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Legal Method Patents and the Rights of the Public

R. Blake Stone

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* J.D. Candidate 2012, University of Georgia School of Law.
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I. INTRODUCTION

Famously one of two Constitutional concepts that justifies its own existence, the patent system is built into the very fabric of our national charter.¹ The Constitution embraces the concept of intellectual property in order “[t]o promote the Progress of Science and useful Arts” and provides for its protection “by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”² While the Founding Fathers are to be praised for their economy of language, over two centuries of development—philosophical, linguistic, technological—have called into question both the meaning and the grounds of this exhortation.

In the past decade, a momentous new development in patent practice has appeared: legal method patents. As an offshoot of business method patents, legal methods were previously not considered to be patentable subject matter. However, the landmark decision in State Street Bank & Trust Co. v. Signature Financial Group, Inc. firmly rejected the business method patent exemption, thus opening the door for a new breed of intellectual property.³ In some sense this development should not be surprising, and could be seen as a predictable accretion to previously patentable subject matter and a natural result of our transformation into a service-oriented economy. Legal method patents, by that account, are “evolutionary rather than revolutionary.”⁴ While that may be true, the rapidity of that evolution, coupled with a sense of the idiosyncrasy of legal methods, has provoked no small amount of consternation in the commentariat.

And so legal method patents have been attacked from all sides. Detractors contend that such patents are not “inventions” for purposes of statutory inclusion,⁵ that their issuance is fundamentally at odds with tax policy,⁶ that the incentive-based rationale for patents is not implicated in the development of legal methods,⁷ and that the existence of such patents may inhibit an

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¹ U.S. CONsT. art. I § 8, cl. 8. The other, of course, is the Second Amendment’s rationale for the right to bear arms.
² Id.
³ 149 F.3d 1368 (Fed. Cir. 1998).
individual’s right of access to the law. Those affected by this subject matter expansion, at this point primarily tax practitioners, are strongly opposed. Critics of the current regime include the American Institute of CPAs, the American College of Trust and Estate Counsel, both Barack Obama and Bobby Jindal, the American Bar Association Section of Taxation, and a legion of law professors and attorneys.

It is neither within the scope of this Note nor the realm of the author’s ability to fully contend with the depth and breadth of the arguments presented by such a coalition. However, this Note does intend to consider at length one particular contention utilized by the opponents of legal method patents. Sometimes addressed directly, but quite often lingering in the corners of a thesis is the suggestion that the issuance of legal method patents heralds grave consequences for the rights of the public, particularly their right of access to the law and due process. The presumption is that a taxpayer (or a criminal, or a businessman) might be prohibited from exercising his legal rights as a result of another entity’s monopoly over a particular legal mechanism. While this argument potentially has merit in some distinctive circumstances (especially, say, in the context of a criminal trial), within the framework of the current patent regime there is no reason to believe that granting monopolies over legal methods will, as a rule, negatively affect people’s rights—constitutional, natural, or otherwise.

This Note contends that legal method patents are not inherently violative of due process or other guaranteed rights. This Note will discuss legal principles that underscore this conclusion, but the focus will be on arguments deriving from policy considerations. Part II will establish the background in which the problem arises by examining case law that opened up the possibility of legal method patents. It will provide an overview of the current state of such

9 Schwartz, supra note 5, at 348.
11 Id.
13 To amend title 35, United States Code, to limit damages and other remedies with respect to patents for tax planning methods, H.R. 2365, 110th Cong. (1st Sess. 2007).
15 See Schwartz, supra note 5, at 371; Beale, supra note 6, at 147.
patents, and discuss some legislative and administrative activity that has resulted from their arrival. Arguments against the existence of legal method patents, along with their respective legal and philosophical underpinnings, will be presented in Part II.

Part III of this Note will briefly address some of the popular arguments against legal method patents, in order to give rise to at least the possibility of validity in the face of non-rights-oriented criticism. Part III will also more fully respond to the arguments arising from due process and rights-based concerns, first through the lens of legal reasoning and interpretation, and then by examining the underlying policy considerations in determining the desirability of legal method patents. Part IV will summarize the status quo and argue that allowing legal method patents will not necessarily deprive the citizenry of essential rights. Moreover, the section will contend that legal methods stand to receive the same benefits as other areas of human activity from their inclusion in the patent regime.

II. BACKGROUND

A. THE STATE STREET DECISION AND THE EMERGENCE OF BUSINESS METHOD PATENTS

In 1998, the U.S. Court of Appeals for the Federal Circuit decided State Street, effectively preempting decades of jurisprudence regarding what is and is not (and, concomitantly, what should and should not be) patentable. The case arose as a result of a patent assigned to Signature Financial Group, Inc. (Signature) that taught a system for aggregating the assets of various mutual funds into a central pool, thereby allowing more efficient investment of capital. State Street Bank & Trust Co. (State Street) attempted to negotiate with Signature to acquire a license to the patented system. When these negotiations broke down, State Street brought a declaratory judgment action, seeking to have the patent invalidated on grounds of "invalidity, unenforceability, and noninfringement."

Upon review, the U.S. Court of Appeals for the Federal Circuit took issue with essentially all of the holdings of the lower court. First, it rejected the district court's interpretation of the Signature patent as constituting a method,

17 Id. at 1370.
18 Id.
19 Id.
20 Id. passim.
elucidating "‘machine’ claims having ‘means’ clauses may only be reasonably viewed as process claims if there is no supporting structure in the written description that corresponds to the claimed ‘means’ elements." Signature’s patent specifically sets forth a variety of “means,” including a computer processor, storage capacity, and specifically configured logic circuits.

Next, the court rejected the classification of the Signature patent’s subject matter as non-statutory. The federal circuit rejected the “mathematical algorithm/physical transformation” test used by the district court, claiming the “test has little, if any, applicability to determining the presence of statutory subject matter.” In the first place, the court held that the analysis should not hinge on the presence of a mathematical algorithm, which is, at some level, present in “every step-by-step process, be it electronic or chemical or mechanical.” The court declined to directly address the second, “physical transformation” element of the test, simply stating that courts contemplating a claim should not focus on the claim’s subject matter categorization, “but rather on the essential characteristics of the subject matter, in particular, its practical utility.”

Finally, and most importantly here, the court put to rest the “ill-conceived” business method exception that comprised the lower court’s alternative proof of invalidity. The appellate court held that the introduction of Section 103 in the 1952 Patent Act rendered business methods subject to an evaluation for validity commensurate with other processes and methods. The cases the lower court cited in direct support of the proposition were rendered moot by the 1952 Act. In that sense, the expansion of patentable subject matter to include business methods was indeed “evolutionary”—that is, brought about through considered legislative action—and the Federal Circuit’s In re Bilski decision is more an overdue clarification of the operative principle than a landmark break with prior jurisprudence. However, the abundance of post-1952 cases that assumed the continued soundness of the business method exception seems to emphasize the unexpectedness of the “new”

21 Id. at 1371.
22 Id. at 1371–72 (discussing U.S. Patent No. 5,193,056 (filed Mar. 11, 1991)).
23 Id. at 1372.
24 Id. at 1374.
25 Id. (quoting In re Iwahashi, 888 F.2d 1370, 1374 (Fed. Cir. 1989)).
26 Id. at 1375.
27 Id.
28 Id.
29 Id.
interpretation, and this clarification did indeed usher in a new line of thought on patentable subject matter.

B. EXTENDING THE DOCTRINE: LEGAL METHOD PATENTS

The United States Patent and Trademark Office (USPTO), as bureaucratic agencies are wont to do, responded positively to this extension of their powers. Following State Street, the USPTO began freely issuing previously unimaginable patents, such as the nigh-infamous “1-click” checkout method patented by Amazon. Then, in 2003, the USPTO unilaterally expanded the scope of business method patents and issued the first-ever legal method patent. The patented invention was designed to “provide a means by which a holder of nonqualified stock options may transfer the value of the options to family members with minimum transfer tax liability.” The end result is the creation of a Stock Option Grantor Retained Annuity Trust (SOGRAP). State Street did not address the validity—or lack thereof—of legal method patents, but its blanket acceptance of business method patents in general (provided, of course, they met the standard requirements for patent validity), paved the way for the inclusion of legal methods. Here again, one can discern a natural, predictable evolution, an expansion, of the scope of patentable subject matter. Once again, as in the case with business method patents, this was not a gradual process, but quite sudden. The rapidity of these significant shifts in patent policy, however predictable or natural, caught many off guard, and a pushback of sorts began.

