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# Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent 'Privilege' in Historical Context

*Adam Mossoff*

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# WHO CARES WHAT THOMAS JEFFERSON THOUGHT ABOUT PATENTS?
## REEVALUATING THE PATENT "PRIVILEGE" IN HISTORICAL CONTEXT

Adam Mossoff*

*The conventional wisdom holds that American patents have always been grants of special monopoly privileges lacking any justification in natural rights philosophy, a belief based in oft-repeated citations to Thomas Jefferson's writings on patents. Using "privilege" as a fulcrum in its analysis, this Article reveals that the history of early American patent law has been widely misunderstood and misused. In canvassing primary historical sources, including political and legal treatises, Founders' writings, congressional reports, and long-forgotten court decisions, it explains how patent rights were defined and enforced under the social contract doctrine and labor theory of property of natural rights philosophy. In the antebellum years, patents were civil rights securing important property rights—what natural-rights-influenced politicians and jurists called "privileges."*

*This intellectual history situates the Copyright and Patent Clause, the early patent statutes, and nineteenth-century patent case law within their appropriate political and constitutional context. In so doing, it resolves many conundrums arising from misinterpretation of the historical patent privilege. Doctrinally, it explains why Congress and courts in the early nineteenth century expansively and liberally construed patent rights, and did not limit patents in the same way they narrowly construed commercial monopoly grants, such as bridge franchises. It also exposes the near-universal misuse of history by lawyers and scholars today, who rely on Jefferson as undisputed historical authority in critiquing expansive intellectual property protections today. Ultimately, the conventional wisdom is a historical myth that obscures the early development of American patent law under the meaningful guidance of natural rights philosophy.*

* Assistant Professor of Law, Michigan State University College of Law. J.D., University of Chicago; M.A., Columbia University; B.A., University of Michigan. Many thanks to Thomas A. Bowden, Michael A. Carrier, Eric R. Claeys, John Duffy, Richard A. Epstein, Timothy Holbrook, Roberta R. Kwall, Mark Lemley, Thomas Nachbar, Craig A. Nard, David Post and Eugene Volokh for their comments, as well as workshop participants at Case Western University School of Law, the University of Chicago Law School, and the George Washington University Law School. In the past two years, conference attendees at the American Society for Legal History Annual Meeting, the Intellectual Property Scholars Conference at DePaul University College of Law, and the Works-In-Progress Intellectual Property Colloquia at Boston University School of Law and Washington University School of Law in St. Louis were sources of important feedback. Rose Willis and the MSU College of Law Library provided invaluable research assistance. As always, Amy Mossoff was a vitally important source of feedback on my research and writing.

## I. INTRODUCTION

In 1966, the Supreme Court discovered that Thomas Jefferson was the founder of American patent law. In *Graham v. John Deere Co.,*[1] the Court first invoked Jefferson's words that the "embarrassment of an exclusive patent" was a special legal privilege justified only because these "monopolies of invention" served the "benefit of society."[2] Jefferson continued to make guest appearances in Court decisions for the next twenty years,[3] leading patent law

[1] 383 U.S. 1, 7-11 (1966).

[2] Letter to Isaac McPherson (Aug. 13, 1813), *in* 13 THE WRITINGS OF THOMAS JEFFERSON 334-35 (A.A. Lipscomb ed., 1903).

[3] *See* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 147 (1989); Diamond v. Chakrabarty, 447 U.S. 303, 308-09 (1980).

scholars to remark recently that Jefferson's "views . . . have proven influential, especially in the Supreme Court."[4] Following the Court's practice, intellectual property scholars, especially those engaged in the increasingly rancorous debate over rights in digital content on the Internet, invoke Jefferson's words as an unassailable historical axiom.[5] Jefferson's hegemony over the history of American patent law is as indisputable as it is wrong.

In using Jefferson as the sole source of early American patent law policy, the Court and scholars have created an historical myth—what this Article calls the "Jeffersonian story of patent law." This conception of early American patent policy arguably results from the sidelining of the Copyright and Patent Clause[6] from many traditional debates in constitutional law.[7] Whereas legal scholars have studied for many years the historical record underlying other constitutional clauses, such as the Commerce Clause,[8] the history of the Copyright and Patent Clause has been left largely unexplored.[9] Patents, and intellectual property rights generally, receive short shrift in

[4] ROBERT P. MERGES & JOHN F. DUFFY, PATENT LAW AND POLICY 8 (3d ed. 2002).

[5] *See infra* notes 46-50 and accompanying text (identifying substantial reliance on Jefferson by scholars).

[6] *See* U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . . To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

[7] There is no discussion of the Copyright and Patent Clause in two prominent constitutional law treatises: ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (2d ed. 2002); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988). The Copyright and Patent Clause also is absent from other constitutional law hornbooks, *see, e.g.*, JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW (3d ed. 1986). *See also* LAWRENCE LESSIG, FREE CULTURE 215 (2004) (noting that "constitutional law courses never focus upon the Progress Clause of the Constitution"); Paul M. Schwartz & William Michael Treanor, Eldred *and* Lochner*: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331, 2331 (2003) (noting that the Copyright and Patent Clause "until very recently . . . received little attention from constitutional law scholars").

[8] *See, e.g.*, Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE (1937); Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335 (1934); TRIBE, *supra* note 7, at 401-45.

[9] Before the 1990s, Bruce Bugbee's and Frank Prager's work comprise almost all citations to the history of American patent law. *See, e.g.*, BRUCE BUGBEE, THE GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW (1967); Frank D. Prager, *Proposals for the Patent Act*, 36 J. PAT. OFF. SOC'Y 157 (1954); Frank D. Prager, *A History of Intellectual Property from 1545 to 1787*, 25 J. PAT. OFF. SOC'Y 711 (1944).

standard legal histories,[10] and even then historians recite by rote the standard line of the Jeffersonian story of patent law. Lawrence Friedman, for instance, states simply that "[m]onopoly was in bad odor in 1776, except for the special case of the patent, which served as an incentive for technical innovation."[11]

Recently lawyers and scholars began to focus their attention on patent law history, but they view the historical record through a lens cut by the Jeffersonian story of patent law.[12] In *Eldred v. Ashcroft*,[13] the petitioner and his supporting *amici* relied on the Jeffersonian story of patent law in arguing that Congress's 1998 extension of copyright terms contradicted the limited status of copyright (and patent) privileges established in the early years of the republic.[14] Scholars use the Jeffersonian story of patent law as an undisputed descriptive baseline for critiquing recent expansions in intellectual property rights, which they call the "propertization" of intellectual property.[15] Furthermore, professors and activists use it in criticizing the Supreme

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[10] There is no mention of patents or other intellectual property rights in MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1992). Lawrence Friedman spends approximately four pages discussing patents in his famous study of American legal history. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 255-56, 435-37 (2d ed. 1985).

[11] FRIEDMAN, *supra* note 10, at 255. Later, Friedman writes that the "patent monopoly was in some regards an anomaly, in an expansive, free-market economy." *Id.* at 436.

[12] *See, e.g.*, Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Copyright and Patent Clause*, 84 J. PAT. & TRADEMARK OFF. SOC'Y 909 (2002); EDWARD C. WALTERSCHEID, THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE (2002).

[13] 537 U.S. 186 (2003).

[14] *See* Brief for Petitioners at 14-16, 24-28, 2002 WL 32135676, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618); Brief of Intellectual Property Law Professors as Amici Curiae Supporting Petitioners at 8-13, 2002 WL 1041866; *see also* Ochoa & Rose, *supra* note 12, at 909 (publishing their amicus brief filed in *Eldred*).

[15] *See, e.g.*, Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L. J. 1, 1 (2004) (declaring that "[o]ne of the most revolutionary legal changes in the past generation has been the 'propertization' of intellectual property," in which such rights are viewed as "absolute property" and the "duration and scope of rights expand without limit"); Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1343 (2004) (noting how it is "fashionable today" among intellectual property scholars to believe that "the public domain stands in opposition to intellectual property—that the public domain is a bulwark against propertization and an alternative to intellectual property"); Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 902 (1997) (concluding after a survey of increasing intellectual property protections that "the 'propertization' of intellectual property is a very bad idea"); *see also* Pamela Samuelson, *Information as Property: Do* Ruckelshaus *and* Carpenter *Signal a Changing Direction in Intellectual Property Law?*, 38 CATH. U. L. REV. 365 (1989) (describing and critiquing the "more proprietarian and anti-dissemination attitude toward information than that which the law has previously displayed"). A legal historian recently noted the historical claim in intellectual property scholars' lamenting "the 'propertization' of the field" in

Court for being Janus-faced: The Court's expansive doctrinal developments in patent law[16] and in other intellectual property fields[17] belie its alleged commitment to its long-standing, historical policy in limiting these special monopoly privileges. Lawrence Lessig thus faults the Court today for failing to heed its own "long history [in] . . . imposing limits on Congress's power in the name of the Copyright and Patent Clause."[18]

In this Article, I offer a modest challenge to these widely held historical assumptions by exploring one aspect of the intellectual history of American patent law—the oft-repeated claim today that patents have always been specially conferred legal *privileges*. In addition to Jefferson's belief that a patent was a special "gift of social law,"[19] there are substantial references to patents as "privileges" in the early years of the American republic.[20] On the basis of this historical evidence, Susan Sell asserts that the focus today on intellectual property rights "obscure[s] the fact that IP 'rights' are actually grants of privileges."[21] Judge Giles S. Rich, regarded by many as a "founding father of modern patent law,"[22] also believes "that patents for

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which the "expansive language of property rights has displaced the traditional discourse of limited monopoly." Morton J. Horwitz, *Conceptualizing the Right Of Access to Technology*, 79 WASH. L. REV. 105, 115 (2004).

[16] *See, e.g.*, Diamond v. Diehr, 450 U.S. 175 (1981) (holding that computer programs are patentable subject matter); *Chakrabarty*, 447 U.S. at 309 (holding that a genetically engineered bacteria "plainly qualifies as patentable subject matter"). Until recently, the Federal Circuit played a central role in expanding patent rights with the Supreme Court's salutary neglect,. *See* State Street Bank & Trust Co. v. Signature Financial Group, Inc., 149 F.3d 1368 (Fed. Cir. 1998) (holding business methods are patentable subject matter), *cert. denied*, 525 U.S. 1093 (1999).

[17] *See, e.g.*, Metro-Goldwyn Mayer Studios Inc. v. Grokster, Ltd., 125 S. Ct. 2764 (2005) (holding peer-to-peer file swapping network liable for indirect copyright infringement); *Eldred*, 537 U.S. at 204 (holding that Congress has the authority under the Copyright and Patent Clause to extend copyright terms retroactively).

[18] LESSIG, *supra* note 7, at 240. *Cf. Eldred*, 537 U.S. at 246 (Breyer, J. dissenting) (castigating *Eldred* majority for ignoring views of Madison, Jefferson, "and others in the founding generation, [who] warned against the dangers of monopolies").

[19] Letter to Isaac McPherson, *supra* note 2, at 334.

[20] This included Supreme Court Justices, such as Justice Joseph Story, *see infra* note 66 and accompanying text, and numerous other federal judges and Circuit Justices, *see infra* note 171 and accompanying text.

[21] SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 146 (2003) (emphasis added).

[22] DONALD S. CHISUM ET. AL, PRINCIPLES OF PATENT LAW 24 (3d ed. 2004).

inventions were historically, and always will be, grants of privilege."[23] Such broad-brushed declarations that patents were merely special legal privileges are wrong.

What is missing today in these oft-repeated historical claims in court opinions and intellectual property scholarship is an appreciation of the intellectual context of the eighteenth and nineteenth centuries—a time period dominated by the labor theory of property and the social contract theory of civil society. Recognizing this past intellectual context is important in understanding history, if only because that context is radically different from the utilitarian and positivist paradigm that dominates our political and legal discourse today.[24] To move from today's positivist, utilitarian world to the natural-rights world of the eighteenth century and early nineteenth century is, in the apt words of Larry Kramer, "rather like visiting a foreign country."[25] Such a cultural and social divide impacts the way people today may interpret historical texts, and the meaning of particular words in those texts, such as the omnipresent, legal-term-of-art *privilege*. In early American history, legal privileges comprised many fundamental rights, such as due process rights, property rights, and even patent rights.[26]

In three parts, this Article will advance its thesis that social contract doctrine and a labor theory of property defined early American patent rights as privileges. First, it will explain the birth of the Jeffersonian story of patent law in Supreme Court decisions, and how many

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[23] Giles S. Rich, *Are Letters Patent Grants of Monopoly?*, 15 W. NEW ENG. L. REV. 239, 248 (1993); *see also* Special Equip. Co. v. Coe, 324 U.S. 370, 382 (1945) (Douglas, J., dissenting) (declaring that it is "mistake . . . to conceive of a patent as but another form of private property" because a "patent is a privilege.").

[24] *Cf.* Robert G. Bone, *A New Look At Trade Secret Law: Doctrine In Search Of Justification*, 86 CAL. L. REV. 241, 259 (1998) (noting in the context of trade secrets doctrine that its supporting theory in the nineteenth century "began to lose its grip, first with the rise of sociological jurisprudence, and then with the advent of legal realism in the early twentieth century"). Bone specifically recognizes that "[a] new positivism and commitment to instrumental reasoning replaced the natural law formalism of the late nineteenth century. This change undermined the logic of the common law property theory . . . ." *Id.* The impact on tangible property doctrines by the cultural shift at the turn of the twentieth century from natural law and natural rights reasoning to utilitarian and positivist reasoning is examined in Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371 (2003).

[25] Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387, 390 (2003).

[26] *See infra* Part III & Part IV.A.

intellectual property scholars today have adopted Jefferson's views of patents as an historical axiom. Second, it will explain how social contract doctrine influenced the development of American patent law, which is revealed in the historical identification of patent rights as privileges. In surveying primary sources from the eighteenth and nineteenth centuries, including philosophical and legal treatises, Founders' writings, congressional records, and judicial decisions, this Article reveals how *privilege* was a legal term of art in the eighteenth and nineteenth centuries that referred to a civil right justified by natural rights philosophy. Finally, it will conclude by identifying some implications for patent law today by reasserting this intellectual context back into the interpretation of the historical record.

This intellectual history has far-reaching consequences. First, as an historical matter, it resolves many puzzles about patent doctrines created by the Jeffersonian story of patent law. If it were true that patents were strictly limited, specially-conferred monopoly privileges saved from condemnation given only their social utility, then why did antebellum courts classify patents as property rights,[27] develop liberal interpretative presumptions favoring their validity,[28] and create additional rights beyond those authorized in the patent statutes, such as a patentee's right to obtain a "reissued" patent to correct a mistakenly defective patent?[29] Furthermore, if patents were strictly limited privileges, why did Congress expressly provide for patent terms extensions in the 1836 Patent Act?[30] Such developments make sense only if one first understands the intellectual context of the patent privilege in the early American republic.

Second, this intellectual history exposes the improper use of the historical record in today's intellectual property debates. Lawyers and intellectual property scholars have been using

[27] *See infra* Part IV.B.
[28] *See infra* Part IV.C.1.
[29] *See infra* Part IV.C.2.
[30] *See infra* Part IV.C.3.

the Jeffersonian story of patent law in claiming that historical authority undoubtedly supports a more restrictive, limited approach to intellectual property doctrines today. In essence, they have been using this historical claim to do the descriptive heavy lifting in their normative work. When the intellectual context of the eighteenth and nineteenth centuries is reasserted back into the historical analysis, it reveals that the Jeffersonian story of patent law used by courts and scholars today is at best a half-truth—at worst, it is an outright myth.[31]

## II. THE JEFFERSONIAN STORY OF PATENT LAW

The Jeffersonian story of patent law is a potent historical claim because it contains a kernel of truth. There were antebellum politicians and jurists who viewed patents as "odious monopolies" that were granted to inventors given only their social utility.[32] But the Jeffersonian story of patent law elevates this one viewpoint into unquestioned historical axiom, and the rest of the record is suppressed or ignored by compressing it into our modern utilitarian framework that deprives it of the intellectual context that gave it meaning. Before explaining this intellectual context and the role of American patent law within it, it is first necessary to explain how the Supreme Court gave birth to the Jeffersonian story of patent law, and how this myth has been nurtured and fed by intellectual property professors, legal historians, and policy activists.

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[31] *Cf.* Thomas B. Nachbar, *Constructing Copyright's Mythology*, 6 GREEN BAG 2d 37, 46 (2002) (critiquing as a "myth" the attempt by the petitioners in *Eldred v. Ashcroft* to frame the history of copyright law in modern terms).

[32] In the eighteenth and nineteenth centuries, government-created monopolies were condemned as "odious" because they infringed rights in property and commerce. *See, e.g.*, Allen v. Hunter, 1 F. Cas. 476, 477 (C.C.D. Ohio 1855) (No. 225) (noting the truism that "monopolies are justly odious" because a monopolist "takes away from the public that which belongs to it" through "the exercise of the sovereign power"); MD. CONST. of 1776, art. XXXIV (prohibiting monopolies because "monopolies are odious, contrary to the spirit of free government, and the principles of commerce"); *see also* The Case of Monopolies, 11 Co. Rep. 84 b, 77 Eng. Rep. 1260, 1266 (K.B. 1603) (condemning, in Lord Coke's report of this famous case, a playing card monopoly granted by Queen Elizabeth under her royal prerogative as an "odious monopoly").

