (2014); Peter S. Menell, *Forty Years of Wondering in the Wilderness and No Closer to the Promised Land: Bilski's Superficial Textualism and the Missed Opportunity to Return Patent Law to Its Technology Mooring*, 63 STAN. L. REV. 1289, 1292–93 (2011). Whether or not this single word can support such doctrine in general, it provides little basis for defining the scope of the exclusion.

207. Miriam Bitton, *Patenting Abstractions*, 15 N.C. J.L. & TECH. 153, 162–63 (2014); Menell, *supra* note 206, at 1292.

rules.<sup>208</sup> Many other Supreme Court intellectual property decisions are similar in this regard.

The difference between congressional and Supreme Court decision-making in patent and trademark law likewise belies an argument that intellectual property decisions are simply the result of deductive legal reasoning. The Intellectual Property Clause of the Constitution provides Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>209</sup> Facially, this clause provides relatively few restrictions on Congress’s authority to legislate with respect to intellectual property law. For example, in several high-profile cases discussed above, litigants argued that the “promote the Progress” language must at least proscribe Congress from passing intellectual property laws that grant retroactive rights and take subject matter out of the public domain.<sup>210</sup> The Supreme Court disagreed, and has consistently refused to read any significant limitations into Congress’s intellectual property authority.<sup>211</sup> Consequently, Congress has extremely broad leeway to legislate in the context of intellectual property law. Given this lack of constitutional constraint, it seems improbable that the Supreme Court would reach starkly divergent outcomes from Congress as the result of the Court’s legal interpretation of Congress’s legislation. That is, it is doubtful that Congress persistently intends the Court to *narrowly* interpret Congress’s attempts to *broaden* patent and trademark rights, and even more implausible that Congress would intend

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208. *Alice Corp.*, 134 S. Ct. at 2354–56; *Myriad Genetics*, 133 S. Ct. at 2116–18; *Mayo Collaborative Servs.*, 132 S. Ct. at 1294, 1297–98; *Bilski*, 561 U.S. at 603–04, 608–09; see John F. Duffy, *Why Business Method Patents?*, 63 STAN. L. REV. 1247, 1261 (2011) (“Most of the rules for finding patentable subject matter have been judicially created.”); see also Michael Risch, *Everything Is Patentable*, 75 TENN. L. REV. 591, 592 (2008) (“Current patentable subject matter jurisprudence is based not on actual issues the Court historically decided, but instead on sweeping dicta that outlined unsubstantiated concerns about broad patent claims.”).

209. U.S. CONST. art. I, § 8, cl. 8.

210. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

211. Jeanne C. Fromer, *The Intellectual Property Clause’s External Limitations*, 61 DUKE L.J. 1329, 1332, 1403, 1405 (2012); Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 317–18 (2004); Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress’s Intellectual Property Power*, 94 GEO. L.J. 1771, 1829 (2006).

the Court to follow such an approach in patent and trademark cases, but the opposite approach in copyright cases.

## 2. Justice Ideology

Experts and scholars who analyze Supreme Court decision-making have identified a significant role for Justice ideology in the Court's decisions in several fields of law.<sup>212</sup> This attitudinal model posits that Justices often reach decisions based on their ideological beliefs and preferences as opposed to more traditional, theoretically value-free legal reasoning.<sup>213</sup> Numerous studies find that the attitudinal model correlates with Supreme Court decision-making to a greater extent than other models.<sup>214</sup>

The attitudinal model has been developed and demonstrated primarily in relation to coding cases along a liberal-to-conservative spectrum.<sup>215</sup> The attitudinal paradigm, however, is commonly perceived as having "little or no relevance" to Supreme Court decision-making in intellectual property cases.<sup>216</sup> Under this view, the traditional liberal-conservative divide that tends to define attitudinal decision-making has only limited im-

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212. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* 191–202, 221–31, 245–71 (1993); see also Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision-Making*, 86 AM. POL. SCI. REV. 323, 325–26 (1992). But see Dan M. Kahan et al., "Ideology" or "Situation Sense"? An Experimental Investigation of Motivated Reasoning and Professional Judgment, 164 U. PA. L. REV. 349, 411–13 (2016) (reporting an experiment indicating that judges tend not to be ideologically driven when engaging in statutory interpretation).

213. Jack M. Balkin, *Ideology as Constraint*, 43 STAN. L. REV. 1133, 1153 (1991); George & Epstein, *supra* note 212, at 325–26, 334.

214. George & Epstein, *supra* note 212, at 325; Sag et al., *supra* note 5, at 802; Unah et al., *supra* note 12, at 295 ("The attitudinal model is a well-established behavioral theory of U.S. Supreme Court decision-making."). The attitudinal model is part of common lay perceptions about Supreme Court decision-making, exemplified by routine media attention to ideological divisions among the Justices. See, e.g., Adam Liptak, *The Polarized Court*, N.Y. TIMES: SUNDAY REV., May 11, 2014, at 1 (discussing ideological polarization on the Court); David Paul Kuhn, *The Incredible Polarization and Politicization of the Supreme Court*, ATLANTIC (June 29, 2012), <https://www.theatlantic.com/politics/archive/2012/06/the-incredible-polarization-and-politicization-of-the-supreme-court/259155> (analyzing ideological polarization on the Court).

215. Sag et al., *supra* note 5, at 805–06; Jeff Yates & Elizabeth Coggins, *The Intersection of Judicial Attitudes and Litigant Selection Theories: Explaining U.S. Supreme Court Decision-Making*, 29 WASH. U. J.L. & POL'Y 263, 270–75 (2009).

216. Sag et al., *supra* note 5, at 809.

port for intellectual property issues, and therefore does not significantly affect such cases.<sup>217</sup> Such analysis places intellectual property issues in the same category as some other types of economic cases that do not appear to be particularly ideologically driven.<sup>218</sup>

This perspective is consistent with the Supreme Court Justices' voting patterns in the intellectual property cases studied here. The Court issued unanimous opinions in twenty-three of the thirty-four substantive intellectual property decisions during the period of study, just over two-thirds of the cases. The Court's rate of unanimous opinions in all other cases during this period is around 35%, far lower than in the intellectual property decisions.<sup>219</sup> Further, not a single one of the Court's forty-four intellectual property cases was decided by a five to four vote, in comparison with over 20% of the Court's opinions in other fields.<sup>220</sup> In other words, the Court reaches unanimous decisions in intellectual property cases nearly twice as often as in non-intellectual property cases, and does not divide along its usual liberal-conservative axis. These data indicate that the Court was not substantially driven by political ideology in intellectual property cases during the period of study.<sup>221</sup>

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217. CRAIG ALLEN NARD & R. POLK WAGNER, PATENT LAW 33 (2008) ("Patent law issues rarely separate neatly along political party lines."); Ann Bartow, *When Bias Is Bipartisan: Teaching About the Democratic Process in an Intellectual Property Law Republic*, 52 ST. LOUIS U. L.J. 715, 715 (2008) ("[I]dentification as a Democrat or Republican does not provide too much guidance or create too many expectations about a person's view of intellectual property issues."); Sag et al., *supra* note 5, at 811 ("[A] more plausible explanation . . . is that judicial policy preferences regarding IP do not fit within the stereotypical view of the liberal-conservative ideological continuum.")

218. See, e.g., Nancy Staudt et al., *The Ideological Component of Judging in the Taxation Context*, 84 WASH. U. L. REV. 1797, 1799 (2006) (finding no ideology effect on Supreme Court Justice decision-making in taxation cases in general, though finding an effect in corporate tax cases); E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571, 1572 (2004) (concluding that Supreme Court justice ideology does not appear to affect decision-making in securities and antitrust cases); see also Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1150-51 (2004) (finding that legal experts had a particularly difficult time predicting Supreme Court outcomes in economic cases).

219. Sunstein, *supra* note 3.

220. *Id.* at 782.

221. To be more precise, the data indicates that the Justices are not ideologically driven from a liberal-versus-conservative perspective. It is possible that the Justices are being driven by some other, nonpolitical ideology. *Infra* Part II.B.3.

Professors Matthew Sag, Tonja Jacobi, and Maxim Sytch conducted a comprehensive empirical study on the effect of judicial ideology on Supreme Court intellectual property decisions from 1954 to 2006. The authors found a minor ideological effect indicating that the more conservative a Justice is, the more likely the Justice was to vote in favor of an intellectual property owner.<sup>222</sup> Politically liberal Justices, on the other hand, did not show any correlation with deciding cases against intellectual property owners.<sup>223</sup> The effect of ideology on intellectual property cases was significantly lower than the effect of ideology on Supreme Court decision-making in other legal fields.<sup>224</sup> As in the instant study, the authors found that the Justices agreed with each other more often in intellectual property cases than in Supreme Court cases generally.<sup>225</sup> Based on their analysis, the authors concluded that the then-incipient Roberts Court would be more supportive of stronger intellectual property rights than the prior court.<sup>226</sup> This prediction did not prove to be accurate, as the case analysis above reveals that the Roberts Court has been hostile to patent and trademark rights nearly across the board, although the Court has been receptive to copyright protection. Thus, in the Supreme Court's recent cases, political ideology does not appear to be playing even the limited role that it may have played earlier.

Several empirical studies have examined judicial ideology and intellectual property decision-making in specific contexts. For example, Professor Barton Beebe has studied whether political ideology affected judicial decision-making in cases involving certain copyright and trademark issues, and found no effect in either context.<sup>227</sup> Kimberly Moore, now herself a Federal Circuit judge, examined whether a judge's political ideology affected their decisions in patent claim construction cases, and likewise found no effect.<sup>228</sup> These studies did not focus on Supreme Court decisions.

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222. Sag et al., *supra* note 5, at 838–40.

223. *Id.* at 845.

224. *Id.* at 846.

225. *Id.* at 822, 835.

226. *Id.* at 851.

227. Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CALIF. L. REV. 1581, 1647–48 (2006); Barton Beebe, *Does Judicial Ideology Affect Copyright Fair Use Outcomes?: Evidence from the Fair Use Case Law*, 31 COLUM. J.L. & ARTS 517, 521 (2008).

228. Kimberly A. Moore, *Are District Court Judges Equipped to Resolve Patent Cases?*, 15 HARV. J.L. & TECH. 1, 38–39 (2001).

