

Foundations and Principles Redux: A Reply to Professor Blankfein-Tabachnick

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This is a response to the commentary by Professor David H. Blankfein-Tabachnick (“B-T”) on my book, Justifying Intellectual Property (JIP) (2011). In JIP, I describe IP law at three levels: foundations, midlevel principles, and specific doctrines and institutions. At the bottom are foundational justifications for the field, ultimate rationales for why a society would have an IP system. In JIP, I explain why utilitarianism—the traditional standard-bearer in the IP field—has failed as a viable foundation. I argue instead for a more deontological foundation, built on the insights of Locke, Kant, and Rawls. At the same time, I recognize that a good number of my colleagues do not share my doubts about utilitarianism, and that they continue to recognize it as the ultimate basis of IP law. I also acknowledge that various scholars have argued persuasively for alternative foundations based for example on traditional religious precepts. Given this level of disagreement, I turn in JIP to what I call “midlevel principles.” These are common themes and tropes that pervade case law and policy discussion in the IP field. The four principles I discuss (proportionality, efficiency, nonremoval or public domain enhancement, and dignity) are consistent with a wide range of divergent foundational commitments. These principles serve as a common language, permitting pluralistic foundational commitments while facilitating analysis and argumentation at the level of basic policies. Midlevel principles facilitate discourse between committed utilitarians, believers in a Talmudic basis for IP law, Kantians, and so on. Finally, at the top of the analytic structure in JIP is the level of specific rules, doctrines and institutions—the everyday surface features of the world of IP discourse.

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B-T makes two basic points about JIP. He says that I am wrong to argue that midlevel principles are independent of foundational commitments. And he says that my midlevel principles are not quite right because they do not adequately explain specific case outcomes, including several he uses as examples.

On the first point, I argue in this response that B-T misreads some of the texts on which I ground my deontological rationale for IP law. In particular, I reject his argument that Rawls's concern with distributive justice cannot be reconciled with the property theories of Locke and Kant. As I do in JIP, I argue that viable IP protection (based on Locke and Kant) is well within the range of fair institutional structures that reasonable agents might agree upon in the original Rawlsian position. And on the second point, I argue that B-T misconceives the role of midlevel principles. They are not super-doctrines that control specific case outcomes, but instead conceptual themes that permeate the field, tying together discrete and disparate areas of doctrine and practice. I point out that echoes of these themes can be found in the very cases B-T chooses to illustrate his critique. I also elaborate a bit on how we should think about midlevel principles in IP law. Empirically, they are common themes and tropes found throughout IP cases and policy discussions. But conceptually, they can be thought of as the product of an overlapping consensus in the spirit of the later Rawls.

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I.

ENCOMIUM

Many people who write books are familiar with this sort of response: "Saw your book. Terrific! I am most impressed." Authors are wise, when confronted with such a comment, to move on quickly. This is because, when

one asks “What did you think of Chapter 4,” or the like, one might well hear, “Ah, I haven’t gotten quite that far,” or “I have just sort of skimmed it,” or even “Well it’s in the stack of books I need to read . . .” It is best, in these situations, to absorb the general kudos without expecting too much in the way of a real reaction.

But once in a while, an author will get another type of response: something like the Essay by David H. Blankfein-Tabachnick (who I hereafter refer to as “B-T”), *Intellectual Property Doctrine and Midlevel Principles*, comprising forty-five pages of detailed, carefully argued critique of my book *Justifying Intellectual Property (JIP)*. With deeply considered arguments, lots of footnotes, and all the earmarks of a thorough scholarly job. In this case, the lucky author (and readers) gets much more than a quick congenial nod of the head. We get a thoroughgoing Response with a capital R.

You might think the first type of reaction is preferable. It is positive, complimentary, and leaves one feeling good. Hey, I wrote a book and someone noticed! Even called it “terrific”!

But the truth is, a Response like the one from B-T is far superior. It is in fact something to treasure. It is a great and true privilege: I wrote a book, and someone cared enough to go through it in detail, to puzzle over it, pore over it, pick it apart even. That is a rare thing, in a world filled with books and busy people trying to read them. So I begin with this acknowledgement: thank you, B-T, for taking my book seriously enough to prepare a detailed Response. Thank you for the work you put into understanding my arguments and looking to see where they failed to make sense to you. Thank you for going light on the kudos and heavy on the critique. I sincerely appreciate it.

II.

SUBSTANTIVE RESPONSE

Now, under the circumstances, the best way to honor B-T’s Essay is to take *it* as seriously as he has taken my book, *JIP*. And so in what follows I aim to address as many of the big points B-T raises as I can. To be more specific, I have structured my response along the following lines.

First, I comment on the overall thrust of B-T’s critique. I try to describe succinctly what *JIP* says about the foundations of intellectual property (“IP”) law, midlevel principles in the field, and specific cases and institutional details. Then I describe what *JIP* has to say about the relationship between these three analytic levels.

A. Overview

In the Abstract to his commentary, B-T says this, referring to the structure of my argument in *JIP*:

IP doctrine, case outcomes, and statutes are suffused with midlevel principles. In turn, the scholarship treats midlevel principles as

consistent with broadly conflicting foundational accounts of property entitlement, from Lockean liberalism on the economic right, to Rawlsian egalitarianism on the left.¹

B-T is right that I see midlevel principles as ideas that span individual cases and specific institutional details. He is also right to say, as he does earlier in the Abstract, that I see these principles as a “bridge” between individual cases and foundational values or concepts. And it is also true that I believe case outcomes and statutes are “suffused with” midlevel principles (though I would prefer to say that the principles are “drawn from” or “induced from” cases and statutes). And finally, he is right that I believe these midlevel principles are also consistent with multiple foundational commitments—that they are compatible with a range of ultimate beliefs, such as utilitarianism, religious values, and deontological moral theories, all of which can be used to ground an IP system.

But we part ways when he argues that the foundations I describe in Part I of *JIP* are somehow “broadly conflicting.” I took pains in that part of the book to explain why I think Locke, Kant, and Rawls taken together provide a solid nonutilitarian grounding for the IP field. And if there are rough edges to the three-sided foundation I construct, I do not agree that it is due to a political conflict in the right/left sense. As I say in the book, the Locke I espouse is the Locke of Jeremy Waldron, and not a cartoon libertarian Locke. And for me, Rawls’s rigorous emphasis on distributive justice helps to flesh out and fill in the somewhat vague references to distributive issues in Locke and Kant.

I take up these issues in more detail in Part II.C below. But before defending my ideas regarding the foundations of IP law, I must first review what B-T has to say about my conception of midlevel principles.

B. Midlevel Principles and IP Doctrine

The concept of midlevel principles plays a crucial role in my understanding of IP law, and seems to have sparked off some interest on the part of commentators. My comments here are meant to frame my response to B-T, but if they help to clarify for others what midlevel principles are about, so much the better.

As I say at several points in *JIP*, midlevel principles have a dual character. I introduce them as a “bridge” (in B-T’s felicitous imagery) between pluralist foundational commitments and detailed doctrines and case outcomes. At this level, they are meant to serve as the equivalent of shared basic commitments in the “public” and “political” sphere described by Rawls in his later book *Political Liberalism*.² That is, midlevel principles supply a shared language, a set of conceptual categories consistent with multiple diverse foundational

1. David H. Blankfein-Tabachnick, *Intellectual Property Doctrine and Midlevel Principles*, 101 CALIF. L. REV. 1315, 1315 (2013).

2. JOHN RAWLS, *POLITICAL LIBERALISM* (Expanded Ed. 2005).

commitments. They are more abstract and operate at a higher level than specific doctrines and case outcomes; but they are pitched in a language that is distinct from that of foundational commitments. They create, as I say in *JIP*, a shared public space in which abstract (non-case-specific) policy discussions can take place.