C. GOVERNMENT INTERVENTION

Just over a year after State Street was decided, Congress passed legislation providing new rights to those accused of infringing the newly allowed business

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34 Id.
35 Id. The term “SOGRAP” is also a trademark of the assignee.
37 Gruner, supra note 4.
method patents. The law provides parties using the patented business method prior to the patent’s issuance a complete defense against charges of infringement. The expansion of the patent regime was no longer going unchecked.

Following the issuance of legal method patents by the USPTO, a similar backlash began, although to less significant results. On February 17, 2007, a bill was introduced to limit access to tax shelters and contained, as one of its provisions, a ban on patenting tax shelters. On May 17, 2007, a bill very similar to 35 U.S.C. § 273 was introduced, seeking to limit liability for those infringing on patents for tax strategies. Most recently, in March of 2009, matching bills were presented in each house of Congress that closely resembled the proposed the “Stop Tax Haven Abuse Act” presented in February 2007. All of these bills have enjoyed some measure of support in the legislative process, though none have been passed into law.

The Internal Revenue Service has also sought to provide some sort of framework for managing these new patents. In 2007, the IRS proposed requiring disclosure of the use of patented tax strategies. Enhanced oversight capabilities such as these may do more than grant government agencies a window into the patents’ usage: they could create a chilling effect through the specter of an audit. The regulations proposed by the IRS, like the legal method-specific bills presented in Congress, have not yet achieved any success, and the fate of legal method patents has largely been left in the hands of the courts.

D. AFFIRMATION: THE BILSKI DECISION

Those hoping for the judiciary to roll back patent subject matter expansion were sorely disappointed when the Supreme Court decided Bilski in the summer of 2010. The case centers on the denial of a patent teaching a method of

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39 Id. § 273(b)(1).
41 To amend title 35, United States Code, to limit damages and other remedies with respect to patents for tax planning methods, H.R. 2365, 110th Cong. (2007).
hedging the risk of price volatility. Specifically, the patent’s claims refer to hedging risk in energy commodities, although the techniques used therein could theoretically apply to virtually any sufficiently sophisticated market.

1. Rejection of the “Machine-or-Transformation” Test. In denying the validity of the patent, the Federal Circuit rejected the “useful, concrete and tangible result” analysis it relied on in State Street, and instead relied on the “machine-or-transformation” test, laid out by the Supreme Court in Benson. The Supreme Court rejected this test as the sole determinant for process patent eligibility. The Court frowned upon the restrictive interpretation of the machine-or-transformation test, repeating their admonition that courts “should not read into the patent laws limitations and conditions which the legislature has not expressed.” Further, the Court reminded us that, under basic tenets of statutory construction, words are to be interpreted as possessing their “ordinary, contemporary, common meaning.” The term “process” is explicitly defined in the Patent Act as a “process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material.” Therefore, the Court determined, there is no reason to require a proposed patent’s compliance with the machine-or-transformation test in order to be correctly categorized as a “process.” The machine-or-transformation test is “a useful and important clue, an investigative tool . . . not the sole test for deciding whether an invention is a patent-eligible ‘process.’”

2. An Expansive and Inclusive View of the Patent Regime. Justice Kennedy, writing here without the backing of a majority, went on to elucidate the policy advantages secured by an expansive interpretation of process patent validity. The Industrial Age has passed; a sizable portion of today’s innovations are not physical or tangible, and represent such diverse and important endeavors such as “software, advanced diagnostic medicine techniques, and inventions based on linear programming, data compression, and the manipulation of digital signals.” Amicus briefs cited by Justice Kennedy stressed the research and development costs required to fund advancements in their respective industries.

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46 Id. at 3223–24.
47 Id. at 3231.
48 In re Bilski, 545 F.3d 943, 954 (Fed. Cir. 2008) (citing Gottschalk v. Benson, 450 U.S. 175 (1981)).
50 Id. (quoting Diamond v. Diehr, 450 U.S. 175, 182 (1981)).
51 Id.
52 35 U.S.C. § 100(b) (2010).
53 Bilski, 130 S. Ct. at 3226.
54 Id. at 3227.
55 Id.
thus implicating the necessity of securing limited monopoly rights in order to reward and encourage innovation.\textsuperscript{56}

Justice Kennedy declined to comment on the suitability of these particular enumerated fields for patent protection.\textsuperscript{57} Indeed, he even acknowledged the forthcoming difficulties as our patent system is in effect expanded to encompass esoteric and unforeseen modes of development.\textsuperscript{58} However, such quandaries are not to be seen as a reason to limit prima facie the breadth of patent protection. The heart of the Patent Act, Section 101, is to be viewed as a “dynamic provision designed to encompass new and unforeseen inventions.”\textsuperscript{59} The cutting edge of patentable subject matter, as a rule, borders greenfields. “A categorical rule denying patent protection for ‘inventions in areas not contemplated by Congress ... would frustrate the purposes of the patent law.’”\textsuperscript{60} It is worth stressing that this interpretation is not an expansion of patentable subject matter to all far-flung, unanticipated dominions. Rather, it is a charge to draw the metes and bounds of validity through reference to the limitations laid out in the Patent Act, and not “to impose other limitations that are inconsistent with the text and the statute’s purpose and design.”\textsuperscript{61}

3. Treatment of Business Method Patents. The Court specifically addresses and affirms the validity of business method patents, basing its reasoning on grounds similar to the expansive view of process patent validity discussed above. The Court has already established that “categories of inventions or discoveries that are eligible for protection” are to be afforded the full scope allowed to them by the Patent Act.\textsuperscript{62} Business method patents are therefore incorporated within the Act since “[t]he Court is unaware of any argument that the ‘ordinary, contemporary, common meaning’ of ‘method’ excludes business methods.”\textsuperscript{63}

Furthermore, 35 U.S.C. § 273, limiting liability for some business method patent infringers, represents a clear acknowledgement and acceptance of the existence of business method patents by Congress.\textsuperscript{64} \textit{State Street} held that the


\textsuperscript{57} Id., 130 S. Ct. at 3228.

\textsuperscript{58} Id.

\textsuperscript{59} Id. at 3227 (quoting J.E.M. Ag. Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc., 534 U.S. 124, 135 (2001)).

\textsuperscript{60} Id. (quoting Diamond v. Chakrabarty, 447 U.S. 303, 315 (1980)).

\textsuperscript{61} Id. at 3226.

\textsuperscript{62} Id. at 3225.

\textsuperscript{63} Id. at 3228 (quoting Diamond v. Diehr, 450 U.S. 175, 182 (1981)).

\textsuperscript{64} Id. at 3228–29.
business method exception to patentable subject matter was a false doctrine following the passage of the 1952 Patent Act. To hold business method patents not patentable as a rule “would violate the canon against interpreting any statutory provision in a manner that would render another provision superfluous.” Business methods are therefore granted legitimacy by both the legislative and judicial branches.

The Court also discusses the growing relevance of business method patents in the Information Age. Just as with software and medical techniques, business methods’ asomatous nature begets special problems, and, indeed, entire subcategories of the field may represent invalid subject matter. However, “the Patent Act leaves open the possibility that there are at least some processes that can be fairly described as business methods that are within patentable subject matter under § 101.”

4. Bilski’s Legacy. The patent at issue in Bilski, as it turns out, does not fall within this conceptual zone of validity. The Court decided the case on narrow grounds, rejecting the petitioners’ claims on the basis that they attempted to patent abstract ideas, namely the hedging of risk. Bilski will provide some guidance as to what constitutes an acceptable marshalling of abstract ideas into a patentable process, but its primary impact will likely be the resounding affirmation of business method patent validity based on a fairly expansive view of patentable subject matter.

However, though the Court unanimously agreed upon the merits of the case, the validity of business method patents as a rule merely earned the accordence of a narrow majority of five. And some of the most exuberant language regarding the expansive scope of subject matter validity failed to acquire a majority opinion at all. Justice Stevens’s concurrence takes direct issue with these sections. But Justice Scalia, whose abstention from these sections denied them majority status, declines to establish which aspect (or aspects) of them he finds disagreeable. It is worth noting that Justice Scalia, at oral argument “closely questioned the patentee’s lawyer on the history of

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66 Bilski, 130 S. Ct. at 3228 (citing Corley v. United States, 129 S. Ct. 1558, 1566 (2009)).
67 Id. at 3227.
68 Id. at 3227–28.
69 Id. at 3229.
70 Id. at 3229–30.
71 Part II-B-2 and II-C-2, tracing innovation’s arc through history.
72 Id. at 3227–30.
73 Id. at 3231–57 (Stevens, J., concurring).
business method patents,\textsuperscript{74} the focus of the sections with which he declined to join.