In sum, the data indicate that Justice ideology appears to play little to no role in Supreme Court intellectual property decisions during the time period under study. This is not entirely surprising. As discussed earlier, people tend not to have strongly held views on intellectual property protection, and the Supreme Court Justices who served during this term had limited prior experience in intellectual property law.<sup>229</sup> The Justices all went to law school at a time before intellectual property courses were a common part of the law school curriculum.<sup>230</sup> Specific experience in a legal field is hardly a necessary antecedent to having an ideological position about issues on the matter, but there is little evidence from their backgrounds to indicate that the Justices who have served on the Supreme Court during the period of study brought particular ideological views about intellectual property law to the Court with them.<sup>231</sup>

### 3. Popular Opinion

The analysis above indicates that the Supreme Court's intellectual property decisions cannot generally be explained by deductive legal reasoning or Justice ideology. Perhaps popular opinion is playing a greater role. At first glance, the notion that popular opinion is significantly influencing Supreme Court decisions appears antithetical to paradigmatic notions of American governmental roles. Congress, and the President, are traditionally expected to be the branches of government that are most responsive to popular will.<sup>232</sup> The Supreme Court, on the other hand, is designed to act as a countermajoritarian check on Con-

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229. See generally *Biographies of the Justices*, SCOTUSBLOG, <https://www.scotusblog.com/reference/educational-resources/biographies-of-the-justices> (last visited Nov. 5, 2017). Justice Breyer's authoring a well-known article on copyright law in 1970 is a notable exception. Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970). For a discussion of tangential connections between the Justices and intellectual property law, see *infra* note 258.

230. The current Supreme Court Justices graduated from law school between 1959 and 1986. *Biographies of the Justices*, *supra* note 229.

231. Again, Justice Breyer's article on copyright law is an exception, though ironically the article is critical of copyright expansionism, whereas copyright law is the one area of intellectual property where the Court has tended to strengthen rights. See generally Breyer, *supra* note 229.

232. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2359 (2006); Frederick Schauer, *Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 5 (2006).

gress when necessary to protect against the potentially unconstitutional tyranny of the majority.<sup>233</sup>

A growing body of empirical evidence indicates that this commonly held political perspective may be somewhat reversed in practice. Rather than being countermajoritarian, the Supreme Court often appears to act in concert with majoritarian preferences—or with what the Court believes to be majoritarian preferences.<sup>234</sup>

The “countermajoritarian difficulty” is a term given to the seemingly paradoxical ability of an unelected Supreme Court to thwart the will of the representative branches.<sup>235</sup> Defending this governmental structure as legitimate in a democracy has been seen as a significant challenge in constitutional theory.<sup>236</sup> Recent work indicates that the countermajoritarian difficulty may not be as significant a problem in practice as it has been conceived historically. Work by a number of legal empiricists, political scientists, and legal historians indicates that the Supreme Court often issues opinions consistent with national public opinion trends.<sup>237</sup> Justice Anthony Kennedy recognized this relationship: “In the long term, the court is not antimajoritarian—it’s majoritarian.”<sup>238</sup>

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233. THE FEDERALIST NO. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961); John Ferejohn & Pasquale Pasquino, *The Countermajoritarian Opportunity*, 13 U. PA. J. CONST. L. 353, 360–69 (2010) (“When other [branches] have made decisions infringing on fundamental rights, the court may be called upon to play a special role in regulating these officials in a countermajoritarian fashion.”).

234. Epstein & Martin, *supra* note 12, at 277; Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 116, 158 (2012); Jeff Yates et al., *For the Times They Are A-Changin’: Explaining Voting Patterns of U.S. Supreme Court Justices Through Identification of Micro-Publics*, 28 BYU J. PUB. L. 117, 122 (2013).

235. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AS THE BAR OF POLITICS* 16–23 (1962); Barry Friedman, *The History of the Countermajoritarian Difficulty: The Road to Judicial Supremacy* (pt. 1), 73 N.Y.U. L. REV. 333, 335 (1998); Unah et al., *supra* note 12, at 298.

236. Friedman, *supra* note 235, at 334–36; Lain, *supra* note 234, at 114–15; David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 GEO. L.J. 723, 727 (2009).

237. Epstein & Martin, *supra* note 12, at 280; Lain, *supra* note 234, at 115, 167; Law, *supra* note 236, at 729 (“As a historical matter, the Supreme Court’s decisions have been, whether by coincidence or design, largely in sync with public opinion.”); Unah et al., *supra* note 12, at 310.

238. Jason DeParle, *In Battle to Pick Next Justice, Right Says Avoid a Kennedy*, N.Y. TIMES, June 27, 2005, at A1.

Professors Lee Epstein and Andrew Martin have conducted one of the most comprehensive analyses of the relationship between Supreme Court decision-making and public opinion.<sup>239</sup> These scholars compared the ideological disposition of every orally argued Supreme Court decision from 1958 to 2008 against the public mood at the time, based on a commonly used quarterly measure of public mood among American adults.<sup>240</sup> Controlling for numerous factors, including the ideology of the Supreme Court median Justice, the direction of the decision on appeal, and the ideology of the President, the House, and the Senate, the analysis finds a statistically significant correlation between the public mood at the time of oral argument and the ideological propensity of the Supreme Court decision.<sup>241</sup>

In a similar vein, Professor Corinna Barrett Lain conducted a detailed historical review of three seminal Supreme Court cases that are typically identified as exemplifying the counter-majoritarian difficulty: *Brown v. Board of Education*,<sup>242</sup> *Furman v. Georgia*,<sup>243</sup> and *Roe v. Wade*.<sup>244</sup> Based on a variety of contemporary accounts, judicial writings, and public opinion data, she concludes that in each case the Court reached an outcome that the Justices believed was consistent with the direction of public opinion.<sup>245</sup> A number of other studies are in accord with both Epstein and Martin's and Lain's analyses.<sup>246</sup> As Chief Justice

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239. Epstein & Martin, *supra* note 12, at 263–67, 271–74.

240. *Id.* at 272.

241. *Id.* at 277.

242. *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

243. *Furman v. Georgia*, 408 U.S. 238 (1972).

244. *Roe v. Wade*, 410 U.S. 113 (1973), *holding modified by* *Planned Parenthood of S.E. Penn. v. Casey*, 504 U.S. 833 (1992).

245. Lain, *supra* note 234, at 125, 131, 135 (“*Brown* presents a striking example of the Supreme Court responding to, and reflecting, deep shifts in prevailing norms when the democratic process would not . . . . The Justices in *Furman*’s majority saw their ruling in fundamentally majoritarian terms . . . . Rather than a Supreme Court thwarting majority will, *Roe* shows a Supreme Court vindicating it—again responding to, and reflecting, deep shifts in public opinion when change through the democratic process was blocked.”).

246. THOMAS R. MARSHALL, PUBLIC OPINION AND THE REHNQUIST COURT (2008) (finding that the Supreme Court decisions since the 1930s have been consistent with public opinion data over 60% of the time); Casillas et al., *supra* note 200, at 79 (finding that “public mood has both a significant short- and long-run influence on the Court’s decisions” for a dataset of Supreme Court cases from 1956 to 2000); Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018, 1033 (2004) (“We have found that the Court’s policy outcomes are indeed affected by public opinion, but to a degree far greater than

Rehnquist stated, “[Justices] go home at night and read the newspapers or watch the evening news on television; they talk to their family and friends about current events . . . [and cannot] escape being influenced by public opinion.”<sup>247</sup>

Though we cannot know for sure, a variety of circumstantial evidence supports the conclusion that the Supreme Court’s decisions in intellectual property cases may be driven in significant part by popular opinion. This is not to assert that public opinion is the only mechanism affecting Supreme Court decisions in intellectual property, or that it explains all decisions. But public opinion appears to play a notable role, one that has not previously been recognized.

It may appear counterintuitive to suggest that public opinion is affecting Supreme Court intellectual property decisions when the public has limited knowledge of intellectual property law and does not appear to pay significant attention to such issues.<sup>248</sup> Low knowledge, however, is not a barrier to strongly held opinions,<sup>249</sup> and limited attention does not mean that there is no influence. Several lines of evidence support the hypothesis that the Supreme Court’s intellectual property decisions tend to reflect popular sentiment.

First, popular opinion about intellectual property law is consistent with the tendency of Supreme Court decisions in patent and trademark law. Survey data reveals that the popular perception of intellectual property rights is that they are too strong.<sup>250</sup> These public preferences are found across a variety of subject matter, from medicine to literary works and from music

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previously documented.”); David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 864–87 (2009) (discussing the Court’s shift in death penalty, sex-based classification/equal protection, and substantive due process cases as instances of the Court moving towards public opinion); Unah et al., *supra* note 12, at 310 (finding “a strong and robust association between public mood and the direction of Supreme Court decisions” for a dataset of Supreme Court cases spanning 1952 to 2011). *See generally* Jane S. Schacter, Commentary, *What Marriage Equality Can Tell Us About Popular Constitutionalism (and Vice Versa)*, 52 HOUS. L. REV. 1147 (2015) (analyzing the shift in public opinion favoring same-sex marriage and equating it with the recent legal developments moving in the same direction).

247. William H. Rehnquist, *Constitutional Law and Public Opinion*, 20 SUF-FOLK U. L. REV. 751, 768 (1986).

248. Mandel et al., *supra* note 164, at 956.

249. Dan M. Kahan et al., *The Polarizing Impact of Science Literacy and Numeracy on Perceived Climate Change Risks*, 2 NATURE CLIMATE CHANGE 732 (2012).

250. Mandel et al., *supra* note 164, at 937–43.

to engineering.<sup>251</sup> Though formal legal reasoning and Justice ideology do a poor job of explaining Supreme Court intellectual property outcomes, public opinion does correlate with these results.

Second, one of the strongest signatures that we see in the Supreme Court data is the divergence between the copyright cases and the patent and trademark cases. Research indicates that popular opinions about what intellectual property law should be are more consistent with copyright law than with patent law.<sup>252</sup> This finding could explain a Court that is more likely to harmonize with the direction of Congress's action in copyright than in patent law.

Third, there is the wealth of unanimous decisions in intellectual property cases during the period under study, a rate that exceeds unanimous decisions in other fields of law by nearly two to one. Public opinion influence on Supreme Court Justice voting can explain this unanimity quite clearly; most other explanatory mechanisms that have been offered cannot.

Fourth, this proposition about intellectual property decisions dovetails precisely with the types of cases in which public opinion is expected to hold the greatest sway. Recent studies of the relationship between popular preferences and Supreme Court decision-making find that the correlation is strongest in nonsalient and unpolarized cases.<sup>253</sup> Intellectual property law fits this mold. The degree of unanimity in the intellectual property cases shows that they tend not to be polarized at the Court.<sup>254</sup> Salience is defined in the pertinent studies based on whether a given decision was reported on the front page of the *New York Times*.<sup>255</sup> Only one of the forty-four Supreme Court

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251. *Id.* at 949.

252. Gregory N. Mandel, *The Public Perception of Intellectual Property*, 66 FLA. L. REV. 261, 292 (2014). This study did not test trademark attitudes.

253. Casillas et al., *supra* note 200, at 83–84 (finding stronger effects in nonsalient cases); Unah et al., *supra* note 12, at 313–16 (finding the strongest effects in unpolarized, nonsalient cases).

254. Nonsalient cases do not necessarily tend to be unpolarized. Stephen Burbank and Sean Farhang found that Supreme Court cases concerning private enforcement rights, for a time period overlapping the present study, are also nonsalient, but highly polarized. Stephen B. Burbank & Sean Farhang, *The Subterranean Counterrevolution: The Supreme Court, the Media, and Litigation Reform*, 65 DEPAUL L. REV. 293, 314–19 (2016).