I identify four specific midlevel principles in IP law: proportionality, efficiency, nonremoval (the public domain), and dignity. These are the four principles that stand out for me when I think about the broad sweep of IP cases across all doctrinal areas. They represent themes, tropes, and motifs that I see over and over again when judges and (to a lesser extent) legislators grapple with difficult cases. To repeat what I say in *JIP*, these principles span and tie together multiple, diverse areas of IP doctrine.

How are these two aspects of midlevel principles related? That is to say, in what way does their Rawlsian public/political role connect to the fact that they are repeated meta-themes in IP law?

To begin, it should be obvious that I am not claiming that judges and legislators actually came together at some point to conduct a Rawlsian procedure of public deliberation regarding basic themes to apply in IP cases. We should be so fortunate! No, the midlevel principles were not formed that way. Rather, when faced with difficult problems in IP law, policymakers have recourse to philosophical fragments, intuitions, and legal archetypes. I believe that generations of people with diverse—but at least somewhat compatible—ultimate commitments have left their imprint on this body of law. When faced with a difficult case, legal decisionmakers draw on their basic intuitions; and from these cases the midlevel principles arise. There is coherence to the midlevel principles because they are drawn from the same intellectual well, so to speak. Copyright cases from the nineteenth century, patent cases from the 1960s, and trademark cases being debated now all tend to draw on a shared set of ideas. The meta-themes that emerge from these bodies of case law are what I call midlevel principles.

These meta-themes are forged over time in a way that calls to mind a shared public space. In *JIP* I look to Rawls for a conceptual or theoretical model of this process. Individual policymakers can (and, in my experience, do) adhere to a variety of foundational commitments. Yet I observe that out of this diversity of ultimate commitments, a shared set of meta-principles emerges. So Rawls's account of a shared political life in the presence of pluralistic ultimate commitments has great appeal. I have observed that, as a social, empirical fact, the IP system hangs together despite widely divergent sets of foundational principles. To use examples: Utilitarians converse and argue with deontological theorists, and they both have much to say to those who see ethical roots for IP law in the Torah or other religious texts/traditions. So what Rawls calls an overlapping consensus is to me a fact of the IP world as I find it.

Put simply, midlevel principles are themes we can identify from a wide range of cases and practices. They emerge from specific instances when IP policy is made. The intuitions from which they emerge are, I believe, consistent with a variety of foundational commitments. But, in most cases, they are not dictated or tightly constrained by any one specific normative foundation. Most of what B-T says about the need for midlevel principles to control or direct case outcomes is misdirected. These are general principles that emerge over time from many cases—not super-doctrines that directly control case outcomes.

Let me add that I find the diversity of ultimate commitments underlying IP law to be not just a fact of the world, but an *appealing* fact. Maybe this is just instinctual. But there may be something more. In my intellectual wanderings I am never sure I have arrived at *the* right answer, so how can I impose a single unitary foundation on other people? And so, pluralism it is.

To summarize: I see midlevel principles as high-level, repeating meta-themes in IP case law. And I think Rawls's account of a shared public space provides a good model for thinking about these principles—not an empirical account of where they come from, but an idealized way to describe and discuss them. Midlevel principles *emerge* from specific cases and practices; but they can be *thought of* as the product of multigenerational hypothetical deliberation among holders of divergent ethical foundations.

With these points in mind, let me turn to B-T's comments on the idea of midlevel principles in *JIP*.

1. Midlevel Principles and Independence

B-T discusses at length my conception of midlevel principles and their relationship to foundations. He compares what I say with the well-known ideas of Ronald Dworkin, noting both contrasts and points of overlap. At the outset, it is a good idea to recall that Dworkin's project is to explain the judge's task. His is a philosophical theory of judicial decision making. Because I pursue a different overall task in *JIP*—providing a thorough account of a single field, IP law—only some of what Dworkin says is really relevant.

Dworkin describes “institutional morality,” or ethical precepts built into legal doctrine.³ These transcend individual cases and doctrines, and are thus the equivalent in some ways to the midlevel principles I discuss. Dworkin contrasts these with what he calls “background” moral rules, which have to do with deep philosophical justifications used to establish or broadly reform a large body of law. Again, focusing on the task of the judge, Dworkin argues that there is an unbridgeable divide between these two sorts of justificatory precepts. In B-T's words,

For Dworkin, the judge is not empowered to make a direct or naked appeal to foundational principles. The judge's role, instead, is to apply

3. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 86–87 (1978).

the inherent principles of the *legal system* to the case at hand. It is in this sense that, for Dworkin, legal decisions are independent from background morality.⁴

I believe I have a different conception of independence. For me, judges are the “official spokespersons” of midlevel principles forged in a pluralistic setting. They are constrained in what they can say. But they are also (at least ideally) highly aware, and specially placed. They give voice to the “official version of things”; they speak in the public and political language of a society. There is in fact a great distinction between the deepest commitments of rational, informed members of society—including judges themselves—and the formal, public political language in which judges speak. This is what I meant by the concept of independence in *JIP*. At the same time, as I have explained, there are *connections* between the deepest level of commitment and the public/political language. It’s just that these connections are typically not spoken of.⁵ Overlapping aspects of ultimate commitments shape the public/political language. But it is not typically appropriate to invoke ultimate principles when deciding particular cases under particular doctrines.

C. A More General View of Midlevel Principles

As explained in *JIP*, I was originally drawn to the idea of midlevel principles by Jules Coleman’s book, *The Practice of Principle*. I had been looking for a way to gain some traction on a high-level, policy-oriented manner of talking about IP law that somehow transcended, or at least steered clear of, the quagmire of disagreement over ultimate foundations. Coleman’s conception of a midlevel principle provided the key. I was also drawn to Coleman’s arguments about the inadequacy of law-and-economics accounts of tort law, which mirrored some of my own thinking about the shortcomings of utilitarian foundations for IP law. But the primary attraction was the notion of a sort of intellectual mezzanine, midway between doctrine and foundational commitments.

By invoking Coleman, as opposed to a more general conception of midlevel principles, I opened the door to some confusion. This takes several forms. First is Coleman’s innovative but somewhat idiosyncratic account of where these principles come from.⁶ And second is the fact that although

4. Blankfein-Tabachnick, *supra* note 1, at 1325.

5. Very close and difficult cases, where ultimate foundational principles may be appealed to as tiebreakers, are the exception. See Robert P. Merges, *The Relationship Between Foundations and Principles in IP Law*, 49 *SAN DIEGO L. REV.* 957 (2012).

6. See, e.g., Stephen R. Perry, *Method and Principle in Legal Theory*, 111 *YALE L.J.* 1757, 1759–60 (2002) (book review):

Coleman envisages the methodological approach he advocates as a pragmatically oriented form of conceptual analysis. The strategy of looking for mid-level principles that are embodied in the relevant practice, which Coleman labels “explanation by embodiment,” is one of a cluster of features that characterize his version of this approach. The other features are semantic nonatomism, which denies that any single element of a language, conceptual

Coleman speaks of midlevel principles in a generic sense, as though there might be many such things in law, he argues that all of tort law can be reduced to a *single* midlevel principle: corrective justice.⁷ I did not mean to subscribe whole-hog to Coleman's complex ideas about how midlevel principles arise, though there is much merit in them.⁸ I also failed to explain adequately how Coleman's conception could lead one to identify *multiple* midlevel principles in a given field. Thus my list of four principles seems to match up poorly with Coleman's account of corrective justice as the key midlevel principle in tort law.

