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WITH GREAT POWER COMES *IGNORED* RESPONSIBILITY: HOW THE SUPREME COURT FAILED TO SAVE SPIDER-MAN

*Maya Zagayer**

I. INTRODUCTION

In the famous words of Spider-Man’s Uncle Ben, “[I]n this world, with great power there must also come—great responsibility.”¹ The Supreme Court may be endowed with inordinate power, but it ignored its responsibility to properly interpret and apply the law in its recent decision, *Kimble v. Marvel Entertainment, LLC*.² The Court was given the opportunity to right a long-standing wrong by overturning erroneous precedent; instead the Court unjustifiably applied a “superpowered form of *stare decisis*,”³ thereby reaffirming the flawed decision.

In a 6-3 split, the Court reiterated the boundaries of patent protection as it pertains to the exaction of royalties, holding that “a patent holder cannot charge royalties for the use of his invention after its term has expired,”⁴ notwithstanding a contractual agreement that stipulates otherwise.⁵ There, Respondent Marvel Entertainment, LLC (“Marvel”) purchased the patent rights to a Spider-Man toy from Petitioner Stephen Kimble (“Kimble”) and agreed to pay Kimble a three percent royalty on all future sales of the toy, without setting a projected end-date for the royalty payments.⁶ Upon the patent’s expiration, Marvel refused to continue paying Kimble

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1. *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2415 (2015) (quoting STAN LEE & STEVE DITKO, AMAZING FANTASY NO. 15: SPIDER-MAN 13 (1962)).

2. 135 S. Ct. 2401.

3. *Id.* at 2410.

4. *Id.* at 2405.

5. *See id.* at 2407 (indicating that “‘an article on which the patent has expired’. . . may be made and sold by whoever chooses to do so. . . . [W]e have deemed unenforceable private contract provisions limiting free use of such inventions.” (quoting *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964))).

6. *Id.* at 2403.

royalties, referencing the Court's decision in *Brulotte v. Thys Co.*,⁷ which held that a royalty provision extending beyond the life of the patent is unlawful per se.⁸

In response, Kimble asked the Court to overturn its decision in *Brulotte*, arguing that the duration of royalty payments for patented inventions should be assessed on a case-by-case basis in accordance with antitrust law's "rule-of-reason."⁹ The Court applied the doctrine of *stare decisis*, stating that Kimble had failed to prove the requisite "special justification" for overruling a case, while adding that the matter presented was one "more appropriately addressed to Congress."¹⁰ Consequently, the Court declined to depart from the precedent set by *Brulotte* and affirmed the lower court's decision to refuse to enforce the contract agreement insofar as it provided for post-patent expiration royalties.¹¹

Though the Supreme Court has the power to interpret and apply the law, the *superpower* of defining the law's parameters belongs only to Congress. The Constitution enumerates congressional power in eighteen specific clauses, one of which reads: "The Congress shall have power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."¹² The Patent Act of 1793 ("the Act")¹³, which highlights the concern for the protection and promotion of intellectual property rights, was among the first to be acknowledged by the framers of the Constitution as a vital component to the advancement of society.¹⁴ The goal of the Act was to strike a balance between incentivizing the creation of new and useful discoveries by securing inventors a monopoly over their discoveries, while also providing the public unfettered access to such innovations.¹⁵ Accordingly, patent holders are given exclusive

7. *Brulotte v. Thys Co.*, 379 U.S. 29 (1964).

8. *Kimble*, 135 S. Ct. at 2405.

9. *Id.* at 2404. For an explanation of the "rule-of-reason," see *infra* note 62.

10. *Kimble*, 135 S. Ct. at 2405.

11. *Id.*

12. U.S. CONST. art. I, § 8, cl. 8.

13. Patent Act of 1793, Ch. 11, 1 Stat. 318–323 (1793).

14. The Act was notable for its definition of the subjects of patents, which still remains unchanged today: "any new and useful art, machine, manufacture or composition of matter and any new and useful improvement on any art, machine, manufacture or composition of matter." *Id.*

15. E. Wyndham Hulme, *The History of the Patent System Under the Prerogative and at Common Law*, 16 L. Q. REV. 44 (1900) (indicating that patent law derives from "the mediaeval policy of the encouragement of new industries and the [] early grants of Elizabeth" which endowed a creator with monopoly over his creation).

control of their inventions, endowing them with “certain superpowers, but only for a limited time.”¹⁶ Upon that term’s expiration, “the unrestricted right to make or use the article passes to the public.”¹⁷

This Comment explores the implications of the Supreme Court’s decision in *Kimble*. Part II discusses the factual background of the case; Part III presents the historical background by providing an overview of the underlying case, *Brulotte v. Thys Co.* Part IV analyzes the Court’s reasoning in *Kimble*, while Part V argues that the Court erred in applying a heightened standard of *stare decisis*, thus engaged in judicial overreach. Finally, Part VI concludes that the Court ignored its responsibility to right a long-standing wrong by improperly operating under a guise of statutory interpretation, ultimately impeding parties’ ability to contract freely, and impermissibly altering the parameters of the Act.

II. STATEMENT OF THE CASE

In 1990, Stephen Kimble patented a toy that allowed children “and young-at-heart adults” to act like Spider-Man by shooting webs—really pressurized foam string—from the palms of their hands.¹⁸ In the interest of selling or licensing this patent, Kimble met with Marvel, who makes and markets products featuring the comic-book character Spider-Man, to discuss his idea for “web-slinging fun.”¹⁹ Shortly thereafter, and without compensating Kimble, Marvel began selling a toy called the “Web-Blaster” which enabled “would-be action heroes to mimic Spider-Man through the use of a polyester glove and a canister of foam.”²⁰ The Web-Blaster significantly resembled Kimble’s patented invention.²¹

In 1997, Kimble brought suit against Marvel alleging patent infringement, among other claims.²² The suit ultimately ended with a settlement agreement whereby Marvel would purchase Kimble’s patent in exchange for a lump sum of almost a half-million dollars, as well as a three percent royalty on all of Marvel’s future sales of

16. *Kimble*, 135 S. Ct. at 2406; see Patent Act of 1793, Ch. 11, 1 Stat. 318–323.

17. *Kimble*, 135 S. Ct. at 2403 (citing 35 U.S.C. § 154(a)(2) (2012) (internal citation omitted)).

18. *Kimble*, 135 S. Ct. at 2405 (quoting U.S. Patent No. 5,072,856).