A. *The Supreme Court's Creation of the Jeffersonian Story of Patent Law*

In the mid-twentieth century, the *Graham* Court recognized Jefferson for an accomplishment that was eclipsed apparently by his other Founding Era activities—it anointed him the founder of American patent law. The Court justified its sweeping discussion of Jefferson's views on patents because, it claimed, Jefferson was an important figure in early American patent law: He was the "moving spirit" in implementing the 1790 Patent Act and "he was also the author of the 1793 Patent Act."[33] To further establish Jefferson's *bona fides* on the subject of patents, the Court further pointed out that "Jefferson was himself an inventor of great note."[34]

The *Graham* Court quoted liberally from Jefferson's correspondence, including his now-famous 1813 letter to inventor, Isaac McPherson.[35] At a minimum, this letter disabused anyone of the idea that the author of the Declaration of Independence believed there was a natural right to the machines or other discoveries produced by the labors of an inventor. The Court's quotation of Jefferson's letter, although lengthy, has proven so significant that it justifies its reproduction here:

> Stable ownership is the gift of social law, and is given late in the progress of society. It would be curious then, if an idea, the fugitive fermentation of an individual brain, could, of natural right, be claimed in exclusive and stable property. If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual

[33] *Graham*, 383 U.S. at 7.

[34] *Id. See generally* SILVIO A. BEDINI, THOMAS JEFFERSON: STATESMAN OF SCIENCE (1990) (detailing Jefferson's extensive scientific and inventive activities, such as inventing a device that duplicated all of his letters).

[35] *Graham*, 383 U.S. at 7-11.

> instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody.[36]

Although this historical excursion was *dicta*—the Court hardly needed to establish the historical policy underpinnings of American patent law in a case addressing one of the novel statutory provisions in the 1952 Patent Act[37]—its lengthy and numerous quotations from Jefferson's writings established his views as *the* historical policy foundation for American patent law. Some Justices joining the *Graham* decision already believed that the Founders viewed patents as special grants of monopoly privileges,[38] but *Graham* formally gave birth to what has grown into the Jeffersonian story of patent law.[39] If there was any doubt about this, the Court reaffirmed its fealty to the Jeffersonian story of patent law over the next twenty years by continually returning to Jefferson as the expositor of early American patent policy.[40]

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[36] *Id.* at 9 n.2. *See also* Letter to Isaac McPherson, *supra* note 2, at 334-35.

[37] Pub. L. No. 82-593, 66 Stat. 792. The issue of first impression before the *Graham* Court concerned the construction of § 103 of the 1952 Patent Act, which codified the nineteenth-century judicially created doctrine that inventions cannot be "obvious . . . to a person having ordinary skill in the art." 35 U.S.C. § 103(a) (2000). *See* Hotchkiss v. Greenwood, 52 U.S. (11 How.) 248, 267 (1851) (affirming an invalidation of a patent because "the improvement is the work of the skilful mechanic, not that of the inventor").

[38] *See, e.g.*, Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Co., 340 U.S. 147, 154 (1950) (Douglas, J., concurring) ("Every patent is the grant of a privilege of exacting tolls from the public. The Framers plainly did not want those monopolies freely granted.").

[39] This was not the first time the Court relied on Jefferson's correspondence to create constitutional doctrine. *See* Everson v. Board of Education, 330 U.S. 1, 16 (1947) (quoting Jefferson's letter to the Danbury Baptist Association about establishing "a wall of separation between Church and State" as historical foundation for Establishment Clause jurisprudence). It is a curious coincidence that legal scholars also accuse the *Everson* Court of creating an historical myth in its use of Jefferson's letter to the Danbury Baptist Association. *See generally* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2004).

[40] *See Bonito Boats*, 489 U.S. at 147 (discussing Thomas Jefferson's views on patents as the basis of patent law policy); *Chakrabarty*, 447 U.S. at 308-09 (1980) (discussing Jefferson's role in drafting the 1793 Patent Act); *see also* Frank H. Easterbrook, *Intellectual Property is Still Property*, 13 HARV. J. L. & PUB. POL'Y 108, 117 (1990) (noting that in *Bonito Boats* "[n]o Justice questioned the equation of patent to monopoly," and that the "Justices attributed this view to Thomas Jefferson").

It is, of course, understandable why the *Graham* Court found Jefferson's letter to McPherson to be such a compelling historical resource. Notably, Jefferson's justification for patents is forward looking. He forcefully advanced the utilitarian and economic justification of the patent system—the primary justification for patents today.[41] Furthermore, Jefferson's elegant metaphors are inspiring. His compelling rhetoric, such as comparing ideas to an inexhaustible flame that spreads the light of understanding throughout the world, is moving in a way that an abstract economic lesson in public goods or free-riding behavior is not.[42] Finally, and most important, this is one of the few policy statements on the Copyright and Patent Clause by a Founder,[43] and it is clearly authored by the man who wrote the Declaration of Independence. Jefferson's eloquent prose captures with great flourish what is otherwise stated in dry, legalistic

[41] Although scholars today identify many operative policies in patent law, they are only different applications of the same utilitarian, incentive-creating theory. *See, e.g.*, Rebecca S. Eisenberg, *Patents and the Progress of Science: Exclusive Rights and Experimental Use*, 56 U. CHI. L. REV. 1017 (1989) (incentive to invent and disclose); F. Scott Kieff, *Property Rights and Property Rules for Commercializing Inventions*, 85 MINN. L. REV. 697 (2001) (incentive to commercialize); Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J. L. & ECON. (1977) (incentive to invent); RICHARD A. POSNER & WILLIAM M. LANDES, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW (2003) (analyzing dynamic efficiency in intellectual property regimes).

[42] Unsurprisingly, scholars often quote or cite Jefferson's letter to McPherson in explaining that intellectual property is a public good. *See, e.g.*, Anupam Chandler, *The New, New Property*, 81 TEX. L. REV. 715, 746 n.167 (2003); Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 MICH. L. REV. 462, 471 n.25 (1998); Paul Ganley, *Digital Copyright and the New Creative Commons*, 12 INT'L J. L. & INFO. TECH. 282, 288 n.36 (2004); James Gibson, *Re-Reifying Data*, 80 NOTRE DAME L. REV. 163, 172-73 n.27 (2004); Daphne Keller, *A Gaudier Future That Almost Blinds the Eye*, 52 DUKE L. J. 273, 295 n.94 (2002); Kieff, *supra* note 41, at 727 n.130; Raymond Shih Ray Ku, *Consumers and Creative Destruction: Fair Use Beyond Market Failure*, 18 BERKELEY TECH. L. J. 539, 547 n.42 (2003); Craig Allen Nard, *Certainty, Fence Building, and the Useful Arts*, 74 IND. L. J. 759, 771 (1999); Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, 13 HARV. J. L. & PUB. POL'Y 817, 846 n.116 (1990); Arti Kaur Rai, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, 94 NW. U. L. REV. 77, 116 n.215 (1999); Katherine Strandburg, *What Does the Public Get? Experimental Use and the Patent Bargain*, 2004 WIS. L. REV. 81, 104 n.104 (2004); Diane L. Zimmerman, *Is There a Right to Have Something to Say? One View of the Public Domain*, 73 FORDHAM L. REV. 297, 371 n.308 (2004).

[43] Aside from Madison's very brief comments on the Copyright and Patent Clause in *The Federalist Papers*, *see* THE FEDERALIST No. 43, at 271-72 (James Madison) (Clinton Rossiter ed., 1961), Jefferson's letter to McPherson represents the most extensive commentary by a Founder on the nature of patent rights. *See* WALTERSCHEID, *supra* note 12, at 110 (explaining that, except for *The Federalist No. 43*, "no Framer ever offered any explanation of the [the Copyright and Patent Clause] or of why it was included in the draft Constitution"). A letter by Madison from the famous Madison-Jefferson correspondence during the Constitutional Convention was published posthumously, in which Madison does discuss patents, but this was private correspondence that was unknown at the time. *See* Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776-1790, at 562, 566 (James Morton Smith ed., 1995). *See also* note 114 and accompanying text (noting lack of commentary at the Constitution Convention).

language in Article I, § 8 of the Constitution. One cannot begrudge the Court for highlighting this important and compelling policy declaration by a Founder, but this is a far cry from the myopic historical focus adopted by the Court and intellectual property scholars in the years that followed—creating the Jeffersonian story of patent law.

B. *The Scholars' Embrace of the Jeffersonian Story of Patent Law*

Although Jefferson's letter to McPherson was known before 1966,[44] its elevation by the Court to constitutional and historical policy foundation for American patent law greatly affected how scholars and lawyers viewed the history of American patent rights. The widespread conclusion among patent scholars is that the Copyright and Patent Clause was intended to provide only special legal privileges as an exception to broadly accepted limits on government monopolies. Almost all seem to agree that natural rights philosophy played no substantive role in the creation or development of early American patent law.

With few exceptions that are notable if only because they are so rare,[45] academic scholarship has conferred on the Jeffersonian story of patent law the status of historical axiom. Rebecca Eisenberg, among many others,[46] believes that Jefferson's letter to McPherson is proof

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[44] *See* Edward C. Walterscheid, *The Jeffersonian Mythology*, 29 JOHN MARSHALL L. REV. 269, 303 n.157 (1995) (noting that Jefferson's letter to McPherson was publicly disseminated immediately after its receipt). Frank Prager, one of the few early historians of patent law, also reprinted a substantial portion of Jefferson's letter to McPherson in his 1944 article, *A History of Intellectual Property from 1545 to 1787*, *supra* note 9, at 759.

[45] *See* Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 340 n.287 (2004) (noting that the historical sources are mixed concerning whether patents fit the eighteenth-century definition of "monopoly"); Joan E. Schaffner, *Patent Preemption Unlocked*, 1995 WIS. L. REV. 1081, 1099-1103 (discussing how Lockean ideas influenced Founding Era views of patents). *Cf.* Schwartz & Treanor, *supra* note 7, at 2375-90 (questioning reliance on Jefferson as primary historical authority in copyright law, but accepting historical claim that copyrights were viewed as "government-created monopolies").

[46] *See, e.g.*, Tom W. Bell, *Indelicate Balancing in Copyright and Patent Law*, *in* COPY FIGHTS 1, 27-28 (Adam Thierer & Wayne Crews eds., 2002) (quoting Jefferson's letter to McPherson as evidence "the Founders . . . viewed copyrights and patents as exceptions to natural rights"); Carrier, *supra* note 15, at 19 (citing Jefferson's letter to McPherson as principal evidence that the Founders adopted the patent system only as an express "exception to the government ban on monopolies"); Linda J. Demaine & Aaron X. Fellmeth, *Reinventing the Double Helix: A Novel and Nonobvious Reconceptualization of the Biotechnology Patent*, 55 STAN. L. REV. 303, 330 n.124 (2002) (citing Jefferson's letter to McPherson in discussing how patent "monopolies" have been historically limited); Glynn S. Lunney, Jr., *E-Obviousness*, 7 MICH. TELECOMM. & TECH. L. REV. 363, 366 (2000) (quoting Jefferson's letter to McPherson as evidence of traditional defense of nonobviousness doctrine as limit on patents as "monopoly rights");

that "[t]he framers of the United States Constitution rejected the notion that inventors have a natural property right in their inventions."[47] In the increasingly acrimonious debate over the "propertization" of intellectual property rights in digital media,[48] Lessig and others repeatedly cite and quote from Jefferson's letter to McPherson as historical authority that early Americans were "against the idea that patent protection was in some sense a *natural right*."[49] In reproducing

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ROBERT P. MERGES & JANE C. GINSBURG, FOUNDATIONS OF INTELLECTUAL PROPERTY 21 (2004) (quoting Jefferson's letter to McPherson as a primary historical document because it has been "most influential" in its "refutation of the 'natural rights' theory of intellectual property"); Robert P. Merges & Glenn H. Reynolds, *The Proper Scope of the Copyright and Patent Power*, 37 HARV. J. ON LEGIS. 45, 47 (2000) (discussing Jefferson throughout article in noting that "the grant of copyright and patent power in the Constitution was intended to provide a positive incentive for technological and literary progress while avoiding the abuse of monopoly privileges"); JANICE M. MUELLER, AN INTRODUCTION TO PATENT LAW 131 (2003) (quoting Jefferson's characterization of the "exclusive patent" as an "embarrassment" in speaking of the policy justification for the nonobviousness requirement); Ochoa & Rose, *supra* 12, at 925-26 (concluding from Jefferson's correspondence that "[i]t is clear that many of the Framers were concerned with restraining monopolies of all kinds"); Max Stul Oppenheimer, *In Vento Scribere: The Intersection of Cyberspace and Patent Law*, 51 FLA. L. REV. 229, 236 (1999) (quoting Jefferson's letter to McPherson as general "constitutional background" to patent law). *See also supra* note 42 (listing, among other sources, patent law articles citing to or quoting from Jefferson's letter to McPherson).

[47] Eisenberg, *supra* note 41, at 1024 n.27 (quoting Jefferson's letter to McPherson).

[48] *See supra* note 15 and accompanying text.

[49] LAWRENCE LESSIG, THE FUTURE OF IDEAS 95 (2001). *See also id.* at 58-59 (quoting again Jefferson's letter to McPherson as supporting historical claim that patents and copyrights were only special, limited monopoly privileges); Lawrence Lessig, *The Death of Cyberspace*, 57 WASH. & LEE L. REV. 337, 337-39 (2000) (quoting extensively from Jefferson's letter to McPherson for proposition that "[i]deas get to run free"). In *Free Culture*, Lessig continues to ply this historical claim, noting that patent and copyright were merely "exceptions to free use [of] ideas and expressions," LESSIG, *supra* note 7, at 84, which grew out of England's "long and ugly experience with 'exclusive rights,' especially 'exclusive rights' granted by the Crown." *Id.* at 88.

*See also* Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23, 60-61 (2001) (quoting Jefferson's letter to McPherson as proof that the Constitution protects intellectual property privileges only on utilitarian grounds); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 53-54 (2003) (quoting extensively from Jefferson's letter to McPherson for proposition that intellectual property is a monopoly); James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177, 182 (1997) (quoting via John Perry Barlow's texts Jefferson's letter to McPherson as evidence for proposition that "information wants to be free"); Raymond Shih Ray Ku, *Grokking Grokster*, 2005 WIS. L. REV. 1217, 1280 (quoting Jefferson's analogy to ideas as fire as a basis for understanding the dissemination of information over the Internet today); Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 263 (2002) (leading off article with quote from Jefferson's letter to McPherson); David L. Lange, *Students, Music, and the Net: A Comment on Peer-to-Peer File Sharing*, 2003 DUKE L. & TECH. REV. 21 (2003) (quoting extensively from Jefferson's letter to McPherson as evidence of utilitarian justification for copyright and patent privileges); Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 185 n.431 (2002) (citing Jefferson's letter to McPherson as animating activists for civil liberties on the Internet); Ruth Okediji, *Givers, Takers, and Kinds of Users: A Fair Use Doctrine for Cyberspace*, 53 FLA. L. REV. 107, 118 n.43 (2001) (citing Jefferson's letter to McPherson as evidence that early American copyright statutes were viewed as "a form of welfare grant"); Jennifer E. Rothman, *Initial Interest Confusion: Standing at the Crossroads of Trademark Law*, 27 CARDOZO L. REV. 105, 129 (2005) (citing Jefferson's letter to McPherson to support claim about copyright that the "scope of an individual's rights in his or her work is meant to be narrowly construed and should theoretically be limited only to protection that is necessary to maximize public welfare"); Christopher Sprigman,

Jefferson's letter to McPherson in their patent law casebook, Donald Chisum, Craig Nard et al. conclude that "Locke's natural rights theory and its impact with respect to intellectual property is dubious."[50]

Today's patent law historians endorse these generalized claims about the lack of any influence by natural rights philosophy on the early development of American patent law. Edward Walterscheid, the principal patent law historian today,[51] states as simple historical fact

> that the patent custom known to the Framers involved privileges rather than property rights as such. The distinction between a *patent privilege* and a *patent property right* is an important one, and one not always recognized in the early literature on the patent law.[52]

Walterscheid cites as evidence that John Fitch, one of the inventors of the steamboat, deleted the term "right" from a draft petition for legislation protecting his inventive work, and replaced it with the term "privilege" in the final version of the petition submitted to congress in 1786 (under the Articles of Confederation).[53] Even prior to the 1780s, Walterscheid maintains that the patent regimes in the various colonies and states "involve[d] exclusive grants of *privilege*."[54]

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*Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 534 n.177 (2004) (quoting Jefferson's letter to McPherson for support for proposition that copyright is merely a utility-maximizing monopoly grant); John Tehranian, *All Rights Reserved? Reassessing Copyright and Patent Enforcement in the Digital Age*, 72 U. CIN. L. REV. 45, 45 (2003) (quoting Jefferson's letter to McPherson in introduction); SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS 23-24 (2001) (citing Jefferson's letter to McPherson as evidence that "the founders . . . did not argue for copyrights or patents as 'property,'" and instead viewed these legal entitlements as "a Madisonian compromise, a necessary evil, a limited, artificial monopoly").

[50] CHISUM ET AL., *supra* note 22, at 44.

[51] *See, e.g.*, Edward C. Walterscheid, *The Nature of the Intellectual Property Clause: A Study in Historical Perspective (Part 1)*, 83 J. PAT. & TRADEMARK OFF. SOC'Y 763 (2001); Edward C. Walterscheid, *The Early Evolution of the U.S. Patent Law: Antecedents (5, Part II)*, 78 J. PAT. & TRADEMARK OFF. SOC'Y 665 (1996); Edward C. Walterscheid, *Priority of Invention: How the United States Came to Have a "First to Invent" Patent System*, 23 AIPLA Q. J. 263 (1995); Edward C. Walterscheid, *To Promote the Progress of Science and the Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. INTELL. PROP. L. 1 (1994).