It might be easier to understand my approach to midlevel principles if I put them in a broader context. Coleman was not the first by any means to identify the value of such a middle tier. It was explicitly recognized at least beginning in the 1970s in the field of medical ethics. According to an account of the rise of the "principlists" in this field,

The principlists believed that broad consensus might be attained about mid-level principles, regardless of philosophical orientation. Thus, in medicine [influential textbook authors] Beauchamp and Childress identify four central principles—autonomy, beneficence, nonmaleficence, and justice. The claim is that these clusters represent a form of "common morality," and tap into an "overlapping consensus" among the otherwise distinctly different moral theories.⁹

The connection with my use of midlevel principles is quite clear from this context. It is also striking that medical ethicists arrived at four such principles—the same number I derived in *JIP*.

scheme, or other semantic system has a determinate meaning that is independent of at least some other elements of the system; inferential role semantics, which holds that the content of a concept is to be analyzed by reference to the practical inferences it warrants or in which it figures; holism, which in this context asserts that the different practices in which a concept figures must, for purposes of analyzing the concept, be considered together; and, finally, revisability, which holds that all beliefs, including those that are nonempirical in character, are revisable in the light of recalcitrant experience.

Id.

7. See JULES L. COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* xiii (2001) ("In Part I, I defend the view that the core of tort law is best understood as embodying the principle of corrective justice.").

8. Briefly, there are some aspects of Coleman's approach that make sense. The overall emphasis on holism jibes well with the idea that midlevel principles are based on and drawn from underlying deep commitments (even if they are not shared). Deep values could well pervade the specific doctrines from which midlevel principles arise. On the other hand, Coleman's complex form of pragmatism distinct from strict consequentialism is not necessary to my purpose, which is simply to identify an analytic level midway between foundational principles and specific doctrines.

9. Paul R. Tremblay, *The New Casuistry*, 12 *GEO. J. LEGAL ETHICS* 489, 503 (1999) (citing TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* (4th ed. 1994)). For Tremblay, incidentally, the "casuistry" in his title reflects "a recognition of the importance of cases and context in moral thinking, in a process that offers better concrete guidance to those who must 'practice philosophy.'" *Id.* at 492. On principlism in medical ethics, see Ezekiel Emanuel's characterization of this claim as a "central tenet of principlism." Ezekiel J. Emanuel, *The Beginning of the End of Principlism*, 25 *HASTINGS CTR. RPT.* 37, 38 (1995).

In the mid-1980s the philosopher Michael Bayles invoked midlevel principles in discussions of applications of moral theory.¹⁰ In 1989, John Rawls's theory of justice as fairness was described as being limited by his search for a set of midlevel principles.¹¹ And Cass Sunstein relied on the midlevel concept in his well-known work on "incompletely theorized agreements" in 1995.¹² In fact, Sunstein's use of the concept is helpful enough for my purposes to quote at length from his discussion:

Incompletely theorized agreements play a pervasive role in law and society. It is rare for a person, and especially for a group, to theorize any subject completely—that is, to accept both a highly abstract theory and a series of steps that relate the theory to a concrete conclusion. In fact, people often reach *incompletely theorized agreements on a general principle*. Such agreements are incompletely theorized in the sense that people who accept the principle need not agree on what it entails in particular cases. People know that murder is wrong, but they disagree about abortion. They favor racial equality, but they are divided on affirmative action. Hence there is a familiar phenomenon of a comfortable and even emphatic agreement on a general principle, accompanied by sharp disagreement about particular cases.

This sort of agreement is incompletely theorized in the sense that it is *incompletely specified*—a familiar phenomenon with constitutional provisions and regulatory standards in administrative law. Incompletely specified agreements have distinctive social uses. They may permit acceptance of a general aspiration when people are unclear about what the aspiration means, and in this sense, they can maintain a measure of both stability and flexibility over time. At the same time, they can conceal the fact of large-scale social disagreement about particular cases.

There is a second and quite different kind of incompletely theorized agreement. People may agree on a mid-level principle but disagree both about the more general theory that accounts for it and about outcomes in particular cases. They may believe that government cannot discriminate on the basis of race, without settling on a large-scale theory of equality, and without agreeing whether government may enact affirmative action programs or segregate prisons when racial tensions are severe. The connections are left unclear, either in

10. See Michael D. Bayles, *Mid-Level Principles and Justification*, in JUSTIFICATION 49, 49–67 (J. Roland Pennock & John W. Chapman eds., 1986); Michael D. Bayles, *Moral Theory and Application*, 10 SOC. THEORY & PRAC. 97 (1984).

11. See Thomas E. Hill, Jr., *Kantian Constructivism in Ethics*, 99 ETHICS 752, 755 (1989) (arguing that the results of Rawls's work following *A Theory of Justice* indicate that his "results are not claimed to be timeless moral truths but rather a core of political principles that reasonable adherents of different moral perspectives can publicly agree upon," and implying that these political principles are midlevel principles of a kind).

12. See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1739 (1995).

people's minds or in authoritative public documents, between the mid-level principle and general theory; the connection is equally unclear between the mid-level principle and concrete cases. So too, people may think that government may not regulate speech unless it can show a clear and present danger, but fail to settle whether this principle is founded in utilitarian or Kantian considerations, and disagree about whether the principle allows government to regulate a particular speech by members of the Ku Klux Klan.¹³

We see here a more general, and more open-ended, account of midlevel principles. The key themes are these: a multiplicity of principles and an indeterminate relationship to the resolution of specific cases or disputes. Sunstein's description comports with earlier uses of the midlevel idea, and in so doing diverges from Coleman's in several important respects. It is this broader sense of midlevel principles that I now draw on to address B-T's critique.

1. Midlevel Principles and Case Outcomes

I have been trying to acknowledge B-T's observation that my invocation of midlevel principles fits only loosely with Jules Coleman's detailed systematic account. I turn now to a separate issue: B-T's criticism that my midlevel principles do not adequately predict, determine, or explain case outcomes.

Because B-T's arguments here are somewhat complex, let me first describe them a bit. He begins this way:

It is crucial to Merges's view that midlevel principles regulate IP case outcomes. The above patent example, however, could conceivably be decided on various normative grounds. Thus, Merges must show that his articulated midlevel principles are the actual principles that control. Return to Merges's "inductive" account of the derivation of midlevel principles. Merges's approach involves first addressing legal doctrine (IP statutes and case law), and then, considering what these laws have in common. What he believes they

13. *Id.* at 1739 (footnotes omitted). Sunstein goes on to describe the specific topic of his article, which is a bit different:

My special interest here is in a third kind of phenomenon—incompletely theorized agreements on particular outcomes, accompanied by agreements on the low-level principles that account for them. These terms contain some ambiguities. There is no algorithm by which to distinguish between a high-level theory and one that operates at an intermediate or low level. We might consider Kantianism and utilitarianism as conspicuous examples of high-level theories and see legal illustrations in the many (academic) efforts to understand such areas as tort law, contract law, free speech, and the law of equality to be undergirded by highly abstract theories of the right or the good. By contrast, we might think of low-level principles as including most of the ordinary material of legal doctrine—the general class of principles and justifications that are not said to derive from any particular large theories of the right or the good, that have ambiguous relations to large theories, and that are compatible with more than one such theory.

Id. at 1740.

have in common are his midlevel principles, which are supposedly capable of support under any foundational theory.

Even if one grants Merges's inductive methodology, it is crucial that Merges shows that the substance of his midlevel principles underlies positive law. For example, that the midlevel principle of proportionality—is *the* principle that animates IP law's cases outcomes.¹⁴

I have no problem with this statement. The trouble begins when B-T spells out what he means in saying that for me, midlevel principles “animate[] IP law's case outcomes.”¹⁵ The best way to see this is to consider B-T's discussion of my treatment of the Supreme Court's *eBay* case.¹⁶ I cite *eBay* as a good example of a case that illustrates the important midlevel principle of proportionality. The key discussion of this theme comes in the concurrence by Justice Kennedy, in which he characterizes the patent at issue in the case as providing “undue leverage” for the patentee.¹⁷ B-T notes that Kennedy's opinion is only a concurrence (though joined by three other members of the Court); and he points out that the cryptic reference to “undue leverage” is in no way a full-throated endorsement of the complex concept of proportionality described in *JIP*:

But, there is no clear evidence of Merges's desert-based notion of proportionality in the opinion of the case, nor in Justice Kennedy's concurrence, which Merges cites enthusiastically. Further, mere overlap of the Court's majority opinion or the concurrence with the would-be outcome of the application of Merges's principle of proportionality is insufficient to show that his principle is constitutive of the positive law. The concurrence simply holds that the Supreme Court of the United States should disallow the market leverage associated with a counterproductive holdout.