19. *Id.* at 2406.

20. *Id.*

21. *Id.*

22. *Id.*

the Web-Blaster and similar products.²³ The parties did not set an expiration date for the royalty provision, “apparently contemplating that they would continue for as long as kids want to imitate Spider-Man (by doing whatever a spider can).”²⁴

Then, Marvel “stumbled across *Brulotte*”²⁵—the case at the heart of this dispute—which interpreted the patent laws as preventing a patentee from receiving royalties for sales made after his or her patent’s expiration.²⁶ Neither party claimed to have knowledge of *Brulotte* at the time of negotiating the settlement, though “Marvel must have been pleased to learn of it”²⁷ considering “the decision’s effect was to sunset the settlement’s royalty clause.”²⁸

Upon making this discovery, Marvel sought a declaratory judgment in federal district court confirming that it could cease paying Kimble royalties come 2010—the end of Kimble’s patent term.²⁹ Relying on the decision in *Brulotte*, the district court granted Marvel’s request for relief, holding that “the royalty provision [was] . . . unenforceable after the expiration of the Kimble patent.”³⁰ The Court of Appeals for the Ninth Circuit begrudgingly affirmed, though made it clear that “the *Brulotte* rule is counterintuitive, and its rationale is arguably unconvincing.”³¹ Kimble appealed the award for relief, and the Supreme Court granted certiorari.³²

III. HISTORICAL FRAMEWORK

As stated, the Court relied upon the reasoning set out in *Brulotte v. Thys Co.* in making its decision.³³ There, the Court decided that exacting royalties for a patented invention after the expiration of the incorporated patent(s) is equivalent to an assertion of monopoly

23. *Id.*

24. *Id.* A patent typically expires twenty years after the date of its application. 35 U.S.C. § 154(a)(2) (2012). Seven years had lapsed on Kimble’s patent at the time of Kimble and Marvel’s settlement agreement; thus thirteen years of exclusive control over the patent remained to either be sold or licensed. *Kimble*, 135 S. Ct. at 2406.

25. *Kimble*, 135 S. Ct. at 2406 (referencing *Brulotte v. Thys Co.*, 379 U.S. 29 (1964)).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* (quoting *Kimble v. Marvel Enterprises, Inc.*, 692 F.Supp.2d 1156, 1161 (D. Ariz. 2010)).

31. *Id.* (quoting *Kimble v. Marvel Enterprises, Inc.*, 727 F.3d 856, 857 (2013)).

32. *Id.*

33. *Id.* at 2405.

power over a patent that has entered the public domain.³⁴

A. Overview of the Underlying Case

Thys Company (“Thys”) was the manufacturer of a hop-picking machine³⁵ that incorporated seven different patents in its design.³⁶ Thys sold these machines to Walter Brulotte, a farmer from Yakima County, Washington, for a flat fee and issued a license agreement detailing the terms of their use.³⁷ That license agreement provided that Brulotte would pay Thys royalties in an amount comparable to the profits accrued in each harvest season where Thys’s machines were used.³⁸ All seven patents incorporated in the hop-picking machines expired in 1957; however, the license agreements exacting royalty payments for use of those machines extended beyond that date.³⁹

Brulotte refused to pay royalties beyond the patented term, and Thys brought an action for breach of their licensing agreement.⁴⁰ The case went all the way to the Supreme Court, where it was ultimately decided that the licensing agreement was void insofar as it demanded royalties after the last of the patents incorporated into the machines had expired.⁴¹

B. The Court’s Reasoning in Brulotte

In making this decision, the Court relied on its interpretation of Article I, section 8 of the Constitution, which authorizes Congress to secure “for limited times” to inventors the “exclusive right” to their discoveries.⁴² The Court reasoned:

A patent empowers the owner to exact royalties as high as

34. *Brulotte v. Thys Co.*, 379 U.S. 29, 33 (1964).

35. Hops are cone-shaped flowers that come in many varieties which “imparts different characteristics and flavors to beer” though their industrial use is not limited to the making and manufacturing of beer. Farmers and brewers use the aid of hop picking machines for ease and aid in harvesting hops. Alison Spiegel, *What the Hell Are Hops, Anyway?*, THE HUFFINGTON POST, June 18, 2014, http://www.huffingtonpost.com/2014/06/18/what-are-hops_n_5503930.html.

36. *Brulotte*, 379 U.S. at 30.

37. *Id.* at 29.

38. *Id.*

39. *Id.* at 30.

40. *Id.*

41. *Id.*

42. *Id.* (referencing 35 U.S.C § 154 which provides that “[e]very patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the right to exclude others from making, using or selling the invention throughout the United States, referring to the specification for the particulars thereof.” (emphasis added)).

he can negotiate with the leverage of that monopoly. But to use that leverage to project those royalty payments beyond the life of the patent is analogous to an effort to enlarge the monopoly of the patent⁴³

Accordingly, the Court concluded that such a licensing agreement was “unlawful *per se*”⁴⁴ and thus unenforceable.⁴⁵

Further, the Court, relying upon *Scott Paper Co. v. Marcalus Manufacturing Co.*,⁴⁶ reasoned that “patents are in the federal domain,” and thus functions of state law that “run counter to the policy and purpose of the patent laws” cannot be used to override the objectives set out by Congress, “whatever the legal device employed.”⁴⁷ Consequently, the Court determined that contracts and/or licensing agreements may not be used to circumvent patent laws, nor may they serve to extend a patent holder’s rights beyond the constitutionally protected patentable term.⁴⁸

IV. REASONING OF THE COURT

The question before the Court in *Kimble* was whether to overrule the decision in *Brulotte*.⁴⁹ Adhering to the principles of *stare decisis*,⁵⁰ the Court declined to do so.

A. The Court Shielded Itself with a “Superpowered Form of Stare Decisis”

The 6-justice majority first addressed the two “traditional justifications”⁵¹ for abandoning *stare decisis*: (1) erosion of doctrinal

43. *Id.* at 33.

44. *Id.* at 32.

45. *See id.* at 33–34 (“The exaction of royalties for the use of a machine after the patent has expired is an assertion of monopoly power in the post-expiration period when...the patent has entered the public domain. . . . [A]fter expiration of the last of the patents incorporated in the machines ‘the grant of patent monopoly was spent’ and an attempt to project it into another term by continuation of the licensing agreement is unenforceable” (citing *Ar-Tik Systems, Inc. v. Dairy Queen, Inc.*, 302 F.2d 496, 510 (1962))).