255. Casillas et al., *supra* note 200, at 81; Unah et al., *supra* note 12, at 309; *see also* Burbank & Farhang, *supra* note 254, at 10 (reporting that most members of the public acquire their information about Supreme Court decisions from the mass media).

intellectual property decisions under discussion merited such coverage.<sup>256</sup> The authors of one study even specifically identified patent law as a field that “may be highly consequential” but that is not salient for the public.<sup>257</sup> The characteristics of intellectual property cases strongly align with the types of cases on which public opinion tends to have the greatest influence on the Court.

Finally, additional support for the public-influence theory can be gleaned from a more nuanced unanimity analysis. While the Supreme Court reached unanimous decisions in 68% of its substantive intellectual property decisions, it was unanimous in only 40% of the intellectual property decisions coded as neutral in the dataset. In addition, of the Court’s twenty-three unanimous decisions in intellectual property cases that substantively strengthened or weakened rights, twenty-two were in patent and trademark. Thus, unanimity was achieved far more often in substantive patent cases (78%) and trademark cases (100%) than in substantive copyright cases (14%). The patent and trademark cases are precisely the areas in which the Supreme Court deviates from Congress; in copyright law cases, the Court and Congress remain in accord. Something is causing the Supreme Court to reach unanimous agreement in an overwhelming percentage of substantive patent and trademark decisions, but rarely in non-substantive decisions in these same fields or in copyright cases. In other words, it is not intellectual property law per se on which the Supreme Court tends to be unanimous, or even patent and trademark law in particular. Rather, it is substantive patent and trademark decisions that weaken intellectual property owner rights where the agreement is strong.<sup>258</sup> Public sentiment leery of strong patent and trademark rights could explain this divergence; few other rationales appear able to do so.

This unanimity evidence also indicates that the Supreme Court’s twenty-first-century intellectual property jurisprudence

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256. Adam Liptak, *Justices, 9–0, Bar Patenting Human Genes*, N.Y. TIMES, June 13, 2013, at A1.

257. Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1549 (2010).

258. Some commentators have attempted to explain the Court’s unanimity in patent cases as a result of the Court’s lack of expertise in the field and reaction to the Federal Circuit. See Holbrook, *supra* note 58, at 71–77; see also Laura G. Pedraza-Fariña, *Understanding the Federal Circuit: An Expert Community Approach*, 30 BERKELEY TECH. L.J. 89, 123–27 (2015) (discussing how the Federal Circuit functioning as an expert community may affect its interaction with the Supreme Court). This rationale, however, cannot explain the pattern of unanimity revealed here, which includes substantive trademark cases but not neutral patent decisions.

is not simply a patent-specific reaction against the Federal Circuit or patent troll concerns. This is not to say that such issues played no role in the Court's patent law cases, only that there are additional factors at play. In addition, even though the Court may not have been reacting to these issues directly, popular concern about the direction of the Federal Circuit's jurisprudence and patent trolls may have catalyzed the Supreme Court Justices' views in these cases. Under this view, those who have argued that the Court responded to the Federal Circuit or patent troll rhetoric have the correlation correct, but fail to recognize the intermediary influence of public opinion driving this relationship.

#### 4. Mechanisms of Public Influence

The evidence supporting the public opinion hypothesis raises questions concerning how popular sentiment might influence the Court and whether such sentiment concerning patent and trademark law can be identified. Epstein and Martin are explicit that they cannot identify the causal relationship between Supreme Court decisions and public mood from their data.<sup>259</sup> The dominant view, particularly in the political science literature, has been that Supreme Court decisions tend to align with public preferences because the Justices strategically bend to the will of the people in an effort to maintain public support and remain an effective, legitimate branch of government in the absence of popular election.<sup>260</sup> This rationale has been theorized in relation to certain patent decisions.<sup>261</sup> The same relationship, however, could also arise because Supreme Court Justices are human beings and members of the public; the same factors that affect public opinion generally may affect Supreme Court Justices as well.<sup>262</sup> As Justice Ruth Ginsburg recently noted about

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259. Epstein & Martin, *supra* note 12, at 264.

260. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 14 (2009); Baum & Devins, *supra* note 257, at 1580; Unah et al., *supra* note 12, at 299; *see also* Epstein & Martin, *supra* note 12, at 264 n.3; Timothy R. Holbrook & Mark D. Janis, *Expressive Eligibility*, 5 U.C. IRVINE L. REV. 973, 979–85 (2015) (discussing how the Supreme Court's decisions in patent law cases may be an attempt to express a level of accountability); Yates et al., *supra* note 234, at 123–24.

261. Holbrook & Janis, *supra* note 260 (arguing that the Supreme Court's subject matter cases support the patent system's legitimacy by letting the public know, for example, that there are outer boundaries of what is patentable).

262. Epstein & Martin, *supra* note 12, at 264, 281; Unah et al., *supra* note 12, at 300; Yates et al., *supra* note 234, at 124–26.

the Court, “Inevitably, it will be affected by the climate of the era.”<sup>263</sup>

Which of these two causal relationships is at play (the Court directly seeking to satisfy public preferences or indirectly being a part of the public mood) has been heavily debated.<sup>264</sup> Several researchers have recently attempted to answer this question, but study design in this context is quite difficult and the results have been mixed.<sup>265</sup>

The Supreme Court’s decisions in intellectual property cases shed new light on this question. Recall that intellectual property studies reveal that most members of the public have relatively limited knowledge about intellectual property issues and that intellectual property issues tend not to align with traditional ideological debates.<sup>266</sup> It would seem implausible, on this basis, to reason that the Supreme Court would feel the need to bend to the will of the public in order to achieve popular legitimacy on intellectual property law.<sup>267</sup>

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263. Adam Liptak, *Right Divided, Disciplined Left Steered Justices*, N.Y. TIMES, July 1, 2015, at A21. A third possibility for a mechanism that some have proposed is the judicial appointments process, but this means of influence would imply static Supreme Court Justice preferences that are unaffected by changes in public opinion over time, a possibility that is belied by the data. *Lain, supra* note 234, at 160.

264. Baum & Devins, *supra* note 257, at 1547–55, 1562; Burbank & Farhang, *supra* note 254, at 303–07; Casillas et al., *supra* note 200, at 74–75; Epstein & Martin, *supra* note 12, at 264 n.3; Yates et al., *supra* note 234, at 123–26.

265. See, e.g., Casillas et al., *supra* note 200, at 78 (attempting to control for the social forces that might affect all individuals by creating a measure of national policy based on military spending and a measure of policy liberalism derived from a set of economic indicators). Compare *id.* at 75 (concluding based on an empirical analysis “that while social forces indeed influence the justices’ ideology. . . [.] controlling for these factors, public opinion maintains a statistically significant effect on the Court’s decisions”), with Micheal W. Giles et al., *The Supreme Court in American Democracy: Unraveling the Linkages Between Public Opinion and Judicial Decision Making*, 70. J. POL. 293, 303 (2008) (concluding based on an analysis of individual Justice’s votes that the “most likely explanation” for the correlation between public opinion and Supreme Court decisions is the Justices being swayed by the same forces that also influence the public).

266. See *supra* Part II.B.2.

267. See Burbank & Farhang, *supra* note 254, at 319–20 (concluding that the Supreme Court is less constrained by popular opinion on issues of lower public visibility). Some scholars, conversely, have argued that Justices may feel a need to bend to the will of the public in nonsalient cases to build a reservoir of diffuse public support that enables them to buck popular preferences in more salient cases. Casillas et al., *supra* note 200, at 81–82. As others have stated, it is hard to imagine that this reservoir is necessary given that (1) the Court’s “legitimacy is largely impervious to [public] disagreement” with its decisions,

The correlation between Supreme Court decisions and popular preferences on intellectual property issues appears much more likely to result from the fact that the Supreme Court Justices are members of a public whose opinions are shaped by the events and forces that influence society more generally. It is certainly possible that the Supreme Court is also acting strategically at the same time, as these causal mechanisms are not mutually exclusive.<sup>268</sup> But the data here indicate that the previously less appreciated effects of Supreme Court Justices being part and parcel of their time and culture are having a significant effect in at least some fields.

Some Justices have made statements that are in accord with this analysis. Chief Justice William Rehnquist wrote: “Judges, so long as they are relatively normal human beings, can no more escape being influenced by public opinion in the long run than can people working at other jobs.”<sup>269</sup> Justice Benjamin Cardozo reflected, “The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by.”<sup>270</sup> Even Justice Antonin Scalia, a longtime proponent of an originalist approach to interpretation, has acknowledged, “[I]t’s a little unrealistic to talk about the Court as though it’s a continuous, unchanging institution rather than to some extent necessarily a reflection of the society in which it functions.”<sup>271</sup>

That the Supreme Court appears to be influenced by the public mood, regardless of the mechanism, raises a subsequent issue of trying to determine which segment of the public is influencing the Court. Though Epstein and Martin’s work focused on national public mood data,<sup>272</sup> subsequent empirical research indicates that micro-publics, rather than broad-based national public opinion, are a more accurate indicator of Justice decision-making.<sup>273</sup> Justices, like everyone else, have a variety of personal, social, and work relationships that can be expected to

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and (2) the Court would be hard-pressed to build public support in nonsalient intellectual property cases given the public’s lack of attention to such matters. Baum & Devins, *supra* note 257, at 1548–52.

268. Yates et al., *supra* note 234, at 126.

269. Rehnquist, *supra* note 247.

270. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 168 (1921).

271. Yates et al., *supra* note 234, at 138–39 (quoting McGuire & Stimson, *supra* note 246, at 1020).

272. Epstein & Martin, *supra* note 12, at 269.

273. Yates et al., *supra* note 234, at 137–38.

shape their perceptions and beliefs.<sup>274</sup> In the case of Supreme Court Justices, these relationships tend to be among societal “elites,” individuals of higher education and socioeconomic status than the general public.<sup>275</sup> For the Justices, this would likely include lawyers and legal communities in particular. As Professors Lawrence Baum and Neal Devins concluded after a comprehensive analysis of prior studies and new data, “[The evidence] supports the conclusion that elites are more important to the Justices, and exert more impact on their choices, than does the public as a whole.”<sup>276</sup> It is not surprising that Justices would be more affected by the populations that they are a part of and identify with because such populations are presumably the most important to the Justices.<sup>277</sup>

Though the evidence discussed above indicates that most people pay little attention to, and have limited knowledge of, intellectual property issues, there is evidence that the higher socioeconomic status cohort that Supreme Court Justices are a part of may be paying more attention.<sup>278</sup> An analysis of the use of the term “intellectual property” in news articles in the *New York Times*, in Westlaw’s news databases, and in sources available on Google Books all indicate a dramatic rise in the use of the term from the 1980s through the present day. In each case, there is continually increasing use of the term in every five-year block from 1980 through 2015, with the phrase being used over forty times more often presently than it was thirty-five years ago.<sup>279</sup>

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274. *Id.* at 128–35 (detailing various correlations between Justices’ voting behavior and different aspects of their lives).