Kennedy does not reference the ideas embodied in Merges's highly stylized understanding of proportionality between the deontic notion of desert and market leverage. Instead, Justice Kennedy balances what he describes as “undue leverage” with a patented “small component.” The mere discussion of a trade-off or “balancing” is insufficient to demonstrate that Justice Kennedy is invoking Merges's principle of proportionality. Importantly, alternative principles would serve equally well as the basis of Justice Kennedy's concurrence. So, foundational principles, say, the utility principle or Rawls's forward-looking principles of justice, would also demand breaking up inefficient holdouts, but at the level of theory, would rule out the desert-based

14. Blankfein-Tabachnick, *supra* note 1, at 1328.

15. *Id.*

16. *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

17. *Id.* at 396–97 (Kennedy, J., concurring).

conception of fairness embedded in Merges's principle of proportionality.¹⁸

I think this shows that B-T and I are not on the same page when it comes to midlevel principles. Again, this may be at least partly because he works hard—harder than I intended him to—to integrate my approach in *JIP* with Jules Coleman's systematic theory of midlevel principles. But whatever the source of the problem, I want to dispel any remaining confusion. To do this I make three points.

First, I want to emphasize that for me, midlevel principles arise from cases, doctrine, and practices in the IP field. They represent the connective tissue—at the conceptual level—that unites and ties together disparate areas of IP law. We rarely see a direct invocation or recitation of a midlevel principle in a judicial opinion or the legislative history behind a statute. So it is not surprising that Justice Kennedy does not say more about proportionality.

Second, midlevel principles do not directly control case outcomes. They work in the background, “animating” (to use B-T's term) disparate areas of IP law, but never really directing or controlling.

And third, given what we know about how judicial opinions are put together, it is not surprising in the least that the majority opinion in *eBay* says little about the ultimate issues driving the case. The deepest principle, in fact, is Justice Roberts's recognition that he needs to pitch the holding at a very high level of generality in order to attract and hold the majority he needs. It is in many ways a model of Sunstein's “incompletely theorized agreement.” Justice Roberts's opinion for the majority says, in effect, that the traditional test in equity law should apply to patent cases. Nothing more, nothing less.

The Kennedy concurrence, by contrast, gets much closer to the deep conflict at the heart of the case.¹⁹ For this, you need not take my opinion. Just look at the many subsequent lower court cases that cite and discuss *eBay*. Lower courts see *eBay* as a case about what I call “disproportionate leverage.” This is clear from the collected holdings of many post-*eBay* cases. A recent

18. Blankfein-Tabachnick, *supra* note 1, at 1331–32 (footnotes omitted).

19. Here is the passage from *eBay* that I quote in *JIP*:

An industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees For these firms, an injunction, and the potentially serious sanctions arising from its violation, can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent When the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest.

ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 166 (2011) (quoting *eBay Inc.*, 547 U.S. at 396–97 (Kennedy, J., concurring)). Note the language: “bargaining tool”; “exorbitant fees”; “undue leverage.” These phrases are telltale signs, in my view, that an important principle is at work—the idea that full enforcement of a patent under these circumstances would give patent owners more leverage than their inventions are worth intrinsically. Why is this leverage “undue”? What leverage would be “due” to these patent owners? This is the terrain of proportionality as I describe it in Chapter 6 of *JIP*.

comprehensive summary of post-*eBay* cases by Colleen Chien and Mark Lemley bears this out:

In the wake of the Supreme Court's 2006 *eBay Inc. v. MercExchange, L.L.C.* decision, district courts rarely grant injunctions in patent infringement cases to patent-assertion entities (PAEs, also known as "patent trolls"). PAEs assert patents as a business model, traditionally using the threat of an injunction to reach a favorable settlement with the defendant. That threat often results in patent holdup. As Justice Anthony Kennedy articulated in his *eBay* concurrence, a holdup problem results when "an injunction . . . can be employed as a bargaining tool to charge exorbitant fees." By requiring federal courts to consider the equities of a particular case before granting an injunction, *eBay* solved much of the patent system's holdup problem.²⁰

Note that the authors of this comprehensive study turned to Kennedy's concurrence as the clearest "articulat[ion]" of *eBay*'s message. But what about their findings? The authors show that only 26 percent of patent infringement actions resulted in injunctions when the plaintiff was a patent assertion entity—and for most of these, the defendant did not contest the plaintiff's request for an injunction.²¹ By contrast, 79 percent of practicing (manufacturing) company plaintiffs succeeded in their injunction requests.²²

And it is not just the type of entity that drives these results; it is also the type of patent, or more properly the relationship between the patented invention and the overall market at stake in the litigation. As Chien and Lemley state: "Following Justice Kennedy's suggestion, when the patented invention covers a small component of the defendant's product, courts have been less inclined to award an injunction."²³

Though the majority opinion in *eBay* did not mention the "undue leverage" issue, courts *by their actions* have surely proven it to be the decision's key concept. So I feel quite safe in asserting that *eBay* has come to stand for this proposition: nonproducing patent owners, especially those who hold patents on small components of an integrated multicomponent product, will not be given negotiating leverage disproportionate to the intrinsic value of the inventions reflected in their patents. I think these post-*eBay* developments show that Kennedy's concurrence gets to the real issues at stake in the case. The concurrence aptly describes the *ratio decidendi* of post-*eBay* cases. Scholars such as Chien and Lemley discuss the concurrence as the driving explanatory force behind the changes wrought by *eBay*. And those changes are best described as an increased focus on concerns about proportionality.

20. Colleen V. Chien & Mark A. Lemley, *Patent Holdup, the ITC, and the Public Interest*, 98 CORNELL L. REV. 1, 2 (2012) (footnotes omitted).

21. *Id.* at 10 fig.1.

22. *Id.*

23. *Id.* at 13 (footnotes omitted).

It is true, as B-T says, that Kennedy nowhere uses the word “proportionality” in his opinion. What he does say is that an injunction can lead to “exorbitant” licensing fees. And that injunctive relief can create “undue leverage.” But what does it mean to say that a royalty is exorbitant? That an alternative, lower fee is more fitting or appropriate. And what does it mean to say that the leverage that would follow from application of a legal rule is “undue”? That another, lesser degree of leverage is “due” to the rightholder. Hidden inside these phrases is the idea that in this case, an injunction would give the patent owner more power than is warranted. Injunctive relief is out of proportion to what the patent owner should receive under the facts of the case. My point is simply this: the concept of proportionality may be obscured by Kennedy’s phraseology. But it is unquestionably there, under the surface, doing much of the conceptual work. It is not always possible to find out the deep structure of a text by doing a simple word search. Counting words or looking for specific phrases will often not reveal the deep conceptual structures of a body of law, or any other text for that matter. And it is at this deep level that we find midlevel principles at work.

Finally, I should mention that even if the Kennedy concurrence did not in fact inform so many subsequent decisions, it might still be an important reference point for a midlevel principle. As I have emphasized, a proper understanding of midlevel principles as espoused by Sunstein and others (and, to some extent, Coleman) is that they are not superdoctrines that control actual case outcomes. They are transcendent principles that emanate from and are expressed in the broad fabric of positive law—including statutes, judicial concurrences, judicial dissents, and academic commentary. It does not count against a principle, in other words, that it is most clearly articulated outside a specific majority opinion in a specific dispute.