46. 326 U.S. 249, 256 (1945).

47. *Brulotte*, 379 U.S. at 31–32 (citing *Scott Paper Co. v. Marcalus Mfg. Co.*, 326 U.S. 249, 256 (1945)).

48. *Id.* at 32.

49. *Kimble*, 135 S. Ct. at 2405.

50. “*Stare decisis*—the idea that today’s Court should stand by yesterday’s decisions—is ‘a foundation stone of the rule of law.’” *Id.* at 2409 (quoting *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2036 (2014)). “The doctrine rests on the idea . . . that it is usually ‘more important that the applicable rule of law be settled than that it be settled right.’” *Id.* (citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

51. *See id.* at 2404, 2410–11 (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 173

underpinnings and (2) precedent that has proved unworkable. The Court concluded that neither of the traditional justifications was applicable.⁵² Moreover, the Court found that this case called for a “superpowered form of *stare decisis*,” thus further reinforcing its unwillingness to depart from *Brulotte*.⁵³

1. Erosion of Doctrinal Underpinnings

The Court noted that “the primary reason” for overruling statutory precedent is when subsequent legal developments, such as growth of judicial doctrine or further action taken by Congress, unseats the foundational reasoning of a past decision.⁵⁴ The Court concluded that *Brulotte*’s statutory and doctrinal underpinnings had not eroded over time because “the core feature of the patent laws on which *Brulotte* relied remains just the same.”⁵⁵ Moreover, the Court explained that when a decision, like *Brulotte*, interprets a statute, “*stare decisis* carries enhanced force.”⁵⁶

2. Nothing About *Brulotte* Has Proved Unworkable

Further, the Court reasoned that the “*Brulotte* rule” is simple to apply because “[a] court need only ask whether a licensing agreement provides royalties for post-expiration use of a patent. If not, no problem; if so, no dice.”⁵⁷ Conversely, Kimble argued that courts should employ antitrust law’s rule-of-reason to identify and invalidate those post-expiration royalty provisions with anti-competitive consequences, calling for an alternative approach requiring a case-by-case assessment of the validity of post-patent expiration royalty agreements. Nevertheless, the Court concluded that the ease of use and application that the *Brulotte* decision provides is not only “workable” but is easier and more determinative

(1989) as identifying “erosion of doctrinal underpinnings” and “unworkability” as traditional justifications for overruling precedent).

52. *Id.* at 2404.

53. *Id.* at 2410.

54. *Id.* (referencing *Patterson*, 491 U.S. at 173).

55. *Id.* The Supreme Court references 35 U.S.C. § 154, Contents and Term of Patent; noting that the statute then, as it does now, “draws a sharp line cutting off patent rights after a set number of years.” *Id.* at 2410-11. The Court also notes that patent laws have remained largely unchanged since their creation, and that earlier cases which have relied upon such laws, like *Scott Paper Co. v. Marcalus Mfg. Co.*, 326 U.S. 249 (1945)—the decision on which *Brulotte* primarily relied—remains good law. *Id.* at 2411.

56. *Id.* at 2404.

57. *Id.* at 2411.

“when compared to Kimble’s proposed alternative.”⁵⁸ Hence, *Brulotte* need not be overturned on “unworkable” grounds.

3. “Superpowered” Form of *Stare Decisis*

The Court then strengthened its unwillingness to depart from precedent by adding that “*Brulotte* lies at the intersection of two areas of law: property (patents) and contracts (licensing agreements),” and that considerations favoring *stare decisis* are “at their acme” in cases involving such rights because parties are especially likely to rely on such precedent.⁵⁹ Accordingly, the Court concluded that “[a]s against this superpowered form of *stare decisis*, we would need a *superspecial justification* to warrant revising *Brulotte*.”⁶⁰

B. Kimble Argued Overruling *Brulotte* Is Justified

In an attempt to establish the requisite “superspecial justification” for overruling *Brulotte*, Kimble made two arguments: first, that *Brulotte* hinged on an economic error—namely on an assumption that post-expiration royalties are always anticompetitive; and second, that *Brulotte* suppresses technological innovation and harms the national economy by preventing parties from reaching agreements to commercialize patents.⁶¹

1. *Brulotte* Erred in Assuming Post-Expiration Royalties Are Always Anticompetitive

Kimble asked the Court to abandon *Brulotte*’s bright-line rule in favor of a more flexible, case-by-case approach based on antitrust law’s rule-of-reason.⁶² Kimble argued that “*Brulotte*’s *per se* rule makes little sense” because patent licensing agreements often *increase* rather than decrease competition, both before and after the

58. The Court explained that the approach Kimble had suggested would limit outcome predictability and an even-handed application of the law because courts would have to assess each case independently in order to determine whether it’s terms violate the Act. *Id.* at 2411.

59. *Id.* at 2410.

60. *Id.* (emphasis added).

61. *Id.* at 2404–05.

62. The rule-of-reason is intended to promote trade and fair commerce. Generally, the “rule of reason” functions to void “[a]ll contracts where there is a bare restraint of trade and no more; . . . where special matter appears so as to make it a reasonable and useful contract, the presumption is excluded.” AUSTIN T. STICKELLS, FEDERAL CONTROL OF BUSINESS: ANTITRUST LAWS § 40 (1972); *Kimble v. Marvel Entm’t, LLC*, 135 S. Ct. 2401, 2404 (2015).

patent expires.⁶³ Longer payment periods typically correlate with lower, more affordable royalty rates; thus a patent holder may license the patent to numerous licensees, fostering more competition.⁶⁴ Kimble added that post-patent-expiration royalties further incentivize competition because the licensee has a continuing obligation to pay royalties, whereas new companies can begin making and selling a similar product while undercutting the licensee on price.⁶⁵

The Court conceded that it “see[s] no error in that [] analysis,” even adding that “a broad scholarly consensus supports Kimble’s view of the competitive effects of post-expiration royalties.”⁶⁶ Still, the Court was reluctant to take *stare decisis* off of its pedestal. In its attempted justification, the Court stated that it “has viewed *stare decisis* as having less-than-usual force in cases involving the Sherman Act;”⁶⁷ thus, if *Brulotte* had been an antitrust case rather than a patent case, the Court would be inclined to agree.⁶⁸ And just to cover all its bases, the Court further reasoned that “even assuming that *Brulotte* relied on an economic misjudgment, *Congress is the right entity to fix it.*”⁶⁹

a. The Court deferred all arguments to Congress

In fact, the Court continuously referenced Congress as the only body capable of providing Kimble the relief he sought, stating that this is a subject matter “more appropriately addressed to Congress,”⁷⁰ and that “[c]ritics of the *Brulotte* rule must seek relief not from this Court but from Congress.”⁷¹ Moreover, the Court added, “Congress . . . has spurned multiple opportunities to reverse *Brulotte*, and has even rebuffed bills that would have replaced *Brulotte*’s *per se* rule with the standard Kimble urges.”⁷² The Court thus interpreted Congress’s silence as “enhanc[ing] even the usual precedential force

63. *Kimble*, 135 S. Ct. at 2412.

