

2013

Does Intellectual Property Law Have Foundations? A Review of Robert Merges's *Justifying Intellectual Property*

David H. Blankfein-Tabachnick
Michigan State University College of Law, dbt@law.msu.edu

Follow this and additional works at: <http://digitalcommons.law.msu.edu/facpubs>



Part of the [Intellectual Property Law Commons](#)

Recommended Citation

David H. Blankfein-Tabachnick, *Does Intellectual Property Law Have Foundations? A Review of Robert Merges's Justifying Intellectual Property*, 45 Conn. L. Rev. 995 (2013).

This Book Review is brought to you for free and open access by Digital Commons at Michigan State University College of Law. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Digital Commons at Michigan State University College of Law. For more information, please contact domannbr@law.msu.edu.

CONNECTICUT LAW REVIEW

VOLUME 45

FEBRUARY 2013

NUMBER 3

Book Review

Does Intellectual Property Law Have Foundations? A Review of Robert Merges's *Justifying Intellectual Property*

DAVID H. BLANKFEIN-TABACHNICK

Robert Merges's Justifying Intellectual Property is an ambitious work of unification in intellectual property law. The book defends a broad and sweeping thesis addressing the positive law of intellectual property and its foundation. Justifying Intellectual Property innovatively articulates a set of normative midlevel principles intended to justify, explain, and predict intellectual property case outcomes. Further, these midlevel principles are alleged to be consistent with a wide range of seemingly conflicting and highly contentious foundational accounts of property ranging from Lockeanism to liberal egalitarian perspectives. This Book Review maintains that Merges's claims of unification, while potentially groundbreaking, are overbroad. The Review raises skepticism with regard to the idea that the positive law of intellectual property is actually governed by normative midlevel principles and argues that the competing and controversial foundational property theories that Merges addresses are not equally compatible with the midlevel principles he articulates. The upshot of the Review is that values other than the midlevel principles described by Merges may be at play in explaining, predicting, and justifying intellectual property law case outcomes. The Review further concludes that proponents of differing views of the strength and structure of foundational property rights will, at the level of principle, also differ over competing accounts of intellectual property doctrine.

BOOK REVIEW CONTENTS

I. INTRODUCTION.....	997
II. MERGES’S CONCEPTUALIZATION	1000
A. INDEPENDENCE OF IP LAW’S MIDDLELEVEL PRINCIPLES.....	1001
B. MERGES’S FOUNDATIONAL PLURALISM.....	1005
III. FOUNDATIONS.....	1007
A. CONCEPTIONS OF PROPERTY: PRE-INSTITUTIONALISM AND POST-INSTITUTIONALISM	1008
B. MAXIMIZING, CONSEQUENTIALIST “FOUNDATIONAL” PRINCIPLES ...	1010
C. DISTRIBUTIVE PRINCIPLES DEFINING JUSTICE AND OWNERSHIP	1011
IV. DISTRIBUTIVE PRINCIPLES AND MIDDLELEVEL PRINCIPLES OF IP LAW	1011
A. THE INCOMPATIBILITY	1011
B. PRE-INSTITUTIONAL FOUNDATIONS AND THE RANGE OF PRINCIPLED COMPATIBILITY WITH MIDDLELEVEL PRINCIPLES	1013
V. MERGES’S PLURALISM AND APPLICATION	1014
A. PLURALISM AND MIDDLELEVEL PRINCIPLES AS PUBLIC DEBATE.....	1014
B. APPLICATION	1014
VI. CONCLUSION	1016



Does Intellectual Property Law Have Foundations? A Review of Robert Merges's *Justifying Intellectual Property*

DAVID H. BLANKFEIN-TABACHNICK*

I. INTRODUCTION

Berkeley Law Professor Robert Merges has identified an important scholarly void in intellectual property law (“IP law”), and his book, *Justifying Intellectual Property*,¹ is significant not only for calling our attention to this gap but also for the ways he endeavors to fill it. IP law is the subject of renewed attention. Increased globalization and transnational development have fueled this heightened awareness.² Competing alternative IP regimes, much like competing tax and transfer schemes, can have dramatic effects upon wealth distribution, wealth maximization, and, importantly, the incentives that serve as preconditions to invention and creation.³ Correspondingly, IP has drawn the attention of a wide range of

* Visiting Assistant Professor of Law, Pennsylvania State Law; Affiliated Transnational Professor, Peking University, School of Transnational Law. I would like to thank John G. Bennett, Jamie Dodge, George Fletcher, David Kaye, Steven Kargman, Renee Knake, Jeffrey S. Lehman and Stephen Yandle for helpful comments and discussions; also, I have learned a great deal from my engagement with Rob Merges’s work and would like to acknowledge an intellectual debt of gratitude to him. I am also grateful to Deans Jeffrey S. Lehman and Philip McConaughay for their encouragement and generous support of my work. I am thankful to Arielle Hansen, Book Review Editor, Sara McCollum, Managing Editor, and the anonymous members of the editorial staff at the *Connecticut Law Review* for their work and care in editing the piece. I am grateful to Brittany Mouzourakis for superb research assistance.

This piece was submitted prior to the rulings of *Association of Molecular Pathology v. United States Patent and Trademark Office*, 689 F.3d 1303 (Fed. Cir. 2012), *cert granted*, 133 S. Ct. 694 (2012), and *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*, 132 S. Ct. 1289 (2012), the outcomes of which create a demand for further normative and conceptual discussion.

¹ ROBERT P. MERGES, *JUSTIFYING INTELLECTUAL PROPERTY* (2011).

² *See id.* at 1 (“[IP] law today is like . . . [a] sprawling, chaotic megacit[y] of the developing world . . . [much like] Shanghai. . . I marvel at the bold, new energy unleashed in the old burgh, and I am not a little pleased at the prosperity it has brought. But I also feel a distinct sense of unease. . . . [N]ew growth . . . with no regard for the classic lines . . . brings a slight case of vertigo. . . . It’s an exciting time, to be sure; but a confusing time too.”).