It is of particular importance to this Note that the Supreme Court's decision in \textit{Bilski} refrains entirely from discussing patents on legal methods. The lower court acknowledges their existence, but only in combination with other intangibles, such as "organizational relationships," "business risks," and "arbitration methods."\textsuperscript{75} There are certainly differences between the specific (legal method patents) and the general (business method patents). These are differences the Court would have been strained to address within the context of \textit{Bilski}. However, by declining to discuss or articulate the distinctiveness of legal method patents, the Court leaves open at least the possibility of their validity within the confines of the \textit{Bilski} decision. This Note will proceed from a presumption of this validity, and address concerns specific to legal method patents in order to more fully justify their existence.\textsuperscript{76}

E. THE STATUS QUO: TAX STRATEGY PATENTS AND THEIR CRITICS

Since the initial SOGRAT patent was granted in 2003, patents on legal methods have become quite favored, with 117 issued and 151 pending as of September 2010.\textsuperscript{77} The USPTO has fully embraced the new paradigm, going so far as to create a specific category for tax strategy patents: U.S. Patent Classification 705/36T.\textsuperscript{78} And while no court has had the opportunity to specifically rule on their validity, at least one lawsuit has been brought seeking to enforce the assignee's monopoly right.\textsuperscript{79}

So far legal method patents have been granted only to patents that teach a specific subcategory of such methods: tax strategies. Other legal methods, such as, say, a novel criminal defense system or a particular corporate structure


\textsuperscript{75} \textit{In re Bilski}, 545 F.3d 943, 962, 1010 (Fed. Cir. 2008).

\textsuperscript{76} This presumption of validity is in keeping with patent law generally, as 35 U.S.C. § 282 maintains that "[a] patent shall be presumed valid." Legal methods, at this point a fait accompli, should thereby enjoy this presumption.


\textsuperscript{79} Wealth Transfer Group v. Rowe, No. 3:06CV00024 (D. Conn. filed January 6, 2006). The suit sprang from none other than the very first legal method patent issued. The suit was eventually settled "based on a presumption of validity." \textit{See} Beale, supra note 6, at 110.
scheme, have not been permitted by the Patent Office. For this reason, this Note will accord special importance to the issues surrounding tax strategy patents specifically. Also, in both theory and effect, there are many important differences between the patents covering tax strategies and patents covering other especial legal methods, such as those concerning criminal defense. These differences will be introduced and analyzed along with the various policy implications arising therefrom.

1. Are Legal Methods “Inventions”? As previously mentioned, most critics of legal method patents have acknowledged the authority of the Patent Office to award them, and instead direct their attacks toward the resultant policy implications.80 Andrew Schwartz, an attorney at Wachtell, Lipton, Rosen & Katz, takes a more direct approach, suggesting “the Patent Office has acted beyond the scope of its power by granting legal method patents.”81 Schwartz adduces many of the common arguments against such patents, but his central thesis is that legal method patents are not “inventions” per Section 101 of the Patent Act.82 Because “the Supreme Court has consistently construed the term ‘invention’ to mean something that utilizes or harnesses laws of nature for human benefit,” legal methods, which utilize the “laws of man,” are not covered under the patent regime.83 Schwartz also denies the title of “patentable invention” to legal methods on policy grounds, primarily on the grounds that they do not incentivize development and that they cannot be kept secret.84

2. Are Tax Strategy Patents Inconsistent with Tax Policy? Linda M. Beale, Professor of Law at Wayne State University, takes a different tack, arguing that the granting of legal method patents in the form of tax strategy patents is inconsistent with the goals of our taxation system.85 Should the Patent Office continue to grant these effective monopolies, it will “become an enabler of promoters of tax shelters,” a phenomenon whose impact the Internal Revenue Service is trying to limit.86 Even if the patents do not directly teach controversial or questionable methods of tax avoidance, Beale’s vision of the tax code as “a system of laws that fairly demand sacrifice of the nation’s residents to fund important governmental goals” casts exclusive rights to avoid or minimize these sacrifices in a negative light.87 Essentially, the goals of the

80 Schwartz, supra note 5, at 335.
81 Id.
82 Id. at 366.
83 Id. at 336, 366.
84 Id. at 336, 368–71.
85 Beale, supra note 6.
86 Id. at 130.
87 Id. at 131.
IRS—to raise funds for the effectuation of governance—will be counteracted by the granting of exclusive licenses to minimize contribution. Beale also addresses what she sees as the risk of establishing private monopolies on tax law interpretation, an issue closer to the focus of this Note, and addressed directly in Part III.C.3.88

Robert King, writing in the American Bar Association’s *The Tax Lawyer*, presents a different argument: the vagaries of tax law make it wholly unsuitable for a happy marriage with patent law.89 A core rationale for granting patent rights is to secure the usefulness of the invention to the public after the patentee’s period of exclusive right.90 King points out that “tax laws change very rapidly,” and that “[a]fter a 20-year period, it is possible that most, if not all, of the patented inventions will be impracticable.”91 King contrasts this to the majority of other patentable inventions, which merely become “obsolete,” and may still “achieve the purpose for which [they were] designed.”92

3. Incentivization of Legal Method Development. Other arguments more directly address the concern that incentivization is improperly achieved by granting patents in the legal field. As discussed in the Introduction, our patent system has been, since its very inception, engineered to provide incentives for the development of ideas. Monopolies, which patents effectively provide, by definition create distortions in the marketplace. Even beyond the economic implications, there are valid concerns over the legitimacy of the government providing individuals with an exclusive right over an invention. The idea is to “[draw] a line between the things which are worth to the public the embarrassment of an exclusive patent, and those which are not.”93 Accordingly the law maintains that these ideas must be “useful.”94 The granting of a limited monopoly on inventions’ uses allows for profit (or at least the possibility thereof) by forward-thinking inventors, who have ostensibly sacrificed time and capital in their development.

Starting from the premise that “[t]he benefit of our patent system . . . is the encouragement of innovation,” Ellen P. Aprill, John E. Anderson Professor of Tax Law at Loyola Law School, argues incentives to develop novel tax strategy

88 *Id.* at 134, 135.
89 King, *supra* note 8, at 777.
90 *Id.*
91 *Id.*
92 *Id.*
techniques are not created by their inclusion in the patent regime.\textsuperscript{95} “Developing tax strategies,” Aprill observes, “does not involve the building of plants or elaborate scientific testing or other capital costs for which monopoly protection is required to prompt necessary investment.”\textsuperscript{96}

Beale provides another angle to the incentivization critique (one also covered by Aprill), claiming “tax advisers already have ample incentive to innovate.”\textsuperscript{97} Because the business of tax planning is competitive, more or less efficient, and well-rewarded, there is little reason to grant monopolies to encourage the development of specific practices or maneuvers.\textsuperscript{98}

4. Other Concerns of Tax Practitioners. Several other arguments are plied against this expansion of patentable subject matter, with varying degrees of frequency and passion. Beale questions the ability of the Patent Office’s current staff to adjudge issues relating to tax strategy, and claims they “will not be able to hire . . . sufficient tax attorneys with the breadth and depth of expertise necessary to assess sophisticated tax planning techniques.”\textsuperscript{99} Beale also raises the possibility of a world where a select few tax firms have captured a majority of the relevant outstanding patents and come to an agreement that would require anyone wishing to practice tax law to deal with their syndicate.\textsuperscript{100} Finally, opponents are quick to cite the burden that ensuring patent compliance would place on tax practitioners.\textsuperscript{101}

F. LEGAL METHOD PATENTS AND THE RIGHTS OF THE PUBLIC

1. What Makes these Concerns Different? With the likely exception of Schwartz, the criticisms heretofore discussed largely attack legal method patents from the same perspective as they would were the expansion to cover any sundry area novel to the patent laws. The extension of intellectual property protection to any field could be held contrary to the field’s countervailing policies, or not properly incentivizing, or unduly complex. These arguments do not necessarily hold that there is something fundamentally different about legal method patents; rather, they are simply not in line with the general principles and priorities associated with intellectual property law.