64. *Id.*

65. *Id.*

66. *Id.* (citing numerous treaties and articles that critique *Brulotte*).

67. *Id.* (citing *State Oil Co. v. Khan*, 522 U.S. 3, 20–21 (1997)).

68. *Id.*

69. *Id.* at 2413 (emphasis added).

70. *Id.* at 2405.

71. *Id.*

72. *Id.* at 2404 (citing *Watson v. United States*, 552 U.S. 74, 82–83 (2007) (*Brulotte* has governed licensing agreements for more than half a century)); *see, e.g.*, S. 1200, 100th Cong., 1st Sess., Tit. II (1987) (providing that no patent owner would be guilty of “illegal extension of the patent right by reason of his or her licensing practices . . . unless such practices . . . violate the antitrust laws”).

we accord to our interpretations of statutes.”⁷³ The Court explained that Congress has repeatedly amended the patent laws, including 35 U.S.C. § 154, Contents and Term of Patent, the specific provision upon which *Brulotte* rested, and still *Brulotte* survived every such change.⁷⁴ Hence, the Court concluded, “Congress’s continual reworking of the patent laws—but never of the *Brulotte* rule—further supports leaving the decision in place.”⁷⁵

2. *Brulotte* Suppresses Technological Innovations and Prevents the Commercialization of Patents

Kimble also argued that *Brulotte* should be overturned because it runs counter to patent policy—the goal of which is to *promote* innovation.⁷⁶ He asserted that *Brulotte* “discourages technological innovation and does significant damage to the American economy” by preventing parties from reaching agreements to commercialize patents.⁷⁷ In support of this argument, Kimble maintained that post-patent royalty payments allow for more flexibility in payment arrangements, and a more precise allocation of risk.⁷⁸

In response, the Court stated, “[m]aybe. Or, then again, maybe not.”⁷⁹ The Court elaborated that neither Kimble nor his amici offered any empirical evidence that *Brulotte* “imposes any meaningful drag on innovation.”⁸⁰ Additionally, the Court confessed, “truth be told, if forced to decide that issue, we would not know where or how to start.”⁸¹ Conveniently, the Court dismissed Kimble’s argument by admittedly reiterating the “opinion’s refrain” that “claims that a statutory precedent has ‘serious and harmful

73. *Kimble*, 135 S. Ct. at 2410 (citing *Watson*, 552 U.S. at 82–83) (referencing a period of “Congressional acquiescence” then totaling only fourteen years).

74. *Id.* at 2410; *see, e.g.*, Uruguay Round Agreements Act, Pub. L. No. 103-465, § 532(a), 108 Stat. 4983 (1994) (increasing the length of the patent term); Act of Nov. 19, 1988, Pub. L. No. 100-703, 102 Stat. 4676 (limiting patent-misuse claims).

75. *Kimble*, 135 S. Ct. at 2410.

76. *Id.* at 2414.

77. *Id.*

78. Kimble argued that extending the ability to pay royalties post-patent expiration will allow for more economic flexibility because parties can choose to either pay a larger lump-sum up front, and pay less to the patent holder in royalty fees; or, those with less liquid capital up front, may choose to pay a small fee for the use of the patent at the forefront, but pay the patent holder a higher percentage of royalties over a specified number of years. Kimble further argues that the ability to structure the most mutually beneficial agreement prevents the discouragement of technological innovation and influx of economy by lowering the barrier of entry. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

consequences’ for innovation are . . . ‘*more appropriately addressed to Congress.*’⁸²

When the majority was not deferring responsibility, it was ignoring it under the pretext of *stare decisis*, stating, “[w]hat we can decide, we can undecide. But *stare decisis* teaches that we should exercise that authority sparingly.”⁸³ Thus, the majority declined to overrule its decision in *Brulotte* due to an absence of “special justification” for departing from precedent.⁸⁴ The Court concluded that Kimble’s claims “fail[ed] to clear *stare decisis*’s high bar,” and thereby affirmed the lower court’s decision in refusing to enforce the entirety of the settlement agreement between Kimble and Marvel.⁸⁵

V. ANALYSIS

The Court erred in applying a heightened standard of *stare decisis* by indolently relying on *Brulotte*, which is rooted in inaccurate economic policy, and most often functions to upset parties’ expectations. Accordingly, the Court’s approach represents a misapplication of the *stare decisis* doctrine and highlights an incredible example of judicial overreach. Moreover, by categorizing *Brulotte* as a case of statutory interpretation, the Court granted itself the privilege of applying a “superpowered form of *stare decisis*” in order to justify its reluctance in overruling the decision, as well as qualify deferring all difficult arguments to Congress.⁸⁶ Ultimately, rather than using *Kimble* as an opportunity to “clear the err,” so to speak, the Court perpetuated the overstepping of its predecessors’ boundaries by reaffirming the flawed *Brulotte* decision.

A. Kimble Serves to Reaffirm a Case of Judicial Overreach

The notion that the Court was improperly adhering to *stare decisis* was not lost on the majority.⁸⁷ The Court stated, “Respecting *stare decisis* means sticking to some wrong decisions [I]t is usually more important that the applicable law be settled, than that it

82. *Id.* (quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2413 (2014) (emphasis added)).

83. *Id.* at 2415 (citing *S. LEE & S. DITKO*, *supra* note 1, at 13 (1962) (“In this world, with great power there must also come—great responsibility”)).

84. *Id.*

85. *Id.* at 2412.

86. *See id.* at 2410.

87. *Id.* at 2409.

be settled *right*.”⁸⁸ Ridiculousness of that sentiment notwithstanding, the inclusion of this statement in the Court’s opinion functions as a blatant admission of error.