³ *See generally* Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821 (2000) (arguing that wealth redistribution through legal rules is less efficient than redistribution through the income tax system); Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994) (comparing wealth transfer legal schemes with the income tax system).

scholars—e.g., those concerned with international law and development, the distribution of medical resources,⁴ tax policy, and the design of academic institutions⁵—as well as property scholars working at the intersection of political and legal philosophy, economics, and law.⁶ This recent interest has generated the need for an up-to-date theoretical and conceptual treatment of the topic. Robert Merges’s wide-ranging and lively book is welcome in meeting this demand. As he informs his reader early on, *Justifying Intellectual Property* “is a reconnaissance and renewal mission . . . going back to the roots of [IP law] to regain a sense of why it was founded, where it was centered, and what the . . . original outline looked like.”⁷

Merges’s book is a theoretical and justificatory treatment of IP law.⁸ The book grows out of and expands upon Merges’s previous work in IP; its aim is to provide a needed systematic rights based or deontological creator-and-inventor-centered account of IP law.⁹ The book is both methodological and normative; Merges divides the ideas, principles, doctrines, and practices of IP law into three categories: foundational principles; “midlevel principles”; and applied issues.¹⁰ Correspondingly, the book is organized in three sections reflecting these themes or subdivisions. First, the book addresses the fundamental values that Merges takes to serve as the field’s foundations: the ideas of contemporary liberal political theory, including Lockeanism, Kantianism, and Rawlsianism.¹¹ Then, in Section II, the book presents what Merges conceives of as the midlevel principles of IP law (described in Part II of this Review), the independent normative values that in his estimation animate and govern actual IP law: the principles of proportionality, efficiency, dignity, and

⁴ E.g., INCENTIVES FOR GLOBAL PUBLIC HEALTH: PATENT LAW AND ACCESS TO ESSENTIAL MEDICINES 233–340 (Thomas Pogge, Matthew Rimmer & Kim Rubenstein eds., 2010) (presenting articles pertaining to intellectual property and access to essential medicines); see, e.g., AIDAN HOLLIS & THOMAS POGGE, THE HEALTH IMPACT FUND: MAKING NEW MEDICINES ACCESSIBLE FOR ALL 94 (2008) (purporting that the Health Impact Fund is a complementary mechanism to the patent system).

⁵ E.g., Masao Miyoshi, *Technology and the Humanities in the “Global” Economy*, in DEFINING VALUES FOR RESEARCH AND TECHNOLOGY: THE UNIVERSITY’S CHANGING ROLE 211, 211–13 (William T. Greenough, Philip J. McConaughay & Jay P. Kesan eds., 2007) (examining the rise of university-industry alliances since the Bayh-Dole Act of 1980, which gave universities the right to retain patents for federally funded inventions).

⁶ See, e.g., Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742 (2007).

⁷ MERGES, *supra* note 1, at 1.

⁸ See *id.* at 2 (“The major [work] I undertake is *conceptual*: . . . what are the best justifications, and how do they shape the contours and limits of [IP law]?”).

⁹ See *id.* at ix (“I wanted to suggest some ways that this area of law could be trimmed and tailored to better serve its main purpose, which for me has always been protecting creative works . . . and rewarding creative people.”).

¹⁰ *Id.* at x.

¹¹ *Id.* at 13.

non-removal.¹² Finally in Section III, the book discusses the practical issues involved in IP law: the rights of creative professionals and corporate ownership, property in the digital era, and the role IP law plays in the provision of medications in the developing world.¹³

Justifying Intellectual Property opens by presenting Merges's tripartite topology of IP law; yet, he suggests that in understanding IP law, we must start in the middle—and not with the field's foundations. The book defends a *striking* position: while foundational values may, in some fashion, serve to inform IP law, it would be a mistake to hold that foundational property theory holds a direct *conceptual* or *principled* constraint on midlevel principles of IP law.¹⁴ Instead, in Merges's view, the actual rules, doctrines, and practices that comprise the *law* of IP are governed by a set of non-foundational, *midlevel* normative *principles* or regulatory ideals that operate *between* foundational principles and applied issues or doctrine.¹⁵ Midlevel principles, for Merges, have not only a practical priority over foundational values, but also a *conceptual* independence from such values.¹⁶ Such midlevel principles as proportionality, efficiency, dignity, and non-removal, Merges argues, serve as the “basic concepts that tie together . . . discrete and detailed doctrines, rules, and practices [of IP law]”¹⁷ and, therefore, occupy a practical or legal priority over foundational property theory.¹⁸

In this vein, *Justifying Intellectual Property* presents itself as a work of *legal* theory, even given its philosophical sophistication and its engagement, at the first order, with the “positive” law of IP. In aiming to justify IP law, Merges, in essence, defends what one might describe as a theoretical middle-ground-position, compelling to those who hold that property scholarship sometimes falls squarely between two stools: either too driven by legalistic rules and doctrines and surface-level values to be properly understood as theoretical or principled, or too philosophical and abstract to properly be understood as *legal*. As rich and intriguing as the argument is, this Review maintains that Merges's compatibilist account of the foundational philosophical values at work in IP law—and what he describes as the field's independent midlevel principles—is overdrawn.

¹² *Id.* at 139.

¹³ *Id.* at viii.

¹⁴ *See id.* at 140 (“I believe in the independence of these foundational normative principles from . . . midlevel principles.”).

¹⁵ *See id.* (explaining that detailed doctrines and practices come first, that midlevel principles arise from them, and that upper-level or foundational principles are at the top of the hierarchy).

¹⁶ *Id.*

¹⁷ *Id.* at 139.

¹⁸ *See id.* at 140 (“It is at the level of midlevel principles . . . that . . . normative debate in the IP field takes place. . . . [I]n fact, this is their role exactly: they enable normative debate—debate above the detailed doctrinal level—without requiring deep agreement about ultimate [or foundational] normative commitments. . . . [T]hey are the common currency of most debate over IP policy.”).

Part III of the Review describes and evaluates Merges's conceptualization of IP law, which aims to unify IP doctrine through normative midlevel principles as well as facially conflicting and controversial accounts of foundational property theories. This Part raises skepticism with regard to Merges's idea that the positive law of intellectual property *is* actually governed by the normative midlevel principles that he describes. This Part further argues that such midlevel principles do not explain, justify or predict case outcomes. Part IV demonstrates the lack of general compatibility between Merges's account of IP law's purported midlevel principles and salient features of the foundational theories he discusses. Part V addresses the range of compatibility of Merges's midlevel principles and foundational property theories. This Part shows that Merges's case for compatibility is strongest in the context of non-maximizing, pre-institutional property (e.g., Lockean) theories, but less so in the context of post-institutional, maximizing foundational theories (e.g., Rawlsianism). Part V takes up Merges's thoughts on public debate and pluralism and his midlevel principle strategy for resolving foundational property disputes. This Part concludes that IP law disagreements may run well beyond the scope of midlevel principles and illustrates this point via the dispute over the strength of pharmaceutical patents and the welfare of the developing world. Part VI concludes by raising skepticism with regard to Merges's claim that midlevel principles drive the positive law of IP and maintains that Merges's claim of general unification in IP law is overbroad.