[52] WALTERSCHEID, *supra* note 12, at 14 (emphasis added).

[53] *Id.* at 225. *See infra* note 111 and accompanying text (discussing this alleged proof of the Jeffersonian story of patent law).

[54] Edward C. Walterscheid, *Patents and the Jeffersonian Mythology*, 29 J. MARSHALL L. REV. 269, 272 (1995) (emphasis added).

Admittedly, Walterscheid and others criticize the Court's excessive reliance on Jefferson,[55] but these are solely institutional or doctrinal critiques,[56] and in these critiques they repeatedly reaffirm the Jeffersonian story of patent law: Patents were specialized monopoly privileges that had the same "limitations" as other special monopoly privileges granted by the government.[57] Also, when professors and historians look beyond Jefferson and the Founding Era, they rely on select sources from the nineteenth century that support the Jeffersonian story of patent law, such as patent law decisions by Chief Justice Taney, the famously anti-monopolist Jacksonian Democrat,[58] or Justice McLean's 1832 decision in *Wheaton v. Peters*.[59] Contrary evidence suggesting any influence by natural rights philosophy is dismissed as empty "rhetoric."[60]

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[55] *See, e.g.*, Kenneth J. Burchfiel, *Revising the "Original" Patent Clause: Pseudohistory in Constitutional Construction*, 2 HARV. J. L. & TECH. 155, 155 (1989) (calling the Court's citation of Jefferson "pseudohistory"); Edward C. Walterscheid, *The Use and Abuse of History: The Supreme Court's Interpretation of Thomas Jefferson's Influence on the Patent Law*, 39 IDEA 195, 195 (1999) (claiming the Court's reliance on Jefferson is an "abuse of history"); Walterscheid, *supra* note 54, at 270 (identifying the Court's use of Jefferson in its patent law jurisprudence as creating a "mythology").

[56] *See, e.g.*, Burchfiel, *supra* note 55, at 209 (accusing Court of failing to acknowledge "Jefferson's contemporaries" who had similar views as Jefferson about "the patent power and its limitations"); Walterscheid, *supra* 54, at 289 (noting that "the Supreme Court has on at least three occasions incorrectly stated that Jefferson drafted the Patent Act of 1793").

[57] Burchfiel, *supra* note 55, at 209. *See also* WALTERSCHEID, *supra* note 12, at 297 ("The Framers clearly viewed patents and copyrights as monopolies and assumed that they would be treated as such.").

[58] Taney is best known for his anti-monopoly decision in *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837), in which the Court strictly construed a monopoly franchise granted by Massachusetts. This decision is widely regarded as "reflect[ing] the prevailing anti-monopoly sentiment that was one of the hallmarks of the Jacksonian period." Deborah A. Ballam, *The Evolution of the Government-Business Relationship in the United States: Colonial Times to Present*, 31 AM. BUS. L. J. 553, 592 (1994). *See also* THE OXFORD COMPANION TO AMERICAN LAW 783 (Kermit L. Hall et al. eds., 2002) (discussing Taney's "fervent" commitment to Jacksonian ideals).

For a representative sample of citations to Taney's claim in *Bloomer v. McQuewan*, 55 U.S. (14 How.) 539, 549 (1852), that patents represent only a "right to exclude" others from this special "franchise" grant, see, for example, Joseph S. Miller, *Enhancing Patent Disclosure for Faithful Claim Construction*, 9 LEWIS & CLARK L. REV. 177, 178 n.5 (2005); Edward C. Walterscheid, *Divergent Evolution of the Patent Power and the Copyright Power*, 9 MARQ. INTELL. PROP. L. REV. 307, 330 (2005); Giles S. Rich, *The Relation Between Patent Practices and the Anti-Monopoly Laws*, 14 FED. CIR. B. J. 37, 37 (2004); CHISUM ET AL., *supra* note 22, at 4; Kieff, *supra* note 41, at 736 n.163; 1 JOHN GLADSTONE MILLS III, DONALD C. REILEY III, & ROBERT C. HIGHLEY, PATENT LAW FUNDAMENTALS § 1:11 (2d ed.).

[59] *See infra* Part III.B.2.

[60] *See, e.g.*, Oren Bracha, *The Commodification of Patents 1600-1836: How Patents Became Rights and Why We Should Care*, 36 LOY. L.A. L. REV. 177, 210 n.185 (2004) (claiming that "judicial rhetoric was influenced by concepts taken from Lockean natural rights thought" in eighteenth-century patent cases, but that any claims of

The Jeffersonian story of patent law reigns supreme in the courts, among intellectual property professors and in historical scholarship. When judges, scholars and activists read historical documents, they see terms like *privilege*, and thus they find vindication that the Jeffersonian story of patent law is historically accurate. Before one can show the influence exerted on early American patent doctrines by natural rights philosophy, however, the intellectual context of the historical sources must first be established, which brings into focus the historical meaning of terms like *privilege*. Thus, Part III will explicate this background political and constitutional context, showing how privileges referred to fundamental civil rights considered on par with natural rights. Once this context has been established, widely misinterpreted sources, such as Madison's remarks about patents in *The Federalist No. 43* and the references to patents in *Wheaton*, can be clarified. Finally, Part IV will examine the largely undiscovered history of American patent law in the early nineteenth century, revealing the substantive impact of the social contract doctrine and the labor theory of property of natural rights philosophy.

## III. RECONSTRUCTING THE HISTORICAL CONTEXT OF THE PATENT PRIVILEGE

The provenance of the American patent system, as the American property system generally, is found in the English feudal system. The fountainhead of Anglo-American patent law was the English Crown's granting manufacturing monopoly privileges to industrialists to promote the economic development of the realm.[61] But a patent secured under American patent

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substantive influence by natural rights philosophy "is simply false"). *Cf.* Glynn S. Lunney, Jr., *Trademark Monopolies*, 48 EMORY L. J. 367, 439-40 (1999) (claiming in modern trademark law that "[p]erhaps recognizing . . . that natural rights' day, if it ever was, has passed, few courts will rest their conclusions on natural rights rhetoric or the simple-minded syllogism of but-for causation"); Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 159 (1998) (critiquing the "rhetoric of romantic genius" that underlies the "practice of intellectual property law . . . to focus on the distinctive, completed work claimed by the specified individual author or inventor").

[61] *See* Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550-1800*, 52 HASTINGS L. J. 1255, 1259-76 (2001).

law in the late eighteenth century was radically different from the royal monopoly privilege dispensed by Queen Elizabeth or King James in the early seventeenth century.[62] Patents no longer created, and sheltered from competition, manufacturing monopolies—they secured the exclusive control of an inventor over his novel and useful scientific or mechanical invention.[63]

Despite this change in the subject matter of patent grants—from manufacturing monopolies secured by royal grant to novel and useful inventions secured by statute—courts and other institutional actors continued to refer to patents as "privileges."[64] This continuing use of *privilege* in American patent law suggests that, despite this change between 1600 and 1800 in the nature of the patent, Americans remained wedded to viewing patents as specially conferred, government-granted privileges. This conclusion seems almost undeniable when Justice Joseph Story—the jurist responsible for creating many American patent doctrines[65]—repeatedly referred to patents as "privileges" in his own patent law decisions.[66]

Although courts and scholars draw this conclusion today, this is an anachronistic reading of the historical record. In the eighteenth and nineteenth centuries, *privilege* referred to several distinct types of legal rights secured to individuals in civil society. One must therefore know the

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[62] *See generally id. Cf.* Rich, *supra* note 23, at 244 (concluding from a survey of early English cases that "[t]he meaning of words like 'patents' often changes with time and place").

[63] *See* Bedford v. Hunt, 3 F. Cas. 37, 37 (C.C.D. Mass. 1817) (No. 1,217) (Story, Circuit Justice) ("No person is entitled to a patent under the act of congress unless he has invented some new and useful art, machine, manufacture, or composition of matter, not known or used before.").

[64] *See, e.g.*, Burr v. Duryee, 4 F. Cas. 806, 810 (C.C.D.N.J. 1862) (No. 2,190) (referring to patents as the "valuable and just privilege given to inventors"); Day v. Union India-Rubber Co., 7 F. Cas. 271, 275 (C.C.S.D.N.Y. 1856) (No. 3,691) (characterizing patents as "special privileges granted to inventors"); American Pin Co. v. Oakville Co., 1 F. Cas. 712, 712 (C.C.D. Conn. 1854) (No. 313) (referring to "the privileges" granted by a patent). *See also* 22 REG. DEB. 996 (1832) (Sen. Dickerson) (opposing a bill granting U.S. patents to three British subjects as "he was not willing to extend these privileges to foreigners").

[65] *See* Frank D. Prager, *The Influence of Mr. Justice Story on American Patent Law*, 5 AM. J. LEGAL HIST. 254, 254 (1961) (noting that it is "often said that Story is one of the architects of American patent law").

[66] *See, e.g.*, Pennock v. Dialogue, 27 U.S. (2 Pet.) 1, 19 (1829) (Story, J.) (referring to a patent as "the privilege of an exclusive right"); Washburn v. Gould, 29 F. Cas. 312, 316 (C.C.D. Mass. 1844) (No. 17,214) (Story, Circuit Justice) (construing renewal provision in patent statute as "intended as a personal privilege of the patentee alone"); Pierson v. Eagle Screw Co., 19 F. Cas. 672, 674 (C.C.D.R.I. 1844) (No. 11,156) (Story, Circuit Justice) (instructing jury that "the defendants used the improvement under a license or privilege originally granted to them by the inventor").

*context* in which this term is used in any particular legal text before one can draw any conclusions as to its meaning. This context is not always self-evident, as *privilege* was a basic term of political and legal discourse in the eighteenth and nineteenth centuries. This meant that Founders, congressmen, and courts rightly assumed that their audience would understand the meaning of *privilege* in its relevant textual context, just as judges and lawyers need not define basic legal terms, such as *title* or *complaint*, when they compose their formal legal texts today.

As the intellectual context of the eighteenth and nineteenth centuries has been lost to us today,[67] it is necessary to reestablish this context in order to understand the meaning of the patent privilege. In other words, one must first understand the social contract doctrine at the heart of eighteenth- and nineteenth-century natural rights philosophy. This is not a game of linguistics or pettifoggery, nor is it a problem faced by only patent lawyers; this is an essential requirement in studying and using historical sources in the law generally. It is particularly pressing if one is researching legal topics that are intimately associated with social and political philosophy, such as constitutional clauses and their resulting application by Congress and federal courts.[68] Thus, this Part will set forth the various senses in which *privilege* was used in political and legal texts in the eighteenth and nineteenth centuries, and how some of these meanings were derived from natural rights philosophy, specifically its social contract doctrine. Ultimately, this illuminates the meaning of the omnipresent references to patents as privileges in the late eighteenth and early nineteenth centuries.

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[67] *See supra* note 24 and accompanying text.

[68] *See* TRIBE, *supra* note 7, at 1309 (recognizing that "[n]atural law philosophy [was] current at the time the Constitution was written'). Some scholars recently have sought to reassert this background context into the study of legal history. *See, e.g.*, Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549 (2003); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L. J. 907 (1993); Carl F. Stychin, *The Commentaries of Chancellor James Kent and the Development of an American Common Law*, 37 AM. J. LEGAL HIST. 440 (1993); Randy E. Barnett, *Are Enumerated Constitutional Rights the Only Rights We Have?: The Case of Associational Freedom*, 10 HARV. J. L. & PUB. POL'Y 101 (1987).

A. *Privilege*

The appeal of the Jeffersonian story of patent law is somewhat understandable because, in Standard English today, *privilege* is an antonym of *right*.[69] In ordinary, day-to-day usage, a privilege is a specially conferred grant in which its recipient cannot claim any moral or legal entitlement to the subject matter of the grant. Many popular aphorisms reflect this sense, particularly those used by parents admonishing their children, such as "a driver's license is a privilege, not a right," or "dessert after dinner is a privilege, not a right." One easily can find additional instances in which courts and legal scholars employ this standard privilege versus right distinction.[70]

The use of language in the law, though, admits of much finer and specialized distinctions. Legal professionals have been splicing Standard English words into legal terms of art for hundreds of years, if not longer.[71] It is not surprising then that *privilege* itself is a legal term of

[69] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1805 (1981) (defining privilege as "a peculiar or personal advantage or right esp. when enjoyed in derogation of common right," or to "deliver by special grace or immunity"); WEBSTER'S NEW INTERNATIONAL DICTIONARY 1969 (2d ed. 1950) (defining privilege as a "right or immunity granted as a peculiar benefit, advantage, or favor").

[70] In *Village of Euclid v. Ambler Realty Company*, for example, the Supreme Court approved zoning ordinances as a proper function of a state's police power because these property regulations would prevent apartment buildings from "depriving children of the *privilege* of quiet and open spaces for play." 272 U.S. 365, 394 (1926) (emphasis added). *See also* TRIBE, *supra* note 7, at 680-81 (noting that "the courts adhered until quite recently to a distinction, expressed most classically by Justice Holmes, between individual 'rights' stemming from constitutional or common law sources and mere 'privileges' bestowed by the government"); s*ee also* Cruz v. Hauck, 404 U.S. 59, 65 (1971) ("Respondent offers none but simply repeats the discredited maxim that paupers' appeals are privileges, not rights."); American Commc'ns Ass'n v. Douds, 339 U.S. 382, 390 (1950) (noting that the legislation under review would not be evaluated as "if it merely withdraws a privilege gratuitously granted by the Government"); Spring Valley Water Works v. Schottler, 62 Cal. 69, 106-07 (1882) (noting that franchises granted by the state of California "do not pertain to the citizens of the State by common right" and are simply "special privileges conferred by Government upon individuals").

[71] In *McCulloch v. Maryland*, for instance, Chief Justice Marshall discovered subtle distinctions in the legal definition of "necessary," as used in the Necessary and Proper Clause. 17 U.S. (4 Wheat.) 316, 414 (1819) ("The word 'necessary' . . . has not a fixed character, peculiar to itself. It admits of all degrees of comparison; . . . . [a] thing may be necessary, very necessary, absolutely or indispensably necessary.") This practice goes back to antiquity, where Aristotle counseled "if a law is ambiguous, we shall turn it about and consider which construction best fits the interests of justice or utility, and then follow that way of looking at it." Aristotle, *Rhetoric*, *in* THE BASIC WORKS OF ARISTOTLE 1374 (W. Rhys Roberts trans., Richard McKeon ed., 1941).

art whose meaning diverges from the layperson's understanding of a special benefit without a rightful claim.

This is neither a novel nor remarkable insight. The use of *privilege* as a legal term of art is omnipresent in the eighteenth century, as evidenced by early American colonial and state constitutions. The title of the constitution drafted by William Penn in founding Pennsylvania in 1701 reads: Charter of Privileges for Pennsylvania.[72] In the state constitutions adopted during the American Revolution, the newly minted state citizens often were guaranteed that they would retain "the privileges, immunities and estates" that were secured to them under their colonial charters,[73] including the "inherent privilege of every freeman the liberty to plead his own cause [in court]"[74] or the right to confront witnesses in criminal cases.[75] It is such fundamental civil rights, among others, that the 1787 Federal Constitution secured equally for all U.S. citizens in its own Privileges & Immunities Clause.[76] Revolutionary Americans, influenced by Lockean ideals concerning the social contract and natural rights, certainly did not think that the rights of confrontation and self-representation in court were merely special benefits doled out by their governments!

What is the connection between Lockean natural rights philosophy and this specialized meaning of privilege? Most legal professionals today are aware of the broad outlines of John Locke's theory of natural rights and its attendant social contract doctrine that dominated early American politics. They typically view the Lockean social contract as a binary, one-to-one

[72] CHARTER OF PRIVILEGES GRANTED BY WILLIAM PENN, ESQ. TO THE INHABITANTS OF PENNSYLVANIA AND TERRITORIES OF 1701.

[73] PA. CONST. of 1776, § 45.

[74] GA. CONST. of 1777, art. LVIII (emphasis added).

[75] CHARTER OF PRIVILEGES GRANTED BY WILLIAM PENN, ESQ. TO THE INHABITANTS OF PENNSYLVANIA AND TERRITORIES OF 1701, art. V (providing that "all Criminals shall have the same Privileges of Witnesses and Council as their Prosecutors").

[76] U.S. CONST. art. IV, § 2 ("Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

exchange: Each person relinquished his "Executive Power"[77] to enforce his natural rights and, in exchange, civil society secured and enforced these natural rights through its public institutions and laws. But Locke, and his fellow natural rights philosophers in the seventeenth and eighteenth centuries, had a more sophisticated and substantive conception of the social contract and the impact it had on citizens' rights.

Contrary to the over-simplified, modern picture of the social contract, Locke and his contemporaries recognized that entering into civil society meant that one would "enjoy many Conveniences, from the labour, assistance, and society of others in the same Community."[78] Accordingly, a person had an expanded range of powers and responsibilities vis-à-vis other people and the state—specifically with respect to the legislative, executive, and judicial institutions that were absent in the state of nature.[79] In other words, in creating civil society, individuals secured the protection of their natural rights, and they also gained a litany of other rights that defined their freedoms relative to their new fellow citizens and public institutions.