The *Brulotte* Court exceeded the boundaries of its judicial powers by redefining the parameters of patent law under the guise of statutory interpretation. Consequently, *Kimble* serves to reaffirm a case of judicial overreach by failing to overturn the erroneous precedent. Thus, by couching its decision on the doctrine of *stare decisis*, the Court’s rationale was dually improper: first, in its misapplication of the doctrine itself, and second, in the flawed reasoning that the doctrine carries “enhanced force”⁸⁹ because of *Brulotte*’s supposed interpretation of the Act.⁹⁰

1. *Brulotte* Is Devoid of Statutory Interpretation

The Act provides that a patent grants certain exclusive rights to the patentee and “his heirs or assigns” for a term of twenty years.⁹¹ Among those rights is the power to exact royalties on a patented invention.⁹² The Act, however, says nothing whatsoever about post-expiration royalties, nor does it preclude their contractibility.⁹³ Nonetheless, the *Brulotte* Court held that such royalties are “unlawful *per se*” without supporting that decision with any language from the Act itself.⁹⁴

Instead, the *Brulotte* Court’s rationale was more akin to antitrust concepts, reasoning that post-expiration royalties would enlarge the patent holder’s monopoly on that idea “by tying the sale or use of the patented article to the purchase or use of unpatented ones.”⁹⁵ Ironically, the *Kimble* Court, relying on this precedent, stated that it “has viewed *stare decisis* as having less-than-usual force in cases involving the Sherman Act,”⁹⁶ which deals precisely with the anti-

88. *Id.* (emphasis added).

89. *See id.* at 2409.

90. *See id.* at 2414.

91. 35 U.S.C. § 154(a)(1) and (2) (2012).

92. *See, e.g.,* United States v. Line Material Co., 333 U.S. 287, 308 (1948) (indicating “a patentee may license others to make and vend his invention and collect a royalty therefor.”).

93. *See generally* 35 U.S.C. § 154 (finding no mention of the illegality or prohibition of post-expiration royalties); *see also Kimble*, 135 S. Ct. at 2415 (Alito, J., dissenting) (noting that “nothing in the text of the Act even arguably forbids licensing agreements that provide for post-expiration royalties.”).

94. *Brulotte v. Thys Co.*, 379 U.S. 29, 32 (1964); 35 U.S.C. § 154.

95. *Brulotte*, 379 U.S. at 33.

96. *Kimble*, 135 S. Ct. at 2412.

competitive rationale the Court adopted in its decision making, yet contrarily required a “*superspecial justification* to warrant reversing *Brulotte*.”⁹⁷

In his dissent, Justice Samuel Alito highlighted the majority’s erroneous categorization of *Brulotte* as relating to statutory interpretation, stating, “[W]e do not give super-duper protection to decisions that do not actually interpret a statute.”⁹⁸ He further emphasized that “[*Brulotte*] was not simply a case of *incorrect* statutory interpretation. It was not really statutory interpretation *at all*.”⁹⁹

Moreover, since the Court’s decision in 1964, *Brulotte* has been widely criticized as a decision based on the “free-floating product of a misplaced fear of monopoly” rather than on an interpretation of either the patent clause of the Constitution, the patent statute, or any other statute for that matter.¹⁰⁰ Thus, notwithstanding the merit of antitrust or other anti-competition arguments, the *Brulotte* Court’s rationale was nonetheless devoid of any interpretation of the Act itself.¹⁰¹

2. *Kimble*’s Rationale Is Inconsistent with the Intent of Congress

Despite the lack of statutory support and decades of disagreement, the *Kimble* Court erroneously relied on *Brulotte* rather than overruling it. The majority reasoned that there had not been an “erosion of doctrinal underpinnings” upon which *Brulotte* rested, thus the “the primary reason” for overruling the precedent was inapplicable.¹⁰² Further, the Court defined the requisite erosion as “either the growth of judicial doctrine or further action taken by Congress” that nullifies the basis of a past decision,¹⁰³ yet dismissed

97. *Id.* at 2410 (emphasis added).

98. *Id.* at 2418 (Alito, J., dissenting).

99. *Id.* at 2415 (Alito, J., dissenting) (emphasis added).

100. *See e.g.*, Scheiber v. Dolby Labs. Inc., 293 F.3d 1014, 1017–18 (7th Cir. 2002) (Posner, J.) (*Brulotte* has been “severely, and as it [s]eems to us, with all due respect, justly criticized However, we have no authority to overrule a Supreme Court decision no matter how dubious its reasoning strikes us, or even how out of touch with the Supreme Court’s current thinking the decision seems”); Ian Ayres & Paul Klemperer, *Limiting Patentees’ Market Power Without Reducing Innovation Incentives: The Perverse Benefits of Uncertainty and Non-Injunctive Remedies*, 97 MICH. L. REV. 985, 1027 (1999) (“Our analysis thus suggests that *Brulotte* should be overruled.”).

101. *See* 35 U.S.C. § 154 (2012).

102. *Kimble*, 135 S. Ct. at 2410.

103. *Id.* (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989)).

these possibilities with the sweeping statement, “the core feature of patent laws on which *Brulotte* relied remains just the same,” citing 35 U.S.C. § 154—Contents and term of patent.¹⁰⁴ Though patent laws have remained largely unchanged since their inception, the Court ignored a post-*Brulotte* amendment to the very section of the statute it cited that specifically concerns the exaction of royalties on patented inventions.¹⁰⁵

On November 29, 2000, Congress amended the patent laws in a manner that exposed potential patent holders to a higher risk of infringement by requiring that patent applications be accessible to the public *prior* to granting the applicant exclusive patent rights.¹⁰⁶ As an attempt to compensate applicants for the negative impact of early disclosure, Congress *expanded* the rights accorded by patent protection by including a “provisional right” codified at 35 U.S.C. § 154(d).¹⁰⁷ This amendment vests the patentee with the additional right to obtain a reasonable royalty on infringement occurring between the time of publication and issuance of the patent.”¹⁰⁸

More importantly, Congress specifically defined a “time limitation” on obtaining *pre-patent* royalties, confining the patentee to a six-year statute of limitations, as enumerated in 35 U.S.C. § 154(d)(3).¹⁰⁹ Yet nowhere in the amendment, the statute, or the language of the Act did Congress delineate a similar expiration date on *current* patents, nor did it forbid *post-patent* royalties.

Despite this, the Court reasoned that Congress’s failure to amend the Act to specifically *include* the right to royalties beyond the life of the patent equated Congress’s intent to preclude such an expansive application of the Act.¹¹⁰ Frankly, this reasoning is absurd;

104. *See id.* at 2410–11.