275. Baum & Devins, *supra* note 257, at 1579–80. The Supreme Court’s decisions “on controversial social issues are more consistent with the views of highly educated people than with the views of the populace as a whole.” *Id.* at 1570–71.

276. *Id.* at 1579. It appears that this effect may be particularly true of swing Justices. *Id.* at 1581.

277. *Id.* at 1537–38.

278. See Burbank & Farhang, *supra* note 254, at 300–03 (discussing how studies have demonstrated that the public in general “knows little about the Court’s decisions,” but that the better-educated, more-attentive public is better informed).

279. A search of articles appearing in the *New York Times* for the term “intellectual property” yields the following numbers of hits for the identified time periods: 1/1/1981–12/31/1985, 49; 1/1/1986–12/31/1990, 291; 1/1/1991–12/31/1995, 398; 1/1/1996–12/31/2000, 721; 1/1/2001–12/31/2005, 1,009; 1/1/2006–12/31/2010, 1,402; 1/1/2011–12/31/2015, 1,683. A search of Westlaw’s databases for the term “intellectual property” yields the following numbers of hits for the identified time periods: 1/1/1981–12/31/1985, 1,392; 1/1/1986–12/31/1990, 2,743; 1/1/1991–12/31/1995, 9,203; 1/1/1996–12/31/2000, 25,109; 1/1/2001–12/31/2005, 47,227; 1/1/2006–12/31/2010, 54,705; 1/1/2011–

In addition to greater public attention to intellectual property law among elites, the Justices have seen a vast increase in the scope of amicus briefs filed in intellectual property cases, both seeking certiorari and on the merits.<sup>280</sup> Several of the Justices have also interacted directly with intellectual property law: they have written on intellectual property issues,<sup>281</sup> have had law clerks or close relatives who are experts in intellectual property law,<sup>282</sup> and have argued intellectual property cases and decided intellectual property cases as appellate and district court judges.<sup>283</sup> As a result, there are a variety of manners in which elite attention to intellectual property law is likely working its way into Supreme Court Justice consciousness.

This suite of circumstantial evidence is not definitive, but combining it appears to paint a picture that more-educated, wealthier, legally-attuned individuals paid substantially more attention to intellectual property issues during the time period

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12/31/2015, 55,034. Google Books data is via a search of the term “intellectual property” on Google Books’ “Ngram Viewer,” available at <https://books.google.com/ngrams>.

280. Balganes, *supra* note 202, at 1594; Colleen V. Chien, *Patent Amicus Briefs: What the Courts’ Friends Can Teach Us About the Patent System*, 1 U.C. IRVINE L. REV. 395, 399 (2011); *see* amicus briefs cited *infra* note 294.

281. *See* Stephen Breyer, *Copyright: A Rejoinder*, 20 UCLA L. REV. 75 (1972); Breyer, *supra* note 229.

282. To note a handful of examples, the following judges, scholars, and practitioners all specialize in intellectual property law: Richard Taranto, Federal Circuit Court of Appeals Circuit Judge, clerked for Justice O’Connor; Kevin Collins, Professor of Law at Washington University Law School, clerked for Justice Sotomayor while she was on the Second Circuit; Rochelle Dreyfuss, Pauline Newman Professor of Law at NYU Law School, clerked for Chief Justice Burger; Jeanne Fromer, Professor of Law at NYU Law School, clerked for Justice Souter; Jane Ginsburg, Morton L. Janklow Professor of Literary and Artistic Property Law at Columbia Law School, is Justice Ginsburg’s daughter; John Golden, Loomer Family Professor in Law at the University of Texas Law School, clerked for Justice Breyer; Scott Hemphill, Professor of Law at NYU Law School, clerked for Justice Scalia; Lawrence Lessig, Roy L. Furman Professor of Law at Harvard Law School, clerked for Justice Scalia; Ronald Mann, Albert E. Cinelli Enterprise Professor of Law at Columbia Law School, clerked for Justice Powell; Molly Van Houwelling, Associate Dean at Berkeley, clerked for Justice Souter; Jeffrey Wall, Special Counsel at Sullivan & Cromwell LLP, clerked for Justice Thomas; Timothy Wu, Isidor and Seville Sulzbacher Professor of Law at Columbia Law School, clerked for Justice Breyer.

283. *E.g.*, Justice Roberts argued both *TraFFix Devices, Inc. v. Mktg. Displays, Inc.*, 121 S. Ct. 1255, Transcript of Oral Argument at 2 (2000) (No. 99-1571), 2000 WL 1808274, at \*2 and *Feltner v. Columbia Pictures Television, Inc.*, 118 S. Ct. 1279, Transcript of Oral Argument at 2 (1998) (No. 96-1768), 1998 WL 29550, at \*2; Justice Kagan was involved with several intellectual property cases in her service as Solicitor General from 2009–2010. *E.g.*, *Bilski v. Kappos*, 130 S. Ct. 3218, 3223 (2010).

in question, and at the same time displayed a growing concern about the strength of intellectual property rights.<sup>284</sup> Supreme Court Justices, as members of these micro-publics, may well have been affected in the same manner.

### C. REEVALUATING THE SUPREME COURT AND CONGRESSIONAL INFLUENCES

That elite popular opinion appears to play an underappreciated role in influencing Supreme Court decision-making on intellectual property issues raises the question of why Congress does not appear to be swayed by similar constituent preferences. Completing the cycle of flipping the countermajoritarian difficulty, legal scholars and political scientists have produced a variety of evidence and analyses indicating that the theoretically representative branches of government often act in countermajoritarian ways.<sup>285</sup> Special interest group influence is one strong example of such an effect. A variety of other work has identified democratic failings in the elected branches of government that have similar consequences. Myriad well-known challenges can limit democratic accountability, including political polarization, social choice voting issues, the Senate filibuster, committee roles, gerrymandered electoral districts, incumbency protection, and other influences.<sup>286</sup> As Corinna Lain writes, “This recognition turns the countermajoritarian difficulty on its head . . . . Instead of a countermajoritarian Court checking the majoritarian branches, we see a majoritarian Court checking the not-so-majoritarian branches.”<sup>287</sup> The results of the instant study of judi-

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284. While more-educated, wealthier individuals tend to prefer stronger intellectual property rights relative to less-educated, less-wealthy individuals, they still believe that intellectual property rights are too strong. Mandel et al., *supra* note 164, at 970.

285. FRIEDMAN, *supra* note 260; Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 ANN. REV. L. & SOC. SCI. 361, 362 (2008) (“[S]cholarly concern with democratic deficits in American constitutionalism has shifted from the courts to electoral institutions.”); Lain, *supra* note 234, at 120–44.

286. KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 46–60 (1951); Lain, *supra* note 234, at 115–16, 148; Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 329–30 (2011).

287. JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA 4 (2006); Lain, *supra* note 234, at 116. *But see* Friedman, *supra* note 235, at 370 (describing how the Marshall Court’s treatment of the Burr conspiracy trials was met by public outrage).

cial and legislative action in the first part of the twenty-first century adds intellectual property to the list of fields in which the Supreme Court appears to be acting in a more majoritarian manner than Congress. This is significant as intellectual property is the first area of private law in which this trend has been identified.<sup>288</sup>

How did this situation arise in intellectual property law? As with many social and cultural phenomena, there are likely an eclectic set of forces at play that operate in varied manners. It would be implausible to identify all the influences that have had an impact, but one factor that likely played a significant role for intellectual property was a shift in innovative industries' relationship to patent law. The growth of the information technology and software industries in the 1990s led to the rise of economically and politically powerful industry segments and several of today's largest companies (including Google, Amazon, and Facebook) that interact with patent law in a significantly different manner than traditional industries.<sup>289</sup> Rather than viewing patent protection as a necessary means to be able to profit off of innovation and intellectual assets, large industry players in the information technology and software industries sometimes encounter patenting as a barrier to innovation.<sup>290</sup> This perception may arise because of companies' needs to design around other entities' patents, to license necessary patented infrastructure, or concern over (potentially frivolous) lawsuits by parties who claim infringement of a patent that may have had little to do with current products.<sup>291</sup> The rise of powerful industries that view stronger patent protection as problematic led to historic clashes throughout the period in question between information technol-

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288. Prior work in this vein has generally focused on public law issues involving civil liberties. *See, e.g.*, Lain, *supra* note 234, at 116 n.11, 119–44 (surveying prior work in this area as well as discussing her own).

289. BURK & LEMLEY, *supra* note 137, at 49–58, 156–58; Ronald J. Mann, *Do Patents Facilitate Financing in the Software Industry?*, 83 TEX. L. REV. 961, 968–98 (2005).

290. BURK & LEMLEY, *supra* note 137, at 156–58; Mandel, *supra* note 184, at 23; Lea Shaver, *Illuminating Innovation: From Patent Racing to Patent War*, 69 WASH. & LEE L. REV. 1891, 1895 (2012) (stating “there are good reasons to believe that patents may also impede innovation by creating barriers to competition”).

291. Barnett, *supra* note 184, at 440–41; Robert P. Merges, *Software and Patent Scope: A Report from the Middle Innings*, 85 TEX. L. REV. 1627, 1631–32 (2007).

ogy and software industry groups on the one hand, and pharmaceutical and biotechnology industry groups on the other.<sup>292</sup> The six-year debate over the AIA described above represents a prime example;<sup>293</sup> these factions also butted heads in many of the Supreme Court cases analyzed earlier as well.<sup>294</sup>

Intriguingly, the entities arguing for weaker patent protection appear to have gotten the better of the public perception debates, or at least the better of the elite public opinion perceptions that Supreme Court Justices are more likely to be influenced by and be a part of. Recent data indicates that this success may not simply be the result of the information technology and software industries having had the better position or having made better arguments. Rather, researchers have found that the American public is more receptive to arguments in favor of weaker intellectual property protection than they are to arguments in favor of stronger protection.<sup>295</sup>

This account appears plausible as an explanation for the Supreme Court's decision-making in patent cases, but does not explain their action in trademark cases (where the Court was similarly hostile to intellectual property rights) or copyright cases (where the Court supported stronger protection). The trademark valence could have flowed on the coattails of public opinion concerning patent law. For people who do not focus in intellectual property law, drawing distinctions between the various areas within intellectual property can appear somewhat nuanced. In

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292. BURK & LEMLEY, *supra* note 137, at 100–02; Anderson, *supra* note 141, at 982–84; David W. Opderbeck, *Patent Damages Reform and the Shape of Patent Law*, 89 B.U. L. REV. 127, 135–36, 149 n.124 (2009); *see also* Anderson, *supra* note 59, at 1075; Matal, *Part I*, *supra* note 137, at 453–66 (detailing the intense legislative debate concerning passage of the AIA).

293. *Supra* Part I.B.4.