It is important to keep this in mind as we turn to the second case B-T covers in detail, *Ethicon, Inc. v. U.S. Surgical Corp.*²⁴ As B-T argues, the holding in *Ethicon* thrusts sharply against our sense of proportionality. In that case, a lab worker (Choi) made a small but nontrivial contribution to one aspect of a complex invention whose development was unquestionably spearheaded by the chief researcher (Yoon), who was initially the only named inventor on the patent. The court found Choi entitled to co-inventor status on the patent—handing a victory to a clever litigation defendant, which received an assignment of Choi’s interest in the invention and therefore wound up with a perfect defense in the case: A co-inventor is presumptively also a co-owner; and a co-owner cannot be sued for patent infringement.²⁵ As an assignee of Choi’s legal interest in the invention, the defendant was a co-owner. Case closed.

24. 135 F.3d 1456 (Fed. Cir. 1998).

25. *Id.* at 1462–64 (stating the holding that Choi was a co-inventor of the two disputed claims).

No conceivable form of a fair proportionality principle yields the result in *Ethicon*. B-T therefore argues that the case shows up fundamental defects in the principle itself. Not so, in my view, for two main reasons. First, midlevel principles arise from a broad swath of cases, and are not expressed in every holding in every case. Even when they do not guide outcomes, however, their presence is felt. The majority in *Ethicon* certainly recognizes that its holding might seem unfair.²⁶ The court in effect acknowledges the seeming lack of proportionality in granting a minor contributor co-owner status on the patent. While this does not control the outcome—the court instead relies on the somewhat dubious notion that co-inventors exercise choice in working on joint projects, and on the fact that co-inventors can enter into contracts *ex ante* that control ownership issues²⁷—it is telling that the majority opinion feels compelled to traverse the issue of fairness at all.

If proportionality plays a minor role in the majority opinion, it provides all the power in the dissent by Judge Pauline Newman. Judge Newman refuses to follow the majority's interpretation of the statute at issue in the case, precisely because it turns a minor contributor to an invention into a full-blown co-owner of the entire patent—a result she finds strikingly at odds with the traditional structure of ownership rules in patent law.²⁸ As she put it in her dissent,

It is not an implementation of the common law of property, or its statutory embodiments, to treat all persons, however minor their contribution, as full owners of the entire property as a matter of law.

26. The majority says: “This rule [i.e., the majority’s holding] presents the prospect that a co-inventor of only one claim might gain entitlement to ownership of a patent with dozens of claims.” *Id.* at 1466.

27. The majority opinion says: [T]he Patent Act accounts for th[e] [possibility that a co-inventor of only one claim may end up co-owning a patent with dozens of claims]: “Inventors *may* apply for a patent jointly even though . . . each did not make a contribution to the subject matter of every claim.” 35 U.S.C. § 116 (emphasis added). Thus, where inventors choose to cooperate in the inventive process, their joint inventions may become joint property without some express agreement to the contrary. In this case, Yoon must now effectively share with Choi ownership of all the claims, even those which he invented by himself. Thus, Choi had the power to license rights in the entire patent.

Id. One problem with this analysis is that—partly because the legal test of co-inventorship is so complex—scientists, engineers, and other inventors have a difficult time predicting in advance whether their work on a particular project rises to the level of co-invention. If a researcher like Yoon had no idea that a lab assistant like Choi might later be deemed a co-inventor, it is a stretch to say that Yoon exercised choice in the matter when involving Choi in aspects of the research. On the other hand, one may defend the majority opinion as an instance of using simple property rules to channel and structure economic interactions—an instance of what I would call the efficiency principle. See *infra* Part II.C.2. For more on this issue, see Robert Merges & Lawrence Locke, *Co-Ownership of Patents: A Comparative and Economic View*, 72 J. PAT. & TRADEMARK OFF. SOC’Y 586 (1990).

28. To be specific, Judge Newman would have held that the 1984 amendment of the co-inventorship statute did not have the consequences for patent ownership that the majority determined in its holding. See *Ethicon*, 135 F.3d at 1470 (Newman, J., dissenting) (“This amendment . . . did not automatically convey ownership of the entire patent to everyone who could now be named as an inventor, whatever the contribution.”).

The law had never given a contributor to a minor portion of an invention a full share in the originator's patent.²⁹

To show the generality of this principle, Judge Newman relied on a mid-nineteenth century Supreme Court case which used language that strikes a distinct note of proportionality; the Court there said that one who is less than a true joint inventor is "forbidden from appropriat[ing] to himself the entire result of the ingenuity and toil of the originator, or put[ing] it in the power of any subsequent infringer to defeat the patent."³⁰

In conclusion, then, I would say this: Proportionality did not determine the outcome in the *Ethicon* case, it is true; but it is *very* much a presence in the case.

2. *The Push and Pull of Principles: "Property Baselines," Efficiency, and Proportionality*

Ethicon, then, is very far from showing that midlevel principles as I understand them are not workable. Many difficult cases will present a clash of conflicting principles, as *Ethicon* illustrates. Commentators on the case have identified this quite clearly. The result, one wrote, is that someone like Choi, the lab assistant, will "gain an equal ownership interest in the entire patent for a grossly unequal contribution."³¹ This commentator and others have concluded that the result in *Ethicon* may be justifiable for the sake of efficiency. Even if one accepts that argument, it is important to see that efficiency is just another midlevel principle at work in the case. Its presence does not mean that proportionality concerns are absent, or that midlevel principles are not actively at work in the case.

29. *Id.* at 1471. This conclusion follows from a disagreement with the majority concerning the impact on ownership of a change in the law of co-invention:

This [1984] amendment did not also deal with the laws of patent ownership, and did not automatically convey ownership of the entire patent to everyone who could now be named as an inventor, whatever the contribution. The amendment simply permitted persons to be named on the patent document, whether as minor contributors to a subordinate embodiment, or full partners in the creation and development of the invention. The ownership relationships among the persons who, under § 116, could now be recognized as contributors to the invention, is irrelevant to the purpose of the amendment of § 116, and to its consequences. Section 116 has nothing to do with patent ownership.

Id. at 1470.

30. *Id.* at 1469 (citing *Agawam Co. v. Jordan*, 74 U.S. (7 Wall.) 583, 604 (1868)).

31. Christopher McDavid, *I Want a Piece of That! How the Current Joint Invention Laws Deal with Minor Contributions to Inventions*, 115 PENN ST. L. REV. 449, 465 (2010). McDavid goes on to defend the majority opinion's analytical structure as a reasonable resolution of a very difficult conundrum:

[Under the majority opinion's reasoning, in a hypothetical case,] [y]our friend would gain an equal ownership interest in the entire patent for a grossly unequal contribution. An essential factor is that you had the power to control whether to include your friend's contribution in your patent. As a matter of policy, because you chose to include the contribution, you should endure the inequity.

Id.

Again, the point is that midlevel principles are not doctrines or rules; they do not determine case outcomes. As we saw earlier, Cass Sunstein said: “People may agree on a mid-level principle but disagree both about the more general theory that accounts for it and about outcomes in particular cases.”³² In a similar vein, Kenneth Henley writes about the relationship of rules to midlevel principles:

Applicable rules give a determinate normative answer, and the rejection of the answer requires either the rejection or modification of the rule; principles have an additional dimension of weight (not found in rules); several different principles can be applicable simultaneously and pull in opposite directions; and a principle need not be rejected or even modified when, all things considered, a course of action is justified that the principle counted against.³³

Put in these terms, I would argue that the proportionality principle was active in the arguments and opinions in the case. It “counted against” the majority’s ultimate decision, though it did not determine it. And a number of commentators mentioned it in post-mortems dealing with the case, which to me implies that, as would be expected, *Ethicon* did not put an end to proportionality as a principle in IP law.