II. MERGES'S CONCEPTUALIZATION

Justifying Intellectual Property is a skillful work articulating a bold thesis. Merges's tripartite topology effectively organizes the sizable body of material he addresses. This organizational approach is not *only* of organizational or pedagogical value; Merges attaches normative and methodological significance to the distinctions he draws. For as broad as the book is, a number of interesting and closely related themes run throughout. First is that idea that midlevel principles—chiefly, the principles of proportionality¹⁹ and non-removal,²⁰ and to a lesser degree,

¹⁹ *Id.* at 8 (“Throughout IP law there is an impulse to tailor a creator’s property right in a way that reflects his contribution. This is the proportionality principle. There is a distinctly Lockean flavor to this principle (though it makes sense on utilitarian grounds as well) At its heart it is about basic fairness: the scope of a property right ought to be commensurate with the magnitude of the contribution underlying the right.”).

²⁰ *Id.* at 145 (“[The public] domain . . . is the end product of the nonremoval principle. Because it is the product of many disparate doctrines, and was not itself launched as a unitary concept, we should not be surprised to see a great diversity in conceptions of it.”).

the principles of dignity²¹ and efficiency²²—as opposed to foundational values (i.e., general theories of contemporary political philosophy and their respective accounts of property) regulate IP doctrine.²³ Second is the idea that midlevel principles have an independence of foundational values. And third is the idea that this independence from foundational values allows midlevel principles, which animate the *positive law* of IP, to be, at once, compatible with various competing foundations.²⁴

A. Independence of IP Law's Midlevel Principles

For Merges, IP law is a self-contained field. The rules, doctrines, and practices of IP law implicitly bear their own set of normative principles and these ideals, in turn, are neither derived from nor are they instrumental to the practical instantiation of foundational principles.²⁵ Instead, for Merges, identifying midlevel principles is an inductive exercise. Methodologically, “one looks for the common conceptual threads in a field and treats them as instances or manifestations of a more complete principle.”²⁶ Merges’s idea is to start with ground-level practices and abstract “upward,” toward a unifying principle that explains and rationalizes the practices.²⁷

The purported upshot is that IP law is consistent with a wide range of foundational property theories; but midlevel principles do not “depend” upon “any particular set” of foundations.²⁸

So, Merges conceives of IP doctrine and practice as governed or regulated by a group of principles that are, although abstract, implicit in the field.²⁹ For Merges, in understanding IP law we look first to the legal

²¹ *Id.* at 156 (“The dignity principle lies behind . . . IP law. It is the principle that says the creator of a work should be respected and recognized in ways that extend beyond the traditional package of rights associated with property: the right to exclude, to alienate (sell or license), to use as one wishes, and so forth. There is often a nonpecuniary dimension . . . and . . . the interests it protects . . . continue after a creator sells the rights to a given creative work. . . . [I]ssues . . . where dignity is relevant are often the closest the formal legal system comes to recognizing . . . [the] personal imprint placed on a work by its creator—familiar elements of Kantian and Hegelian property theory.”).

²² *Id.* at 153 (“Efficiency guarantees that whatever entitlements the legal system starts with, they will be allocated to their highest-valued use as cheaply and quickly as possible.”).

²³ *But cf.* LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP: TAXES AND JUSTICE* 19 (2002) (arguing in the context of tax policy that independent principles or metrics of tax policy analysis, e.g., the benefit or equal sacrifice principles, are inconsistent with distributive principles and every plausible conception of liberalism).

²⁴ *See* MERGES, *supra* note 1, at 140 (“[T]here is ‘room at the bottom,’ at the foundational level of the field, for various justificatory principles Midlevel principles . . . do not depend on any particular set of values for their validity.”).

²⁵ *See id.* (asserting the independence of midlevel principles of IP).

²⁶ *Id.*

²⁷ *See id.* at 9 (“[T]he operative principles of the IP system are the midlevel principles . . .”).

²⁸ *Id.*

²⁹ *See id.* (“Midlevel principles . . . are the common currency of most debate over IP . . .”).

doctrine, and in doing so, we find a wide array of seemingly disparate rules and legal doctrines that have grown up over time as a response to newly arising conditions.³⁰ In understanding these seemingly disparate rules and doctrines, he calls us to look for abstract principles common to the various rules, despite the more concrete differences between them.³¹ In this conceptual analysis, one may “induce the principle from the details of the specific rules and practices.”³² The idea is that while the rules and doctrines of legal practice vary, there are implicit in these rules midlevel principles to be induced,³³ and these principles, in turn, serve to explain and justify the rules and the doctrine. So, for Merges, one moves from rules, doctrine, and practice, to more abstract unifying principles; these principles, once refined, in turn serve in either a justificatory capacity, an explanatory capacity or, perhaps, both.³⁴

Justification and explanation, of course, are not mutually exclusive—some explanations *are* justifications. From the text, however, Merges’s position in this regard is not entirely clear. It seems that his analysis of midlevel principles, given the claim of independence from foundational values, might, at best, explain or predict the positive law, as opposed to justify it. That is, midlevel principles might predict case outcomes or provide a needed inference in explaining the law as social phenomenon, where a unified explanation of seemingly disparate data is needed. It does not follow, however, that simply because a set of principles are implicit in a consensus or social practice, a set of rules or in legal doctrine, and because conceptual analysis is capable of bringing these principles to the surface, that the principles are themselves *justificatory* principles. Here, it seems that absent a significant foundational constraint, which Merges appears to deny, so-called midlevel principles would remain, at best, *explanatory* as opposed to *justificatory*. To his credit, Merges does briefly indicate a link between midlevel principles and foundations: “Midlevel principles engage foundational values in a number of ways, but they do *not* depend on any particular set of values for their validity”³⁵ But, he never elaborates on the nature or substance of this engagement and his strong claims of midlevel independence would appear to be in significant tension

³⁰ See *id.* at 139 (arguing that midlevel principles tie together “disparate doctrines and practices”).

³¹ See *id.* at 143 (“Identifying midlevel principles is an inductive exercise: one looks for the common conceptual threads in a field and treats them as instances or manifestations of a more complete principle.”).

³² *Id.*

³³ See *id.* at 141 (“[P]rinciples can be identified out of a welter of doctrines and rules . . .”).

³⁴ See *id.* at 140–43 (First indicating a justificatory role, “this is their role exactly: [midlevel principles] enable normative debate—debate above the detailed doctrinal level,” but also indicating that the midlevel principle of nonremoval “ties together and explains each of these rules in terms of a broader conception.”).

³⁵ *Id.* at 140 (emphasis added).

with this claim.