\textsuperscript{95} Aprill, \textit{supra} note 7, at 5.
\textsuperscript{96} \textit{Id.}
\textsuperscript{97} Beale, \textit{supra} note 6, at 144.
\textsuperscript{98} \textit{Id.}
\textsuperscript{99} \textit{Id.} at 131.
\textsuperscript{100} \textit{Id.} at 138.
\textsuperscript{101} \textit{See} AICPA Letter to Leahy, \textit{supra} note 77; Beale, \textit{supra} note 6, at 143; Schwartz, \textit{supra} note 5, at 335.
However, it is quite simple to make the case that legal method patents represent a subject matter wholly different from the areas traditionally covered by intellectual property law. This difference may in fact be indicated by legal method patents' critics' contradictory approaches to their undesirability. The patents are argued to represent both a threat to the nation's tax base and a potential windfall to the IRS.\textsuperscript{102} Tax strategy development is held to be both nonconducive to incentivization and also already sufficiently incentivized.\textsuperscript{103} Though these critics cannot agree as to whether the porridge is too hot or too cold, they all come to the conclusion that it is inedible. It is reasonable to conclude that this inedibility might stem from the very distastefulness associated with granting monopoly rights over aspects of public governance, an argument stemming from the fundamental difference between the respective subject matters.

This argument is so effective because it draws from a deeply held sense that laws operate on a fundamentally different premise than other competing interests that intellectual property concerns. In Schwartz' case, the primary distinctions between law and ordinarily patentable subject matter (including even amorphous processes) is that the law by definition does not provide a meaningful framework on which monopoly rights can reside.\textsuperscript{104} Taking this argument a bit further, as Schwartz hints at, one could reach the conclusion that monopoly rights over legal mechanisms are inappropriate per se, as the public at large has an inherent right in these same mechanisms.\textsuperscript{105} Because of the singular nature of the sovereign, granting exclusive methods of cooperating with its mandates necessarily invites a different analysis than when considering interactions arising solely between private parties. Cordon off formerly legal avenues of compliance implicates policy concerns distinct from those created by patents granting dominion over a better mousetrap.

For the purposes of this Note, the distinction between legal method patents and patents covering any other subject matter can be conceptualized along two different axes. The first, the "breadth," refers to the unusually large ambit of legal methods, and particularly tax strategies. The second axis is the "depth," that is, the peculiarly personal effect of restricting one's ability to and in accordance with the law. The latter of these measures serves as the main focus of the Note, as fundamental rights and due process concerns arise from the fact

\textsuperscript{102} Compare King, supra note 8, at 773, with April, supra note 7, at 7.
\textsuperscript{103} Compare April, supra note 7, at 5, with Beale, supra note 6, at 144.
\textsuperscript{104} Schwartz, supra note 5.
\textsuperscript{105} Id. at 371.
that legal method patents affect interests intrinsic to citizenship and personhood.

2. The Breadth of Tax Strategy Patents. King posits that "[t]ax patents are unique in that they potentially affect a much larger population than most other patents."\(^{106}\) Whereas most patents only limit the potential actions of competitors in the same field, a patent on a tax plan, or, for that matter, a courtroom maneuver, potentially limits the actions of the entire population. King bases the need for a deeper "inquiry into the policy considerations of allowing" tax patents on their "potentially disruptive nature [stemming from] such far reaching implications."\(^{107}\)

3. The Depth of Tax Strategy (and Legal Method) Patents. Aside from the possible uniqueness of the breadth of tax strategy (and other legal method) patents, another, more ominous concern presents itself: their depth. As King puts it, "patenting methods of complying with the tax law raises the issue of whether it is normatively preferable for the government to freely license individuals to prohibit other individuals' access to the tax law."\(^{108}\) King looks to \textit{Veeck v. Southern Building Code Congress International, Inc.}\(^{109}\) a Fifth Circuit decision in which "free access to the laws [represents] a policy 'based on the concept of due process.' "\(^{110}\) In \textit{Veeck}, the court "held that the law of municipalities was not copyrightable, so that copying of codes did not constitute infringement."\(^{111}\) King takes care to deny any distinction between the access to the law (the issue in \textit{Veeck}) and compliance with the law (more to the point here): "The freedom of access to the laws that was protected in \textit{Veeck}, and expressed in the line of Supreme Court cases that \textit{Veeck} depended upon, is utterly meaningless without the concomitant right of an individual to follow those laws."\(^{112}\)

In addition, King advances another argument for why it may violate taxpayers' rights to be constrained by private monopolies on particular methods of compliance. King quotes Judge Learned Hand: "[a]ny one may so arrange his affairs that his taxes shall be as low as possible; he is not bound to choose the pattern which will best pay the Treasury . . ."\(^{113}\) From this King adduces that "the government is wholly without the power to determine the amount of taxes that an individual must pay beyond requiring a compliance with those tax

\(^{106}\) King, \textit{supra} note 8, at 773.
\(^{107}\) \textit{Id.} at 773–74.
\(^{108}\) \textit{Id.} at 775.
\(^{109}\) 293 F.3d 791 (5th Cir. 2002).
\(^{10} \) \textit{Id.} at 799.
\(^{111}\) \textit{Id.}
\(^{112}\) \textit{Id.}
\(^{113}\) \textit{Id.} at 776 (quoting Helvering v. Gregory, 69 F.2d 809, 810 (2d Cir. 1934)).
rules that the government has already promulgated."  

III. ANALYSIS

A. NON-RIGHTS-BASED CONCERNS ABOUT LEGAL METHOD PATENTS

The focus of this Note is to demonstrate that legal method patents are not inherently violative of due process. However, it is worth addressing some of the most common concerns regarding legal method patents if only to establish at least the possibility that they are otherwise acceptable.

1. Legal Methods as 'Inventions.' Schwartz’s argument, that legal methods are not properly characterized as “inventions,” is perhaps the most compelling. Further, it holds by far the most danger for legal method patentability as it attacks not the wisdom or desirability of the policy, but its actual legality. However, Schwartz does leave a few open questions as to why legal method patents are inherently not inventions.

Schwartz freely acknowledges that “something that utilizes or harnesses [the] laws of nature for human benefit qualifies as an ‘invention’ within the meaning of the Patent Act.” He gives as an example a business method employing the Black-Scholes options-pricing model. The SOGRAT method “minimizes transfer tax through the use of grantor-retained annuity trust . . . funded with stock options . . .” It is clear from this brief description that some mathematical algorithm must be employed in order to harness its functionality. So why should this particular type of business method receive less protection from the Patent Office?

Schwartz’s answer is that, while the SOGRAT or any other method of tax patent (or, for that matter, any type of legal method patent) may harness laws of nature in order to provide utility, that utility only exists within the context of man-made laws. So while the proverbial better mousetrap could still presumably provide utility in an anarchic state, a method for complying with the tax code is only useful given the existence of and reliance upon a very specific

114 Id. King considers the payment of license fees to tax strategy patent holders to be effectively equivalent to paying a higher tax rate.
115 Schwartz, supra note 5, at 372.
116 Id.
117 Id. at 346–47.
law. It is possible to think of several patented items whose use lies chiefly within the boundaries of legal compliance: breathalyzers, house arrest bracelets, etc. However, with these examples there are at least conceptual uses that do not rely on a legal system to establish their usefulness.

Schwartz’s approach, though compelling, may be rendered ineffectual after the expansive scope afforded to patentable subject matter in *Bilski*. The Court there recognized that “Congress plainly contemplated that the patent laws would be given wide scope,” and emphasized that there are “three specific exceptions to Section 101’s broad patent-eligibility principles: ‘laws of nature, physical phenomena, and abstract ideas.’” Specifically addressing the potential validity of business method patents, the Court stresses the necessity of interpreting terms using their “ordinary, contemporary, common meaning,” and proclaims the absence of any argument that such an interpretation of “method” in Section 101 excludes business methods. Such inclusive language would presumably encompass legal method patents, which are, after all, a subset of business method patents.

The Court goes on to cite the prior user rights granted by 35 U.S.C. § 273 as evidence that Congress contemplated and approved of the existence of business method patents. Though no legislation specific to tax strategy patents has been passed, the introduction of several bills that contend with their presence is at least some indication that they are regarded as valid. Schwartz’ arguments do bear merit, but it seems that his interpretation of “invention” as specifically excluding legal methods may not be one shared by the Supreme Court or Congress. Moving forward, the other arguments against legal method patents potentially suffer from even more connate fallacies.