The other midlevel principle that figured heavily in *Ethicon* was efficiency. The Federal Circuit read the co-inventorship statute in a way that perpetuated the simple ownership structure that has prevailed in U.S. patent law for centuries: the idea that, in the first instance (without contracts), ownership follows from inventorship. Co-inventors are, in the absence of agreement to the contrary, co-owners.

The key to understanding the efficiency issue here is to see that the co-inventor/co-owner rule is a default rule. It is the result the statute provides in the absence of agreement to the contrary. In other words, it can be modified by contract. In the world of research, inventions, and patents, contracts are routinely employed precisely to protect against the default rule.³⁴ From this point of view, the “harsh” rule in *Ethicon* can be seen as an application of the “penalty default” idea—a punitive default result that drives parties toward ex ante contracting.³⁵

32. Sunstein, *supra* note 12, at 1739.

33. Kenneth Henley, *Abstract Principles, Mid-Level Principles, and the Rule of Law*, 12 LAW & PHIL. 121, 122–23 (1993) (footnote omitted).

34. See, e.g., Robert P. Merges, *The Law and Economics of Employee Inventions*, 13 HARV. J.L. & TECH. 1, 7 (1999) (“Because the default rules award ownership to employees in some cases, employers routinely require new R&D employees to pre-assign title to future inventions. Many employers also require such contracts from non-R&D employees.”).

35. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989) (“Penalty defaults are designed to give at least one party to the contract an incentive to contract around the default rule and therefore to choose affirmatively the contract provision they prefer.”).

The majority's approach can be described as adopting a strong "property baseline," but this in no way means that its reasoning is completely unaffected by midlevel principles as I understand them. Property baselines are for me a good example of the efficiency principle at work. The fact that this principle clashes with proportionality in no way undermines the role of midlevel principles in the *Ethicon* opinion.³⁶ Indeed, as I argue in *JIP*, part of the function of midlevel principles is to provide a common language, a shared conceptual "space," in which to conduct arguments and resolve conflicts concerning important policy issues at stake in a legal dispute.³⁷ So to see proportionality clashing with efficiency in this case is not to witness the negation of midlevel principles. It is instead to see these principles slapped on the back, pulled off the bench, and put into play. They are out on the field of active debate. No particular principle determines the outcome of every game. But through their interaction, the collisions and cooperation among them, midlevel principles do exert significant influence on how the game is played. And collectively, often enough, they have a hand in the outcome as well.

*D. Cracks in the Foundations of IP Law:
B-T's Critique of Foundational Pluralism*

A central claim in *JIP* is that different people hold different conceptions about the ultimate basis or rationale for IP law.³⁸ Some people are die-hard utilitarians. They believe that IP law exists to maximize net social welfare. Others are guided by deontological precepts. They (or rather, we) believe that IP finds its ultimate justification in systems of thought concerned with moral obligations or ethics—basic matters of right and wrong, rights and duties. Others find support in religious traditions. And some people may believe in something else altogether.

The thesis of Part One of *JIP* is that these differing sets of ultimate commitments can all coexist. For the field to progress, and for individuals within it to converse and debate, we need not await the arrival of a universally acceptable foundational program. Using the metaphor of foundational

36. For example, one set of *Ethicon* commentators criticizes Judge Newman's proportionality-centric analysis as an approach that creates numerous inefficiencies:

The practical application of such an alternate system [as implied by Judge Newman's dissenting opinion] appears unduly burdensome on its face, and would likely require major changes in the way patents are currently documented and enforced. Perhaps in light of this concern, the majority chose to maintain the equal-interest property scheme, inequitable as it may be, with the feasible justification that the "voluntariness principle" will alleviate some of its potential unfairness.

Dale L. Carlson & James R. Barney, *The Division of Rights Among Joint Inventors: Public Policy Concerns After Ethicon v. U.S. Surgical*, 39 IDEA 251, 259 (1999) (footnote omitted).

37. See MERGES, *supra* note 19, at 10 (discussing my theory of intellectual property and arguing that "[m]idlevel principles provide our common space, our place of engagement").

38. See *id.* at 140 (arguing that "there are a number of foundational normative commitments that may serve equally well to anchor the principles and practices of IP law," and that "there is 'room at the bottom,' at the foundational level of the field, for various justificatory principles").

commitments for the field, I say in *JIP* that there is “room at the bottom.” My approach is thoroughly pluralistic, in other words.

B-T contests how well this account holds together. But his critique is not limited to the general pluralist proposition. He takes aim at the specific foundational account that I provide in Part One of *JIP*. There I describe my own *personal* foundational scheme for the IP field. In separate chapters I detail how I can justify IP law using three distinct philosophical thought systems: those of John Locke, the property theory of Immanuel Kant, and the distributive justice theory of John Rawls.

B-T argues in particular that my attempt to integrate Rawls into the property framework of Locke and Kant does not and cannot work. By way of introduction, B-T notes that the legal philosopher Stephen Perry takes a position quite similar to the one I take in *JIP*. Perry says that the midlevel principle of corrective justice (which, as we have seen, is said to account for the structure of tort law by scholars such as Perry and Jules Coleman) is fully consistent with the two principles of justice that form the cornerstone of Rawls’s theory of justice (“justice as fairness”).³⁹ This is in line with the general approach I take, which also includes a separate conceptual level for midlevel principles, as well as a personal foundational theory integrating Rawls and the property theorists, Locke and Kant. B-T objects to this:

Since the Rawlsian principles of justice are maximizing, there is little indeterminacy in the selection of the complete scheme of legal and political institutions, as Perry maintains. The selected scheme is constructed to maximize the position of the least well-off, while satisfying the maximizing requirements of the first principle of justice and the opportunity principle, taken in that order. A scheme of legal and political institutions that includes the backward-looking corrective justice model of tort law, at the level of principle, conflicts with the demands of the two principles of distributive justice—when compared to all other possible schemes. Merges’s midlevel account of IP is subject to a similar conflict.⁴⁰

I side with Stephen Perry on this issue. B-T’s critique of Perry, and thus his view of Rawls, both seem crabbed to me. Consider the following passage from *A Theory of Justice*, found in a section where Rawls describes an idealized four-stage process commencing with the original position (OP) and culminating in the enactment and enforcement of just laws and policies by a legislature established in accordance with principles agreed upon in the OP:

39. These are: (1) The liberty principle (“Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all”); and (2) the difference principle (“Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, . . . and (b) attached to offices and positions open to all under conditions of fair equality of opportunity”). JOHN RAWLS, *A THEORY OF JUSTICE* 266 (rev. ed. 1999).

40. Blankfein-Tabachnick, *supra* note 1, at 1337 (footnotes omitted).

Thus a just constitution is one that rational delegates subject to the restrictions of the second [i.e., post-OP constitutional convention] stage would adopt for their society. And similarly just laws and policies are those that would be enacted at the legislative [i.e., third] stage. Of course, this test is often indeterminate: it is not always clear which of several constitutions, or economic and social arrangements, would be chosen. But when this is so, justice is to that extent likewise indeterminate. Institutions within the permitted range are equally just, meaning that they could be chosen; they are compatible with all the constraints of the theory. Thus on many questions of social and economic policy we must fall back upon a notion of quasi-pure procedural justice: laws and policies are just provided that they lie within the allowed range, and the legislature, in ways authorized by a just constitution, has in fact enacted them. This indeterminacy in the theory of justice is not in itself a defect. It is what we should expect. Justice as fairness will prove a worthwhile theory if it defines the range of justice more in accordance with our considered judgments than do existing theories, and if it singles out with greater sharpness the graver wrongs a society should avoid.⁴¹

This captures well the spirit in which *JIP* describes property-friendly institutions designed in accordance with Rawls's two principles. I argued in *JIP* that Rawls understates the extent to which property forms part of the basic liberties of citizens under his first principle.⁴² In addition, I tried to show that IP rights are defensible under Rawls's second principle, which requires that deviations from a pure egalitarian distribution must be shown to benefit the poorest members of society. It is true of course that Rawls's second principle is aimed at maximizing the minimum support provided to the poorest members of society. But in the passage above Rawls says unequivocally that although this principle aims at "maximizing" (B-T's term) one variable (basic resources for the neediest), this goal can be achieved through many different institutional arrangements. The point of the principle is maximization, but this provides only a constraint on a "permitted range" of institutional setups. When I folded a Lockean-Kantian conception of property into a conventionally Rawlsian basic

41. RAWLS, *supra* note 39, at 176.

42. Specifically, I argued as follows:

[In the original position,] anyone might potentially be a creative professional whose best and highest employment, and whose personal happiness, would lie in a job in which IP protection would give much greater freedom than is possible without these crucial rights.