Working under the social contract doctrine in the eighteenth and nineteenth century, scholars, jurists, and politicians came to refer to those rights that arose as a consequence of the social contract as *privileges*. William Blackstone's *Commentaries* provided Americans with what became the canonical distinction between natural rights and civil rights.[80] Blackstone explained that the original natural rights, such as liberty, were secured in civil society as "private

[77] JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 128, at 352 (Peter Laslett ed., 1988) (1690) [hereinafter Locke, Second Treatise]. In the famous words of the Declaration of Independence, "all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness," and "That to secure those Rights, Governments are instituted among Men." DECLARATION OF INDEPENDENCE (1776).

[78] LOCKE, SECOND TREATISE, § 130, at 353.

[79] LOCKE, SECOND TREATISE, § 124-26, at 350-51.

[80] *See* Daniel Boorstin, *Preface to the Beacon Press Edition*, in THE MYSTERIOUS SCIENCE OF THE LAW: AN ESSAY ON BLACKSTONE'S COMMENTARIES n.p. (1973) ("In the history of American institutions, no other book . . . has played so great a role as Blackstone's *Commentaries on the Laws of England*." ) (the preface is non-paginated); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 209 (1979) (critiquing the *Commentaries* because it is "the single most important source on English legal thinking in the 18th century, and it has had as much (or more) influence on American legal thought as it has had on British").

*immunities*."[81] But these were not the only rights secured in civil society. Blackstone recognized the "society hath engaged to provide" additional rights secured by express law, which he called "civil *privileges*."[82] Thus arose the well-known locution in the federal and state constitutions—privileges and immunities—which referred to civil and natural rights, respectively.[83]

In this way, the social contract doctrine of natural rights philosophy explained the complex relationship between the privileges and immunities—civil and natural rights—secured to individuals in civil society. For instance, in accord with his natural rights philosophy, Blackstone recognized that property is an "absolute right,"[84] but additional privileges concerning property and its uses are created in civil society that did not exist in the state of nature, such as title deed requirements and formal contractual requirements in conveying property from one person to another.[85] These are the "civil advantages," Blackstone reminded his many American readers, that citizens received "in exchange for which every individual has resigned a part of his natural liberty."[86] This was not Blackstone's original insight, as Locke acknowledged in the *Second Treatise* that "in Governments the Laws regulate the right of property, and the possession of land is determined by positive constitutions."[87] These constitutions and civil laws secured fundamental property rights essential to the functioning of a proper and just society—they secured *privileges*.[88]

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[81] 1 BLACKSTONE, COMMENTARIES 125 (U. Chi. Press ed. 1979) (emphasis added).

[82] *Id.* (emphasis added).

[83] *See supra* notes 72-76 and accompanying text.

[84] 1 BLACKSTONE, COMMENTARIES 134.

[85] *Id.* (recognizing "the modification under which we at present find [property], the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society").

[86] *Id.*

[87] LOCKE, SECOND TREATISE, § 50, at 302. *See also* LOCKE, SECOND TREATISE, § 45, at 299 (recognizing explicitly the legitimacy of title deed and other express legal requirements that "regulated" land ownership under the "Compact" or "positive agreement" creating "distinct Territories, and . . . Laws within themselves").

[88] Another example was the just compensation requirement in the exercise of the eminent domain power. *See* Gardner v. Newburgh, 2 Johns. Ch. 162 (N.Y. Ch. 1816) (Chancellor James Kent) (justifying a just compensation requirement as inherent in the right of due process and "a deep and universal sense of its justice").

In the Founding Era, Blackstone's "privilege" nomenclature was as ubiquitous as the social contract doctrine that gave rise to it.[89] In 1783, George Washington welcomed Irish immigrants to New York City, noting that "[t]he bosom of American is open to . . . the oppressed and persecuted of all Nations and Religions; whom we shall welcome to a participation of all our rights and privileges."[90] At the 1787 Constitutional Convention, James Madison argued forcefully that it was of paramount importance that the new constitution guaranteed that citizens of different states would share an "equality of privileges."[91] In *The Federalist No. 7*, Hamilton echoed this concern about securing "equal privileges" to all citizens, and the central role of the equal protection of these rights in promoting the "habits of intercourse"—commerce—between citizens of the different states.[92]

The most significant example of a Founder distinguishing between civil and natural rights was Madison's remarks in introducing in Congress the bills that would eventually become the Bill of Rights. Madison noted that the bills expressly secured both natural rights and civil rights. The civil rights, he noted, were "specif[ied] positive rights, which may seem to result from the

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Although *Gardner* does not use the legal terms *privilege* or *civil right*, his reasoning clearly reflects the social contract framework of natural rights philosophy.

[89] For instance, *Cato's Letters*, essays that were responsible for disseminating Locke's ideas throughout Anglo-American society in the eighteenth century, embraced an identical usage of *privilege*. Letter No. 62 states:

> But where property is precarious, labour will languish. The *privileges of thinking, saying, and doing* what we please, and of growing as rich as we can, without any other restriction, than that by all this we hurt not the publick, nor one another, are the *glorious privileges of liberty*; and its effects, to live in freedom, plenty, and safety. These are privileges that increase mankind, and the happiness of mankind.

1 JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS 432 (Ronald Hamowy ed. 1995) (Letter No. 62, Saturday, Jan. 20, 1721) (emphases added). The letter later remarks: "This shews that all civil happiness and prosperity is inseparable from liberty, [deriving from] privileges inconsistent with tyranny." *Id.* at 433.

[90] Letter of Dec. 2, 1783, *in* 27 THE WRITINGS OF GEORGE WASHINGTON 254 (John C. Fitzpatrick ed., 1938).

[91] 1 RECORDS OF THE FEDERAL CONVENTION 317 (Max Farrand ed., 1911) (criticizing the New Jersey proposal for failing to protect uniformly citizens' privileges).

[92] THE FEDERALIST No. 7, at 63 (Alexander Hamilton). *See* Ward v. Maryland, 79 U.S. (12 Wall.) 418, 430 (1870) (holding that the Privileges and Immunities Clause "plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business").

nature of the compact."[93] Such rights, though, were as essential as "liberty" and other "rights which are exercised by the people in forming and establishing a plan of Government."[94] One such civil right was trial by jury, ultimately secured in what would become the Seventh Amendment, and which Madison eloquently defended in terms of natural rights philosophy:

> Trial by jury cannot be considered as a natural right, but a right resulting from a social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature.[95]

Such words should lay to rest the mistaken belief that in the eighteenth and nineteenth centuries, statutory rights, such as patents, either conflicted with natural rights or lacked any justification in natural rights philosophy.[96]

Consistent with these remarks by Blackstone and the Founders, early American courts used *privilege* to refer to those rights that necessarily flowed out of the social compact and thus were secured under express law in civil society. In 1809, Chief Justice Marshall referenced the "privileges of contracts,"[97] which would be common identification of contract rights in Supreme Court decisions throughout the nineteenth century.[98] In 1823, Justice Bushrod Washington identified as "privileges deemed to be fundamental" such rights as the "elective franchise," "the benefit of the writ of habeas corpus," and the "right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise,"

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[93] 1 ANNALS OF CONG. 454 (Joseph Gales ed., 1789).

[94] *Id.*

[95] *Id.*

[96] *See, e.g.*, Bone, *supra* note 24, at 256 (noting that, in the nineteenth century, "[s]tatutes . . . were just expressions of historically and culturally contingent social policy," and thus "the Copyright and Patent Acts had no special claim to authority" under natural rights philosophy).

[97] Harrison v. Sterry, 9 U.S. (5 Cranch) 289, 298 (1809).

[98] *See, e.g.*, Stark v. Starr, 94 U.S. 477, 479 (1876) (recognizing that a land conveyance contract was intended to "divide the proceeds of any sales of lots or other property or privileges on the land claimed"); Piqua Branch of State Bank of Ohio v. Knoop, 57 U.S. (16 How.) 369, 381 (1853) (noting that the "privileges granted in private corporations are not a legislative command, but a legislative contract, not liable to be changed"); Peyroux v. Howard, 32 U.S. (7 Pet.) 324, 338 (1833) (attorney arguing that under Louisiana law "an express contract for [repairing a ship for] a specific sum is not a waiver of the privilege" to a lien on the ship); The St. Jago de Cuba, 22 U.S. (9 Wheat.) 409, 417 (1822) (noting that "rights derived under maritime contracts" are "called liens or privileges").

among many other rights.[99] Chief Justice Marshall and Justice Washington's references to these fundamental rights as *privileges* flowed directly from their acceptance of the basic tenets of the ubiquitous social contract doctrine of their day. This was merely the technically precise way of identifying those rights conferred, defined, and secured in civil society, and one can find many examples in antebellum case law reflecting this usage of privilege.[100] Chief Justice Marshall's or Justice Washington's contemporaries would not have read their decisions to suggest that such constitutional and statutory entitlements constituted only gratuitous benefits granted to citizens without any claim of right or justice.

It is, of course, too easy to go to the opposite extreme, committing the converse error as the Jeffersonian story of patent law, in which one interprets every historical use of privilege as referring to a fundamental civil right. There were cases,[101] and even antiquarian legal dictionaries,[102] in which the modern, standard meaning of privilege is used. Also, renowned

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[99] Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3,230) (Washington, Circuit Justice). In 1866, a congressman declared with poetic flourish that the Privileges and Immunities Clause in Article IV, § 2, was "the palladium of equal fundamental civil rights for all citizens." Cong. Globe, 39th Cong., 1st Sess. 1836 (1866) (statement of Rep. Lawrence).

[100] *See, e.g.*, Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 574 (1839) (recognizing that "it is the privilege of every complainant to bring suit in any English or American Court upon all lawful contracts"); Calder v. Bull 3 U.S. (3 Dall.) 386, 398 (1798) (Iredell, J.) (referring to Connecticut's "strange . . . power to grant, with respect to suits depending or adjudged, new rights of trial, new privileges of proceeding, not previously recognized and regulated by positive institutions"); Evans v. Kremer, 8 F. Cas. 874, 875 (C.C.D. Pa. 1816) (No. 4,565) (Washington, Circuit Justice) (referring to the "privilege of pleading the general issue" in court).

[101] *See, e.g.*, Ripley v. Knight, 123 Mass. 515, 519 (1878) (recognizing "the natural meaning of the word 'privilege,' which may be defined as a right peculiar to an individual or body"); Adams v. Burke, 1 F. Cas. 100, 101 (C.C.D. Mass. 1871) (No. 50) (referring to the "peculiar privileges secured by the patent"); Day v. Union India-Rubber Co., 7 F. Cas. 271, 275 (C.C.S.D.N.Y. 1856) (No. 3,691) (noting that patents grant "special privileges" to inventors in order to benefit the public).

[102] *See, e.g.*, THOMAS BLOUNT, A LAW-DICTIONARY (2d ed. 1691) ("A *Personal Priviledge* is that which is granted or allowed to any person, either against or besides the course of the Common-Law.") (this text is unpaginated); GILES JACOB, A NEW LAW DICTIONARY (J. Morgan ed., 10th ed. 1782) (defining privilege, in part, "whereby a private man, or a particular corporation is exempted from the rigor of the Common law") (this text is unpaginated); 2 STEWART RAPALJE & ROBERT L. LAWRENCE, A DICTIONARY OF AMERICAN AND ENGLISH LAW 1009 (1883) ("A privilege is an exceptional or extraordinary right, immunity, or exemption."); JOHN BOUVIER, LAW DICTIONARY 296 (1839) (defining privilege, in part, as "a particular law . . . which grants certain special prerogatives to some persons, contrary to common right"); 3 THOMAS E. TOMLINS, THE LAW-DICTIONARY 219 (1836) (defining privilege, in part, "whereby a private man, or a particular corporation is exempted from the rigour of the Common Law"). *See also* OXFORD ENGLISH DICT. (2002) (quoting from a 1799 source that a privilege "in Roman jurisprudence, means the exemption of one individual from the operation of a law").

natural law philosophers known to the Founders and early American judges and lawyers, such as Cicero and Aquinas, defined a privilege as an express grant of a legal right or benefit to a particular individual.[103] The conventional meaning ascribed to privilege today—a special grant contrary to or without right—is rooted in well-established historical practices.[104]

This explication of the multiple senses of privilege in the eighteenth and nineteenth centuries simply means that references to patent privileges in the historical record must be read in context. Readers today should avoid any accidental anachronisms in construing an antiquarian legal text. For the same reason that it would be wrong to declare in sweeping language that all uses of privilege in historical texts referred to fundamental civil rights expressly secured in civil society, it is equally wrong to declare, as does Walterscheid, that one must "avoid any misapprehension that the states issuing privileges under patents of monopoly characterized and identified those privileges as property rights per se . . . . [because nowhere] was there any legal guarantee of a property right to or in a patent *privilege*."[105]

According to Walterscheid's logic—the logic of the Jeffersonian story of patent law—one would have to admit that Blackstone, Washington, Madison, Hamilton, and Chief Justice Marshall viewed rights of property conveyance and contract as specially conferred grants from the government lacking any basis in moral or legal right,[106] or that Justice Washington thought

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[103] Thomas Aquinas, *Summa Theologiae I-II*¸ Q. 96, A.1, *in* SAINT THOMAS AQUINAS, ON LAW, MORALITY, AND POLITICS 66 (Fathers of the English Dominican Province trans., William P. Baumgarth & Richard J. Regan eds., 1988) (explaining that some laws "are called 'privileges,' i.e., 'private laws,' as it were, because they regard private persons, although their power extends to many matters"); Cicero, *De Doma Sua*, *in* CICERO: THE SPEECHES (N.H. Watts trans., 1965) (stating that a legal "measure is a 'privilege'" if it addresses only "private individuals").

[104] *See* Mossoff, *supra* note 61, at 1287 (discussing cases litigated before the Privy Council in late seventeenth century in which patents were identified as royally conferred privileges).

[105] Edward C. Walterscheid, *The Early Evolution of the United States Patent Law: Antecedents (Part 1)*, 76 J. PAT. & TRADEMARK OFF. SOC'Y 697, 715 (1994) (emphasis added).

[106] *See supra* notes 80-97 and accompanying text.

the same of the right to vote.[107] Perhaps more surprisingly, one would have to conclude that William Penn and other American colonists similarly viewed constitutional rights, such as the rights of confrontation and self-representation in court, as specially conferred grants by the government, because they referred to such rights as *privileges* in their state constitutions.[108] These observations establish a basic historiographical requirement: The Copyright and Patent Clause in the Constitution, the patent statutes it empowers Congress to enact, and the resulting case law developed in the federal courts, should be construed in the same historical context as other constitutional and legal doctrines of the eighteenth and nineteenth centuries. It is time to come to terms with the patent privilege in its appropriate intellectual context.

B. *The Patent Privilege in* The Federalist No. 43 *and* Wheaton

Once one has established the intellectual context set by natural rights philosophy in the eighteenth and nineteenth centuries, this creates a more stringent standard of review in using historical materials than has been employed previously in modern patent law decisions and policy debates. As *privilege* had multiple senses, and one was consistent with a natural rights justification for legal rights, patent law history requires more than merely referencing Jefferson's remarks,[109] identifying who drafted what statutes,[110] or highlighting uses of *privilege* in the historical record[111]—it requires setting forth the intellectual context in which such events occurred. Rediscovering the intellectual context set for patent law by natural rights philosophy in the eighteenth and nineteenth centuries further requires reviewing sources previously disregarded

[107] *See supra* note 99 and accompanying text.
[108] *See supra* notes 72-75 and accompanying text.
[109] *See supra* notes 46-50 and accompanying text.
[110] *See, e.g., supra* note 53 and accompanying text.
[111] A prime example is Walterscheid's citing Fitch's 1786 petition, in which Fitch replaced "right" with "privilege." *See supra* note 53 and accompanying text. Without knowing more, we cannot say whether Fitch intended "privilege" in his petition to function as a synonym for *right* (more specifically, an express *civil right*) or to refer to a *specially conferred benefit*. Walterscheid provides additional details concerning Fitch's petition in an earlier article, Edward C. Walterscheid, *Charting a Novel Course: The Creation of the Patent Act of 1790*, 25 AIPLA Q. J. 445, 460-63 (1997), but it provides no information to answer this vital question.

as empty rhetoric, such as Madison's remarks in *The Federalist No. 47*, or sources widely employed in support of the Jeffersonian story of patent law, such as the Supreme Court's decision in *Wheaton v. Peters* in 1834.

1. *Natural Rights, Social Contract Doctrine and* The Federalist No. 43

One of the pressing problems with assessing the historical record in patent law, especially for anyone who *uses* this record today, is the paucity of Founding Era references to the Copyright and Patent Clause specifically, and patent law generally.[112] This is not a modern insight, as one late nineteenth-century court faced with interpreting the Copyright and Patent Clause confessed that "[w]hat immediate reasons operated upon the framers of the Constitution seem to be unknown."[113] This was one of the few provisions of the Constitution that passed without any debate at the Constitutional Convention, and thus nothing was said there indicating the truth of either the Jeffersonian story of patent law or the social contract doctrine justification of natural rights philosophy.[114] Some scholars highlight statements by various Americans in the Founding Era condemning *commercial* monopolies, but it is unclear whether government-granted commercial monopolies, such as England's grants of exclusive trade routes to the East-India Company, were viewed in the same light as patents for *inventions*.[115] Although both

[112] *See supra* note 43 (discussing this lack of Founding-Era sources on patents).

[113] McKeever v. United States, 14 Ct. Cl. 396, 420 (1878).