Yet, midlevel principles, for Merges, are crucial to legal theory. It is *only* midlevel principles that are capable of “actual” legal work and operate at the heart of legal debate.³⁶ Merges discusses the bounds of the public domain; maintaining that his midlevel *principle of nonremoval* is essential in the legal context to providing answers to questions concerning the strength, breadth, and length of time involved in the assignment of various IP rights.³⁷ Likewise, he claims that it is his midlevel *principle of proportionality*, as opposed to foundational values, that distinguishes between “rent-seeking” behavior and “investment.”³⁸ Further, the principle of proportionality is operative in “the nonobviousness requirement” in patent law where “an invention is patentable only if it represents a nontrivial advance.”³⁹ In other words, “[t]he award of a patent is . . . calibrated so that only significant inventions are rewarded. . . . [with a] property right . . . when a . . . contribution is proportional to the legal right at stake.”⁴⁰ Additionally, the proportionality principle shows specifically “when courts feel comfortable modifying the entitlement structure of already-issued IP rights to correct for undue leverage,”⁴¹ that is, when the court engages in breaking-up an anti-commons because existing entitlements give someone “‘excessive’ or ‘disproportionate’ leverage,” as in the context of “patents for small snippets of genes made possible by modern sequencing technology.”⁴²

The claim that midlevel principles control in answering these questions is crucial to Merges’s view. But, the conclusion to which Merges’s examples point is that a *normative principle* or *normatively salient benchmark* is required to resolve these issues; it is less clear that the midlevel principles he articulates are *the* operative normative values at stake. Consider the disproportionate leveraging example in the context of the prominent eBay IP case.⁴³ Here, the Federal Circuit upholds an injunction providing a patentee with additional leverage in licensing as “a natural consequence of the right to exclude.”⁴⁴ The Supreme Court of the United States vacates the judgment.⁴⁵ Merges maintains:

³⁶ *Id.*

³⁷ *See id.* at 141–42 (explaining the principle of nonremoval by examining what information can be protected by IP rights, the duration of IP rights, and the “zone of expression” around freely available works).

³⁸ *Id.* at 171.

³⁹ *Id.* at 161.

⁴⁰ *Id.*

⁴¹ *Id.* at 181.

⁴² *Id.* at 160.

⁴³ *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006).

⁴⁴ *MercExchange, LLC v. eBay Inc.*, 401 F.3d 1323, 1339 (Fed. Cir. 2005).

⁴⁵ *eBay Inc.*, 547 U.S. at 394.

The Supreme Court takes the position that it may in proper cases look behind the leverage created by a property right. This inquiry . . . reveals the heart of the proportionality principle. . . . The contribution of the property owner is weighed against the economic leverage the right provides in actual market transactions.⁴⁶

For Merges, where this relationship lacks balance, the court will intervene to create proportionality.⁴⁷

It is *unclear*, however, that it is Merges's *principle of proportionality* that is operative in the case. What is clear is that the Supreme Court reverses for a normative reason, which disallows such a holdout or such market leverage.⁴⁸ Simply because there is a tradeoff, it does not follow that the Court has invoked Merges's principle of proportionality—the (foundational) utility principle, a principle notoriously antagonistic to the notions of “fairness” embedded in the principle of proportionality, may yield a similar result demanding efficiency via the break-up of an anti-commons,⁴⁹ as the empirical facts of the situation may mandate.⁵⁰ Merges's claim that midlevel principles control IP case outcomes cannot be sustained.

Further, it is not clear that the Court is balancing what Merges describes as the “contribution” (i.e., the backward-looking moral or economic *desert*) of the right holder with the “leverage” the right provides;⁵¹ in fact, the Court balances a patented “small component” with “undue leverage.”⁵² There is no mention of a relationship between the

⁴⁶ MERGES, *supra* note 1, at 167.

⁴⁷ *Id.*

⁴⁸ See *eBay, Inc.*, 547 U.S. at 392–93 (“As in our decision today, this Court has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed.” (citations omitted)).

⁴⁹ Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698, 699, 701 (1998) (noting that the development of useful products may require the removal of obstacles and other restrictions within a patent system that both increase costs and slow pace of such development).

⁵⁰ See Smith, *supra* note 6, at 1781 (“It is ultimately an empirical question at what point the uncertainty in the contours of intellectual property rights leads to serious enough holdout problems to justify a move away from injunctions (property rules) toward damages (liability rules).”); see also Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 TEX. L. REV. 783, 841 (2007) (“In identifying core cases where one regime or another is most effective, scholars can isolate the hardest cases where closer empirical investigation is necessary. In our view, the holdup scenario that can arise in patent . . . regulation clearly justifies a case-specific liability rule . . .”).

⁵¹ MERGES, *supra* note 1, at 167.

⁵² *eBay Inc.*, 547 U.S. at 396–97 (Kennedy, J., concurring) (“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 . . .”).

backward-looking notion of *desert* (implicit in Merges's idea of "the contribution of the property owner")⁵³ and market leverage—again, the tradeoff addressed may equally well be one of simple utility, invoking no midlevel principle. Additionally, were midlevel principles to be understood not only as normative principles, but also as predictive or descriptive of case outcomes, Merges's claim would require significant empirical analysis into case outcomes—well beyond the methods his book employs.

Merges, however, takes foundational philosophical ideas seriously and, presumably, holds that they are, in some fashion, important to IP law. As I say, the book thoughtfully considers IP ramifications of three prominent, competing foundational approaches to property in the liberal tradition. Yet, Merges is clear: he does not allow the regulatory ideals of IP law—the field's "midlevel" principles that "spring from doctrine and detail, from the grain of actual practice,"⁵⁴ principles that "do not depend on any particular set of [fundamental] values for their validity"⁵⁵—to be overtaken by foundational theory. Instead, Merges requires the "independence of . . . foundational normative principles from the operational details of [IP law], as well as from the midlevel principles that arise from and are shaped by those [operational] details."⁵⁶

B. *Merges's Foundational Pluralism*

Merges indicates that foundational principles are "at the top of this hierarchy"—"what lies beyond [midlevel] principles . . . is a set of 'upper-level' principles, which correspond roughly to deep or foundational . . . values."⁵⁷ It would, of course, be natural to conceive of "midlevel" principles as being constrained or governed by foundational principles. Indeed, for the consequentialists among us, any midlevel principles, metrics of analysis, or regulatory norms concerning *property* arrangements, were they to exist, would either give way in the face of conflict, or else have been constructed instrumentally in service to meeting the demands of distributive principles.

But this is not Merges's position; instead, he finds compatibility between a plurality of foundations and his articulated midlevel principles.⁵⁸

⁵³ MERGES, *supra* note 1, at 167.

⁵⁴ *Id.* at 140.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *See id.* at 10 ("My theory of IP includes . . . foundational pluralism. . . . [T]he great virtue of pluralism is that I can engage in a meaningful way with those who . . . place their faith in other foundations altogether. Midlevel principles provide our common space, our place of engagement. They . . . allow[] us all to play together, even if we disagree . . .").

In doing so, Merges largely leaves open the question of the normative control assigned to foundational principles. Merges is clear that foundational values lie behind midlevel values and purports to take them seriously,⁵⁹ yet, one is less certain in his model exactly how, if at all, such foundational principles (at the top of his normative hierarchy) are to interact with, or exert normative force upon midlevel principles and, consequently, guide legal doctrine given his strong views of the “independence”⁶⁰ of midlevel principles from foundations.