2. Consistency with the Nature of Taxation. The argument that tax strategy patents are at odds with the purposes and goals of our tax policies is less holistic, and seems to result more from a particular political-philosophical viewpoint. Of course, one could look at complex and sophisticated tax planning strategies as clawing back the government’s rightful share of revenue, as a rejection of taxpayers’ duties. Congressman Lloyd Doggett, who introduced a bill to ban the patenting of tax shelters, perhaps most concisely sums up this viewpoint, claiming “[o]ur government should not be in the

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118 Interestingly, the “poison pill” of Schwartz’s article’s title could theoretically provide value outside the framework of governmental regulation, at least insofar as it governs private interests, duties, and relationships. Of course, its usefulness would certainly be diminished.


120 *Id.* at 3226 (quoting Diamond v. Diehr, 450 U.S. 175, 182 (1981)).

121 *Id.* at 3228–29.
business of patenting new and inventive ways to bilk the Treasury at the expense of law-abiding taxpayers.” Alternatively, one could see tax planning and its various methodologies as the reservation of an individual's earned income through legal methods. In that sense, the goal of the IRS is not to collect as much money as possible, but rather to collect all money to which it is legally entitled under the limitations set upon it by Congress. Going further, one could claim that leaving capital in the hands of those who seem to be doing the most to preserve and utilize it is not on its face bad for society at large. It may be true that some of the technicalities upon which these strategies operate are unfair to the public, or unwise in their effect on revenue collection. In that case, there is no reason that the oversight, mistake, or loophole cannot be eliminated through the usual channels, leaving the owner of a patent teaching such a method a worthless right. Ruling out entire fields of patent law because they may unfairly capitalize on an unwise construction of other fields of law seems unnecessary. In any case, the channeling of novel, valuable, and unforeseen applications of the tax code through a particular conduit (namely, the Patent Office) would seemingly provide a much greater vantage point from which to spot objectionable tax strategies.

Furthermore, it is unclear why granting monopolies on the use of particular tax strategies would further depress the tax base. Any subsequently discovered ways to reduce tax liability could be locked up by patent, raising entry costs to potentially interested taxpayers and perhaps denying them the use of these strategies altogether. King, no fan of legal method patents, acknowledges this likelihood.

In addition to the increased barriers to entry to potential tax strategists, King introduces the concept of a “patent thicket,” which could conceivably emerge in the tax strategy market. King defines the phenomenon as a “theoretical problem in which multiple overlapping patents cover the same invention, thus retarding the pace of innovation by requiring subsequent innovators to obtain agreements from all the overlapping patent holders in order to move forward with the subsequent invention.” The concept is the logical progression of the simpler argument above, the difference being that barriers to entry are not merely dissuasive but prohibitive (not in the sense that paying one's taxes would become impossible, but in the sense that entire avenues of tax compliance would be foreclosed). Regardless of the boundaries of the theory reached, King

122 Lambert, supra note 44.
123 This viewpoint is elucidated by Judge Learned Hand in Part II.F.3.
124 King, supra note 8, at 772–73.
125 Id. at 772.
126 Id. at 772 n.74.
concludes that tax revenue is unlikely to see a significant drop-off as a result of the allowance of tax strategy patents.\textsuperscript{127} On the pragmatic level, King compares Aprill's testimony before Congress in the run-up to the proposed Patent Reform Act of 2007 to that of the Internal Revenue Service. In contrast to Aprill, "the Service made no effort to assert that patenting tax strategies could lead to [a possible drop in the Service's revenue-collecting capabilities]."\textsuperscript{128} Indeed, King asserts that in the event of a patent thicket developing in certain corners of the tax code, "the Service would most likely be able to collect even more revenue than it currently does."\textsuperscript{129}

King's argument that the rapidly-changing nature of tax law creates a valid distinction between legal method patents and those that develop their utility through the harnessing of natural laws is similarly unavailing. To an extent, this concern echoes those of Schwartz, who sees man-made law as an improper grounding for patentable inventions.\textsuperscript{130} However, King's approach focuses not on the legal validity of the bargain struck between the government and the patentee, but on the likely outcome of the bargain.\textsuperscript{131} Even if we take King's assertion that the patents at their expiration will be largely worthless, the argument focuses unduly on semantic distinctions between the outcomes of the compared subject matters. Whether the invention becomes "obsolete" or "impracticable," the end result is the lack of any value reaped by the public from the publication of the patent's specifications.

Moreover, this argument ignores practical aspects of patent practice, namely the famous admonition that only a small fraction of inventions are capable of covering the cost of the patent.\textsuperscript{132} Unprofitable from their inception, it is hard to see what value the public receives from protecting these patentees' monopoly rights in return for the invention's schematics. And in contrast with a garage tinkerer's quest for a vanity patent, it is reasonable to assume that a top-notch accountant or tax lawyer (that is, one actually capable of producing a nonobvious and useful method of tax compliance) will only spend resources on patenting a valuable development. That the shelf life of its usefulness may not extend past the period of its protection does not differentiate it at all from the

\textsuperscript{127} Id. at 771.
\textsuperscript{128} Id.
\textsuperscript{129} Id. at 772.
\textsuperscript{130} Schwartz, supra note 5.
\textsuperscript{131} King, supra note 8, at 777.
case of the development of a microchip. The inconstancy of tax law and the steadfastness of Moore's Law result in the same outcome.133

3. **Incentivization Provided by Legal Method Patents.** The first point of the incentivization argument against legal method patents, that their development requires no substantial capital outlay that must be protected against the threat of free riders, falls severely short. It is true that the development process of a tax strategy or other legal method is likely to be less capital intensive than, say, producing a new pharmaceutical. It remains true, however, that the opportunity cost of an attorney, at the top of his field and with years of experience, devoting considerable time and energy to the resolution of a very particular question of legal theory, is likely to be meaningful. Regardless, this capital outlay for the purpose of developing certain inventions, while maybe an underlying rationale, is not at all a requirement of our patent system. On the contrary, there is a strong history of accidental yet hugely profitable discovery. "Teflon, nylon, SuperGlue, and mauve" were all the result of "accidental or unexpected" discovery.134

As for the argument that tax advisers are already adequately incentivized to create novel and useful strategies, the fact remains that this is a question of degree. The alternative viewpoint to Beale's is that issuing patents for these strategies would bring the "level of innovation to a more optimal point."135 Beale acknowledges the existence of this line of thinking, but counters it with the need to balance incentive optimization with the supposedly special nature and requirements of the tax regime, as discussed in Part III.A.2.136

4. **Other Non-Rights-Based Arguments.** As for the other arguments against legal method patents mentioned in this Note, there is little reason to look at the problems they present as specific to legal method patents. Rather, they represent problems faced by every aspect of the patent regime. It is undoubted that becoming familiarized with the tax code will be a challenge for the Patent Office's examiners. But while tax law can be arcane and incredibly complex,

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133 Moore's Law refers to Intel co-founder Gordon Moore's famous prediction that the number of components able to be placed on an integrated circuit would double every year (later changed to every two years). *See Happy Birthday: The Tale of a Frivolous Rule of Thumb*, ECONOMIST, Mar. 26, 2005, at 65. The prediction has proven remarkably prescient.

134 Sean B. Seymore, *Serendipity*, 88 N.C. L. REV. 185, 188–89 (2009). Of course, these discoveries did all occur in a laboratory, indicating a significant initial investment. However, by that logic, the expenses of setting up a law firm, of attending law school, and all the sundry expenses that place one in a position to be able to develop legal methods could be included as a capital outlay.


136 Beale, *supra* note 6, at 144.
the same is true for space travel, neurochemistry, and, as has become clear in recent years, exotic financial derivatives. The tax bar may indeed feel that their knowledge is not within the grasp of the Patent Office employee. Rocket scientists, neurosurgeons, and bond traders—all of whose inventions are covered by the same office—likely feel the same.

As to the fear of a band of patent holders requiring tribute to effectively practice tax law, there are several responses to alleviate this concern. Firstly, such an arrangement is likely to be violative of several laws outside the realm of taxation and intellectual property. It would represent a high degree of collusion, and if actually harmful would attract no small amount of attention. Secondly, the effect on the way taxes are paid by the allowance of legal method patents is likely to be small. The patents are only issuable upon a non-obvious, useful, and novel discovery. This is a tall order and such methods are likely to exist at the fringe of tax law, as will other legal method patents should they come into existence.