[114] The constituent elements of what became the Copyright and Patent Clause were proposed as various separately listed congressional powers on August 18, 1787, at which time they were referred to the Committee on Detail without any discussion of these provisions. *See* 2 RECORDS OF THE FEDERAL CONVENTION 321-22, 324-35. The Committee presented the final version of the Copyright and Patent Clause to the Convention on September 5, 1787, at which time Madison's notes reflect that the "clause was agreed to nem. con" (without debate). *Id*. at 509.

[115] It is precisely this distinction between patents and copyrights, on the one hand, and commercial monopolies, on the other, that Ochoa and Rose conflate in their citations to the ratification debates. *See generally* Ochoa & Rose, *supra* note 12. For instance, they quote George Mason declaring his opposition to the new Constitution because "[u]nder their own construction of the general clause at the end of the enumerated powers, the Congress may grant monopolies in trade and commerce." *Id*. at 927. They also identify another Anti-Federalist from New York who argued that "Monopolies in trade [will be] granted to the favorites of government, by which the spirit of adventure will be destroyed, and the citizens subjected to the extortion of those companies who will have an exclusive right." *Id.* at 927. Ochoa and Rose explicitly invoke these statements in support of Jefferson's opposition to patents and copyrights. *Id.* at 926 (stating that "Jefferson's concerns were widely shared by others at the time").

commercial monopolies and patents have a common ancestor in the Crown's granting of special privileges via letters patent, they had diverged in the law by the eighteenth century.[116]

The only official, public document in which a Founder expressly discussed patents is *The Federalist No. 43*. There, Madison pithily justified the inclusion of the Copyright and Patent Clause in the Constitution:

> The utility of this power will scarcely be questioned. The copy-right of authors has been solemnly adjudged in Great Britain, to be a right at common law. The right to useful inventions, seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The states cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point by laws passed at the instance of congress.[117]

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It is clear that Mason is not speaking of the Copyright and Patent Clause here, as he references "the general clause at the end of the enumerated powers," which is the Necessary and Proper Clause, *not* the Copyright and Patent Clause. Moreover, Mason is speaking of monopolies in "trade and commerce," which were terms of art in the eighteenth century, and thus would not have included *property* rights defined by statute. *See generally* Barnett, *supra* note 8. It is apparent that Mason's and the Anti-Federalist New Yorker's concern here is with the federal government exploiting the Necessary and Proper Clause to expand its expressly enumerated power under the Commerce Clause in granting monopolies in trade and commerce.

To be fair, Ochoa and Rose do identify statements that explicitly speak to patents and copyrights, *see* Ochoa & Rose, *supra* note 12, at 927-28, but they are obviously attempting to prove the Jeffersonian story of patent law by increasing the number of historical sources allegedly confirming this historical claim. But in doing so, they conflate two very different complaints: (1) condemnations of *patents and copyrights* as monopolies, and (2) condemnations of *commercial* monopolies. *See also* note 140 (discussing evidence of this distinction in Madison's public condemnation of monopolies). Schwartz and Treanor make a similar observation, but they focus on "the potential breadth of powers" under the Constitution rather than on the exact nature of the complaint about monopolies itself. *See* Schwartz & Treanor, *supra* note 7, at 2378 n.272.

[116] *See generally* Mossoff, *supra* note 61 (tracing evolution of patents from manufacturing monopolies in early seventeenth century to legal rights in novel inventions by the late eighteenth century).

Prominent eighteenth-century advocates of Lockean natural rights philosophy did not make this connection between patents for invention and commercial monopolies. In their famous *Cato's Letters*, for example, Gordon and Trenchard condemned monopolies, devoting two entire essays to the subject. *See* 2 GORDON & TRENCHARD, *supra* note 89, at 643-48 (Letter No. 90, Aug. 18, 1722) and 648-53 (Letter No. 92, Sept. 1, 1722). The focus of their blistering critiques were the exclusive trade monopolies granted to companies, such as the famous East-India Company's grant from the Crown for exclusive control over all commercial trade with India. Notably, patents for inventions are never mentioned in either of these two essays, which are devoted to revealing the odious nature of monopolies according to natural rights philosophy. In other essays, Gordon and Trenchard praise the development of arts and sciences in free countries, and they recognize that the source of arts and science is "invention and industry." 1 GORDON & TRENCHARD, *supra* note 89, at 473 (Letter No. 67, Feb. 24, 1721). This suggests that, without additional context, one cannot legitimately infer from critiques of commercial and trade monopolies that eighteenth-century authors would have thought the same of patents for inventions. As with Fitch's 1786 petition, such sources are historically ambiguous in the context of patent law. *See supra* p. 38 (discussing this point about Fitch's petition).

[117] THE FEDERALIST No. 43, at 271-72 (James Madison).

Today, these brief remarks are criticized more than they are approved. Thomas Nachbar, for instance, points out that Madison was "mistaken" in grounding the legal status of patents with non-existent English common-law copyright.[118] Walterscheid further believes that this was a vacuous justification for patents, as Madison "made no attempt to substantiate" his claim that patents and copyright served both the public good and individual good.[119]

These critiques miss the significance of Madison's defense of the Copyright and Patent Clause and his connection of patents to copyrights. The reason is that they fail to account for the intellectual context of the Founding Era—the then-dominant natural rights philosophy and its social contract doctrine. As Jefferson wrote in 1825: His authorship of the Declaration of Independence "was intended to be an expression of the American mind" and "[a]ll its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney &c."[120] Madison likely presumed that the readers of *The Federalist Papers* were aware of

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[118] Thomas Nachbar, *Patent and Copyright Clause*, *in* THE HERITAGE GUIDE TO THE CONSTITUTION 120, 121 (Edwin Meese III, David F. Forte & Matthew Spalding eds., 2005); *see also* Nachbar, *supra* note 45, at 336 n.275 (noting about Madison's defense of patents that the "lack of a common-law patent right at the time of his writing is beyond dispute"). Providing a similar doctrinal critique, Walterscheid suggests it was unclear whether English common-law doctrines were authoritative precedent for American courts. WALTERSCHEID, *supra* note 12, at 202-12.

[119] Edward C. Walterscheid, *Musings on the Copyright Power: A Critique of* Eldred v. Ashcroft, 14 ALBANY L. J. SCI. & TECH. 309, 352 (2004).

[120] Letter from Thomas Jefferson to Henry Lee (May 8, 1825), *reprinted in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 719 (Adrienne Koch & William Peden eds., 1944).

American political and legal treatises in the eighteenth and early nineteenth centuries cited to, relied on, and were influenced by the work of the natural rights philosophers. For instance, Chancellor Kent, in his famous and oft-cited *Commentaries*, declares that "Grotius [is] justly considered the father of the law of nations," and he lists Pufendorf, Wolff, Burlamaqui, and Rutherforth, as "the disciples of Grotius." 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 16-18 (O.W. Holmes, Jr. ed., 12th ed. 1873) (1826). In a formal statement as Secretary of State in 1793 concerning the status of treaties between the U.S. and France following the French Revolution, Jefferson would also refer to "Grotius, Puffendorf, Wolf, and Vattel" as philosophers who are "respected and quoted as witnesses of what is morally right or wrong." THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON, *supra* note 120, at 296. The natural rights philosophers' ideas were evident in Supreme Court decisions, *see* Calder v. Bull, 3 U.S. (3 Dall.) 386, 386-95 (1798) (Chase, J.), and they were considered legitimate sources of authority for courts adjudicating run-of-the-mill legal disputes. *See, e.g.*, Pierson v. Post, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805). *See also* Mossoff, *supra* note 24, at 406 n.140 (listing nineteenth-century property cases and noting common practice of lawyers and judges in citing to and relying on natural rights philosophers and legal scholars).

these basic principles, and thus he need not be pedantic, saving his lengthier explanations for the more novel ideas and institutions in the Constitution.

In setting this intellectual context, it is clear that the fulcrum of the justification of patents in *The Federalist No. 43* is Madison's claim that patents are justified "with equal reason" as common-law copyrights. Madison was not alleging that patents were secured at common law,[121] which he certainly knew to be false; rather, he was arguing that the reason *why* copyrights were secured at common law was the *same reason* why patents should be secured by federal statute. He was suggesting a connection between copyrights and patents in their policy justification, not in their technical legal status.

By the late eighteenth century, it was well known that common law rights were tantamount to natural rights.[122] There was little more justification needed for a privilege than that the policy justification for securing it in civil society was "with equal reason" the same policy justification for the common law protection of a similar legal entitlement. Notably, this was the same justification Madison offered for securing civil rights, such as the right to a jury trial, along with more fundamental natural rights when he introduced to the First Congress the bills that

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[121] *See supra* note 118 and accompanying text.

[122] *See* 1 KENT, *supra* note 120, at 561 (explaining that the common law is "the application of the dictates of natural justice and of cultivated reason to particular cases"); EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 213, at 142 (14th ed. 1791) (1628) (stating that "it is to be observed, that the common law of *England* sometimes is called right, sometimes common right, and sometimes *communis justicia*," and that in the Magna Carta "the common law is called right").

The connection of "natural justice," "right" and "Reason" is one of the central elements of seventeenth- and eighteenth-century natural rights philosophy. *See* LOCKE, SECOND TREATISE § 6, at 271 ("The *State of Nature* has a Law of Nature to govern it, which obliges every one; And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions."); SAMUEL PUFENDORF, ON THE LAW OF NATURE AND NATIONS 201 (C.H. Oldfather & W.A. Oldfather trans., 1934) (1672) (stating that "[m]ost men agree on the one point that the law of nature should be deduced from the reason of man himself, and should flow from that source"); HUGO GROTIUS THE LAW OF WAR AND PEACE 38 (Francis W. Kelsey trans., 1925) (1625) (stating as a definition that "[t]he law of nature is a dictate of right reason").

Accordingly, eighteenth- and nineteenth-century Anglo-American jurists continued to identify natural law, and its derivative form, the law of nations, with the "law of reason" or "right reason." *See* 1 KENT, *supra* note 120, at 2-3 (recognizing that the law of nations "derive[d] much of its force and dignity from the same principles of right reason . . . as those from which the science of morality is deduced"); 1 BLACKSTONE, COMMENTARIES 40-41 (noting that "the discovery of these first principles of the law of nature depended only upon the due exertion of right reason . . . . [a]nd if our reason were always . . . unclouded by prejudice, . . . we should need no other guide but this").

became the Bill of Rights.[123] One can assume "with equal reason" that the New Yorkers reading Madison's words in *The Federalist No. 43* understood this context as well as the congressmen who heard his floor speech on the Bill of Rights a few years later.

Madison's justification for patent rights as privileges (civil rights) becomes even clearer once one recognizes the eighteenth-century justification for securing copyrights at common law: The labor theory of property of natural rights philosophy.[124] Several states already had enacted statutes protecting copyright on the ground that "there being no property more peculiarly a man's own than that which is produced by the labour of his mind."[125] Blackstone provided additional support for such legislation, writing that "the right, which an author may be supposed to have in his own original literary compositions" is a "species of property" because it is "grounded on labor and invention."[126] In America, Chancellor Kent further explained in his *Commentaries* that "literary property" is "[a]nother instance of property acquired by one's own act and power."[127] In fact, Chancellor Kent made explicit Madison's implied policy connection between copyrights and patents, classifying both under the heading: "Of Original Acquisition by Intellectual Labor."[128] Here, Chancellor Kent announced the unremarkable proposition of his day that "[i]t is

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[123] *See supra* notes 93-95 and accompanying text.

[124] The labor theory of property was ubiquitous in the eighteenth century. As one modern scholar puts it, "[t]he American Revolution was virtually built on the labor theory of property/value." JAMES L. HUSTON, SECURING THE FRUITS OF LABOR 17 (1998). *Cato's Letters*, for instance, announced to their English and American readers: "By liberty, I understand the power which every man has over his own actions, and his right to enjoy the fruit of his labour, art, and industry . . . . And thus, . . . every man is sole lord and arbiter of his own private actions and property." 1 GORDON & TRENCHARD, *supra* note 89, at 427 (Letter No. 62, Jan. 20, 1721).

[125] Massachusetts, New Hampshire, and Rhode Island all adopted copyright statutes in 1783 that contained this provision. COPYRIGHT ENACTMENTS OF THE UNITED STATES, 1783-1906, at 4 & 8-9 (Thorvald Solberg ed., rev. 2d ed. 1906).

[126] 2 BLACKSTONE, COMMENTARIES 405. Blackstone directly refers to "Mr. Locke" here and cites to the *Second Treatise* as the source of this idea, but he also recognizes through a cross-cite to his introductory chapter that there were "many others" who advanced this proposition, such as Grotius, Pufendorf, and Barbeyrac.

[127] 2 KENT, *supra* note 120, at 497. American jurists relied on Kent's *Commentaries* in adjudicating patent disputes. *See, e.g.*, Hotchkiss v. Greenwood, 52 U.S. (11 How.) 248, 269 (1851) (Woodbury, J., dissenting) (quoting from Kent's *Commentaries* in leading nineteenth-century Court decision applying what is now known as the nonobviousness doctrine in 35 U.S.C. § 103).

[128] 2 KENT, *supra* note 120, at 497.

just that [authors and inventors] should enjoy the pecuniary profits resulting from mental as well as bodily labor."[129]

By invoking the natural rights principle that one should reap the fruits of his labor—"mental as well as bodily labor"—Chancellor Kent also made explicit the justification for copyright that Madison invoked in *The Federalist No. 43* as applying "with equal reason" to patents. In sum, Madison was not making a *legal* argument that patent rights were secured at common law—an argument that he surely understood as false—but rather he was justifying these civil rights with the same *labor-desert policy* justifying the common-law (natural right) in copyright. Without this context, of course, Madison's brief remarks in *The Federalist No. 43* are easily misinterpreted, or, at the very least, their significance is lost on the modern reader who lacks the cultural context of the eighteenth and nineteenth centuries.[130]

Madison's purpose in justifying patents as privileges on par with other civil rights, such as the right to a jury trial, is further established by his concluding remark in *The Federalist No. 43* that the "states cannot separately make effectual provision" for either copyrights or patents. In other words, these privileges can only be secured effectively through national, as opposed to state, legislation. Here, the presumption of patents as privileges—rights secured expressly by legislation—is complete. Thus, the federal Constitution preempted various state enactments to secure copyright and patent privileges, such as South Carolina's 1784 statute, which provided

[129] *Id.*

[130] This fundamental normative connection between property and patents also illuminates Madison's seemingly strange remark in *The Federalist No. 43* that the "public good fully coincides . . . with the claims of individuals." *Supra* note 117 and accompanying text. This statement must be construed in the intellectual context in which it was written, i.e., within the framework of natural rights philosophy that viewed all rights as securing the means for human happiness. *See* Mossoff, *supra* note 24, at 412 n.166 (discussing consequentialist nature of natural law and natural rights philosophy). Modern academics read such remarks as utilitarian, but it is a mistake to conflate consequentialism with utilitarianism, which is a species of consequentialism. *See* OXFORD DICTIONARY OF PHILOSOPHY 388 (1996) (defining utilitarianism as "a form of consequentialism"). In this respect, the *Eldred* Court was correct that Americans in the eighteenth and nineteenth century viewed labor and consequentialist theories of copyrights (and patents) as "complementary." *Eldred*, 537 U.S. at 212 n.18.

that inventors "shall have a like exclusive privilege . . . under the same privileges and restrictions granted to, and imposed on, the authors of books."[131] The structure of South Carolina's statute reflected the natural rights understanding of privilege, as it secured "privileges" (an exclusive right) along with imposing separate "restrictions" (such as term limitations). It is unsurprising that this same structure is reflected in the Copyright and Patent Clause, which secures "the exclusive Right" for inventors, but only "for limited Times."[132]

If only this were the end of the story, as the historical record is rarely so straightforward. Madison was inconsistent between his public and private writings on the nature of patent rights.[133] In private correspondence in 1788 with the eponymous source of the Jeffersonian story of patent law, Madison adopted the language and arguments that Jefferson used in his famous letter to McPherson. After Madison sent Jefferson a copy of the Constitution (Jefferson was in France), Jefferson provided Madison with some general commentary, including a request for an additional constitutional provision that would prohibit granting any "monopolies."[134] In his reply, Madison rejected Jefferson's request, but he ratified Jefferson's reference to patents and copyrights as "monopolies."[135] Madison further defended these monopolies with the same utilitarian argument that Jefferson later would use to justify the "embarrassment of an exclusive patent" to McPherson: "But is it clear that as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced?"[136] Madison repeated this

[131] *See* COPYRIGHT ENACTMENTS OF THE UNITED STATES, *supra* note 125, at 23.

[132] U.S. CONST. art. I, § 8, cl. 8.

[133] Proponents of the Jeffersonian story of patent law emphasize this fact. *See, e.g.*, Tom W. Bell, *Escape from Copyright: Market Success vs. Statutory Failure in the Protection of Expressive Works*, 69 U. CIN. L. REV. 741, 770-74 (2001) (reviewing the correspondence between Jefferson and Madison in 1788 and thus concluding that Madison "appears not to have held a natural rights view of copyright"); Ochoa & Rose, *supra* note 12, at 925-26 (quoting correspondence between Jefferson and Madison).

[134] Ochoa & Rose, *supra* note 12, at 925 (quoting letter from Jefferson to Madison (July 31, 1788)).

[135] *Id.* at 925-26 (quoting letter from Madison to Jefferson (Oct. 17, 1788)).