The argument flows from Rawls's first principle: IP is a basic liberty for those who would most benefit from creative independence and the career fulfillment that follows. Everyone in the original position faces the possibility that he or she will have the talent to enjoy these benefits.

MERGES, *supra* note 19, at 110 (footnote omitted). Later, I discussed in more detail a tradeoff caused by IP rights: between the liberty interest of creators and the potential loss in wealth for consumers (due to higher prices for creative goods under an IP regime). I argue that people in the original position might agree to a reasonable tradeoff along these lines, because of the crucial importance of IP rights in advancing the liberty interest or autonomy of creative professionals. *Id.* at 110–12.

social structure, I was, I believe, proposing a societal setup that is well within the “permitted range.”⁴³

I do not have space here to recapitulate my entire argument. But I will say a few things briefly. The account of property rights I find in Locke and Kant can support a set of property institutions that are “within the permitted range” in the Rawlsian sense. It is true that Locke’s emphasis on labor as the root of justifiable property acquisition meets some resistance in Rawls’s well-known concerns with notions of desert. I traverse these issues in Chapter IV of *JIP*. It is also true that my account of Kant might be seen to push against certain themes important to Rawls. Kant explains property rights in a way that depends heavily on an expansive notion of individual autonomy, which I take quite far in defending IP rights for those who work to make new creative products. Rawls, on the other hand, is generally careful not to define individual rights so broadly that they wholly undermine his concern with the fair distribution of resources. But in my chapters on Locke and Kant I strive mightily (or at least nontrivially) to defend the place of robust property rights in a fair (Rawlsian) society. I defend effort and desert as values that would find their way into deliberations in the OP. I defend a broad form of creative autonomy as something people in the OP would agree to, on the chance that, after the “veil of ignorance” was lifted, they would discover they were among those endowed with talents that make it possible to earn a living as creative professionals. And I explain the many ways that property rights formed in the image of Locke and Kant include numerous public-regarding exceptions and limitations. In all these ways, I tried to show—contrary to B-T’s assertion—that strong but constrained property rights institutions are not fatally inconsistent with Rawls’s framework, but in fact fall within Rawls’s “permitted range” of fair social institutions.

1. Pre-Political Rights, IP Foundations, and Principles

B-T’s critique of my own foundations for IP law has several features. One has to do with differences in the way Rawls, Locke, and Kant conceive of basic rights. Locke describes the right to property as “pre-political”: it precedes (conceptually, if not temporally) the formation of any given state or civil society. Kant, on the other hand, sees a viable state as necessary to the creation of true property rights. Kant therefore believes that property rights and the state are institutions that come into being simultaneously. Meanwhile, Rawls describes an elaborate multistage process for creation of a fair society,

43. For instance, in *JIP* I discussed IP institutions and Rawls’s second, “difference,” principle: So while we do not know for sure that there is no better way to get innovations and desirable entertainments to the poorest members of society, we do know that the system as it is produces numerous benefits for these people. That may be as close as we can come at this point to showing that IP-based industries comply with Rawls’s second principle.

Id. at 120.

beginning with deliberations in the OP and culminating with implementation in a working society.

It is thus a fair critique that my foundations for the IP field are drawn from three theorists who disagree about the timing of rights definitions.⁴⁴ B-T says relatively little about this, however. His main beef is once again with the midlevel principles. These, he says, are inconsistent with my account of a foundational period at which IP rights are established and first defended. Speaking of the “deontic considerations” that are appropriately expressed at the pre-political (OP) stage, B-T says: “Such deontic considerations are either endogenous to the principles themselves or have been abandoned in the original position as arbitrary from the moral point of view.”⁴⁵ The point being that there is no necessary relationship between the foundational level of analysis I have described and the midlevel principles of IP law.⁴⁶

But there is such a relationship. It is integral to my book. When properly understood, my argument is that there is room for property in a Rawlsian setup, and this allows me to deploy the full Rawlsian apparatus in defending the distributional consequences of IP rights. Again, the point is that IP is consistent with deliberations in the OP; that IP institutions can be understood to embody certain midlevel principles as a consequence of being established using a fair procedure; and that certain of these principles are in fact to be found in the details of the actual IP system we currently have.

44. I would defend my approach as follows: What Locke sees as pre-political rights, and Kant sees as rights codetermined along with the establishment of civil society, might well be basic values that are expressed in the OP by those deliberating the establishment of a Rawlsian fair society. The considerations that *make* them basic, in other words, apply regardless of which conceptual narrative one uses to describe them and regardless of how they arise.

45. A fuller version of the passage:

[T]he principles of justice are consequentialist, maximizing, and forward-looking in their selection among competing complete schemes of legal and political institutions.

The two principles of justice evaluate the distributive outcomes of competing complete legal and political schemes in terms of the expected quality of life of citizens living under such schemes, measured by what Rawls describes as an objective index of primary goods. The principles, in their application or function, are indifferent to all backward-looking moral concerns. Such deontic considerations are either endogenous to the principles themselves or have been abandoned in the original position as arbitrary from the moral point of view. Once the two principles of justice are derived, any remaining commitment to pre-institutional notions of economic desert is irrelevant.

Blankfein-Tabachnick, *supra* note 1, at 1343 (footnotes omitted). My comments in the text show my disagreement with this statement.

46. This latter point comes through most clearly when B-T says:

[S]everal important aspects of Rawlsianism, crucial and powerful as they are, often go unappreciated. Once fully acknowledged, they demonstrate the incompatibility between Merges’s midlevel principles and the Rawlsianism conception of distributive justice. Importantly, this incompatibility does not show or suggest that Merges’s midlevel principles are defective or unacceptable in their own right. Instead, the Section casts doubt upon Merges’s ambition of unification in IP and suggests that his midlevel account might be best understood as an appealing alternative to Rawlsianism, rather than being understood as consistent with it.

Id. at 1341. It is perhaps a compliment to be told that I have constructed “an appealing alternative” to Rawls, if only in the limited domain of IP law. But somehow I don’t quite buy it.

My point about the independence of midlevel principles and foundational commitments is this: midlevel principles are broadly consistent with a wide range of foundational commitments. They make it unnecessary to resort to foundational conflict in order to engage in high-level conceptual debate over matters of IP policy.⁴⁷ From the point of view of the personal foundations I defend, midlevel principles can be seen as part of the institutional fabric decided upon in a Rawlsian OP. According to Rawls's multistage model, institutions are *intended* to supersede OP-style deliberations, and thus to *avoid* the sort of fundamental conflicts that B-T says are inherent in my approach.