To his credit, Merges himself recognizes the importance of these issues, posing a variant of these questions and answering at both the operational and theoretical level; his answers to these questions, I believe, articulate the central claim of the book:

What would it do to our thinking about the field [of IP law] if the deep substratum could be changed under our feet . . . ? The answer at the operational level is: not much. That’s because the operational principles of the IP system are the midlevel principles Efficiency, Nonremoval, Proportionality and Dignity—these basic principles . . . are largely independent of the deep conceptual justifications of IP protection. *Except in a few boundary cases, [foundations] rarely do much direct work, or make a large practical difference, to the IP system in its day-to-day operation.* What about at the theoretical level? What would it do to our understanding of the field if we shifted from one foundation to another? . . . *My theory of IP includes this foundational pluralism. . . . In the vast majority of cases, the new normative grounding does not affect my view of correct policy in any way.* It may help me resolve borderline cases, and perhaps might lead me to favor an owner or rightholder in a close case or at the margin.⁶¹

So, given their range of practice-oriented and doctrinal-level application, midlevel principles are taken to have a legal priority over foundational theories, yet Merges importantly purports not to be a skeptic of normative foundations.⁶² He finds *compatibility* between his midlevel principles and foundational theories. Merges maintains, perhaps surprisingly, that there is plenty of conceptual “room at the bottom”⁶³ and

⁵⁹ *Id.* at 140.

⁶⁰ *Id.* (“Midlevel principles . . . do not depend on any particular set of [foundational] values for their validity.”).

⁶¹ *Id.* at 9–11 (emphasis added).

⁶² *See id.* at 11 ([N]ormative grounding . . . helps me push on through foundational doubts.”).

⁶³ *Id.* at 10, 140.

that his three, arguably conflicting, foundational conceptions of property are not only compatible—at the level of principle—with midlevel principles, but also that these conflicting foundations “may serve *equally* well to *anchor* the principles and practices of IP law,”⁶⁴ which—to be clear—he understands as *inclusive* of midlevel principles.⁶⁵ Merges’s “aim is to [conjoin] social practices and institutions; midlevel principles, such as efficiency and proportionality; and the foundational concepts of Locke, Kant, and Rawls, in a single coherent theory of the IP field.”⁶⁶ Merges offers what he describes as the foundational property conceptions of Kant, Locke, and Rawls, which in his view are the foundations that “best justify the structure of IP law,” but “other foundations might serve as well.” Merges continues that “there is [again] ‘room at the bottom’ at the foundational level of the field, for various justificatory principles, including perhaps *utilitarianism* and various alternative ethical theories.”⁶⁷

III. FOUNDATIONS

But still, important issues remain: the foundational values Merges discusses themselves offer competing liberal conceptions of *property*. These competing foundational theories, at the level of principle, are in tension with one another; this is a point that Merges catches quickly, but then releases: “For me, a lock-solid utilitarian case might someday unseat deontological rights as [IP’s] foundation.”⁶⁸ Further, there is not only the possibility of conflict between foundational principles, but also the conflict between foundational principles and midlevel principles. For Merges, of course, midlevel principles are range limited; they exert normative control over legal doctrine. Foundational principles presumably bear a different, although unspecified by Merges, range of application. But, importantly for Merges, they are not addressed to legal doctrine.⁶⁹

In conventional thinking, Merges’s foundational property principles serve a justificatory role—they, over their relevant domains, crucially provide *definitive* normative answers to questions of justice in economic distribution, property baselines, details of ownership and rights of entitlement.⁷⁰ Since these property rights are, in practice, set by legal doctrine as well as tax and economic policy (inclusive of IP law) and since

⁶⁴ *Id.* at 140 (emphasis added).

⁶⁵ *See id.* at 139 (identifying “the four primary midlevel principles in IP law: *nonremoval* . . . ; *proportionality*; *efficiency*; and *dignity*.”).

⁶⁶ *Id.* at 13.

⁶⁷ *Id.* at 140 (emphasis added).

⁶⁸ *Id.* at 10.

⁶⁹ *See id.* at 140 (stating Merges’s “belie[f] in the independence of . . . foundational normative principles from . . . midlevel principles” which, he notes, are addressed to legal doctrine).

⁷⁰ *See id.* (noting Merges’s view that justificatory principles exist at the foundational level of IP law).

IP doctrine is, in Merges's account, under the nearly exclusive control of midlevel principles, it would appear that foundational values, conventionally understood as fixing terms of ownership, and midlevel principles, as Merges understands them, are addressed to identical questions: the details of property rights. But, if this is true, conflict would appear imminent.⁷¹ Once the justificatory force of foundational principles is introduced, it is not clear that Merges can escape it so easily. I elaborate my concern in the context of Rawlsian theory, a dominant approach for Merges,⁷² which he (too) contrasts with pre-institutional property conceptions.⁷³

A. *Conceptions of Property: Pre-Institutionalism and Post-Institutionalism*

The first section of the book describes basic positions in foundational property theory. Merges does an accurate job of describing and articulating Kantian, Lockean, and Rawlsian liberal political theory. The first section of the book is largely exegetical—this section is a reliable and sound resource for those with an IP bent interest in a solid introduction to liberal property theory. I am in agreement with much of what Merges details; indeed, I am in particularly *strong* agreement with several of the observations and claims of the book's first section concerning Rawlsianism. In what follows, I would like to illuminate these points of agreement with Merges, casting them in a somewhat brighter light, as it seems the theoretical ramifications of these observations—namely, the distinction between pre-institutional and post-institutional conceptions of property, the maximizing and consequentialist nature of Rawls's principles of justice, and the role that Rawls principles of justice⁷⁴ play in *defining* a conception of justice may be underappreciated by Merges. Ultimately, I believe they hold a greater significance for his midlevel principles of IP, and his methodology in general, than *Justifying Intellectual Property* may recognize.

For Merges, there is a crucial distinction between Lockean (or natural-rights) conceptions of liberalism and other liberal conceptions of

⁷¹ See *id.* (explaining that midlevel principles exert normative control over legal doctrine).

⁷² See *id.* (Merges offers Rawls's theory of distributive justice among others because he takes such foundations to "best justify the structure of IP law.").

⁷³ See *id.* at 35, 140 (Merges accepts aspects of the Lockean pre-political state of nature—as one that animates his view of IP law.).