105. *See* 35 U.S.C. § 154(d)(1)(A)(i) (“[A] patent shall include the right to obtain a reasonable royalty from any person who . . . makes, uses, offers for sale, or sells in the United States the invention as claimed in the published patent application.”). *See generally* *Kimble*, 135 S. Ct. 2401 (2015) (finding no mention of amended section 154(d) anywhere in the opinion).

106. Judith R.S. Stern, *Reasonable Royalty Damages After Publication and Before the Patent Issues: Interpretation of Provisional Rights Provisions*, BOS. PATENT LAW ASS’N, May 2005, at 3, <http://c.ymcdn.com/sites/www.bpla.org/resource/resmgr/Newsletters/05-02.pdf?hhSearchTerms=%222005%22>.

107. *Id.*

108. *Id.*; 35 U.S.C. § 154(d)(1) and (3).

109. 35 U.S.C. § 154(d)(3); *see* Patrick J. Birde & Nicholas J. Nowak, *35 U.S.C. § 154(d) Grants Patent Applicants Provisional Rights in Their Published*, THE INTELLECTUAL PROP. STRATEGIST 1, 3, (Sept. 2003), http://www.kenyon.com/media/~media/Files/Publication%20PDFs/2003-09-01_Rights.ashx.

110. *See Kimble*, 135 S. Ct. at 2409 (indicating that “Congress has spurned multiple opportunities to reverse *Brulotte*,” but that long congressional acquiescence is proof of their

it is akin to arguing the permissibility of wrongful conduct for as long and until one is told otherwise. The Court is essentially stating that until Congress expressly provides for post-patent royalties, it will continue operating under the assumption that such a right is prohibited.¹¹¹

3. The History of the Act Further Refutes the Court's Reasoning

The *Kimble* Court attempted to cement this argument by treating *Brulotte* as the seminal case for the Act's interpretation, proclaiming, "*Brulotte* has governed licensing agreements for more than half a century,"¹¹² and thus the Court "prefer[s] not to unsettle stable law."¹¹³ Yet, despite its praise, *Brulotte*'s reign remains relatively recent.¹¹⁴ The right of patent protection spans over two hundred years, predating even the Constitution.¹¹⁵ As such, courts and Congress alike have applied and interpreted the parameters of the Act for centuries in a manner inconsistent with *Brulotte*'s, and thus *Kimble*'s, understanding of the law.

Accordingly, before the *Brulotte* Court redefined the parameters of the Act, courts had interpreted the law to presume that royalties were not to be paid after the expiration of a patent; however, parties may contract to the contrary.¹¹⁶ Thus, rather than statutory

reluctance to do so).

111. *Id.*

112. *Id.* at 2410.

113. *See id.* at 2411 (indicating that *Brulotte*'s "close relation to a whole web of precedents means that reversing it could threaten others").

114. *Brulotte* was decided in 1964, whereas patent law dates back to the "beginning of our nation." *The Origins of Patent and Copyright Law*, 23 BILL OF RIGHTS IN ACTION (Constitutional Rights Found., Los Angeles, Cal.), no. 4, 2008, <http://www.crf-usa.org/bill-of-rights-in-action/bria-23-4-a-the-origins-of-patent-and-copyright-law#UU-OeVdMy3M>.

115. *Id.* ("[The Framers] gave Congress the power to 'Promote the Progress of Science and useful Arts' by giving an economic incentive to inventors and writers. That power, and the national patent and copyright laws that soon followed, have stimulated the country's economy for more than 200 years") (quoting U.S. CONST. art. I, § 8, cl. 8).

116. *See, e.g.,* *E.R. Squibb & Sons v. Chem. Found. Inc.*, 93 F.2d 475, 477 (2d Cir. 1937) ("There is a presumption that royalties are not to be paid after the expiration of a patent; if the intention is to have them continue longer, the parties should phrase their contract in language from which such intention may fairly be inferred."); *Pressed Steel Car Co. v. Union Pac. R. Co.*, 270 F. 518, 525 (2d Cir. 1920) ("Although the general rule is that liability to pay royalties terminates upon the expiration of the patent, the parties may contract to the contrary."); *Sproull v. Pratt & Whitney Co.*, 108 F. 963, 965 (2d Cir. 1901) ("Royalties are not payable upon articles manufactured and sold after the expiration of the life of the patent, however, parties may, of course, contract as they choose"); *Bettis Rubber Co. v. Kleaver*, 104 Cal. App. 2d 821, 824–25 (1951) (indicating that contracts involving the payment of royalties for patented inventions may exceed the life of the patent if so intended by the parties).

interpretation, the Court ironically engaged in an act of policymaking when deciding *Brulotte*¹¹⁷—a responsibility the *Kimble* Court repeatedly reiterated as one entrusted only to Congress.¹¹⁸ Yet rather than correct this unwarranted expansion of the Act upon its reevaluation in *Kimble*, “[t]he Court employ[ed] *stare decisis*, normally a tool for restraint, to reaffirm a clear case of judicial overreach.”¹¹⁹

*B. Post-Patent Expiration Royalties Do Not Enlarge
the Patent’s Monopoly*

A licensing agreement that provides for the payment of royalties after a patent’s term has expired does not, as the Court in *Brulotte* asserted, enlarge the patentee’s monopoly or extend the term of the patent.¹²⁰ Instead, it simply creates a contractual right between the licensor (holder of the now-expired patent) and the licensee with whom he or she contracted, for the sale and/or use of the invention in question—similar to any other such agreement not pertaining to intellectual property rights.¹²¹ In the fifty-two years since *Brulotte* was decided, courts and commentators have heavily criticized it as economically irrational.¹²² Contrary to the Court’s reasoning in *Brulotte*, and thereafter reiterated in *Kimble*, the application of post-patent expiration royalties does not enlarge the patent’s monopoly because it does not prevent the patented idea from entering into the public domain upon its expiration.¹²³ Instead, “post-expiration royalties merely amortize the price of using patented technology and . . . do not necessarily harm competition because new competitors are free to enter the market without paying royalties after

117. *Kimble*, 135 S. Ct. at 2415 (Alito, J., dissenting).

118. *Id.* at 2405 (majority opinion).

119. *Id.* at 2415 (Alito, J., dissenting) (noting that “*stare decisis* does not require [the Supreme Court] to retain [] baseless and damaging precedent”).