Beale mentions the possibility that revisions in the tax law might inspire a “race to the Patent Office... in an attempt to corner the patent market... using the new provision.”  However, even these developments, while perhaps useful and by definition novel, still have to be non-obvious. “Non-obvious” here would be in reference to the viewpoint of a reasonably skilled tax adviser, not the drafter who memorialized the imprecise and malleable regulation or statute. Any new “invention” likely to inspire a “race” is probably fairly obvious.

The contention that allowing patents in the realm of tax planning, thus creating compliance costs for accountants and tax lawyers, is perhaps the most easily addressed. While a variety of commentators decry the cost of compliance to practitioners, seldom, if ever, is there given any reason why this cost would be borne disproportionately by the tax industry. It is a given that monopolies, the effective outcome of providing patents, can create deadweight loss. However, patents are justified on the basis that the benefit of knowledge spillover outweighs the cost of allowing artificial scarcity, thereby providing a more efficient allocation of resources in the long term. Absent any explanation why tax patents provoke excessive or extraordinary costs, this criticism is just as easily leveled against the patent system as a whole. Judging solely from the tax practitioners’ perspective, it is certainly suboptimal to check registered patents to see what strategies have been expropriated. However, the proper interest to
take into account when calculating allocative efficiencies generated by patent issuance is society's as a whole.

These objections to legal method patents are far from comprehensive, but they are indicative of the breadth of opinion on the subject, and were represented based on their frequency of use and strength of argument. Hopefully this Note, while maybe not overpowering any one of them, has at least opened up enough doubt in these arguments to justify going into further depth on another, specific objection to the expansion of patentable subject matter.

B. THE VARIABILITY OF LEGAL METHOD PATENTS

Even within the confines of the category of legal method patents, various potential applications possess sharp levels of distinction amongst themselves. For instance, vastly different interests are affected by a patent teaching a method to reduce tax liability on the one hand, and a patent teaching a method to suppress damning evidence in a capital murder trial on the other.\footnote{No patent like the latter has been issued, and it is unlikely that one could. This Note assumes arguendo that such a patent could hurdle the obstacles placed before it by traditional patent law (novelty, non-obviousness, etc.) in order to provide a fuller discussion of the issues surrounding rights-based objections to legal method patents.} Use of the former patent marginally reduces tax exposure for what is likely already a very wealthy beneficiary.\footnote{Gruner, supra note 4, at 66 ("[M]ost if not all of the sorts of tax planning methods that have qualified for patents as yet cover methods that are only helpful to and capable of use by highly affluent individual taxpayers or corporations 
... ").} The latter patent, exercised in a particular circumstance, could protect interests guaranteed by the Constitution, and thereby prevent the erroneous execution of a person.

The theoretical possibility of such an extreme scenario, however unlikely, has tempered the language of this Note. It would be a stretch to say that legal method patents cannot be violative of due process concerns. Instead, one is forced to argue that these patents are not necessarily violative of due process. To that end, this Note focuses on due process concerns kindled by tax strategy patents, the less problematic and grim end of the spectrum. Though this Note concludes that legal method patents, as an entire category, are neither legally prohibited nor practically undesirable, this is not to say that limitations might not be beneficial (or even constitutionally mandated) for certain sub-categories therein. If a line does exist between acceptable and unacceptable legal method patents, it is blurry; as useful and interesting as a granular approach to the
separation of these ideas would be, such an exercise is ultimately outside the scope of this Note.

Much of the consternation behind the emergence of legal method patents has focused on slippery slope arguments, asserting the easy conceptual leap from tax strategies to other legal methods. For example, in Congressional hearings investigating the impact of tax strategy patents, the issue of the expansion of these rights to cover other legal methods became a primary concern.\textsuperscript{141} Congresswoman Stephanie Tubb Jones asked whether lawyers will start “seeking a patent on legal advice for picking a jury, setting up the insanity defense, [and] all kinds of other things that go on in the course of a trial?”\textsuperscript{142} These concerns were waved away by Professor Richard Gruner, the Director of the Center for Intellectual Property Law and Professor of Law at the John Marshall Law School in Chicago. Gruner responded that “the techniques used in the courtroom and legal practice generally are the common techniques.”\textsuperscript{143} Congresswoman Tubb Jones took issue with the factual content of Professor Gruner’s response, but she would have been better served to attack its underinclusiveness. Even if Gruner is correct that the novelty and nonobviousness requirements render most courtroom procedures unpatentable, those elements are not definitively preclusive of any future developments in practice.

C. RIGHTS-BASED CONCERNS ABOUT LEGAL METHOD PATENTS

1. \textit{An Acceptable Breadth}. Pointing to the potentially broad impact of legal strategy ownership perhaps overemphasizes the difference between this and other areas of intellectual property law. After all, the entire population is affected by the issuance of any patent, regardless of the exact field to which it applies. Patents are essentially a bargain between the inventor and the public, and the specificity of the field at issue does not remove certain members of the public from being effective counterparties in the bargain. For instance, not all members of the public are in the business of drilling oil. But anyone who purchases gasoline, or tires, or any of the multitude of existing petroleum products is affected (however marginally) by the issuance of a patent for some new drilling technology. Even those few, if any, who do not purchase these products are affected due to petroleum’s function as a central cog in the global

\textsuperscript{141} King, \textit{supra} note 8, at 770 (citing Hearing on Issues Relating to the Patenting of Tax Advice: Hearing Before the Subcomm. on Select Revenue Measures and the H. Comm. on Ways and means, 109th Cong. (2006)).

\textsuperscript{142} \textit{Id.} at 770 n.67.

\textsuperscript{143} \textit{Id.} at 770–71.
economy. Long term, it is assumed that the technology underlying the patent will reduce the costs of production, thereby lowering the ultimate cost to the consumer. However, depending on exactly how the monopoly right is used, costs could actually rise in the short term. The public at large has an interest in the issuance of any patent, and a balancing test must be applied at all times. That balance is not served by preemptively blocking off whole fields of potential endeavor without the requisite showing of particular utility created by an invention.

Perhaps the argument is limited to an understanding that the costs associated with monopoly rights in the tax strategy context are potentially direct, as opposed to the diffused costs discussed above. So even though not all citizens drill oil, all (or at least an overwhelming amount) of citizens do pay taxes. But while this is true, it is still not the case that an overwhelming amount of citizens pay taxes in a manner likely to be precluded by patents. The standard elements necessary to receive a patent prevent any method commonly used to pay taxes from being restricted from free public use. The strategies covered by patents issued thus far are complex and highly-specific, and do not amount to a “method” of filling out a 1040-EZ with a freshly sharpened pencil. The average user of these types of strategies is not the average taxpayer. These strategies require a starting point of not insignificant resources, both to secure the efforts of experts qualified to construct the strategy and, perhaps even more so, to be positioned so as to benefit from the strategy.

Ultimately, though, the inability to indict tax strategy patents as affecting the entire population in ways fundamentally different from the impact of any other patent class is not grounds for refusing to examine their actual impact on individual members of the public. A broad swath of people need not be disenfranchised in order to declare that disenfranchisement illegal or undesirable. And so it is still necessary to examine the exceptional effects of legal method patents on the individual.

2. The Unique Depth of Legal Method Patents. In addressing King’s concern of whether it is “preferable” to allow tax method patents, it is imperative to examine the reasoning underlying his conclusion, namely the court’s argument in Veeck. While Veeck dealt with “access” to the laws, King asserts that this guaranteed access “is utterly meaningless without the concomitant right of an individual to follow those laws.”144 This makes sense intuitively and follows logically from the holding in Veeck. However, one need not find fault with the linkage of this complementary right in order to recognize that there may be a meaningful difference between the ability to comply with a law and the right to

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144 Id. at 775.
comply with the law in all conceivable fashions. The issuance of a tax strategy patent does not prohibit compliance with the tax code; rather, it forecloses what is by definition a very narrow, specific, and perhaps even arcane method of compliance. “[I]n almost all cases, a patent holder will only control one means of law compliance, not all means of law compliance.”

Imagine, for example, an imaginary law requiring automobiles to be able to travel fifty miles for every gallon of gasoline consumed. A patent claiming all automobiles that achieve such a MPG standard would prevent competitors from complying with the law. It is inconceivable that such a patent would be issued, however, as it would not only be obvious, but also taught by the prior art. However, the development of a new, more efficient engine configuration or a novel aerodynamic body design would most certainly be allowable. Such methods of “complying” with the law are often patented. Likewise, compliance with the sum requirements of tax law is not in any danger of being “owned” by a savvy patentee. Instead specific avenues of compliance, similar to specific automotive developments, would be discovered and patented.