294. *See, e.g.*, Brief for Google, Inc. et al. as Amici Curiae Supporting Respondents, *Alice Corp. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014) (No. 13-298), 2014 WL 828041; Brief for Genentech, Inc. et al. as Amici Curiae Supporting Respondents, *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 (2013) (No. 12-398), 2013 WL 1098262; Brief for Biotechnology Indus. Org. as Amicus Curiae Supporting Respondent, *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289 (2012) (No. 10-1150), 2011 WL 5373695; Brief for Pharm. Research & Mfrs. of Am. as Amicus Curiae Supporting Respondent, *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289 (2012) (No. 10-1150), 2011 WL 5373698.

295. Anne A. Fast et al., *Experimental Investigations on the Basis for Intellectual Property Rights*, 40 LAW & HUM. BEHAV. 458, 470–71 (2016).

fact, the lay public tends not to distinguish their opinions between the different areas of intellectual property law.<sup>296</sup> Further, though patent law and trademark law are strikingly different fields, they may be linked in popular perception due to the existence of the PTO. In particular, much of the criticism that was leveled against patent law in the past decade-plus was directed at the PTO itself.<sup>297</sup>

Why is there a difference in the Supreme Court's copyright jurisprudence? The empirical study of Supreme Court ideology discussed earlier, based on intellectual property decisions from 1954 to 2006, similarly found that the Supreme Court tended to favor copyright owners to a greater extent than patent or trademark owners.<sup>298</sup> The authors hypothesized that this difference might arise (a) because copyright infringers are only liable for actual copying (whereas independent inventors can be liable for patent infringement); (b) because Supreme Court Justices as writers may be "more sympathetic to the romantic myth of the author underlying copyright [law]"; or (c) because the Justices are less concerned about overbreadth in copyright protection due to its numerous exceptions and limitations.<sup>299</sup> As discussed above, recent data indicates that public preferences tend to align with copyright law to a greater extent than patent law, perhaps resulting in less pushback against stronger copyright protection at the Court.<sup>300</sup> Though none of these explanations is definitive, the analysis in the current study extends the prior study's finding: over a period spanning more than sixty years, the Supreme

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296. See Mandel et al., *supra* note 164, at 966–68 (noting little difference in public perception across intellectual property fields with respect to a variety of factors).

297. Michael D. Frakes & Melissa F. Wasserman, *Does the U.S. Patent and Trademark Office Grant Too Many Bad Patents?: Evidence from A Quasi-Experiment*, 67 STAN. L. REV. 613, 615 (2015) ("Many believe the root cause of the patent system's dysfunction is that the U.S. Patent and Trademark Office (PTO or Agency) is issuing too many invalid patents that unnecessarily drain consumer welfare, stunt productive research, and unreasonably extract rents from innovators."); Mark A. Lemley, *Rational Ignorance at the Patent Office*, 95 NW. U. L. REV. 1495, 1495 (2001) (stating that the PTO has been criticized "for failing to do a serious job of examining patents, thus allowing bad patents to slip through the system"); Sean B. Seymore, *The Presumption of Patentability*, 97 MINN. L. REV. 990, 990–91 (2013) (explaining that the USPTO "has come under fire for issuing patents of questionable quality. . . . [And] [a]side from being technically invalid, commentators have argued that such patents are worthless and burdensome on the patent system") (footnotes omitted).

298. Sag et al., *supra* note 5, at 840–42.

299. *Id.* at 841–42.

300. *Supra* Part II.B.3.

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Court has been more supportive of stronger copyright protection than of protection in other fields of intellectual property law.

If Supreme Court jurisprudence is being driven by popular opinion, the Court's long-term trend of supporting copyright protection could be coming to an end. The recent pushback against the SOPA and PIPA legislation included widespread popular opposition to expanding copyright protection.<sup>301</sup> To the extent the Supreme Court is swayed by these same forces, as indicated by the present analysis, the Justices may be less accommodating of copyright protection in the future than they have been historically.

### III. NORMATIVE IMPLICATIONS OF INTERBRANCH CONFLICT

Part I of this Article presented an empirical analysis demonstrating a divergence between the Supreme Court's and Congress's intellectual property activity in the first part of the twenty-first century. Digging deeper into the data, this divergence arises from the two branches moving in different directions on patent law and trademark law; the branches are in accord on copyright protection. Part II built on this insight to provide an analysis of the political and social mechanisms that may be producing Congress and the Supreme Court's opposing perspectives. In the intellectual property context, Congress appears to be driven in significant part by special interest group influence, while the Supreme Court's decisions tend to reflect elite popular opinion. Part III shifts from uncovering new evidence and trends to a normative examination of what these findings mean for intellectual property law. The conflict between Congress and the Supreme Court has significant implications for governmental efficiency, majoritarian democracy, and achieving the objectives of intellectual property law.

#### A. GOVERNMENTAL EFFICIENCY

One inference from the extended breach between the branches of government is that it produces high transaction costs for settling law. Our government is designed as a system of checks and balances under which it is appropriate for the Su-

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301. Evan Engstrom, *Five Years Later: What the SOPA/PIPA Protest Meant for Tech*, ENGINE (Jan. 18, 2017), <http://www.engine.is/news/category/five-years-later-what-the-sopapipa-protest-meant-for-tech>; *supra* Part II.A.2.

preme Court to strike down unconstitutional laws, and for Congress to override non-constitutionally based Supreme Court interpretations of law to better achieve congressional intent.<sup>302</sup> But, when the government is functioning as it is traditionally conceived, these instances should be relatively rare and not play out continuously across entire fields of law.<sup>303</sup>

Some models of judicial decision-making hypothesize that courts' appropriate role is to fine-tune broad congressional legislation that cannot be comprehensive due to a variety of legislative practicalities.<sup>304</sup> In this view, the Judicial and Legislative Branches are not in tension; rather, courts step in to fill a void left by necessarily incomplete legislation.<sup>305</sup> If the incomplete-legislation hypothesis was the full explanation for intellectual property law, however, one would expect the Supreme Court cases to be balanced between strengthening and weakening owner rights. The strong bias displayed in the data towards weakening protection, particularly in contrast to the thrust of legislative activity, contradicts this neutral explanation.

Both Congress and the Supreme Court are very expensive governmental bodies.<sup>306</sup> Legislation is costly and slow.<sup>307</sup> Any space on the Supreme Court's docket is a precious resource, as

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302. WILLIAM J. RICH, 3 MODERN CONSTITUTIONAL LAW § 37:1 (3d ed. 2011); see Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1203–04 (2014); David H. Moore, *Taking Cues from Congress: Judicial Review, Congressional Authorization, and the Expansion of Presidential Power*, 90 NOTRE DAME L. REV. 1019, 1027–28 (2015).

303. Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1331–41 (2014) (reporting a low background rate of congressional overrides of Supreme Court decisions, with some increase starting in 1974, a particularly high rate from 1991–1998, and a very low rate since 1998); Ryan Eric Emenaker, *Constitutional Interpretation and Congressional Overrides*, 3 J.L. 197, 203 (2013) (reporting a historical congressional override rate of less than one a year from 1803 to 2010); Richard L. Hasen, *End of the Dialogue? Political Polarization, The Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 209 (2013) (reporting that Congress passed overrides of Supreme Court statutory decisions fewer than three times per Term from 2001–2012).

304. Tonja Jacobi, *The Role of Politics and Economics in Explaining Variation in Litigation Rates in the U.S. States*, 38 J. LEGAL STUD. 205, 207–13 (2009).

305. *Id.*; Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine*, 11 MICH. TELECOMM. & TECH. L. REV. 381, 401 (2005).

306. STEVEN S. SMITH ET AL., THE AMERICAN CONGRESS 328 (8th ed. 2013); Michael W. Bowers & Richard C. Cortner, *Financing Constitutional Litigation: Pursuing the Watergate Principle*, 10 HARV. J.L. & PUB. POL'Y 573, 573 (1987).

307. SMITH ET AL., *supra* note 306, at 105–06.

the Court hears less than ninety cases a year.<sup>308</sup> To the extent that a relatively similar level of patent or trademark protection could be achieved simply by both branches acting less, the government could save substantial resources and free each body to attend to other pressing needs.

Obviously, the intellectual property statutes and judicial decisions at issue here are not precise trade-offs in terms of protection (with the clear exception of Congress's legislative override of the Supreme Court's *Moseley* decision),<sup>309</sup> but the conceptual point remains the same. Given the breadth of many of the Supreme Court's decisions, the variety of Congress's legislation, and the consistently contrary approaches of each branch in patent and trademark law, the body of law-making over the past fourteen years in these fields cannot be written off as each branch fine-tuning in complement to each other. Rather, the two branches of government appear to be expending significant resources in an oppositional mire.

#### B. MAJORITARIAN DEMOCRACY

From the perspective of democratic values, whether the Supreme Court's activity in intellectual property cases over the past fourteen years is a beneficial or harmful development depends significantly on one's view of Congress's legislative function and motivation in passing intellectual property laws. Congress is designed under the Constitution to be the more representative branch of government and is expected to reflect the popular will.<sup>310</sup> As discussed above, however, there are myriad practical realities of legislative action that often preclude Congress from representing constituents' best interests or acting in a manner that reflects their democratic will.<sup>311</sup> Where Congress's democratic functioning breaks down, such as when it legislates in response to special interest preferences rather than based on constituent interests or legislators' view of what is best

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308. Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 868 (2004); Nancy Morawetz, *Counterbalancing Distorted Incentives in Supreme Court Pro Bono Practice: Recommendations for the New Supreme Court Pro Bono Bar and Public Interest Practice Communities*, 86 N.Y.U. L. REV. 131, 139 (2011); *The Supreme Court at Work*, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/about/courtatwork.aspx>.

309. See *supra* Part I.B.1.

310. Alexander Tsesis, *Self-Government and the Declaration of Independence*, 97 CORNELL L. REV. 693, 724, 731 (2012).

311. Lain, *supra* note 234, at 157; *supra* Part II.A.2.

for society, it is no longer operating in its designed majoritarian role.<sup>312</sup>

Ironically, in these circumstances, the Supreme Court may be better able than Congress to reflect the will of the majority.<sup>313</sup> The empirical evidence and political theory analyzed above indicate that the Supreme Court is often responsive to popular opinion.<sup>314</sup> Regardless of whether this response occurs because the Supreme Court is actively pursuing public preferences in an effort to maintain legitimacy or (as the evidence in the intellectual property cases suggest) because the Justices are members of the public, the outcome is the same. Under such conditions, the Supreme Court might be more likely to promote majoritarian outcomes than Congress.<sup>315</sup>

This approach may appear particularly appropriate to the extent Congress is perceived as captured by special interests. One goal of the Framers of the Constitution in designing a system of government with separation of powers was to address the problem of faction.<sup>316</sup> To the extent Congress is controlled by special interests, it is fitting for the Court to step in and protect the public interest from factional self-interest. Attributing the Court's intellectual property decision-making to such proper democratic functioning, however, is likely too rosy-eyed a view. If the Court is intentionally protecting the public interest in patent and trademark cases, it is hard to understand how the Court could view Congress's copyright legislation as less influenced by special interests.