120. *Brulotte v. Thys Co.*, 379 U.S. 29, 33 (1964).

121. See 35 U.S.C. § 261 (indicating that a patent “shall be assignable in law by an instrument in writing”); see also *Flatspikes, LLC v. Softspikes, LLC*, 913 F.Supp. 2d 208, 213 (D. Md. 2012) (“The mere presence of a possible question about patents, however, does not convert the state law breach of contract action into one arising under the patent laws”); 35 U.S.C. § 1338(a) (noting that the civil action must arise under any Act of Congress relating to patents).

122. Scott W. Doyle, et al., *Brulotte Rule Upheld Despite Suspect Economic Rationale*, LAW360, (June 23, 2015, 6:01 PM), <http://www.law360.com/articles/670682/brulotte-rule-upheld-despite-suspect-economic-rationale>.

123. *Kimble*, 135 S. Ct. at 2414; see also 35 U.S.C. § 154(a)(2) (discussing the patent’s term and duration as ending twenty years after the date on which the application was file, at which point that invention enters the public domain).

the expiration of the patent, even if prior market participants continue to pay royalties.”¹²⁴ Thus, not only was *Brulotte* unsubstantiated by the language and terms of the Act, but it was also based on an economic theory that has since been debunked.¹²⁵

Similarly, Kimble argued that such an arrangement might even *encourage* competition because others would be free to make, use, or sell the patented idea after its expiration; and, because of diminished overhead costs, it may even occur at a rate lower than originally provided by the licensee.¹²⁶ Upon the patent’s expiration, the public would have unfettered access to its use, as intended by the Act, and only the licensee would be required to pay for its continuing use, as per the terms of the parties’ agreement.¹²⁷

Jay Dratler, Jr., the Goodyear Professor of Intellectual Property at The University of Akron School of Law and author of *Licensing Intellectual Property*, the definitive treatise in its field, added:

It is therefore worth noting that the *per se* rule of *Brulotte* is an anachronism with little or no economic justification. As one of the few remaining vestiges of Justice Douglas’ one-man crusade against patent protection, it is a lonely *per se* outpost in a rule-of-reason world. In attempting to draw a bright line outlawing royalties after patent expiration, it relies on formal distinctions, rather than economic substance, in contravention of the growing trend in antitrust law.¹²⁸

Moreover, contracts allowing for post-patent expiration royalties differ little, both competitively and economically, from contracts that permissibly provide for periodic or installment payments for the use or sale of unpatented goods.¹²⁹ However, the *Brulotte* Court rejected

124. Doyle, *supra* note 122.

125. *Id.*

126. *Kimble*, 135 S. Ct. at 2416.

127. See 35 U.S.C. § 154 (a)(2) (indicating that a patent holder obtains the exclusive rights to the patent for a duration of twenty years); 35 U.S.C. § 154 (d)(1) and (3) (discussing that a patent holder has the right to obtain a reasonable royalty on his or her patent, and that that right shall be available only when brought not later than six years after the patent is issued. The language of the Act, however, makes no mention of when the royalties must terminate or expire).

128. JAY DRATLER, JR., *LICENSING OF INTELLECTUAL PROPERTY*, § 4.04 (1994) (Arguing that there is a growing realization among the courts that “the competitive effect of patent licensing is a matter of antitrust law, not patent law, and one to be governed by rules of substantial economic effect, not barren legal formalism. This trend promises, in the long run, to undermine *Brulotte* to the point where the Supreme Court may feel compelled to revise or overrule it.”).

129. *Id.*

this argument absent any substantiated ground for their reasoning.¹³⁰ Instead, the Court dismissed that it was “unable to conjecture what the bargaining position of the parties might have been and what resultant arrangement might have emerged had the provision for post-expiration royalties been divorced from the patent and nowise subject to its leverage.”¹³¹ In sum, the Court criticized contracts providing for post-expiration royalties as a “bald attempt” to enlarge a patent’s monopoly, despite decades of economic justification that prove otherwise.¹³²

C. *Brulotte* and *Kimble* Impede Contract Law and Parties’ Ability to Attain the True Value of Their Patents

The judicial overreach in *Brulotte* caused an unintended expansion of patent protection that impedes contract law and disrupts parties’ ability to contract freely due to the misguided assumption of patent monopoly expansion—a view that was erroneously perpetuated by *Kimble*.

1. Federal Patent Law Does Not Preempt State Contract Law in This Case

The *Brulotte* Court reasoned, “patents are in the federal domain; and ‘whatever the legal devise employed,’ a projection of the patent monopoly after the patent expires is not enforceable.”¹³³ Building upon that argument, the *Kimble* Court further stated that, “by virtue of federal law . . . we have deemed unenforceable private contract provisions limiting free use of [articles on which the patent has expired].”¹³⁴ The *Kimble* Court argued that “to permit such a result, whether or not authorized ‘by express contract’ would impermissibly undermine patent laws” by expanding the patent holder’s monopoly of that invention.¹³⁵

However, both *Brulotte* and *Kimble* drew this reasoning from a line of cases that dealt primarily with contracts contesting a patent’s *validity*, rather than the parameters of patent protection post-patent expiration.¹³⁶ Thus, while federal patent law generally preempts state

130. *Id.* § 4.05(d) (citing *Brulotte v. Thys Co.*, 379 U.S. 29, 32 (1964)).

131. *Brulotte*, 379 U.S. at 32.

132. *Id.*

133. *Id.* (quoting *Scott Paper Co. v. Marcalus Mfg. Co.*, 326 U.S. 249, 256 (1945)).

134. *Kimble*, 135 S. Ct. at 2407 (citing *Scott Paper*, 326 U.S. at 256).

135. *Id.* (quoting *Scott Paper*, 326 U.S. at 255–56).

136. *See Lear, Inc. v. Adkins*, 395 U.S. 653, 668–75 (refusing to enforce a contract requiring

contract law,¹³⁷ the language of the patent act does not prohibit post-term royalties, or the possibility of contracting for them.¹³⁸

Moreover, the historical application and interpretation of the Act did not preclude the payment of such royalties pursuant to the federal statutory language, but rather presumed their termination upon expiration of the patent, absent a valid contract indicating otherwise. Thus, contrary to what the *Brulotte* and *Kimble* Courts have asserted, federal patent law does not supersede contract law in this case, but rather the two work in conjunction with one another.