[136] *Id.* Chancellor Kent also wrote that one of the justifications for copyright was the need for authors to be "stimulated to the most active exertion of the powers of genius, in the production of works useful to the country and

sentiment in an undated note that was published posthumously in 1914, in which he claimed that, with respect to "authors of Books, and of useful inventions, . . . . there can be no just objection to a temporary monopoly in these cases."[137]

The disconnect between Madison's public remarks in *The Federalist No. 43* and his private notes and correspondence is intriguing. It is, of course, too easy to dismiss his statements in *The Federalist No. 43* as politically motivated rhetoric,[138] as these essays were published in newspapers as part of the public debate swirling around New York's ratification convention. Perhaps Madison was more willing to be honest with Jefferson, particularly in private correspondence, than he was in debating Anti-Federalists whether the Constitution should be ratified by the states.

If true, though, this criticism cuts against the Jeffersonian story of patent law, as it confirms a key point in the earlier analysis of patent privileges within the social contract doctrine of natural rights philosophy. The exchange between Jefferson and Madison raises a very interesting question: Assuming that Madison agreed with Jefferson's view of patents and copyrights, then why did he not repeat the content of his letter to Jefferson when he justified the Copyright and Patent Clause in *The Federalist No. 43*? It is possible that he did not do so because New Yorkers (and other Americans) would not have found such arguments compelling; they may have disagreed with the central premise of the Jeffersonian story of patent law that patents were odious monopoly privileges saved from condemnation because of their social utility. They did not agree with the Jeffersonian story of patent law because the arguments that

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instructive to mankind." 2 KENT, *supra* note 120, at 497. However, this does not necessarily contradict his advocacy of the labor theory of copyright and patents, as natural rights philosophy justified the labor theory of property as serving consequentialist purposes. *See supra* note 130 (discussing consequentialist nature of natural rights philosophy).

[137] JAMES MADISON, WRITINGS 756 (Jack N. Rakove ed., 1999). Again, this writing has been highlighted by advocates of the Jeffersonian story of patent law. *See, e.g.*, Ochoa & Rose, *supra* note 12, at 928 (quoting same).

[138] *See supra* note 60 and accompanying text.

Madison made in *The Federalist No. 43* resonated with their pre-existing ideas. In other words, this confirms that natural rights philosophy and its social contract doctrine defined the basic social and political norms of early American society.[139] The Jeffersonian story of patent law survives today in court opinions and scholarship precisely because it represents an historical claim about the *public* understanding of patent law. If Madison recognized that his public statements had to be framed in natural rights terminology, even if he personally disagreed with such arguments, then this only indicates the degree to which the Jeffersonian story of patent law indeed takes elements of the historical public record out of context.[140]

2. Wheaton v. Peters *and Patents as Privileges*

The Supreme Court's 1834 decision in *Wheaton v. Peters*[141] plays an important role in the Jeffersonian story of patent law, deserving therefore its own treatment. Although *Wheaton* was a copyright case, the arguments by counsel and the majority and dissenting opinions canvassed the nature of both the patent and copyright statutes enacted by Congress pursuant to the Copyright and Patent Clause. In essence, the Court held that the Constitution did not secure a pre-existing natural right to copyright or patent, and that such rights were defined and secured only by the statutes that the Constitution empowered Congress to enact.[142] Accordingly, intellectual property professors and historians often cite *Wheaton* as final, conclusive proof of the

[139] *See supra* notes 120-132 and accompanying text.

[140] Further evidence for the *public* understanding of patents as legitimate property rights is found in Madison's famous essay, "Property," which was published in the *National Gazette* on March 29, 1792. JAMES MADISON, THE MIND OF THE FOUNDER 186-88 (Marvin Meyers ed., rev. ed. 1973). There, Madison excoriated "arbitrary restrictions, exemptions, and monopolies" imposed by government fiat as violations of the citizens' property rights. *Id.* He illustrated these unjust "monopolies" by referencing *exclusive commercial franchises*, and he did not mention patents (or copyrights). *Id.* This is another example of how eighteenth-century scholars and politicians distinguished between odious commercial monopolies and legitimate property rights in patents. *See supra* notes 115-116 and accompanying text.

[141] 33 U.S. (8 Pet.) 591 (1834).

[142] *Id.* at 657.

Jeffersonian story of patent law.[143] In sum, we are told that *Wheaton* confirms that patents (and copyrights) were merely special grants of monopoly privileges justified solely by their social utility.

The significance of *Wheaton* reaches beyond the confines of intellectual property law,[144] but for the purposes of this Article, it is important to explain only how patent rights became implicated in a copyright dispute between two of the original reporters of Supreme Court decisions. In his lawsuit against Peters, Wheaton claimed a common-law copyright in his Supreme Court reports, and thus he recognized very early in the case the pressing need to distinguish copyright from patent law because "[t]here is at common law no property in [patents]."[145] Wheaton further explained to the Supreme Court: "Although united in this clause [in the Constitution], the same purpose of being secured by congress, the subjects of patents and of copyrights have little analogy. They are so widely different, that the one is property, the other a legalized monopoly."[146] Given that Wheaton based his legal claims in common-law copyright, the game was lost for him if the Court viewed copyrights and patents as equivalent monopoly privileges granted by Congress. Thus, counsel raised arguments concerning the nature of patents from the outset in disputing whether reports of Supreme Court decisions were secured by copyright.

As to be expected, Peters maintained in his defense that copyright and patent were "[a]nalogous rights," as neither required "actual possession and use," which was the well-known

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[143] *See, e.g.*, WALTERSCHEID, *supra* note 12, at 232 (summarizing the *Wheaton* decision that "the intellectual property clause refers only to a grant of authority to Congress to create a future right and not to the protection of an existing right"); Ochoa & Rose, *supra* note 12, at 935 (concluding from its survey of *Wheaton* that in "rejecting Wheaton's claim of perpetual common-law copyright, the U.S. Supreme Court confirmed the utilitarian view embodied in the Constitution"); LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 209 (1968) (stating that the "basic premise in the majority opinion [in *Wheaton*] was simply that copyright is a monopoly").

[144] *See generally* Craig Joyce, *"A Curious Chapter in the History of Judicature":* Wheaton v. Peters *and the Rest of the Story (of Copyright in the New Republic)*, 42 HOUSTON L. REV. 325 (2005).

[145] *Wheaton*, 33 U.S. at 599.

[146] *Id.* at 597.

standard for recognizing property rights at common law (derived itself from natural law).[147] Peters further noted that the Court already had established this in its patent law jurisprudence, as it was now law that mere *public disclosure* of an invention prior to applying for a patent would defeat an inventor's right to receive the patent.[148] He framed the public disclosure rule in patent law in terms of the first-possession requirement at common law, noting that, "let an inventor lose his possession, and his *privilege* is gone."[149] An inventor's inability in securing *exclusive* possession in the use of his invention explained why this "deficiency is wisely and justly supplied" by "the positive provisions" in the Constitution and in express statutes, and thus "is not to be found in natural law or common law."[150] He concluded that the Copyright and Patent Clause did not "secure" any pre-existing natural right in copyright, because "[i]n inventions, it is admitted, there was no common law property."[151]

Perhaps sensing the Justices' receptiveness to Peters' argument, one of Wheaton's attorneys (the famed Daniel Webster) invoked the labor theory of property in his closing argument at the end of the hearing before the Supreme Court. He asked, in seemingly rhetorical fashion, whether "there has been an indefensible use of the [plaintiff's] labors?"[152] The answer was obviously yes, as an author has "[t]he right . . . to the production of his mind," and thus it "is

[147] *Id.* at 625. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573 (1823) (discussing discovery rule by which "title might be consummated by possession"); *Pierson*, 3 Cai. R. at 176-77 (discussing rule of capture as an application of the rule of first possession); *see also* GROTIUS, *supra* note 122, at 296 ("Now the first method of acquiring property, which by the Romans was ascribed to the law of nations, is the taking possession of that which belongs to no one. This method is without a doubt in accord with the law of nature. . . .").

[148] Here, Peters cited Justice Story's decision in *Pennock v. Dialogue*. *See Pennock*, 27 U.S. (2 Pet.) at 23-24 (holding that "that the first inventor cannot acquire a good title to a patent; if he suffers the thing invented to go into public use, or to be publicly sold for use, before he makes application for a patent"). The modern analog is 35 U.S.C. § 102(b) (2000) (providing that an inventor forfeits his right to file for a patent if he permits the invention to be disclosed publicly more than a year before filing his patent application).

[149] *Wheaton*, 33 U.S. at 625 (emphasis added).

[150] *Id.*

[151] *Id.* at 641.

[152] *Id.* at 651.

his property. It may be true that it is property which requires extraordinary legislative protection, and also limitation. Be it so."[153]

With both parties using patents as the foil to understand the status of copyright—Wheaton arguing common-law right and Peters arguing statutory privilege—the Court's decision weighed in favor of statutory privilege. Without repeating Peters' sophisticated legal analysis concerning the Copyright and Patent Clause, Justice McLean's opinion for the Court stated simply: "[T]he word *secure*, as used in the constitution . . . . refers to inventors, as well as authors, and it has never been pretended by any one, either in this country or in England, that an inventor has a perpetual right, at common law."[154] The conclusion was clear: If the common law protected natural rights,[155] and patents were not protected at common law, then patents (and by implication, copyrights) were not protected under the Constitution as natural rights. The Court, in a significant antebellum copyright case, seemed to declare definitively the truth of the Jeffersonian story of patent law.

But this now familiar account of *Wheaton*'s core supporting role in the Jeffersonian story of patent law fails to take into account what the attorneys and Justices were actually saying. First, it is remarkable that the central thesis of the Jeffersonian story of patent law—that a patent was a special legal privilege saved from condemnation and granted to an inventor given only its social utility—is glaringly absent from the *Wheaton* decision. A single attorney's reference to a patent as a "legalized monopoly" reflects the only evidence of the Jeffersonian story of patent law in this vital and early decision on the legal status of copyrights and patents.[156]

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[153] *Id.* at 652.

[154] *Id.* at 660-61. *See also id.* at 657 (noting that "it has never been pretended" that an inventor possessed, "by the common law, any property in his invention, after he shall have sold it publicly").

[155] *See supra* note 122 and accompanying text.

[156] *Wheaton*, 33 U.S. at 597. The attorney, Mr. Paine, qualified this reference, timidly suggesting that copyright "is a natural right, [but] the [patent] is in some measure against natural right." *Id.* at 598. Mr. Paine's

Second, neither the Justices nor the attorneys, not even Daniel Webster, argued that there was a common law right to a patent.[157] As confirmed by Peters' winning argument before the Court, in which he referred to a patent as a "privilege,"[158] everyone agreed that patent rights were secured by statute. Patents were privileges. The question was what *type* of privilege: Special monopoly grant or civil right securing a property right?

The *Wheaton* decision confirmed that the Justices, and at least some of the attorneys, viewed patents as statutory rights on par with similar civil rights derived from the social compact. This is revealed in the *Wheaton* Court adopting Webster's appeal to the labor theory of property,[159] despite rejecting his legal conclusion, and applying it as a justification for securing copyright by statute: "That every man is entitled to the fruits of his own labour must be admitted; but he can enjoy them only, except by statutory provision, under the rules of property, which regulate society, and which define the rights of things in general."[160] This was the same policy justification that Madison obliquely referenced in *The Federalist No. 43*, and more explicitly developed by Chancellor Kent. In context, *Wheaton* corroborated the view of patents as privileges—civil rights in property justified by the same labor-desert policy animating the natural right to property. This was the social contract background of natural rights philosophy that

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qualification of patents as contradicting natural rights only "in some measure" undermines the claim today that this is clear support for the Jeffersonian story of patent law. *See supra* note 143 and accompanying text.

[157] Even Justice Thompson refused to make such a claim, despite his vigorous and caustic dissent blasting the majority opinion for failing to recognize that "every principle of justice, equity, morality, fitness and sound policy concurs, in protecting the literary labours of men, to the same extent that property acquired by manual labour is protected." *Wheaton*, 33 U.S. at 672 (Thompson, J., dissenting).

[158] *Id.* at 625.

[159] *See supra* note 152-153 and accompanying text.

[160] *Wheaton*, 33 U.S. at 657. With respect to the Court's use of "regulation," *see* Claeys, *supra* note 68, at 1553-55, 1571-74 (discussing how nineteenth-century jurists influenced by natural rights philosophy defined "regulation" differently than how this term is used in the twentieth century).

defined and justified the fundamental privileges in property secured in civil society for all citizens.[161]

The background political and constitutional context for *The Federalist No. 43* and *Wheaton* reveals how these two significant texts in the history of American patent law reflect a social contract justification for patent rights within natural rights philosophy. Without first understanding the definition of privileges as civil rights justified by the same policies as natural rights—such as Madison's reference to patents as justified "with equal reason" as the labor-theory of common-law copyright—this important historical justification for patents is lost on modern readers. As will be seen in Part IV, this intellectual context also is necessary in exploring the evolution of American patent law in the early nineteenth century—a time period in which patents were expressly identified as *privileges*, and, accordingly, received expansive and favorable treatment by both Congress and the courts as securing important and valuable property rights.

## IV. THE PATENT PRIVILEGE IN EARLY AMERICAN PATENT LAW

Understanding the background social and political context of natural rights philosophy—its labor theory of property and attendant social contract doctrine—is necessary in understanding American constitutional and legal doctrines in the late eighteenth and early nineteenth centuries. As shown in Part III, this intellectual context elucidates previously misunderstood texts, such as *The Federalist No. 43* and *Wheaton*. As this Part further explains, this context is equally necessary to understand the early evolution of American patent law, which grew dramatically in both statutory and judicially created doctrines in the antebellum period.

This growth seems puzzling at first. If it were true that early Americans believed that patents were special legal privileges saved from condemnation as odious monopolies given only

[161] *See supra* notes 80-100 and accompanying text.

their social utility, then patents would have been treated as Lessig and others claim they were: Congress and courts would have viewed patents as extremely limited and circumscribed legal entitlements.[162] In fact, patents would have been treated no differently than other special grants of legal monopolies by the government, such as the extremely limited rights afforded to owners of public franchises in bridges.[163]

The historical record reveals the exact opposite. Indeed, Congress and courts construed patents as privileges: They were civil rights in property afforded expansive and liberal protection under the law. This is evidenced by the reliance on property case law and rhetoric in patent cases, the development of legal presumptions favoring liberal interpretation of both the patent statutes and patents, and, lastly, in the judicial recognition of additional rights beyond those expressly provided in the patent statutes. Moreover, Congress repeatedly granted patent term extensions to individual inventors, and in the 1836 Patent Act, provided all patentees with a seven-year term extension on the basis of an express labor-desert policy. None of this has been discussed in modern court opinions, intellectual property scholarship, or historical studies. It is the purpose of Part IV to illuminate this previously undiscovered country in the history of American patent law—revealing that patents were treated as privileges under the guiding hand of natural rights philosophy.

### A. *Patents as Privileges in Nineteenth-Century Case Law*

Beyond the confines of popular political pamphlets and copyright decisions, nineteenth-century case law leaves little doubt that many jurists considered patents to be privileges in the technical, legal sense. In fact, *Wheaton* confirms that lawyers, jurists and scholars agreed that a

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[162] *See generally supra* Part II. *Cf.* VAIDHYANATHAN, *supra* note 49, at 11 (claiming that "in the American tradition," copyright "was originally a narrow federal policy that granted a limited trade monopoly in exchange for universal use and access").

[163] *See* Charles River Bridge v. Warren Bridge, 33 U.S. (11 Pet.) 420 (1837). *See also supra* note 58 (discussing *Charles River Bridge* decision as embodying prevailing anti-monopolist views of Jacksonian period).

patent was neither a natural right nor a common-law right.[164] In 1862, a district court could declare with little fear of being misunderstood: "The patent itself, with all the privileges which it confers, is the creature of the statute."[165] Patents were privileges—civil rights securing to inventors "the fruition of their labors" for which this "privilege is granted."[166]

Throughout nineteenth century patent law jurisprudence, courts reaffirmed their view of patents as civil rights on par with contract and property rights similarly identified as privileges.[167] One circuit court, for instance, held that an assignment of patent rights to a third party required the court to recognize that "the patentee grants the exclusive local privilege to the utmost and fullest extent."[168] Reflecting that *privilege* was a basic norm of legal discourse, this court repeatedly referred to the patent rights conferred by the assignment contract as "the local privilege."[169] Similarly, another circuit court rejected a patentee's "precise and rigid" reading of the "privilege" conferred in a license, observing that the patentee was now "seeking to deprive a party of a privilege for which he undoubtedly paid a full consideration."[170] These are but a few examples of the widespread legal norm in nineteenth-century patent law jurisprudence to refer to patents as privileges—a norm predicated on a wider socio-political context informed by natural rights philosophy.[171] It would be anachronistic to interpret these court decisions as holding that contract and patent rights were merely specially conferred grants of benefits to citizens.

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[164] *See supra* note 157 and accompanying text. However, by the eighteenth century, patents were being adjudicated solely in the common-law courts, as required by the 1623 Statute of Monopolies. *See* Mossoff, *supra* note 61, at 1276-87, 1313-14 (discussing shift in eighteenth century from the Privy Council to the common-law courts as the fora in which patent disputes were adjudicated in England).

[165] Jacobs v. Hamilton County, 13 F. Cas. 276, 278 (C.C.S.D. Ohio 1862) (No. 7,161).