An alternative explanation is that the Supreme Court offers an outlet for majoritarian democratic results because passing legislation in Congress is often extremely difficult.<sup>317</sup> There are

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312. Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1553 (2000); Lain, *supra* note 234, at 115–16.

313. Lain, *supra* note 234, at 117.

314. See *supra* Part II.B.3.

315. Lain, *supra* note 234, at 117.

316. DAN T. COENEN, *THE STORY OF THE FEDERALIST: HOW HAMILTON AND MADISON RECONCEIVED AMERICA* 84, 96–97, 158, 269 n.21 (2007).

317. Jacobi, *supra* note 304, at 207–10; Lain, *supra* note 234, at 157–58; Terri Peretti, *Democracy-Assisting Judicial Review and the Challenge of Partisan Polarization*, 2014 UTAH L. REV. 843, 844–45, 857–58 (2014).

many reasons why it is very hard to get a bill, even a well-supported bill, through Congress.<sup>318</sup> Supreme Court decision-making, on the other hand, is more fluid and often faster.<sup>319</sup> Under this view, where issues arise for which there is popular will but legislative inaction, pressure on the Supreme Court to act may arise precisely because Congress is not responding to the will of the people.<sup>320</sup> Supreme Court decisions consistent with public opinion in these circumstances could achieve what Congress should have done in the first instance, but could not. Thus, the Supreme Court may effectively achieve democratic-like outcomes, not through majoritarian processes, but by producing majoritarian results (or, micro-public majoritarian results).<sup>321</sup>

The nuance in this final point is an important one. Even where the Supreme Court helps to achieve majoritarian preferences, it still is not acting in a democratic manner.<sup>322</sup> Reflecting popular will does not change the fact that the Court is not popularly elected. This difference raises a fundamental question about the structure of government: Is it enough that the system achieves a majoritarian result, or does government have to achieve that result in the desired democratic manner? It is potentially problematic that the Supreme Court cedes to popular will because this indicates that the Court may be abdicating its constitutional role of checking Congress and the President.<sup>323</sup> Alexander Hamilton recognized the Supreme Court as “an excellent barrier” against “the encroachments and oppressions of the representative body,” “an essential safeguard against the effects of occasional ill humors in the society.”<sup>324</sup> In other words, even if the Supreme Court achieves the majoritarian result, doing so could threaten the Constitution’s model of government because there is no longer any entity guarding against the potential tyranny of the majority.<sup>325</sup> These lofty concerns may be less of an

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318. *E.g.*, John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*, 105 L. LIBR. J. 131, 133–35 (2013); Peretti, *supra* note 317, at 857–58; Barbara Sinclair, *Is Congress Now the Broken Branch?*, 2014 UTAH L. REV. 703, 718–19 (2014).

319. Lain, *supra* note 234, at 157.

320. *Id.* at 168.

321. *Id.* at 117.

322. *See* Strauss, *supra* note 246, at 903.

323. *Id.* at 905–06.

324. THE FEDERALIST NO. 78, at 465, 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

325. Adam Burton, *Pay No Attention to the Men Behind the Curtain: The Supreme Court, Popular Culture, and the Countermajoritarian Problem*, 73 UMKC L. REV. 53, 56 (2004) (“The framers justified the judiciary’s power to

issue in intellectual property law than in fundamental rights cases, but the intellectual property decisions provide new evidence that this concern is a real one. Those who believe that proper democratic procedure forms the backbone of a well-functioning society will not be satisfied with the Supreme Court achieving majoritarian ends if it is not being accomplished through appropriate democratic means.

### C. INSTITUTIONAL COMPETENCE AND INTELLECTUAL PROPERTY LAW

The core question for intellectual property law is identifying which branch of government, Congress or the Supreme Court, is more likely to effect intellectual property laws that achieve socially desirable objectives. The answer to this question turns somewhat on whether one takes an instrumentalist or deontological view of the goals of intellectual property law.

The Intellectual Property Clause of the Constitution grants Congress the power “[t]o promote the Progress of Science and useful Arts” by enacting copyright and patent laws.<sup>326</sup> Consistent with this consequentialist preamble, the dominant view of intellectual property law and policy in the United States has often been that intellectual property law exists in order to incentivize creative and innovative activity.<sup>327</sup> The incentive theory of intellectual property law is based on the rationale that providing authors and inventors with the potential for intellectual property rights will induce them to engage in greater innovative activity than they would otherwise, from the creation to the production to the commercialization of intellectual works.<sup>328</sup>

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invalidate legislation as a necessary legal check on popular opinion to protect minorities against a ‘tyranny of the majority.’”); Richard H. Pildes, *Is the Supreme Court A “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103, 105 (2010) (“For better or worse, the Court does not and cannot protect political minorities, be they the ‘discrete and insular minorities’ of liberal jurisprudential fame, or any other kind of minority.”).

326. U.S. CONST. art. I, § 8, cl. 8.

327. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 4 (2003) (“[I]t is acknowledged that analysis and evaluation of intellectual property law are appropriately conducted within an economic framework that seeks to align that law with the dictates of economic efficiency.”); Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1746 (2012) (“According to the dominant American theory of intellectual property, copyright and patent laws are premised on providing creators with . . . incentive[s] to create artistic, scientific, and technological works . . .”).

328. ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 11–14 (5th ed. 2010); Christopher Buccafusco & Christopher

Other scholars and experts rely on John Locke's labor theory of property rights and similar concepts to argue that intellectual property law exists to protect authors' and inventors' natural rights in their creative works.<sup>329</sup> This deontological perspective views individuals as automatically entitled to the fruits of their efforts.<sup>330</sup> Natural rights theory supports intellectual property protection on the basis that a creator is morally entitled to control the copying and distribution of inventions or artistic creations produced as a result of the creator's own labor and effort.<sup>331</sup>

Under the traditional, romantic view of the branches of government enshrined in the Constitution, those who believe in a deontological basis might tend to favor Congress as the intellectual property law decision-maker and be wary of Supreme Court interference. Natural rights in intellectual property law are an ill-defined concept, and majoritarian preferences could be an appropriate way to define such rights.<sup>332</sup> In fact, experts who support natural rights concepts in intellectual property law often

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Sprigman, *Valuing Intellectual Property: An Experiment*, 96 CORNELL L. REV. 1, 3–4 (2010); Christopher A. Cotropia & James Gibson, *The Upside of Intellectual Property's Downside*, 57 UCLA L. REV. 921, 926–27 (2010).

329. See, e.g., Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1540 (1993); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 296–330 (1988) (discussing Locke's labor theory as it relates to intellectual property rights).

330. ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 34–41 (2011).

331. See Gordon, *supra* note 329, at 1543 (“[A]ll persons have a duty not to interfere with the resources others have appropriated or produced by laboring on the common.”); Hughes, *supra* note 329, at 297 (“Locke proposes that . . . there are enough unclaimed goods so that everyone can appropriate the objects of his labors without infringing upon goods that have been appropriated by someone else.”). There are additional perspectives on the objectives of intellectual property law, such as that it should serve expressive ends. Fromer, *supra* note 327, at 1754–56 (discussing application of personhood theories to patent law); Hughes, *supra* note 329, at 330–65 (discussing different theories of self-expression in intellectual property). Such other perspectives, however, tend to receive far less support than the ones identified above and are a poor match for explaining much actual intellectual property law. MERGES, *supra* note 330, at 34–41; Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1597–99 (2003); Fromer, *supra* note 328, at 1746–51.

332. See Gordon, *supra* note 329, at 1547, 1549, 1553. Congress's protection of intellectual property rights is, of course, distinct from their protection (or not) of other rights. See, e.g., William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 615–16 (1991) (explaining shifts in Congress's and the Supreme Court's positions on civil rights over time); Serena J. Hoy, *Interpreting Equal Protection: Congress, the Court, and the Civil Rights Acts*, 16 J.L. & POL. 381, 383 (2000) (discussing Congress's shifting approach to civil rights).

point to popular opinion and perceptions as evidence corroborating their views about what intellectual property rights should be.<sup>333</sup>

The Supreme Court, on the other hand, may appear more attractive to consequentialist proponents. Rather than deciding intellectual property rights based on popular vote, achieving optimal incentives requires balancing the incentive benefits that intellectual property protection provides against the exclusionary costs that it creates.<sup>334</sup> The Supreme Court, not Congress, may be better able to engage in this calculated weighing. In support of this perspective, the Supreme Court has affirmed the incentive objectives of intellectual property law in numerous opinions, recognizing the need to balance the incentives of protection against intellectual property rights “not inhibit[ing] further discovery.”<sup>335</sup>

The findings reported here invert this traditional reasoning about the branches of government. To the extent that Congress is driven by special interest lobbying rather than majoritarian

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333. See Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1345–46 (1989) (“The special burdens scholars place on copyright may have their origins in public perception. There is often a distrust of copyright when its compulsions conflict with the usual expectations people have of the freedoms they should be entitled to exercise over their physical possessions.”) (footnote omitted). See generally, JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* (2015) (reporting on attitudes concerning creativity and intellectual property rights from an extensive series of interviews with a variety of people involved in the creative process).

334. Barnett, *supra* note 184, at 395; Cotropia & Gibson, *supra* note 328, at 923; Gregory N. Mandel, *Leveraging the International Economy of Intellectual Property*, 75 OHIO ST. L.J. 733, 736 (2014); Mandel, *supra* note 34, at 1453–54.

335. Mayo Collaborative Servs. v. Prometheus Labs., Inc., 132 S. Ct. 1289, 1301 (2012); see *id.* at 1305 (“[T]he promise of exclusive rights provides monetary incentives that lead to creation, invention, and discovery.”); Eldred v. Ashcroft, 537 U.S. 186, 223 (2003) (Stevens, J., dissenting) (“[T]he grant of exclusive rights [in the Intellectual Property clause] is intended to encourage the creativity of ‘Authors and Inventors.’”); Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349 (1991) (“The primary objective of copyright is not to reward the labor of authors, but [t]o promote the Progress of Science and useful Arts.”) (quoting U.S. CONST. art. 1, § 8, cl. 8); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 558 (1985) (“[C]opyright supplies the economic incentive to create and disseminate ideas.”); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (granting patents and copyrights is “intended to motivate the creative activity of authors and inventors”); United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948) (“The sole interest of the United States and the primary object in conferring the [copyright] monopoly lie in the general benefits derived by the public.” (quoting Fox Film Corps. v. Doyal, 286 U.S. 123, 127 (1932))).

public preferences, it will be a poor representative for defining natural rights in intellectual property works. Congress will pass laws to satisfy rent-seeking industry interests rather than the natural rights of authors and inventors. Conversely, the Supreme Court may now look more attractive to natural rights proponents, as it is the governmental body that actually adheres more closely to the public will.<sup>336</sup> As the Court appears to decide patent and trademark cases in accord with public opinion, regardless of what the Court writes about incentives in its decisions, the Court may actually be a good mechanism for setting natural rights consistent with popular preferences.