King very briefly anticipates a similar argument. Presumably drawing from language in Veeck that public access to the law cannot “be limited to a minimum availability,” King holds that “the availability of the most obvious and unpatentable manners of compliance with the laws is not enough to guarantee the type of due process envisaged by Veeck . . . .” However, the very narrow question at issue in Veeck, the rightful ownership of the content of a statute, does not lend itself well to such a broad conception of “compliance” as used by King. This is especially true when, as just discussed, particular methods of complying with laws are regularly and unobjectionably patented.

King’s contention that, since the government is without power to require taxes above and beyond the minimum mandated by law, it is thus without power to allow private parties to achieve a similar result also falls flat. Primarily, there is a definite difference between the powers the government possesses and those that it is able to distribute. This distinction can be readily seen in the (unlikely) case of bounty hunters. “[B]ounty hunters are not usually considered state actors . . . . This result is troublesome because it allows bounty hunters to exercise broader powers of search and arrest than police officers . . . . [T]hey

145 Gruner, supra note 4, at 65.
146 King specifically denies the universal applicability of a parallel between patents for complying with environmental regulations and those for complying with the tax code. However, his argument in this regard rests on the allegedly unique nature of tax law, an issue dealt with in Part III.A.2 of this Note.
147 King, supra note 8, at 775 (quoting Veeck v. Southern Building Code Congress International, Inc., 293 F.3d 791, 799 (5th Cir. 2002)).
are not constrained by the constitutional and regulatory safeguards that law enforcement officers must adhere to."\textsuperscript{148}

The end result of bounty hunting, the capture of a fugitive, is certainly just as much an effective equivalent of a standard arrest as is the paying of license fees in lieu of freely practicing a tax strategy. In fact, it is likely even more of an equivalent as the former case actually achieves the government’s objective, whereas licensing fees fail to generate governmental revenue, the purpose of taxes. Admittedly, the law covering bounty hunters is far afield from the issues in play here. However, the comparison bears making because of the magnitude of the “expansion” in governmental powers allowed in that case. If the government has the power to authorize private parties to skirt imperatives derived from no less an authority than the Constitution (namely, among others, the Fourth Amendment), surely we must not dismiss out of hand the government’s “ability to empower patent holders to collect what is effectively additional tax revenue in the form of licensing fees.”\textsuperscript{149}

3. Policy Considerations for Allowing Legal Method Patents. Even if legal method patents are not found to be congenitally illegitimate in the eyes of the law, it is still useful to examine the policy implications of allowing their issuance. After all, even if there is no reason to declare legal method patents invalid under the current law, suitable reasons may exist for curtailing their propagation or effect. Much as in the myriad other arguments arrayed against their promulgation, the essence of determining their desirability is in determining the actual differences between legal method patents and more traditional varieties thereof.

Some basis exists for believing there are separate policy concerns relating to the practice of law as compared to all other concerns. Consider, for example, the case of \textit{Dwyer v. Jung}.\textsuperscript{150} In \textit{Dwyer}, a non-compete agreement was held unenforceable against a partner departing a law firm. While restrictive covenants are generally acceptable, the case holds that “[s]trong public policy considerations preclude their applicability” in the case of lawyers.\textsuperscript{151} This approach is generally followed, though restrictive covenants may still apply to other professionals, such as doctors.\textsuperscript{152} And so, the question is whether access to particular legal maneuvers are such an important concept (as is, apparently,
access to legal counsel of one’s choice) that any restriction thereto runs counter to public policy.

The answer, at least so far as this Note is concerned, is no. Especially with regard to the tax code, there is no immediately obvious reason why public rights to legal methods deserve special protection not afforded to other areas of intellectual property. Our patent system is expansive, and its reach into a field such as life-saving pharmaceuticals presents a much more compelling case for restrictions on its scope. Consider the prostate cancer drug Provenge, a full course of treatment of which costs $93,000.153 It is possible that licensing the rights to use a particular tax strategy could cost more in absolute terms as the amount to be saved is potentially very large. However, it is important to consider the expense of tax strategy patent licensing (however large) relative to the cost of enforcing exclusionary rights. Denial of access (which is the effective result of prohibitive costs) to Provenge, Avastin, Soliris, and other extremely expensive drugs could result in death.154 Even outside the narrow context of saving millionaires a few dollars on their taxes, even in the extreme case of restricting a criminal defendant’s rights to certain defense techniques, it is unclear what interests potentially at issue would be more crucial to the self than free access to a life-saving drug.

Of course, one could make very similar arguments with regard to the distinction presented by Dnyer and Karpinski, two cases which, read as analogues, reach a conclusion opposite to the one presented here.155 The law of restrictive covenants sees fit to differentiate between the law and all other human pursuits. Why, then, should the field of intellectual property reach a different result?

The reason for reaching a different conclusion is presented above, namely, that our patent system restricts rights to interests more fundamental to the concept of the self than those at issue in the case of legal methods. Furthermore, it does this for valid reasons. This is likely true even beyond the best-case scenario (for this Note) wherein the legal methods at issue are effectively represented by tax strategies. In accepting this rationale as sufficient

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155 Karpinski in fact concerned an oral surgeon, but according to the logic of the case it could just as well have been an oncologist. The difference in outcomes between Dnyer and Karpinski results solely from a sense of the singular role that lawyers play in society.
on its own, it is simply enough to say that the application of the rule with respect to restrictive covenants should not be transported to intellectual property. However settled, or even advantageous, the law may be in the former field, it is not necessarily the case that it should therefore be freely transferred to other areas of the law, especially when sound reasons exist for denying the applicability of the law in other fields.

There are still other important distinctions between legal method patents and pharmaceutical drug patents, however. This Note briefly contends that legal method patents (tax strategy patents specifically) may satisfy the incentivization rationale underlying our intellectual property regime. But the conclusion reached comes short of a claim that the rationale applies equally strongly to all conceptions of intellectual property. As previously mentioned, not insubstantial resources may be expended in developing novel and beneficial tax strategies, but, these outlays are still likely to pale in comparison to those necessary to develop effective drugs.\textsuperscript{156} As an example, "[i]t costs around $1.75 billion to develop the average cancer medicine."\textsuperscript{157} Thus, it could be argued that the practice of restricting access to needed drugs, though facially even more repellent than restricting access to legal methods, is a necessary evil accepted to serve the greater public good of providing an incentive to produce these drugs in the first place.

This Note accepts that such an argument is correct, insofar as it goes. However, just because one tenet of intellectual property rationalization exists more strongly for one subset of its domain than another is no reason to deny the application of the rationale in the category vindicated less thoroughly. Inasmuch as there is any incentivization provided by the granting of exclusionary rights at all, it is necessary to weigh the relative costs and benefits of granting these rights in order to adjudge their desirability from a public policy perspective. As noted above, the exact type of legal method patented is likely to have a substantial impact on the patent's legality and desirability. Arguing from the extreme case of a criminal defendant in a capital trial, even if one accepts the proposition that denying cancer patients uninhibited access to pharmaceuticals is more abhorrent than restricting the defendant's rights to certain defensive techniques, it is still a valid contention that incentivization provides a better justification in the context of drug development. However, this argument is unlikely to be equally effective with regards to the entire continuum of imaginable legal method patents.

\textsuperscript{156} See supra Part II.E.3.

Looking at the opposite extreme of tax strategy patents (which, not unimportantly, represent the entirety of legal method patents at the present), a different calculus is in order. While incentivization principles may still weigh more heavily in favor of drug development, the difference between the costs to those excluded (namely, increasing the taxable income of the wealthy compared to denying a sick person drugs needed to live) is enormous. Therefore, it would be improper to say that legal method patents, as a rule, are fundamentally conceptually distinct from pharmaceutical patents with regard to their justification from an incentivization standpoint.

4. Whither “Rights”? Even if one were to accept Dwyer as a proper model for structuring unfettered access to all possible methods of legal compliance, there is an important difference between the rights upheld in that case and those at issue here. The core of Dwyer is expressed in the proposition that “[a] client is always entitled to be represented by counsel of his own choosing.”158 However, this entitlement is not equivalent to an absolute right to the representation. Dwyer paraphrases Abraham Lincoln’s “sage observation” that “[a] lawyer’s time and advice are his stock in trade.”159 Likewise, the “stock” of a patentee, at least in the narrow sense of his exclusionary rights, is the patent itself. The principle of Dwyer is not to require all lawyers to provide their goods and services to whosoever may ask. Rather, it only requires that members of the public not be legally precluded from negotiating in their own best interest for access to those goods and services. The nature of our patent law provides exactly this possibility of access. The public is free to negotiate with the patentee to receive a license for his invention’s use. The fact that a license may be cost-prohibitive is not particularly availing: access to the brightest legal minds is likely to be attended by its own spectacular cost.