2. *Brulotte* Hinders a Patentee's Ability to Contract for the True Value of The Patent

The term “royalty” ordinarily envisages a duty to make, and a corresponding right to receive, payments proportionate to the use of patented methods or machines.¹³⁹ This type of payment recognizes that the market value of intellectual property is inherently uncertain and unpredictable.¹⁴⁰ In consequence, “it measures that value as it unfolds, in the course of commercial exploitation of the underlying intellectual property,” thus sparing the licensor and the licensee the risk of guessing at market value in advance.¹⁴¹ Accordingly, the payment of royalties as a direct reflection of the use or sale of a patented invention is the most accurate representation of the patent's worth¹⁴² and a system of compensation favored and relied upon in a broad spectrum of business transactions. Thus, the decision in *Brulotte*, and its reiteration in *Kimble*, hinders parties' ability to

a licensee to pay royalties while *contesting a patent's validity*); *Scott Paper*, 326 U.S. at 255–56.

137. See *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 229 (1964) (“[Patent] laws, like other laws of the United States enacted pursuant to constitutional authority, are the supreme law of the land. When state law touches upon the area of these federal statutes, it is ‘familiar doctrine’ that the federal policy ‘may not be set at naught, or its benefits denied’ by the state law”) (internal citations omitted); see also *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 238 (1964) (indicating that “federal patent laws prevent a State from prohibiting the copying and selling of unpatented articles.”).

138. See 35 U.S.C. § 154 (2012); DRATLER, *supra* note 128 (explaining the permissibility and parameters of exacting royalties on patented ideas by delineating a start date but never an end date).

139. *Bettis Rubber Co. v. Kleaver*, 233 P.2d 82, 84 (Cal. Ct. App. 1951) (citing *Eastman Oil Well Survey Corp. v. Lane-Wells Co.*, 136 P.2d 564, 565 (Cal. 1943)).

140. See DRATLER, *supra* note 128, at § 4.01.

141. *Id.*

142. J. Gregory Sidak, *The Proper Royalty Base for Patent Damages*, 10 J. COMP. L. & ECON. 989, 990 (2014), <https://www.criterioneconomics.com/the-proper-royalty-base-for-patent-damages.html>.

contract according to the actual value of the patent.¹⁴³

3. *Brulotte* Disrupts Contractual Expectations

In *Kimble*, the Court conceded, “the *Brulotte* rule . . . prevents some parties from entering into deals they desire.”¹⁴⁴ The agreement at the heart of *Kimble* proved case and point.¹⁴⁵ Marvel agreed to purchase Kimble’s patent in exchange for a lump sum of about half a million dollars, as well as a three percent royalty on all of Marvel’s future sales of the Web-Blaster and similar products.¹⁴⁶ The parties set no end date for royalties, “apparently contemplating that they would continue for as long as kids want to imitate Spider-Man.”¹⁴⁷ Accordingly, the Court’s decision to void that contractual agreement insofar as it allowed royalties that exceeded beyond the patented term not only robbed Kimble of the true value of his patent, as discussed above, but also disrupted Kimble’s contractual expectations.¹⁴⁸

Despite admission by *both* parties to being unaware of the precedent set by *Brulotte* at the time their agreement was negotiated,¹⁴⁹ the Court maintained that *stare decisis* was “at [its] acme” because “parties are especially likely to rely on such precedents when ordering their affairs.”¹⁵⁰ However, the Court’s belief that there is a “reasonable possibility that parties have structured business transactions in light of *Brulotte*” is fanciful.¹⁵¹ Further, the Court’s only support for this conclusion was Marvel’s self-serving assertion that “some contracts might not specify an end date for royalties because the parties expect *Brulotte* to supply the default rule.”¹⁵²

Notwithstanding the fact that Marvel’s assertion was wholly unsubstantiated by evidence, even operating under the assumption of

143. See *Kimble v. Entm’t, LLC*, 135 S. Ct. 2401, 2015 (2015).

144. *Id.* at 2408.

145. See *id.* at 2406 (referencing the deal desired by, and denied to, Kimble).

146. *Id.*

147. *Id.*

148. See *id.* at 2417 (Alito, J., dissenting) (indicating that if the parties had been aware of *Brulotte*, they might have agreed to higher payments during the patent term, or perhaps are larger lump-sum up front).

149. *Id.* at 2406.

150. See *id.* at 2410 (indicating that “so long as [there is] a reasonable possibility that parties have structured their business transactions in light of *Brulotte*, [the Court] ha[s] one more reason to let it stand”).

151. *Id.*

152. *Id.* at 2417 (Alito, J., dissenting).

its truth would dispel the Court's rationale.¹⁵³ Pursuant to the law of contracts, if parties actually relied on *Brulotte* to supply a default rule, courts would enforce the contracts as the parties intended.¹⁵⁴ Consequently, there would be no need for the Court to refuse to overrule *Brulotte* on the theory that it would upset parties' expectations—which, paradoxically, is exactly what ensued by upholding the flawed precedent.¹⁵⁵

VI. CONCLUSION

The *Kimble* Court disregarded statutory amendment that qualifies overturning *Brulotte*, thereby ruling in a matter inconsistent with Congress's intent and reaffirming a clear case of judicial overreach. Moreover, rather than "clearing the err," the Court poignantly directed all arguments back to Congress's doorstep. But as Justice Alito aptly stated, "[W]e cannot 'properly place on the shoulders of Congress' the entire burden of correcting the Court's own error."¹⁵⁶ And when the majority was not deferring responsibility, it was ignoring it under the pretext of *stare decisis*, ultimately impeding parties' ability to contract freely, and impermissibly altering the parameters of the Act. The Supreme Court is undeniably endowed with incredible power, but when faced with the opportunity to use that power for good and not for evil, the Court's deflection was too great even for Spider-Man to save.

153. *Id.*

154. RICHARD A. LORD, 27 WILLISTON ON CONTRACTS § 70:124 (4th ed. 2003) ("The prevailing mandate is that mistakes of fact and law weigh in equally on equity's scales of justice, making relief available where the intention of the parties has been thwarted by a mutual mistake of law.").

155. *See generally Kimble*, 135 S. Ct. 2401 (explaining how the Court's application of the *Brulotte* rule served to upset *Kimble*'s contractual expectations of obtaining an indefinite royalty on his patent, as stipulated by the parties, thereby undervaluing the value of his patent).

156. *Id.* at 2418 (Alito, J., dissenting) (citing *Girouard v. United States*, 328 U.S. 61, 69–70 (1946)).