Though Congress may no longer appear attractive to deontists, instrumentalists may want to take a second look. Rather than bending to popular preferences, Congress appears more responsive to industry preferences, and industry will often have better information and expertise concerning how to achieve greater incentives. For industries in which there are strong representatives who want to strengthen and strong representatives who want to weaken intellectual property rights in order to support innovation, this buffeting from each side could produce law that actually takes both the benefits and costs of intellectual property into account.<sup>337</sup> Current patent law debates may provide such an example. With powerful industry representatives on both sides of the issues, the only laws that can get passed may be ones that are relatively accommodating to innovation in multiple contexts.<sup>338</sup> This argument could easily be overstated. As noted earlier, legislation is difficult to pass and powerful industry groups on both sides of the debate may uniformly favor certain laws that simply provide barriers to entry, but are likely harmful to innovation.<sup>339</sup> Overall, however, Congress may be more accommodating to incentive pressures in certain circumstances than originally thought.

In the end, neither instrumentalists nor deontists will likely feel satisfied with either the Supreme Court or Congress as a reliable option for setting intellectual property law and policy. Special interest group influence is a poor way to decide intellec-

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336. The Court is certainly informed of special interest positions, as the wealth of amicus briefs filed with the Court attests, but does not appear to be as influenced by such positions as Congress. *See supra* notes 280, 294.

337. Mandel, *supra* note 184, at 55.

338. *See supra* Part II.A.2.

339. *See supra* Part II.C.

tual property rights, but majoritarian popular preferences on issues implicating specialized knowledge may not be much better.

### CONCLUSION

This analysis of Supreme Court and congressional decision-making in intellectual property law in the first part of the twenty-first century does not paint a rosy picture. The Supreme Court and Congress appear fractured concerning intellectual property law and neither branch appears to be functioning in its proper governmental role. Congress seems to have abandoned its position of serving as a representative of the people on intellectual property issues, and the Supreme Court appears to have abdicated its responsibility to guard minority interests against the tyranny of the majority. There is, however, a potential silver lining in this cloud of weak institutional competence, one that may be welcome news for intellectual property advocates and scholars.

As discussed above, the Supreme Court studies indicate that the Court tends not to follow majority public preferences in general, but rather the opinion of the micro-publics that the Justices are a part of.<sup>340</sup> In fact, when Supreme Court decisions deviate from mainstream public opinion, they tend to deviate in the direction of elite popular preferences.<sup>341</sup> The elite public opinion that appears to influence Supreme Court Justice voting the most is likely that of well-educated, legally sophisticated actors.<sup>342</sup> This relationship provides a direct avenue for intellectual property scholars and experts to help influence the development of intellectual property law. One does not need to have the ear of a Supreme Court Justice directly to have an effect; influencing intellectual property perceptions among legally elite groups may be enough to cause a shift in the course of the law. Contrary to the received wisdom,<sup>343</sup> legal scholarship and scholarly advocacy may be a successful avenue for legal change.

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340. See Lain, *supra* note 234, at 164 (noting that Supreme Court Justices are not average members of the public, but elites); Yates et al., *supra* note 234, at 139–40.

341. Lain, *supra* note 234, at 164–65; Strauss, *supra* note 246, at 895.

342. Baum & Devins, *supra* note 257, at 1537–38; Strauss, *supra* note 246, at 895.

343. See generally Gerald N. Rosenberg, *Romancing the Court*, 89 B.U. L. REV. 563, 563 (2009) (critiquing the “potential role of the Supreme Court of the United States as an agent of progressive social change”); Diane P. Wood, *Legal Scholarship for Judges*, 124 YALE L.J. 2529 (2015) (discussing the disconnect

## APPENDIX A

## SUPREME COURT DECISIONS

Case	Holding	Field	Effect	Vote
Halo Electronics v. Pulse Electronics, 136 S. Ct. 1923 (2016)	Enhanced damages for willful infringement are available for egregious activity “beyond typical infringement.”	Patent	Strengthens	8–0
Cuozzo Speed Techs., L.L.C. v. Lee, 136 S. Ct. 2131 (2016)	Decision to institute IPR is unreviewable; PTO may apply broadest reasonable construction to patent claims in IPR.	Patent	Weakens	8–0
Kirtsaeng v. John Wiley & Sons, Inc., 136 S. Ct. 1979 (2016)	Attorney’s fees decisions consider all circumstances, including objective reasonableness of losing party’s position.	Copyright	Neutral	8–0
Kimble v. Marvel Entm’t, LLC, 135 S. Ct. 2401 (2015)	A patent holder cannot charge royalties for the use of an invention after the patent has expired.	Patent	Weakens	6–3
Commil USA, L.L.C. v. Cisco Systems, Inc., 135 S. Ct. 1920 (2015)	Accused infringer’s subjective belief that a patent is invalid is not a defense to an induced infringement claim.	Patent	Strengthens	6–2

between legal scholarship and the judicial decision-making process); The Honorable John G. Roberts Jr., Chief Justice, Supreme Court of the U.S., Conversation at Fourth Circuit Judicial Conference, C-SPAN (June 25, 2011), <https://c-span.org/video/?300203-1/conversation-chief-justice-roberts&start=694> (commenting that legal scholarship plays little to no role in judicial decision-making). *Contra* Jonathan M. Barnett, *Has the Academy Led Patent Law Astray?*, 32 BERKELEY TECH. L.J. (forthcoming 2017) (manuscript at 2–9, 42) (arguing that prevalent views among legal scholars are cited by courts and other policymakers).

B & B Hardware, Inc. v. Hargis Indus., Inc., 135 S. Ct. 1293 (2015)	TTAB adjudication precludes a party from arguing the same issues before a district court.	Trademark	Neutral	7–2
Hana Fin., Inc. v. Hana Bank, 135 S. Ct. 907 (2015)	Whether an older trademark can be tacked to a newer one for priority purposes is a question of fact.	Trademark	Neutral	9–0
Teva Pharms. USA, Inc. v. Sandoz, Inc., 135 S. Ct. 831 (2015)	District court resolution of subsidiary facts in claim construction is reviewed for clear error.	Patent	Neutral	7–2
American Broadcasting Companies, Inc. v. Aereo, Inc., 134 S. Ct. 2498 (2014)	Retransmission of a television broadcast over the Internet is a public performance for purposes of the Copyright Act.	Copyright	Strengthens	6–3
Alice Corp. v. CLS Bank Int'l, 134 S. Ct. 2347 (2014)	A computer-implemented method for exchanging financial obligations is a patent-ineligible abstract idea.	Patent	Weakens	9–0
Limelight Networks, Inc. v. Akamai Techs., Inc., 134 S. Ct. 2111 (2014)	No liability for inducing patent infringement where steps were not performed by a single party.	Patent	Weakens	9–0
Nautilus, Inc. v. Biosig Instruments, Inc., 134 S. Ct. 2120 (2014)	Ambiguous patent claims with multiple reasonable interpretations are indefinite.	Patent	Weakens	9–0
Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962 (2014)	Laches do not bar infringement action brought within Copyright Act's statute of limitations.	Copyright	Strengthens	6–3

Octane Fitness v. Icon Health and Fitness, 134 S. Ct. 1749 (2014)	An "exceptional case" for fee-shifting purposes is one that stands out with respect to a party's litigation.	Patent	Weakens	9-0
Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc., 134 S. Ct. 1744 (2014)	A district court's determination that a case is exceptional is reviewed for abuse of discretion.	Patent	Neutral	9-0
Medtronic, Inc. v. Mirowski Family Ventures, L.L.C., 134 S. Ct. 843 (2014)	The patentee bears the burden of persuasion when a licensee seeks a declaratory judgment of noninfringement.	Patent	Weakens	9-0
Federal Trade Commission v. Actavis, Inc., 133 S. Ct. 2223 (2013)	Patent case reverse payment settlements may unreasonably diminish competition in violation of antitrust laws.	Patent	Weakens	5-3
Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107 (2013)	Isolated DNA sequences are not patent eligible products of nature.	Patent	Weakens	9-0
Bowman v. Monsanto Co., 569 U.S. 278 (2013)	Patent exhaustion does not permit the reproduction of legally purchased, patented seeds.	Patent	Strengthens	9-0
Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519 (2013)	The first-sale doctrine applies to copies of copyrighted works that are lawfully acquired abroad.	Copyright	Weakens	6-3

Gunn v. Minton, 568 U.S. 251 (2013)	State courts can have jurisdiction over claims alleging legal malpractice in a patent case.	Patent	Neutral	9-0
Already L.L.C. d/b/a Yums v. Nike, Inc., 568 U.S. 85 (2013)	A trademark owner's covenant not to sue a defendant deprives the court of Article III jurisdiction.	Trade- mark	Strength- ens	9-0
Kappos v. Hyatt, 566 U.S. 431 (2012)	There are no particular limitations on a patent applicant's ability to introduce new evidence in a section 145 proceeding.	Patent	Strength- ens	9-0
Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S, 566 U.S. 399 (2012)	Generic drug manufacturer can assert a counterclaim challenging patentee's product description as overbroad.	Patent	Weakens	9-0
Mayo Collaborative Servs. v. Prometheus Labs., Inc, 566 U.S. 66 (2012)	Claims directed to drug administration decision are not patent-eligible subject matter natural laws.	Patent	Weakens	9-0
Golan v. Holder, 565 U.S. 302 (2012)	Restoring copyright status to certain foreign works did not violate the Copyright Clause of the Constitution.	Copy- right	Strength- ens	6-2
Microsoft Corp. v. i4i Ltd. P'ship, 564 U.S. 91 (2011)	An invalidity defense to patent infringement must be proved by clear and convincing evidence.	Patent	Strength- ens	8-0

Bd. of Tr. of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc., 563 U.S. 776 (2011)	Bayh–Dole Act does not automatically confer federally-funded inventions to federal contractors.	Patent	Neutral	7–2
Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754 (2011)	Induced infringement requires knowledge of infringement, which can include willful blindness to infringement.	Patent	Neutral	8–1
Costco Wholesale Corp. v. Omega S.A., 562 U.S. 40 (2010)	[Split vote; did not decide effect of first sale doctrine on foreign goods].	Copyright	Neutral	4–4
Bilski v. Kappos, 561 U.S. 593 (2010)	Method of hedging losses is not patent-eligible subject matter as an abstract idea.	Patent	Weakens	9–0
Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010)	Federal court has jurisdiction over infringement claims concerning unregistered works.	Copyright	Strengthens	5–3
Quanta Computer, Inc. v. LG Elecs., Inc., 553 U.S. 617 (2008)	Patent exhaustion applies to sale of component that embodies a patent’s essential features.	Patent	Weakens	9–0
KSR Int’l Co. v. Teleflex, Inc., 550 U.S. 398 (2007)	Prior art may be combined in the nonobviousness analysis where there was a reason to combine.	Patent	Weakens	9–0
Microsoft Corp. v. AT&T Corp., 550 U.S. 437 (2007)	There is no U.S. liability for export of master disk to install U.S. patented software on foreign computers.	Patent	Weakens	7–1

MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118 (2007)	A licensee need not terminate or breach its license prior to seeking declaratory judgment of patent invalidity.	Patent	Weakens	8-1
eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006)	The traditional four-factor test applies to determine the award of a permanent injunction for patent infringement.	Patent	Weakens	9-0
Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 546 U.S. 394 (2006)	Party's failure to move for a new trial after verdict precludes it from seeking one for insufficiency of the evidence.	Patent	Neutral	7-2
Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005)	Distribution of a device with the object of promoting its use to infringe creates liability for infringement by third-parties.	Copyright	Strengthens	9-0
Merck KGaA v. Integra Lifesciences I, Ltd., 545 U.S. 193 (2005)	Use of patented compounds in preclinical studies is exempt from infringement liability if they may be subject of FDA submission.	Patent	Weakens	9-0
K.P. Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 543 U.S. 111 (2004)	Fair use defense does not require a party to demonstrate an absence of a likelihood of confusion.	Trademark	Weakens	9-0
Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23 (2003)	Lanham Act does not prevent the unaccredited copying of an uncopyrighted work.	Trademark	Weakens	9-0

Moseley v. V Secret Catalogue, Inc., 537 U.S. 418 (2003)	Federal Trademark Dilution Act (FTDA) requires a showing of actual dilution, not simply a likelihood of dilution.	Trade-mark	Weakens	9-0
Eldred v. Ashcroft, 537 U.S. 186 (2003)	Copyright Term Extension Act does not violate the Constitution's "limited times" requirement.	Copy-right	Strengthens	7-2

## APPENDIX B

## CONGRESSIONAL LEGISLATION

Name of Law	Primary Effects	Field	Effect
Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376	Creates a private cause of action for trade secret theft in federal court; remedies include seizure to prevent further dissemination.	Trade Secret	Strengthens
Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, 130 Stat. 122	Enables the DHS to better restrict, coordinate activity on, and provide information on the import and export of goods that infringe copyrights.	Copyright	Strengthens
Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, 130 Stat. 122	Enables the DHS to better restrict, coordinate activity on, and provide information on the import and export of goods that infringe trademarks.	Trade-mark	Strengthens
Collectible Coin Protection Act, Pub. L. No. 113-288, 128 Stat. 3281 (2014)	Enhances trademark owner rights in connection with unauthorized, trademark infringing, collectibles.	Trade-mark	Strengthens

Pub. L. No. 113-227, 128 Stat. 2114 (2014)	Allows certain law students to practice patent law before the USPTO on a pro-bono basis.	Patent	Neutral
Pub. L. No. 113-227, 128 Stat. 2114 (2014)	Allows certain law students to practice trademark law before the USPTO on a pro-bono basis.	Trade-mark	Neutral
STELA Reauthorization Act of 2014, Pub. L. No. 113-200, 128 Stat. 2060	Extends provisions of the Satellite Television Extension and Localism Act through 2019.	Copyright	Neutral
An Act to correct and improve . . . provisions of Leahy-Smith America Invents Act and title 35 . . ., Pub. L. No. 112-274, 126 Stat. 2456 (2013)	Administrative and funding adjustments at the PTO; technical changes to transitional program for covered business method patents and joinder of parties.	Patent	Neutral
An Act to correct and improve . . . provisions of Leahy-Smith America Invents Act and title 35 . . ., Pub. L. No. 112-274, 126 Stat. 2456 (2013)	Administrative funding adjustments at the PTO, including using patent and trademark fees interchangeably to cover proportionate PTO costs.	Trade-mark	Neutral
Foreign and Economic Espionage Penalty Enhancement Act of 2012, Pub. L. No. 112-269, 126 Stat. 2442	Increased the fines available as penalties for economic espionage.	Trade Secret	Strengthens

Theft of Trade Secrets Clarification Act of 2012, Pub. L. No. 112-236, 126 Stat. 1627	Prohibits the theft of trade secrets taken for intended (not just actual) use and expands the definition of a trade secret to include information related to services.	Trade Secret	Strengthens
Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011)	Myriad changes, including shifting from a "first to invent" to a "first inventor to file" system and developing new post-grant oppositions.	Patent	Mixed ( <i>see</i> Part I.B.4)
Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011)	Minor changes to trademark law concerning administration at the PTO.	Trademark	Neutral
Copyright Cleanup, Clarification, and Corrections Act of 2010, Pub. L. No. 111-295, 124 Stat. 3180	Among other amendments, provides that distribution of a phonorecord before 1978 is not publication of the work embodied therein.	Copyright	Strengthens
Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-175, 124 Stat. 1218	Updated and reauthorized satellite carrier and cable statutory licenses in part to account for digital broadcast television transition.	Copyright	Neutral
Continuing Extension Act of 2010, Pub. L. No. 111-157, 124 Stat. 1116	Amended Communications Act of 1934 to extend moratorium on copyright liability for certain subscribers of satellite TV.	Copyright	Neutral
Trademark Technical and Conforming Amendment Act of 2010, Pub. L. No. 111-146, 124 Stat. 66	Among other changes, permits trademark owners to correct certain deficiencies in post registration maintenance.	Trademark	Strengthens

Temporary Extension Act of 2010, Pub. L. No. 111-144, 124 Stat. 42	Amended Communications Act of 1934 to extend moratorium on copyright liability for certain subscribers of satellite TV.	Copyright	Neutral
Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, 123 Stat. 3409	Extended provisions of Copyright Act and Communications Act permitting satellite television providers to retransmit certain network programming.	Copyright	Neutral
United States Capital Police Administrative Technical Corrections Act of 2009, Pub. L. No. 111-145, 124 Stat. 49	Authorizes the Director of the USPTO to shift funds from trademark registrations to patent activities under certain conditions.	Trademark	Neutral
United States Capital Police Administrative Technical Corrections Act of 2009, Pub. L. No. 111-145, 124 Stat. 49	Authorizes the Director of the USPTO to shift funds from trademark registrations to patent activities under certain conditions.	Patent	Neutral
Webcaster Settlement Act of 2009, Pub. L. No. 111-36, 123 Stat. 1926	Defines "webcaster" for provisions relating to sound recordings via webcasting.	Copyright	Neutral
Webcaster Settlement Act of 2008, Pub. L. No. 110-435, 122 Stat. 4974	Allows internet radio stations and streaming services to negotiate rates directly with record companies.	Copyright	Neutral
Vessel Hull Design Protection Amendments of 2008, Pub. L. No. 110-434, 122 Stat. 4972	Amends copyright law to specify that the design of a vessel's hull, deck, or combination is copyright protected.	Copyright	Strengthens

<p>Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256</p>	<p>Prohibits the transshipment or exportation of counterfeit goods under the Lanham Act and increases trademark seizure damages provisions.</p>	<p>Trademark</p>	<p>Strengthens</p>
<p>Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256</p>	<p>Created a safe harbor for registration errors, allows impoundment of records during infringement action, prohibits export of copies without permission.</p>	<p>Copyright</p>	<p>Strengthens</p>
<p>A bill to amend title 35, United States Code and the Trademark Act of 1946 . . . , Pub. L. No. 110-313, 122 Stat. 3014 (2008)</p>	<p>Transferred authority to appoint administrative patent judges from the Director of the PTO to the Secretary of Commerce.</p>	<p>Patent</p>	<p>Neutral</p>
<p>A bill to amend title 35, United States Code and the Trademark Act of 1946 . . . , Pub. L. No. 110-313, 122 Stat. 3014 (2008)</p>	<p>Transferred authority to appoint administrative trademark judges from the Director of the PTO to the Secretary of Commerce.</p>	<p>Trademark</p>	<p>Neutral</p>
<p>Trademark Dilution Revision Act of 2006, Pub. L. No. 109-312, 120 Stat. 1730</p>	<p>Amended trademark dilution law to allow actions based on likelihood of dilution and clarify famous mark definition as based on general public.</p>	<p>Trademark</p>	<p>Strengthens</p>

Copyright Royalty Judges Program Technical Corrections Act, Pub. L. No. 109-303, 120 Stat. 1478 (2006)	Amends administrative provisions concerning Copyright Royalty Judges, including that they are subject to the Administrative Procedure Act.	Copyright	Neutral
Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594	Concerns the Office of Scientific and Technical Information; rare instances for Department of Energy acquisition of background intellectual property.	Patent	Neutral
Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, 119 Stat. 218	Increases penalties for copyright infringement to prevent filming movies in theaters and unlicensed early release of movies and software.	Copyright	Strengthens
Intellectual Property Protection and Courts Amendments Act of 2004, Pub. L. No. 108-482, 118 Stat. 3912	Lowers standard for willful copyright infringement concerning domain name registration; increases penalties regarding counterfeit goods.	Copyright	Strengthens
Intellectual Property Protection and Courts Amendments Act of 2004, Pub. L. No. 108-482, 118 Stat. 3912	Lowers standard for willful trademark infringement concerning domain name registration.	Trademark	Strengthens
Cooperative Research and Technology Enhancement (CREATE) Act of 2004, Pub. L. No. 108-453, 118 Stat. 3596	Provides that patentability is not precluded by obviousness for certain situations involving team research under joint research agreements.	Patent	Strengthens

Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, 118 Stat. 3393	Extends and expands provisions of the Satellite Home Viewer Improvement Act to facilitate satellite television industry's transition to digital signals.	Copyright	Neutral
Individuals with Disabilities Education Improvement Act (IDEA) of 2004, Pub. L. No. 108-446, 118 Stat. 2647	Exempts from copyright liability certain instructional materials for individuals with disabilities used in elementary or secondary schools.	Copyright	Weakens
Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341	Replaced the royalty arbitration process with three permanent Copyright Royalty Judges to be appointed by the Librarian of Congress.	Copyright	Neutral
An Act to improve the United States Code, Pub. L. No. 108-178, 117 Stat. 2637 (2003)	Minor administrative amendments concerning the PTO.	Patent	Neutral
Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066	Requires more detailed statements for paragraph IV abbreviated new drug application certifications and limits amendment opportunities.	Patent	Strengthens
Small Webcaster Settlement Act of 2002, Pub. L. No. 107-321, 116 Stat. 2780	Allows small webcasters and copyright holders to enter voluntary licenses and permits SoundExchange to negotiate on behalf of copyright holders.	Copyright	Neutral

21st Century  
Department of  
Justice Appro-  
priations Au-  
thorization Act,  
Pub. L. No. 107-  
273, 116 Stat.  
1758 (2002)

Reauthorized the PTO and  
clarified that third-party re-  
questers can invoke inter  
partes reexamination in  
light of new evidence.

Patent

Neutral

21st Century  
Department of  
Justice Appro-  
priations Au-  
thorization Act,  
Pub. L. No. 107-  
273, 116 Stat.  
1758 (2002)

In addition to new reporting  
requirements, extended an  
exemption from copyright li-  
ability for instructional  
broadcasting to distance  
learning.

Copyright

Weakens