⁷⁴ See JOHN RAWLS, A THEORY OF JUSTICE 302 (1971) ("First Principle: Each person is to have an equal right to the most extensive total system of basic liberties compatible with a similar system of liberty for all. Second Principle: Social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged ['the difference principle'] . . . and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.").

liberalism: namely, the distinction between *pre*-⁷⁵ and *post*-institutional conceptions of property.⁷⁶ For pre-institutional liberals, fundamental economic concepts, including aspects of IP, are conceived of as normatively prior to political institutions. For such pre-institutional theorists, there is neither a *normative* nor a *conceptual* demand for political institutions in defining the property rights and economic liberties that turn upon them—such theories instead engage the backward looking (pre-political) notions of desert and entitlement in defining property rights.⁷⁷

Post-institutional liberals, on the other hand, maintain that political and legal institutions play a *necessary* role in defining the details of economic arrangements.⁷⁸ Political institutions and the distributive principles that define them are taken to be normatively and conceptually *required* in the construction of basic economic concepts.⁷⁹ Absent the institutional instantiation of such principles, morality and justice are simply silent on matters of property as well as any rights derivative of the instrumentalist conception of property.⁸⁰ So, here, property and economic institutions are designed in service to distributive principles, but pre-political morality is—in the first instance—agnostic with regard to the actual content of such principles.⁸¹ For Rawls, for example, the pre-institutional values of

⁷⁵ MERGES, *supra* note 1, at 35 (“Locke argu[es] that on the basis of this *prepolitical* [property] right to individual appropriation, people come together to form governments.” (emphasis added)).

⁷⁶ *Id.* at 95 (describing the post-political account of property and IP rights as “not really conceivable without a state, so they cannot in any sense precede the state, at least not in their final, mature form”).

⁷⁷ See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 149–51 (1974) (stating his view that “a distribution is just if everyone is entitled to the holdings they possess under the distribution,” and contrasting this view with a statist or redistributive account, while making no mention of the state’s playing a role in a distribution he deems just); see also A. JOHN SIMMONS, THE LOCKEAN THEORY OF RIGHTS 223 (1992) (expressing the Lockean principle that “labor in creating or improving a thing gives one special claim to it”).

⁷⁸ See RAWLS, *supra* note 76, at 10 (“[W]hat properly belongs to a person and . . . what is due to him . . . [are] very often derived from social institutions and the legitimate expectations to which they give rise.”); *id.* at 311 (“A just scheme . . . satisfies [man’s] legitimate expectations as founded upon social institutions.”); *id.* at 314 (same).

⁷⁹ See *id.* at 11 (“[W]e are not to think of the original [social] contract as one . . . to set up a particular form of government. Rather, the guiding idea is that the principles of justice for the basic structure of society are the object of the original agreement. . . . [T]hose who engage in social cooperation choose together . . . the principles which are to assign basic rights and duties and to *determine* the division of social benefits.” (emphasis added)).

⁸⁰ See *id.* at 12 (“Among the essential features of [the pre-government ‘primitive condition’] is that no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets . . .”).

⁸¹ See *id.* at 313 (“[W]hen just economic arrangements exist, the claims of individuals are properly settled by reference to the rules and precepts . . . which these practices take as relevant. . . . [I]t is incorrect to say that just distributive shares reward individuals according to the [pre-political notion of] moral worth. But what we can say is that . . . a just scheme . . . allots to each what he is entitled to as defined by the scheme itself. The principles of justice for institutions and individuals establish that doing this is fair.”).

freedom and equality that motivate the Original Position⁸² (“O.P.”) are in the first instance silent with regard to the details of economic rights and economic desert, inclusive of IP. Such fundamental values as freedom and equality inform the selection of the principles of justice and therefore guide institutional design, but the details of basic economic matters are *not* normatively primitive. Notions of *economic* desert are constructed, post-institutionally by Rawls’s two principles of justice.⁸³

B. Maximizing, Consequentialist “Foundational” Principles

Next, Merges at various points in his discussion of Rawls and distributive justice acknowledges my second point above, that the two principles of justice are in their *application* both consequentialist and maximizing.⁸⁴ These features of Rawlsianism,⁸⁵ although laudably recognized by Merges, are often and understandably misunderstood in the literature given Rawls’s avowed general commitment to Kantian deontology, even if not in the application of the principles of justice themselves.⁸⁶ Although the values enshrined in the principles of justice, taken in lexical order, reflect the deontological features of the O.P., the principles of justice (themselves) once adopted function as consequentialist maximizing principles in selecting between competing *complete* schemes of legal and political institutions, including all economic and property constructions. The principles (themselves) are *forward-looking*.⁸⁷ They evaluate (complete) competing legal and political schemes in a purely *outcome* based manner.⁸⁸ They evaluate such schemes in terms of the *quality of life* (as measured in terms of an *objective* index of *primary goods*) that citizens living under different schemes may reasonably

⁸² See *id.* at 17–22 (describing “the original position [(“O.P.”)] as the appropriate initial status quo which insures the fundamental agreements reached in it are fair”). The O.P. is Rawls’s idealized social choice scenario in which representatives select political and economic principles so as to maximize their self-interest under less than perfect knowledge conditions from behind a veil of ignorance.

⁸³ See *id.* at 313.

⁸⁴ MERGES, *supra* note 1, at 104 (“Rawls’s specific formulation [of the economic component of the second principle of justice] is often described as the ‘maximin’ principle (short for maximizing the minimum): inequalities are tolerated only insofar as they *maximize* the minimum level of support in a society, that is, the support for the least advantaged.” (emphasis added)).

⁸⁵ See Thomas W. Pogge, *Three Problems with Contractarian-Consequentialist Ways of Assessing Social Institutions*, 12 SOC. PHIL. & POL’Y, June 1995, at 241, 244 (evaluating justice of institutional schemes as “a function of the quality of the individual lives (Q_i) each tends to produce”).

⁸⁶ MERGES, *supra* note 1, at 104 (“[Rawls’s] system of thought begins with a Kantian focus on the rights of each individual, but then integrates this with an emphasis on the . . . *distribution of resources*.” (emphasis added)).

⁸⁷ See *id.* at 107 (“Rawls starts with egalitarian fairness and adjusts for property rights, in contrast to Locke and Kant who (roughly speaking) begin with property and then adjust for collective fairness.”).

⁸⁸ *Id.*

expect.⁸⁹ The principles of justice are indifferent, for example, to all “backward looking” moral concern (i.e., how it is that results have come about—whether through luck or desert). In this sense, the principles of justice are *consequentialist*.⁹⁰

C. *Distributive Principles Defining Justice and Ownership*

These two features of Rawlsianism lead naturally into my third point above, which is also consistent with Merges, namely, that moving forward from the O.P., Rawls’s two principles of justice are, as a matter of pure procedural justice, *definitive* of the post-institutional *conception* of justice, including all economic and property oriented claims.⁹¹ This feature of Rawlsianism renders the inner workings of the Rawlsian legal and political scheme immune to objections of *injustice* or *unfairness* rooted in pre-institutional or exogenous free-floating notions of fairness, or pre-political claims of economic desert. Such objections to the political and legal institutions constructed in service to the principles of justice grounded in *pre-institutional* conceptions of justice are rendered either incoherent or irrelevant. The two principles of justice define a conception of justice.