One final response to B-T's concerns is in order. Part One of my book incorporates the far-reaching *substantive* distributional thinking of Rawls's *A Theory of Justice* into a more comprehensive theory of IP law, one that includes greater reliance on property theory as espoused by Locke and Kant. In constructing this comprehensive theory, I have tried to integrate and make coherent various strands of thought with distinctive relevance to IP law. Locke and Kant are wonderful, but they lack the systematic attention to distributive justice that I believe is central to IP law—both as it is and even more so as it should be. So I tried to bring more Rawls into IP theory at the foundational level. I tried to see where Rawls's two tenets could add to Locke's and Kant's cryptic, underdeveloped attempts to include fairness considerations in their respective theories of property. In constructing my own approach, the works of Locke, Kant, and Rawls were my primary texts. I tried to see where their ideas overlapped and how each of these three distinctive theories could add to a foundational understanding of whether a just society would adopt IP rights, and if so, in what general form. I did not ask of these texts complete consistency. The relationship I was looking for might better be described as "consilience"—did the three sets of ideas work well together, form an integrated whole, fill in gaps and open places in an overall structure that holds together and makes sense? I leave to the reader of Part One of *JIP* to judge for him or herself whether I succeeded. But this is what I was trying to do.

As I have said, I do not expect everyone to agree with my personal foundations. Others may have comprehensive worldviews that lead them to definitive views on IP law and its basic features, and this is of course perfectly acceptable. My claim is that there are a number of basic principles governing

47. B-T is absolutely correct when he says that my approach requires not just a sort of working compromise (i.e., a *modus vivendi*—a way for disputing parties to accommodate one another to get by), but full-fledged, deep-level agreement on basic principles. B-T says:

There is always a possibility of a range of contingent (non-principled) overlap, and concerns over the rule of law or political stability may bring about compromise among proponents of differing foundational principles. However, this form of agreement or compromise is insufficient to serve Merges's principled unification project.

Id. Cf. Steven Wall, *Modus Vivendi Liberalism: Theory and Practice*, 122 *ETHICS* 194, 195 (2011) (book review) ("Modus vivendi liberalism may or may not offer a better prospect for generating agreement on the general structure of liberal political orders. It all depends on how demanding the ideal of political justification is taken to be.").

this area of law that comport with the foundations that make sense to me, as well as other foundations that may make sense to others. The hypothetical deliberative process by which we reach these basic principles follows the contours of Rawls's idea of an overlapping consensus, as expressed in his book *Political Liberalism*. In the end, then, I employ the more "procedural" approach of later Rawls (*Political Liberalism*) in explaining why it is not essential that all readers agree with me about the importance of early Rawls (*A Theory of Justice*) regarding the foundations of the IP field. I find early Rawls persuasive; but if you don't, we can employ later Rawls to bring us together to find common ground in a set of "public" principles arrived at deliberatively, which we will use to conduct debates in the IP field.

Now, hold for a moment in your mind this idea of basic principles, arrived at through this hypothetical procedure. Then shift your attention to positive IP law—the actual body of case law, statute, and practices that make up the field of IP. I make the further claim in *JIP* that when we look at the details of positive law we can identify meta-themes—conceptual patterns that tie together and reach across many disparate and far-flung cases, doctrines, rules, and practices. There are many ways to describe these meta-themes. They are structural motifs; repeating narratives; conceptual models; forms of argumentation. Following other legal theorists, I call them midlevel principles to distinguish them from individual cases, rules, etc., on the one hand, and foundational commitments on the other.

Now, to bring the normative-hypothetical together with the positive: I believe that midlevel principles embody structural values that are the product of ultimate commitments at the foundational level. They are manifested in numerous specific doctrines and rules in the IP system precisely because they reflect basic values and ultimate commitments. These values and commitments work through midlevel principles; they find their expression, in implementable form, in these principles.

If whatever is ultimate or foundational drives midlevel principles, why not skip over these principles and appeal directly to the foundational level? The answer of course is lack of agreement on foundations. We interpose midlevel principles between ultimate commitments and detailed cases because we cannot get agreement on a single system of ultimate commitments or core values. So we make these commitments and values the animating force behind a set of principles that have two qualities: (1) they are sufficiently broad to cover, or at least touch on, a wide variety of discrete cases and controversies in IP law; and (2) they are expressed at a level, and in a language, that is at one remove from ultimate or foundational commitments. This language reflects the lack of complete agreement on ultimate foundations, but also reflects a respect for tolerance and disagreement. The terminology and conceptual apparatus of the midlevel principles thus both embody and help to perpetuate Rawls's idea of an overlapping consensus.

Midlevel principles as I see them therefore have a dual character. They can be conceptualized as products of the hypothetical political-deliberative process envisioned by Rawls and best captured in the idea of an overlapping consensus. At the same time, they can be identified in actual, existing case law and practice. They are meta-themes that span and tie together disparate IP rules and doctrines. Certain meta-themes arise over and over in IP case law; and these, I have come to believe, represent various applications or specific instances of more general thought patterns or principles. It is in this latter sense that the midlevel principles of *JIP* are consistent with the work of Jules Coleman.

One way to put this is as follows: A long and careful study of many IP cases and disputes will reveal certain conceptual regularities in patterns of argument, certain important values that are repeatedly expressed in various doctrines across IP law. These are the meta-themes of IP law. These meta-themes are usually consistent with multiple foundational systems—the Torah, Kantian morality, utilitarian wealth maximization, Rawlsian liberal theory, etc. But rather than advert to any one of these schemes for an exclusive explanation or account of the meta-themes, or IP law as a whole, I choose to express these meta-themes as midlevel principles. These principles are best thought of, in my view, as the result of a Rawlsian deliberative procedure that respects divergent belief systems and ultimate commitments. The language and apparatus of midlevel principles allow us to move away from ultimate-level (foundational) disagreements and work instead at the level of a social-deliberative consensus. Put succinctly, midlevel principles are empirical regularities, pitched at the meta-level, which are best described and discussed in a neutral way—in language and concepts that are, in Rawls’s sense, “public” and “political.”

The payoff is this: a committed Kantian can argue with a firm believer in the Christian (or Muslim, etc.) basis of IP law about the proper scope of fair use in copyright, or the proper length of the term for patent protection, or what should be required to prove that a trademark has been abandoned. The argument can proceed without the Christian or Muslim needing to convert the Kantian to a religious worldview, and without the Kantian talking the others out of the view that religious texts provide a set of comprehensive guiding principles for right behavior. They can—and indeed, often do!—speak in terms of an appropriate public domain (i.e., the nonremoval principle); a fair reward for creators (proportionality); or the cheapest way to offer legal protection at the lowest net social cost (efficiency).

CONCLUSION

At the outset, it might well be thought that disagreements over the ultimate principles of an entire society are expected to be deeper and more intractable than those over a modest social practice such as IP protection. In a different world, it might well be so. But in this world, disputes over IP law have

proven very extensive and very deep-seated as well. We in the IP field need pluralism as much as our overall political system does.

There is, in my view, both need and room for compromise at the conceptual level. Yet it need not reach into our deepest, ultimate commitments. Indeed, the only ultimate commitment we need to share to make progress is a commitment to this sort of compromise, this public-political space. The desire for this space is itself an important shared value. It is in a way something like a midlevel principle: a value consistent with many ultimate justificatory schemes but explicitly pitched as independent of any particular such scheme.

This account of pluralism is an idealized description of where midlevel principles come from. These principles are shared conceptions consistent with multiple foundations. In operation, they are embodied in many concrete cases and institutional details. These principles shape debates, and in so doing guide outcomes in a general way—not in the sense of determining outcomes, but in the sense of providing a shared, public vocabulary for debate.

Property in general, and IP even more so, is very difficult to account for using a single reductive theory. And individual people have their own ultimate comprehensive worldviews, which shape their perspectives on this essential social practice. B-T points out the many flaws in my attempt to make sense of all this, and to provide a coherent description of the conceptual structure of IP rights. I again thank B-T for his efforts, and for pushing me to clarify—at least a bit—some of what I said in *JIP*. May the conversation continue, and may the IP field make better sense as a result.