[166] Goodyear v. Hills, 10 F. Cas. 689, 690 (C.C.D.C. 1866) (No. 5,571a) (bemoaning unfortunate fact that to many inventors to whom "the privilege is granted are never to see the fruition of their labors").

[167] *See supra* notes 91-100 and accompanying text (discussing identification of contract and other rights as privileges by Chief Justice Marshall and Justice Washington, among others).

[168] Chase v. Walker, 5 F. Cas. 524, 525 (C.C.E.D. Pa. 1866) (No. 2,630).

[169] *Id.* at 525-26.

[170] Belding v. Turner, 3 F. Cas. 84, 85 (C.C.D. Conn. 1871) (No. 1,243).

[171] *See, e.g.*, Henry v. Providence Tool Co., 11 F. Cas. 1182, 1183 (C.C.D.R.I. 1878) (No. 6,884) (noting that the "privileges which the act of congress grants to an inventor" are secured by an inventor through both

Significantly, a "Note" in one of the *Federal Cases* reporters further explains this background context for American patent law.[172] (This brief, anonymous essay has never been discussed in any monographs or court opinions.) The Note recognized the basic legal truth that a patent was a "privilege," as "[t]he exclusive right to an invention can only have existence by virtue of some positive law."[173] In England, where patents were given as a "grant by the crown," the Note explained, the patentee's "right has been regarded a personal privilege, inalienable unless power to that effect is given by the crown."[174] In the U.S., however, the patent statutes provided that patents could be conveyed by their owners, which meant that the patent "is then defined as an incorporeal chattel, which the patent impresses with all the characteristics of personal estate."[175] In sum, patents were privileges—civil rights securing property rights.

B. *The Framing of Patent Privileges as Property Rights*

As patents were defined as privileges—civil rights securing property rights—courts felt no compunction in identifying patents as property, and treating them as such. Federal courts

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"show[ing] his right by invention" and by "[v]igilance" in securing the patent); Johnson v. Beard, 13 F. Cas. 728, 730 (C.C.S.D.N.Y. 1875) (No. 7,371) (recognizing the "exclusive privilege legally vested" in a plaintiff-patentee); Dorsey Revolving Harvester Rake Co. v. Bradley Mfg. Co., 7 F. Cas. 946, 947 (C.C.N.D.N.Y. 1874) (No. 4,015) (recognizing right of patentee to convey "qualified privilege" to licensees); Cahart v. Austin, 4 F. Cas. 997, 1000 (C.C.D.N.H. 1865) (No. 2,288) (identifying the reissue right provided in § 13 of the 1836 Patent Act as a "privilege"); Goodyear v. Bishop, 10 F. Cas. 642, 645 (C.C.S.D.N.Y. 1861) (No. 5,559) (explaining how plaintiff-assignees were "the exclusive owners of the privileges"); Beach v. Tucker, 2 F. Cas. 1102, 1104 (C.C.D.C. 1860) (No. 1,153) (construing rights to use or convey under 1839 Patent Act as "privileges granted . . . only to the inventor"); Bray v. Hartshorn, 4 F. Cas. 38, 39-40 (C.C.D. Mass. 1860) (No. 1,820) ("Invention or discovery is required as the proper foundation of a patent, and, where both are wanting, the applicant cannot legally secure the privilege."); Goodyear v. Beverly Rubber Co., 10 F. Cas. 638, 640 (C.C.D. Mass. 1859) (No. 5,557) (identifying for "[i]nventors . . . . [t]hose privileges [that] constitute the rights secured to them by their letters-patent"); Ellithorp v. Robertson, 8 F. Cas. 562, 565 (C.C.D.C. 1858) (No. 4,409) (identifying the rights secured to an inventor under the 1836 and 1839 Patent Acts as "privileges"); Bryan v. Stevens, 4 F. Cas. 510, 511 (C.C.S.D.N.J. 1841) (No. 2,066a) (recognizing that a right conferred to a licensee by a patentee "is but a privilege under the patent"); Blanchard's Gun-Stock Turning Factory v. Warner, 3 F. Cas. 653, 657 (C.C.D. Conn. 1840) (recognizing power in congress to provide a patentee the ability to transfer to assignees his "rights and privileges").

[172] *See* 3 F. Cas. at 85.

[173] *Id.*

[174] *Id.*

[175] *Id. See also* Carew v. Boston Elastic Fabric Co., 5 F. Cas. 56, 57 (C.C.D. Mass. 1871) (No. 2,398) (explaining that "the rights conferred by the patent law, being property, have the incidents of property, and are capable of being transmitted by descent or devise, or assigned by grant").

recognized that they had primary jurisdiction over this species of property, despite the typical adjudication of property rights in state common-law courts, because patents represented a "right and property created under the federal statutes."[176] Accordingly, judges instructed juries that a "patent right, gentlemen, is a right given to a man by law where he has a valid patent, and, as a legal right, is just as sacred as any right of property."[177] In this way, another court noted, a patent secured for an inventor the right to "enjoy the fruits of his invention" because "it is his property."[178] Such uses of property rhetoric were not unusual, as references to patents as *property* are omnipresent in nineteenth-century patent law jurisprudence.[179] Courts thus accused patent infringers of committing *trespass*,[180] and, even more common, *piracy*.[181]

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[176] Goodyear Dental Vulcanite Co. v. Willis, 10 F. Cas. 754, 755 (C.C.E.D. Mich. 1874) (No. 5,603).

[177] Hayden v. Suffolk Mfg. Co., 11 F. Cas. 900, 901 (C.C.D. Mass. 1862) (No. 6,261).

[178] Hawes v. Gage, 11 F. Cas. 867, 867 (C.C.S.D.N.Y. 1871) (No. 6,237).

[179] *See, e.g.*, Allen v. New York, 1 F. Cas. 506, 508 (C.C.S.D. N.Y. 1879) (No. 232) ("the [patent] right is a species of property"); *Henry*, 11 F. Cas. at 1185 (rejecting argument by plaintiff as this would "make the rights of property in this country depend upon the discretion exercised by a foreign sovereign"); Hamilton v. Rollins, 11 F. Cas. 364, 365 (C.C.D. Minn. 1877) (No. 5,988) (distinguishing claims in tort from patent infringement claims, which are "property" claims in that they are capable of "assignment"); Henry v. Francestown Soap-Stone Stove Co., 11 F. Cas. 1180, 1181 (C.C.D.N.H. 1876) (No. 6,382) (referring to the "property in the letters patent"); Holbrook v. Small, 12 F. Cas. 324, 325 (C.C.D. Mass. 1876) (No. 6,595) (referring to patents at issue in case as "the property of the plaintiffs"); Ball v. Withington, 2 F. Cas. 556, 557 (C.C.S.D. Ohio 1874) (No. 815) (noting simply that patents are a "species of property"); *Carew*, 5 F. Cas. at 57 (explaining that "the rights conferred by the patent law, being property, have the incidents of property"); Lightner v. Kimball, 15 F. Cas. 518, 519 (C.C.D. Mass. 1868) (No. 8,345) (noting that "every person who intermeddles with a patentee's property . . . is liable to an action at law for damages"); Ayling v. Hull, 2 F. Cas. 271, 273 (C.C.D. Mass. 1865) (No. 686) ("right to enjoy the property of the invention"); Gay v. Cornell, 10 F. Cas. 110, 112 (C.C.S.D.N.Y. 1849) (No. 5,260) (recognizing that "an invention is, within the contemplation of the patent laws, a species of property"); *Bryan*, 4 F. Cas. at 511 (rejecting plaintiffs as lacking standing as they "[h]av[e] no direct and absolute property in this patent"); Gray v. James, 10 F. Cas. 1019, 1021 (C.C.D. Pa. 1817) (No. 5,719) (Washington, Circuit Justice) (referring to a breach of a patent as "an unlawful invasion of property")

[180] *See* Goodyear Dental Vulcanite Co. v. Van Antwerp, 10 F. Cas. 749, 750 (C.C.D.N.J. 1876) (No. 5,600) (analogizing to "trespass" of horse stables and unauthorized use of horses for determining rule of damages in patent infringement action); Burliegh Rock-Drilling Co. v. Lobdell, 4 F. Cas. 750, 751 (C.C.D. Mass. 1875) (No. 2,166) (noting that the defendants "honestly believ[ed] that they were not trespassing upon any rights of the complainant"); Livingston v. Jones, 15 F. Cas. 669, 674 (C.C.W.D. Pa. 1861) (No. 8,414) (accusing defendants of have "made large gains by trespassing on the rights of the complainants"); Case v. Redfield, 5 F. Cas. 258, 259 (C.C.D. Ind. 1849) (No. 2,494); Eastman v. Bodfish, 8 F. Cas. 269, 270 (C.C.D. Me. 1841) (No. 4,255) (Story, Circuit Justice). *Cf.* Goodyear Dental Vulcanite Co. v. White, 10 F. Cas. 752, 752 (C.C.S.D.N.Y. 1879) (No. 5,602) (referring to plaintiff's "exclusive possession" of the patent and defendant's "well knowing the premises" in his beach of the patent right).

[181] *See* Pennock v. Dialogue, 27 U.S. (2 Pet.) 1, 12 (1829) (Story, J.) (recognizing that "if the invention should be pirated, use or knowledge, obtained by piracy" would not prevent the inventor from obtaining a patent); Irwin v. McRoberts, 13 F. Cas. 124, 124 (C.C.N.D. Ill. 1879) ("I know patentees are much troubled with piracies

Beyond using property rhetoric, courts also treated patents as property in more substantive, and legally precise, ways. They identified a patent as a *title* that was possessed and owned by a patentee,[182] and, accordingly, they identified multiple owners of a patent as *tenants*

upon their inventions."); American Diamond Rock Boring Co. v. Sullivan Mach. Co., 1 F. Cas. 641, 643 (C.C.S.D.N.Y. 1877) (No. 298) (recognizing that a mechanical equivalent "is a piracy of the principle, and a violation of the patent"); Goodyear v. Mullee, 10 F. Cas. 707, 708 (C.C.E.D. Pa. 1868) (No. 5,579) (noting that a follow-on inventor who makes an improvement "can not pirate the original invention"); Goodyear v. Evans, 10 F. Cas. 685, 687 (C.C.S.D.N.Y. 1863) (No. 5,571) (recognizing "extraordinary exertions" by patentee "to prevent piracies"); Goodyear v. Dunbar, 10 F. Cas. 684, 685 (C.C.D.N.J. 1860) (No. 5,570) (noting defendant's claim that "he has a just defence, and is not a willful pirate of the plaintiff's invention"); Ex parte Ball, 2 F. Cas. 550, 552 (C.C.D.C. 1860) (No. 810) (noting that patentees must be protected from "invasion by pretended inventors and pirates and from the effect of subtle refined distinctions"); Page v. Ferry, 18 F. Cas. 979, 985 (C.C.E.D. Mich. 1857) (No. 10,662) (charging jury that if the defendant's machine "obtained by mechanical equivalents [the same result as plaintiff-patentee's invention], it would certainly constitute an infringement" because "it is a piracy of the principle"); Batten v. Silliman, 2 F. Cas. 1028, 1029 (C.C.E.D. Pa. 1855) (No. 1,106) (decrying defendant's "pirating an invention, the title which has been clearly established either by trial at law, or by long and peaceable possession"); Goodyear v. Central Rubber Co. of N.J., 10 F. Cas. 664, 667 (C.C.D.N.J. 1853) (No. 5,563) (Grier, Circuit Justice) (noting that it is "evident that such person is pirating the plaintiff's invention" when the defendant made only minor "variations" in plaintiff's patented product); Buck v. Cobb, 4 F. Cas. 546, 547 (C.C.N.D.N.Y. 1847) (No. 2, 079) (recognizing patent law policy in construing "patent rights" with a "favoring eye" as an effort to "secure to inventors the rewards of their genius against the incursions of pirates"); Dobson v. Campbell, 7 F. Cas. 783, 785 (C.C.D. Me. 1833) (No. 3,945) (Story, Circuit Justice) (concluding that patent-assignee has been injured by "the piracy of the defendant"); Grant v. Townsend, 10 F. Cas. 985, 985 (C.C.S.D.N.Y. 1829) (No. 5,701) (noting that the patented machine had "been pirated" by many different people in several states); Earle v. Sawyer, 8 F. Cas. 254, 547 (C.C.D. Mass. 1825) (No. 4,247) (Story, Circuit Justice) (instructing jury that "piracy by making and using the [patented] machine" justifies an injunction).

Infringers of patents were also accused of committing *fraud*. *See, e.g.*, Davis v. Palmer, 7 F. Cas. 154, 159 (C.C.D. Va. 1827) (No. 3,645) (Marshall, Circuit Justice) (instructing jury that if "the imitator attempted to copy the [patented] model" and made an "almost imperceptible variation for the purpose of evading the right of the patentee," then "this may be considered as a fraud on the law"); Dixon v. Moyer, 7 F. Cas. 758, 759 (C.C.D. Pa. 1821) (No. 3,931) (Washington, Circuit Justice) (explaining that an attempt to make a "mere formal difference" between a patented device and an infringing copy is "a fraudulent evasion of the plaintiff's right").

[182] *See* Franz & Pope Knitting-Mach. Co. v. Lamb Knitting-Mach. Mfg. Co., 9 F. Cas. 721, 722 (C.C.E.D. Pa. 1881) (No. 5,061a) (recognizing that "the title to said letters patent . . . is duly vested" in the plaintiffs); Birdsall v. McDonald, 3 F. Cas. 441, 444 (C.C.D. Ohio 1874) (No. 1,434) ("patents are [an inventor's] title deeds"); Ashcroft v. Walworth, 2 F. Cas. 24, 24 (C.C.D. Mass. 1872) (No. 580) ("legal title"); Earth Closet Co. v. Fenner, 8 F. Cas. 261, 263 (C.C.D.R.I. 1871) (No. 4249) (observing rule that the "patent is prima facie proof of title"); *Blandy*, 3 F. Cas. at 679 ("titles"); *Goodyear*, 10 F. Cas. at 643 (noting that the plaintiffs "hold their title to the exclusive right to manufacture" the patent); *Hayden*, 11 F. Cas. at 902 (recognizing that a validly issued patent establishes a "prima facie case for the plaintiff in the question of title"); Carr v. Rice, 5 F. Cas. 140, 146 (C.C.S.D.N.Y. 1856) (No. 2,440) ("perfect title"); Clum v. Brewer, 5 F. Cas. 1097, 1102 (C.C.D. Mass. 1855) (No. 2,909) (referring to the "title of an inventor"); *Bryan*, 4 F. Cas. at 511 (referring to patentees who have "titles" in their property and thus can 'sue for a violation"); Dobson v. Campbell, 7 F. Cas. 783, 785 (C.C.D. Me. 1833) (No. 3,945) (identifying conveyance of "title" in patent via a "deed"); *Grant*, 10 F. Cas. at 1021 (noting that defendant might have "sought to acquire title to this property by contract"); Evans v. Kremer, 8 F. Cas. 874, 875 (C.C.D. Pa. 1816) (No. 4,565) (noting that plaintiff-patentee must "be prepared to maintain his title, in relation to the question of original discovery").

*in common*.[183] In a patent infringement trial in 1846, for instance, the court instructed the jury that "[a]n inventor holds a property in his invention by as good a title as the farmer holds his farm and flock."[184]

The classification of patents as *titles* was particularly instructive, as this led courts to utilize a familiar conceptual framework in (tangible) property law: The distinction between inchoate versus choate rights. In sum, discovery or first possession provided a landowner with an inchoate right that is perfected by securing a title.[185] The courts declared the same is true for inventions. For instance, in one early patent dispute, Chief Justice Marshall, riding circuit, referred to a pre-patented invention as an "inchoate and indefeasible property."[186] This "inchoate property which [is] vested by the discovery,"[187] he explained, is "perfected by the patent."[188] He summed up that it was the "constitution and law, taken together, [that] give to an inventor, from the moment of invention, an inchoate property therein, which is completed by suing out a patent."[189] A short time later, the famed attorney, John Sergeant, succeeded brilliantly in the equally famous 1829 patent case, *Pennock v. Dialogue*, with his argument that an act of invention established an

[183] *See* Dunham v. Indianapolis & St. L. H. Co., 8 F. Cas. 44, 45 (C.C.N.D. Ill. 1876) (No. 4,151) ("The patentees are tenants in common of the right."); *Clum*, 5 F. Cas. at 1103 (owners of divided interests in patent are "tenants in common").

[184] Hovey v. Henry, 12 F. Cas. 603, 604 (C.C.D. Mass. 1846) (No. 6,742).

[185] *See* 2 BLACKSTONE, COMMENTARIES 311-12; De La Croix v. Chamberlain, 25 U.S. (12 Wheat.) 599, 600-01 (1827) (noting that "actual possession" established an "inchoate right, but not a perfect legal estate" that could support "an action of ejectment"); Willets v. Van Alst, 26 How. Pr. 325, 333 (N.Y. Sup. 1864) (noting that a purchaser of land may acquire an "interest defeasible and inchoate," but "a writing or conveyance was necessary" to perfect it under the law); Pearsall v. Post, 20 Wend. 111, 114 (N.Y. Sup. Ct. 1838) (holding that a dedication of land to the public, even "if not perfect, the previous user had given the public an inchoate right which ripened and became absolute by the continued user during the life estates"); Whittington v. Christian, 23 Va. (2 Rand.) 353, 371, (Va. 1824) (recognizing that a person holding only an "inchoate right, by entry or survey, could [not] assert it at law against such legal title" held by another).