IV. DISTRIBUTIVE PRINCIPLES AND MIDDLELEVEL PRINCIPLES OF IP LAW

A. *The Incompatibility*

My claim is that the Rawlsian post-institutional conception of justice has little conceptual space for principled commitment to concepts embodied in any alternative approach to liberalism. This incompatibility, in my view, derives from these important, although *often underappreciated* features of Rawlsianism. Rawlsianism appears to stand in sharp contrast to the middle position Merges develops; there is a fundamental *incompatibility* between the Rawlsian, post-institutional, maximizing conception of distributive justice and any independent or free-standing midlevel principles of IP law of the kind Merges articulates and defends.⁹²

I have elsewhere articulated what I take to be the proper “Rawlsian” view of private law (e.g., bankruptcy, property, contract, tort, and private

⁸⁹ See *id.* (“It follows that the fruits or proceeds from these lucky endowments are fair game for redistribution under Rawls’s second principle. . . . So unless the proceeds from a lucky endowment happen to help the destitute, those proceeds can be taken and given away to people in greater need.”).

⁹⁰ See Pogge, *supra* note 85, at 244 (clearly elucidating these consequentialist and forward-looking aspects of Rawls’s two principles of justice).

⁹¹ *Id.* at 102–03 (“[T]he starting point for discussion [of Rawls’s work] is not fairness *within* the institution of property, but the fairness *of* property itself, considered in its overall social and economic context. For Rawls, the key question is whether, and to what extent, the very existence of private property promotes a fair distribution . . .”).

⁹² See *id.* at 11, 140.

ordering),⁹³ maintaining that the maximizing (though non-utilitarian) post-institutional aspects of the Rawlsian conception of liberalism render it *incompatible* with competing, pre-institutional accounts of liberalism and their respective, free-standing or independent, conceptions of the private law (e.g., the *ex post* conception of contract⁹⁴ or the corrective justice conception of tort⁹⁵)—these strike me as analogous to what Merges describes as midlevel principles.⁹⁶ Merges acknowledges this work on private law “discussing Rawls’s two principles of justice and how they apply to private associations.”⁹⁷ But, he appears not to push the point to its logical conclusion: that there is a principled conflict between the alternative sets of values, implicit in his midlevel principles and the values he takes to serve as the foundations of IP law.

Merges is certainly correct that IP law undoubtedly has a very significant impact on maximizing the position of the least well off, in terms of the distribution of primary goods—correspondingly, IP law ought to be understood, for Rawls, as being subject to the two principles of justice. In this, Merges and I are in nearly complete agreement. Given the above incompatibility, however, Merges must either concede that his midlevel principles of IP, invoking notions of pre-political economic desert and property claims, can be accommodated as *only* a matter of functional overlap (i.e., empirical frequency) with the demands of the overarching distributive principles, or counter-intuitively, abandon these commitments and his commitment to midlevel principles. Since such principles are maximizing, it is unlikely, then, that there is room in the complete constructed scheme for a set of (deontic) midlevel constraints, for example, the principle of proportionality, embodying the values of fairness and economic desert.

Further, Merges’s midlevel principles (e.g., proportionality and

⁹³ E.g., Kevin A. Kordana & David H. Blankfein Tabachnick, *The Rawlsian View of Private Ordering*, 25 SOC. PHIL. & POL’Y, July 2008, at 288, 306–07 (arguing that “[d]espite the ambiguity in the Rawlsian texts, the right to freedom of association for Rawls is not . . . a basic right” and that “the proper role of property in the Rawlsian scheme” resolves such ambiguity); Kevin A. Kordana & David H. Tabachnick, *Rawls and Contract Law*, 73 GEO. WASH. L. REV. 598, 632 (2005) (arguing that “Rawlsianism is [not] silent on matters of contract and private ordering, as has conventionally and historically been maintained”).

⁹⁴ See, e.g., CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 1 (1981) (arguing that “[t]he promise principle . . . is the moral basis of contract law”).

⁹⁵ See, e.g., Stephen R. Perry, *On the Relationship Between Corrective and Distributive Justice*, in OXFORD ESSAYS IN JURISPRUDENCE 237–38 (Jeremy Horder ed., 4th ed. 2000) (examining the conceptual and normative relationship between corrective and distributive justice); Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 FORDHAM L. REV. 1811, 1811 (2004) (arguing that “implicit in Rawls’s writing is a powerful and persuasive account of the normative significance of tort law and corrective justice”).

⁹⁶ MERGES, *supra* note 1, at 139.

⁹⁷ *Id.* at 379 (citing Kordana & Blankfein Tabachnick, *The Rawlsian View of Private Ordering*, *supra* note 93, at 288).

nonremoval) conceptually require property baselines in making their normative assessments (i.e., the background conditions of ownership which define the terms of any reference to a commons or private property). The Rawlsian position, however, is that, strictly speaking, *all* significant economic constructions are understood as second principle of justice matters, maximizing the position of the least well-off.⁹⁸ Given, as I say, that principles of proportionality and nonremoval require relevant moralized property baselines and must, therefore, be largely constructed as second principle matters, maximizing the position of the least well-off, it would appear then that Merges's midlevel principles must yield to the overarching distributive principles. This is a demand that I am not certain Merges's appeal to foundational pluralism can escape.

Return now to IP; given that all legal institutions must be constructed instrumentally in answer to the *maximizing* demands of the principles of justice, such legal institutions are by definition *distributive* in nature. The point is simply that all legal rules for Rawlsianism are selected because of their (instrumental) role in the *overall* set of political and legal institutions that maximize the position of the least well off, while meeting the demands of the first principle of justice and the opportunity principle in lexical order.⁹⁹

B. *Pre-Institutional Foundations and the Range of Principled Compatibility with Midlevel Principles*

I openly acknowledge, however, that in the context of pre-institutional (non-maximizing) liberalism, where the private law need not answer to overarching *justice* oriented *distributive principles*, my case is not as strong as it is in the context of maximizing post-institutionalism. Here, since the foundational principles are non-maximizing, there may be conceptual space for Merges's midlevel principles. As a normative matter, midlevel principles and foundation do not always peacefully coexist; the compatibility between foundations and midlevel principles is, as one would expect, a function of the *content* of the foundational principles. So, the view Merges articulates is more likely to find a home in the context of pre-institutional Lockean liberalism where independent or midlevel constraints need not yield to maximizing distributive principles.¹⁰⁰ Here I say likely to find a home because, as stated above, the precise role of midlevel principles, whether explanatory, justificatory or both, is left more vague

⁹⁸ *Id.* at 104–05 (stating that the right to hold property, a feature of the first principle of justice, is not necessarily in line with the principle of fairness).