In that sense, monopoly rights of a certain sort (that is, so to speak, a monopoly on talent) have always existed in the legal field, much the same as in any other field of human endeavor. Our legal system is constructed to ensure all its participants have access to suitably competent counsel, but it is uncontroversial to say that material differences in ability often exist between attorneys. Whether or not we choose to allow patents on tax strategies or corporate structures or courtroom tactics, the public’s access to certain techniques will necessarily be limited by the quality of their counsel. The requirements of patentability ensure that any developments in the legal field are

158 Dwyer v. Jung, 336 A.2d 498, 500 (N.J. Super. Ct. Ch. Div. 1975). In the case’s sole footnote, the court makes a potential exception in the case of indigency. Id. at n.1. The existence of such an exception is no impediment to this Note’s argument.
159 Id. at 499.
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quite likely to be peculiarly insightful, and only discoverable by those at the top of their field. Accordingly, access to the legal methods capable of being patented is already limited to the privileged few represented by the top tier of legal counsel. The accomplishment of our patent system is that it encourages those who are most capable—those making advances in their chosen art—to bring their inventions forth, so that the public, at least in the future, may share in their utility. Thus, rather than reducing the ability of the public at large to have full dominion over all means of legal compliance, legal method patents may effect the very purpose of patents broadly: a distribution, over time, of the benefits of progress.

There is no reason to believe that the inherently distinctive nature of legal method patents prevents them from being suitable subject matter from a public policy standpoint. Our intellectual property regime protects interests that are at least as crucial to the maintenance of the self as the full command of the tax code. Furthermore, the purposes of the patent system, namely the incentivization to discover and the dedication of the benefit to the public, may certainly be served by the inclusion of legal methods in its domain. But even if it is accepted that their usefulness warrants their existence, it is still possible some measures might be necessary in order to temper their effect.

5. A More Limited Approach to Regulating Legal Method Patents. Though expressing grave concerns over the effects of tax strategy patents, Aprill recognizes the potential difficulty of unringing the bell, and discusses the possibility of “limit[ing] liability for infringing or inducing infringement of such patents.” A handful of approaches to this effect have already been attempted. The rather unique case of medical patents has prompted some successful legislation to achieve a similar result. In 1996, Congress limited liability “[w]ith respect to a medical practitioner’s performance of a medical activity that constitutes an infringement.” Under the law, “the patentee has no remedy, and no injunction, no damages and no attorney fees are available against a medical practitioner who performs [a patented] medical activity.” The arguments marshaled in favor of the law were very similar to those arrayed against the promulgation of legal method patents: restricted access to procedures and a concomitant compromise of patient care, increased financial burdens, and the lack of a need for incentivization in the field. Lee contends

160 Aprill, supra note 7, at 26.
161 See supra Part II.C.
164 Id. at 710.
that “these concerns could have been addressed by strict application of the current laws and administratively rather than through... legislation.” That claim is certainly consistent with the approach taken by this Note, but even if one were to believe that the legislation was necessary in the case of medical processes, it is still not clear that a similar restriction is necessary or advisable as regards legal methods.

In response to the “main thrust of the medical community’s opposition to medical procedure patents,” there is not obviously the same “tradition of free and open exchange of information” in the field of legal methods. Opponents of legal method patents foretell a chilling effect of sorts on the free exchange of innovative techniques. Although, especially with respect to tax strategies, it is unclear to what golden age of free information exchange opponents refer. As Gruner points out, “[a] number of innovators in tax reduction methods have made these methods available to clients only under trade secret restrictions that have limited public dissemination and discussion of these methods.”

Furthermore, the burden of compliance, both in theory and practice would likely be smaller in the case of legal practitioners. Although it would be unfair and inefficient to saddle all attorneys with the responsibility of becoming experts in intellectual property law, it is still true that they are better positioned to do so than doctors. This advantage likely carries over even in the case of accountants, who could presumably comprise a sizable proportion of tax strategy patentees. The purview of tax specialists—the assimilation and manipulation of various aspects of tax law—lends itself more to an understanding of patent restrictions than does that of doctors, whose area of expertise lies in the life sciences.

Furthermore, opponents of legal method patents express concern over the possible burden of “due diligence research on the existence of patents.” Although it is unclear why this restriction would singularly injure legal practitioners compared to other professionals, the real-world consequences of such a requirement would appear more dire in the case of a doctor at the operating table, unsure of whether he was about to transgress intellectual property rights. And so even if one accepts the expediency of Section 287(c), it does not follow that such a policy should be applied to legal method patents. It is unclear what benefits, if any, would accrue to limiting the vigor of enforcement of legal method patents as distinct from other patent varieties.

165 Id.
166 Id.
167 Gruner, supra note 4, at 75.
168 Beale, supra note 6, at 108.
IV. CONCLUSION

Legal method patents do present unique challenges and likely do represent a conceptually distinct classification within patent jurisprudence. However, even as a separate category, these patents can fulfill the roles contemplated by our intellectual property regime. To be sure, in the context of granting exclusionary rights over methods of legal compliance there are important differences between the different conceivable types of legal method patents. Generally, however, the arguments commonly applied against legal method patents are equally applicable (with, perhaps, varying degrees of force) to the lot.

Legal method patents are claimed to be outside the purview of the patent system because they do not qualify as inventions. It is argued that monopolies over legal methods are not necessary to properly incentivize their development. Tax strategy patents, specifically, are alleged to be inconsistent with the purpose of the tax system. There is at least some reason to doubt that these arguments, even taken together, are dispositive of the validity or desirability of legal method patents. In essence, many of these arguments implicate another, potentially more alarming, supposed fault with the patents' existence: the distinctive nature of the legal system calls for a wholly separate analysis in determining the legitimacy of granting dominion over particular applications of its machinery.

The breadth of the legal system, that is, its capacity to affect vast proportions of the populace, is one potential reason to more closely examine the desirability of legal method patents. However, as the nature of the patent system is essentially a bargain between the inventor and the government qua the public, this is true for all patentable subject matters. Even considering that tax strategy ownership may effect a more direct cost on the citizenry (as such a large percentage thereof are actual taxpayers), it remains the case that the narrow applicability of patentable developments means very few individuals will be precluded from partaking in their benefit.

The other aspect of legal method patents that potentially distinguishes them from other patentable subject matters is the natural rights and legal guarantees concerning an individual’s access to the law. Even if one considers legal method patents as granting exclusive rights over compliance with the law (as opposed to say, a particular method of structuring investments that merely reaps the benefits of our tax law), there is an important distinction between an individual’s fundamental right to be able to comply with the law and a supposed right to comply with the law in all conceivable fashions.

Beyond a legal right to full, unimpeded access to the rights cordoned off by legal method patents, there may still be concerns over whether the expansion of patentable subject matter in the field remains a good idea. However, this Note
discerns no valid reason why legal method patents should be subject to any specific strictures. It is true that the law (and at the very least its practice) has been seen sufficiently singular so as to warrant a different approach in regulating its use in some contexts. This difference has not yet been so firmly established in intellectual property jurisprudence though, and there is no compelling reason to do so.

Intellectual property rights over life-saving technology (though often maligned) are a firmly established principle. Compared to this standard, any pretense to a legal technique (especially in the case of, say, a particular method of reducing tax liability) is likely to be less indispensable to those making a claim thereto. The greater need for generating positive externalities in the development of pharmaceuticals is offset by the lesser cost of denying the public uninhibited access to a hypothetical patented legal method (especially, once again, in the narrow context of tax strategies). In any case, there is a natural, even inexorable, gradation in the access of the public to the full privilege of the law. Allowing legal methods to be patented will allow novel and beneficial developments in the field to be more freely enjoyed by the public at large. Even a more limited restriction of the scope of legal method patents is unnecessary. The immunity that doctors receive from infringing medical processes is less warranted and less necessary to insulate infringers of legal methods.

More thought needs to be devoted to the degree certain theoretical manifestations of legal method patents may infringe upon the rights of the public. As a category unto themselves, however, legal method patents are a natural and possibly beneficial outgrowth of the patent system.