⁹⁹ *Id.* at 104.

¹⁰⁰ See Kevin A. Kordana & David H. Tabachnick, *Taxation, the Private Law and Distributive Justice*, 23 SOC. PHIL. & POL'Y, July 2006, at 142, 154 (analogously discussing the compatibility of independent normative tax policy modules with pre-institutional conceptions of property and justice).

than one might hope, particularly given the significant weight Merges assigns to them.¹⁰¹

V. MERGES'S PLURALISM AND APPLICATION

A. *Pluralism and Midlevel Principles as Public Debate*

Merges's compatibility thesis often appeals to foundational pluralism.¹⁰² His idea is that in the context of IP law, appeals to foundations, interestingly as they are, again, are theoretically and foundationally irrelevant to resolving IP questions.¹⁰³ Regardless of one's foundational commitments, according to Merges, we can engage in public and legal debate through merely the use of *his* midlevel principles.¹⁰⁴ Merges's idea is that midlevel principles of IP are a set of non-foundational values that all, regardless of prior or foundational commitments, can accept as normative principles in IP disputes.¹⁰⁵ While there may be reasons to compromise among the proponents of competing foundational principles, I am not certain that the idea of normative agreement drawn from the idea of an overlapping consensus will ultimately serve Merges's purpose. The extent or range of such empirical regularity or overlap, or whether such overlap exists at all, is unclear. For example, utilitarianism demands a set of legal and economic institutions concerning the details of ownership which the Rawlsian denies—the range of overlap is problematic, as is the normative force of any such *mere* empirical regularity. There remains a problem with normativity.

B. *Application*

My concern with the normative compatibility of competing foundations with midlevel principles may be clear in an applied context. Consider pharmaceuticals and the developing world, a topic important to Merges which he, interestingly, does discuss, in the first instance, contra his view, in terms of foundational values as opposed to midlevel principles.¹⁰⁶ There is debate over the question of the loss of market

¹⁰¹ See *id.* at 141 (stating that “[m]idlevel principles create an overlapping consensus among people with differing beliefs about the ultimate normative foundations of IP law”).

¹⁰² *Id.* at 10; see *id.* at 141 (“My version of [midlevel principles] derives, as many will recognize, from John Rawls’s conception of pluralism in a modern state.”).

¹⁰³ *Id.* at 10–11 (“[Kant and Locke] provide a grounding outside the contours of my field as conventionally practice, one that helps me resolve foundational doubts and get back to work confidently ‘inside’ my field.”).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 104.

¹⁰⁶ See *id.* at 277 (“I have couched the pharmaceutical patent issue in the language of the various foundational theories . . . : Locke, Kant, and Rawls as well as utilitarian theory If I am to stay true to the pluralism I espouse . . . it would seem necessary also to discuss the issue in terms of the midlevel

freedom in the developing world caused by the strength—in duration of time—of monopolistic patents protecting pharmaceutical innovation. It is thought that patents are required so that investors and creators are compensated for their energies and investment in research and development; a market-limiting rule (i.e., patent) that disallows the creation of generic pharmaceuticals is required for pharmaceutical research and development to proceed.¹⁰⁷ There is a tradeoff between the deservingness and (*ex ante*) incentives of investors and creators and the loss of freedom allowed in artificially blocking win-win transactions between poor generic pharmaceutical-consumers and would-be producers of cheaper generic medications. That is, there is a tradeoff between the loss of freedom (and its associated economic deadweight loss) involved in barring hypothetical win-win pharmaceutical sales that would move forward under a less restrictive IP regime at prices between marginal cost and the very high patent (monopolistic) price, and the economic demands of creators and investors.¹⁰⁸

The Rawlsian, given the demand for maximizing the position of the least well-off, will, at the level of theory and operation, hold a position with regard to IP which is quite distinct from the utilitarian, maximizing net aggregate welfare. This would present itself as a debate over the length of the time-component of patents (for Rawlsians shorter, than for, say, Lockeans and utilitarians). The Rawlsian will have *no* tolerance for the *proportionality* metric of the above described trade-off required by the utilitarian or the Lockean. The differing principles *require* or demand a differing *proportionality*, in this regard. An appeal to the free-floating midlevel principle of proportionality will not resolve the matter, nor does it obviously appear in any overlap of the application of the principles.¹⁰⁹

principles of IP law.”). But, this way of laying things out—starting with a foundational account of patent and then reverse engineering the fit of midlevel principles—runs strongly counter to Merges’s avowed methodology and raises serious questions concerning the contours of his approach.

¹⁰⁷ See Pogge, Rimmer & Rubenstein, *supra* note 4, at 145 (providing a lucid account of the ostensive rational for pharmaceutical patents, but objecting that such rational is not, in fact, justificatory).

¹⁰⁸ *Id.*

¹⁰⁹ The conflict may well be greater than this dispute over patent duration. Rawlsian philosopher Thomas Pogge, for example, maintains that principles of justice require a significant abandonment of the (monopolistic) patent system in favor of what he describes as a Health Impact Fund, based largely, instead, upon a system of tax and transfer: “If rich countries and their citizens desire medical innovation, then they must find ways of funding it that either leave the [market] freedom of the poor unreduced or else adequately compensate the poor for the loss of freedom imposed upon them [via monopolistic patents].” *Id.*, at 145. The point is that differing foundational values may require differing property approaches that do not lend themselves to the type of overlap Merges’s pluralistic account may require or that his midlevel principles would address.

VI. CONCLUSION

In this Review, I have attempted to explain, analyze, and, at times, critique Merges's view of foundational normative principles of property and their relationship to what he describes as midlevel principles of IP law. I embrace Merges's view that IP law must be informed of normative theory. I am less certain, however, of the compatibility between the plurality of foundational theories and the midlevel principles he espouses. I have raised reservations about the normative role Merges's midlevel principles might play, given his views of their independence of foundations. These concerns are strongest in the context of maximizing distributive theories such as Rawlsianism. I have also questioned whether or not Merges's midlevel principles actually play the doctrinal role he assigns to them.

Despite these concerns, *Justifying Intellectual Property* is a theoretically sophisticated work that defends a powerful and, for many, desirable middle-ground thesis. The book fills a void in the theoretical work on IP law and provides a much needed, careful, philosophically insightful and reliable account of foundational property theories, which are enormously helpful to those with IP law interests. *Justifying Intellectual Property* has and will continue to spark reinvigorated interest in work at the intersection of property theory and IP law, in legal method, and on questions concerning the role midlevel principles play in the private law.