[186] Evans v. Jordan, 8 F. Cas. 872, 873 (C.C.D. Va. 1813) (No. 4,564) (Marshall, Circuit Justice).

[187] *Id.* at 874.

[188] *Id.* at 873.

[189] *Id.*

> inchoate right; that is, a right to have a title upon complying with the terms and conditions of the law. It is like an inchoate right to land, or an inceptive right to land, well known in some of the states, and every where accompanied with the condition, that to be made available, it must be prosecuted with due diligence, to the consummation or completion of the title.[190]

By 1850, the Supreme Court recognized the truism that an inventor was "vested by law with an inchoate right . . . which he may perfect and make absolute by proceeding" to secure a patent under the patent statutes.[191] Courts also recognized the implications of recognizing that a patent comprised a perfected title in property, as one circuit court instructed a jury that the "assignees [of a patent] become the owners of the discovery, with perfect title," and thus "[p]atent interests are not distinguishable, in this respect, from other kinds of property."[192] It was a widespread judicial practice to invoke these fundamental legal concepts in real property law throughout nineteenth-century patent law decisions.[193]

Nineteenth-century courts ultimately recognized these perfected legal titles in patents, secured as privileges, as analogous to traditional common-law property rights. This was implicit in Sargeant's success in *Pennock* by analogizing an inventor's discovery to "an inchoate right in land,"[194] but the courts also made such connections themselves.[195] In assessing whether a patent

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[190] *Pennock*, 27 U.S. at 10.

[191] Gaylor v. Wilder, 51 U.S. (10 How.) 477, 493 (1850).

[192] *Carr*, 5 F. Cas. at 146.

[193] *See Henry*, 11 F. Cas. at 1186 (noting that extension rights provided in 1836 Patent Act "were inchoate rights under the law"); Emmons v. Sladdin, 8 F. Cas. 681, 683 (C.C.D. Mass. 1875) (No. 4,470) (recognizing that an inventor can "perfect and make absolute" his "inchoate right" in his invention by "proceeding in the manner which the law requires" and securing a patent); Hoeltge v. Hoeller, 12 F. Cas. 289, 289 (C.C.S.D. Ohio 1870) (No. 6,574) (making unremarkable observation that plaintiffs "have but an inchoate right" given that their "patent is still pending in the patent office"); Hoffheins v. Brandt, 12 F. Cas. 290, 298 (C.C.D. Md. 1867) (No. 6,575) (recognizing that a patentee can "sell her inchoate right to a renewal" under the 1836 Patent Act); Hill v. Dunkler, 12 F. Cas. 151, 154 (C.C.D.C. 1857) (No. 6,489) (noting at time of conception, an invention is "an inchoate right" that an inventor may "perfect, and make absolute by proceeding to mature it in the manner which the law requires"); *Clum*, 5 F. Cas. at 1102-03 (noting that "perfection" in a patent is "completion" of the "inchoate right" in the act of invention); *Ellithorp*, 8 F. Cas. at 567 (recognizing that an inventor may "perfect his inchoate right by patent"); Case v. Redfield, 5 F. Cas. 258, 258 (C.C.D. Ind. 1849) (No. 2,494) (noting that patent extensions are based on policy "to compensate [the inventor] for his expenditures, labor and ingenuity in the invention, and in *perfecting* it").

[194] *Pennock*, 27 U.S. at 10. *See supra* note 190 and accompanying text.

[195] *See, e.g.*, Chambers v. Smith, 5 F. Cas. 426, 427 (C.C.E.D. Pa. 1870) (No. 2,582) (analogizing to *land sale* as basis for framing scope of patent rights); Johnson v. Onion, 13 F. Cas. 777, 778 (C.C.D. Md. 1870) (No.

licensee could convey further his interests in the patent, for instance, one court noted that this "privilege" was similar to "a right of way granted to a man for him and his domestic servants to pass over the grantor's land," citing a litany of real property cases from classic common law authorities, such as Coke's *Institutes*, *Coke's Littleton*, *Viner's Abridgment*, and *Bacon's Abridgement*, among others.[196] Finally, Justice Story, riding circuit, resolved one complicated patent assignment case by looking to "strong[] analogous cases in equity" in which courts recognized the legitimacy of "the deeds" conveying land even if a "feoffment is stated without any averment of livery of seisin."[197] Such feudal property rules are rarely seen beyond the confines of 1L Property casebooks today!

In summary, nineteenth-century case law provides substantial support for Madison's declaration in *The Federalist No. 43* that patent rights were justified with "equal reason" as the labor-based property justification for common-law copyright.[198] Patents were indeed privileges—civil rights securing property rights. This historical understanding of patents was summarized succinctly in Circuit Justice Swayne's jury instructions in an 1869 patent infringement trial:

> The rights secured by a patent for an invention or discovery are as much property as anything else, real or incorporeal. The titles by which they are held, like other titles, should not be overthrown upon doubts or objections . . . . This principle should be steadily borne in mind by those to whom is intrusted [sic] the administration of civil justice.[199]

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7,401) (upholding validity of patent term extension on basis of Supreme Court cases construing real property instruments); Armstrong v. Hanlenbeck, 1 F. Cas. 1140, 1141 (C.C.S.D.N.Y. 1844) (No. 544) (relying on landlord-tenant cases and related common-law rules governing real property).

[196] Brooks v. Byam, 4 F. Cas. 261, 268-270 (C.C.D. Mass. 1843) (No. 1,948) (Story, Circuit Justice).

[197] *Dobson*, 7 F. Cas. at 785. In this case, Circuit Justice Story was required to assess whether the assignment "set[] up a title to the patent right" sufficient to support a claim for infringement by the plaintiff-assignee. *Id.* The sticking point was that the assignment was not recorded with the Secretary of State, as required by the 1793 Patent Act. *See* Patent Act of 1793, § 4, 1 Stat. 318, 322 (repealed 1836). Invoking the equity cases upholding real property interests transferred without the requisite legal formalities, Circuit Justice Story held that assignee had sufficient legal interest to sue for infringement. *Dobson*, 7 F. Cas. at 785.

[198] *See supra* Part III.B.1.

[199] Blandy v. Griffith, 3 F. Cas. 675, 679 (C.C.S.D. Ohio 1869) (No. 1,529). Circuit Justice Clifford would similarly remark in 1873:

It is undeniable, of course, that there were jurists who agreed with Jefferson that patents were merely special, limited monopoly privileges.[200] Unfortunately, modern scholars and jurists focus myopically on those cases, creating thereby the historical myth that is the Jeffersonian story of patent law. It is time the complete historical record is uncovered, recognizing the palpable influence exerted by social contract doctrine and the labor theory of property on the evolution of the American patent privilege—a civil right securing a property right.

C. *The Nineteenth-Century Expansion of Patent Privileges*

In addition to invoking property rhetoric, doctrines and policies in nineteenth-century case law, courts also treated patents as privileges in other important respects, both procedurally and substantively. As patents were privileges, Congress and the courts expansively promoted these civil rights similarly to their treatment of other property and commercial privileges justified by the same natural-rights policies. As will be explained in this Section, courts provided patents with expansive procedural guarantees, adopting canons of liberal construction for both patents and the patents statutes. Furthermore, Congress (with support from the Supreme Court) adopted substantively expansive patent doctrines, such as extending patent terms. In sum, patents historically were treated quite differently from traditional legal monopolies granted to American citizens, such as bridge franchises, which were treated suspiciously by the Supreme Court and, appropriately, narrowly construed against the grantee.

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> Inventions lawfully secured by letters patent are the property of the inventors, and as such the franchises and the patented product are as much entitled to legal protection as any other species of property, real or personal. They are indeed property, even before they are patented, and continue to be such, even without that protection, until the inventor abandon the same to the public . . . .

Jones v. Sewall, 13 F. Cas. 1017, 1020 (C.C.D. Me. 1873), *rev'd on other grounds*, 91 U.S. (1 Otto) 171 (1875).

[200] *See e.g., Livingston*, 15 F. Cas. at 674 (referring to a patent as securing "the monopoly of use of a patented machine"); Lowell v. Lewis, 15 F. Cas. 1018, 1020 (C.C.D. Mass. 1817) (No. 8,568) (Story, Circuit Justice) (referring to a patent as a "monopoly").

1. *The Expansive Construction of Patent Privileges by Courts*

In accord with the widespread recognition of patents as privileges, courts adopted expansive and liberal canons in construing both patents and the patent statutes themselves. Today, the courts' liberal construction of patents is mandated by § 282 of the 1952 Patent Act,[201] which is justified on the ground that the Patent and Trademark Office (PTO) examines patent applications to see if they meet the statutory patentability requirements.[202] This examination system was put into place by the 1836 Patent Act,[203] and thus scholars today believe that this is the beginning point of the presumption of validity accorded to patents by the courts.[204] This is untrue.

Although there was no examination system between 1793 and 1836,[205] it was during this period that courts adopted the presumption favoring liberal construction of patents. For example, in 1827, Chief Justice Marshall, riding circuit, instructed a jury in a patent infringement trial that the patent was to receive "a liberal common sense construction."[206] A few years later, Circuit Justice Baldwin instructed a jury in another patent infringement trial that they should be "looking on them as a statement of the *patentee's right and title*, [in which the jury] will overlook all

[201] 35 U.S.C. § 282 (2000) ("A patent shall be presumed valid."). *See* American Hoist & Derrick Co. v. Sowa & Sons, Inc., 725 F.2d 1350, 1358-59 (Fed. Cir. 1984) (discussing enactment of § 282 in 1952 Patent Act).

[202] *See, e.g.*, Intervet America, Inc. v. Kee-Vet Lab., Inc., 887 F.2d 1050, 1054 (Fed. Cir. 1989) ("The presumption of validity under 35 U.S.C. § 282 carries with it a presumption the examiner did his duty and knew what claims he was allowing."); *American Hoist & Derrick Co.*, 725 F.2d at 1359 (noting that § 282 is based on "the basic proposition that a government agency such as the then Patent Office was presumed to do its job").

[203] *See* Patent Act of 1836, ch. 357, § 7, 5 Stat. 117, 119-20 (repealed 1870) (providing that "on the filing of any such application . . . the Commissioner shall make or cause to be made, an examination of the alleged new invention or discovery").

[204] *See, e.g.*, 2-5 CHISUM ON PATENTS § 5.06 (2005) ("After creation of the Patent Office in 1836 and implementation of the examination system, the courts recognized the presumptive validity of issued patents.").

[205] Although the 1793 Patent Act provided that applications would be "examined" by the Attorney General to determine if they were "conformable to this act" prior to issuance of the patent by the Secretary of State, Patent Act of 1793, § 1, 1 Stat. 318, 321 (repealed 1836), the Secretary of State adopted in practice a registration system in which patents were issued without any prior examination whether they met the statutory requirements.

[206] *Davis*, 7 F. Cas. at 158.

defects in the mode of setting it out."[207] Thus, several years *before* the creation of the examination system, Circuit Justice Story announced the well-settled rule that "[p]atents for invention are not to be treated as mere monopolies odious in the eyes of the law, and therefore not to be favored; nor are they to be construed with the utmost rigor, as *strictissimi juris*."[208] The courts expressly adopted a policy of treating patents as other property privileges, such as title deeds, in which they construed these civil rights favorably in order to best secure these property interests.[209]

This pro-patent presumption was significant because it was contrary to the courts' concomitant treatment of franchises and other monopolies granted to citizens by express statutory authorization. As early as 1797, the Supreme Court declared that a legislative "act . . . being in derogation of the common law, is to be taken strictly."[210] In the famous 1837 anti-monopoly case, *Charles River Bridge v. Warren Bridge*,[211] the Court used this canon to construe narrowly a state franchise in a bridge monopoly.[212] In fact, Chief Justice Taney, the author of

[207] *Id.* at 1080 (emphasis added).

[208] Ames v. Howard, 1 F. Cas. 755, 756 (C.C.D. Mass. 1833) (No. 326). Justice Story further stated that courts should "construe these patents fairly and liberally, and not to subject them to any over-nice and critical refinements." *Id.* For explanation of Justice Story's use of the term of art, "odious," *see supra* note 32.

[209] After the adoption of the examination system in the 1836 Patent Act, courts still recognized that the "liberal spirit in which the patent law ought to be construed in favor of honest patentees" was established before 1836. *Ex parte* Dyson, 8 F. Cas. 215, 215 (C.C.D.C. 1860) (No. 4,228) (citing Grant v. Raymond, 31 U.S. (6 Pet.) 218 (1832)). *See also* Jones v. Merrill, 13 F. Cas. 991, 992 (C.C.N.D. N.Y. 1875) (No. 7,481) (acknowledging the well-settled "liberal interpretation now accorded to patents"); Imlay v. Norwich & W.R. Co., 13 F. Cas. 1, 5 (C.C.D. Conn. 1858) (No. 7,012) (recognizing that "[p]atents are to be construed liberally" so that the "rights secured are to be protected against any substantial violation"); French v. Rogers, 9 F. Cas. 790, 792 (C.C.E.D. Pa. 1851) (No. 5,103) (noting that "as inventors are rarely experts either in philology or law, it has long been established as a rule, that their writings are to be scanned with a good degree of charity").

[210] Brown v. Barry, 3 U.S. (3 Dall.) 365, 367 (1797) (Elsworth, C.J.). *See also* 3 NORMAN J. SINGER, SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION § 61:1 (6th ed. 1997) ("Statutes which impose duties or burdens or establish rights or provide benefits which were not recognized by the common law have frequently been held subject to strict, or restrictive, interpretation.").

[211] 36 U.S. (11 Pet.) 420 (1837).

[212] The *Charles River Bridge* Court affirmed a Massachusetts Supreme Judicial Court decision, which expressly rejected the franchise owner's claim that he should be given a "liberal and extended construction of the charters," because this was "inconsistent with the improvement and prosperity of the state." Charles River Bridge v. Warren Bridge, 24 Mass. 344, 460 (1830), *aff'd*, 36 U.S. (11 Pet.) 420 (1837). The Massachusetts Court concluded

*Charles River Bridge*,[213] believed that a similarly restrictive canon should be applied to patents. Such beliefs were offered in dissents in patent decisions.[214] The antebellum courts refusal to apply to patents well-established canons requiring strict construction of monopoly franchises is further evidence that patents were viewed as privileges—as civil rights securing property rights.

Consistent with their liberal construction of patent grants, antebellum courts also liberally construed the patent statutes in favor of expansive patent rights. In 1832, for instance, the Supreme Court affirmed the Secretary of State's practice in permitting patentees to surrender mistakenly defective patents and obtain corrected "reissued" patents.[215] Notably, the then-governing 1793 Patent Act did not empower the Secretary of State to grant reissued patents. Nonetheless, the Court held that the "laws . . . ought, we think, to be construed in the spirit in which they have been made," highlighting both the progress of the useful arts and the "reward" secured to the inventor by the patent statutes.[216] Several years later, Circuit Justice Story was required to construe a private legislative act providing an inventor with an extended patent term, in which he acknowledged his judicial duty "to give validity to the present letters patent under the act."[217] By the mid-nineteenth century, the Supreme Court cited these earlier decisions in reaffirming its commitment to the canon that patents "are to be construed liberally, in accordance with the design of the Constitution and the patent laws of the United States."[218]

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that "we ought. . . to adopt a more limited and restricted" construction of the franchise. *Id.* The U.S. Supreme Court agreed.

[213] *See supra* note 58 (discussing Chief Justice Taney and *Charles River Bridge* decision).

[214] *See, e.g.*, Winans v. Denmead, 56 U.S. (15 How.) 330, 345 (1854) (Campbell, J., dissenting) (arguing with Taney's support against expansive infringement doctrines, as a patentee should be restricted to "exactly the limits of his invention.").

[215] *See* Grant v. Raymond, 31 U.S. (6 Pet.) 218 (1832).

[216] *Id.* at 241-42.

[217] Blanchard v. Sprague, 3 F. Cas. 645, 646 (C.C.D. Mass. 1838) (No. 1,517). Ultimately, Justice Story held that the a judicial correction of the alleged mistake in the statute would "depart from the intention of congress, manifested in the other parts of the act." *Id.* at 648. Faced with this contradiction in the original act, he refrained from construing it in favor of the patentee. *Id.*

[218] *Winans*, 56 U.S. at 341-42 (citing *Grant v. Raymond* and *Blanchard v. Sprague*).

Contrary to early American courts' restrictive treatment of "monopolies odious in the eyes of the law,"[219] they embraced patents as privileges—identifying them as important civil rights securing equally important property interests. As one district court instructed a jury "called to act on the subject of patents" in an infringement trial: The jury members should "regard[] as unjust and against law" the theory "that there can be no property in a discovery or invention."[220] Consistent with this command, antebellum courts embraced liberal and expansive constructions of both patents and the patent statutes themselves—interpretative canons that survive in patent law to this day—in order to secure properly this privilege.

2. *The Reissue Right*

Antebellum courts not only expansively construed the property rights secured under patents and the patent statutes—treating these rights as privileges—they also extended rights to patentees beyond those expressly authorized in the patent statutes. One such example was the reissue right, discussed earlier in illustrating the courts' expansive construction of the patent statutes in favor of patentees.[221] This judicial expansion of patent rights beyond those expressly provided in the patent statutes reflected the courts favorable treatment of patents as privileges.

Although patent statutes have secured a reissue right since 1836,[222] the provenance of this valuable remedial right is found not in Congress, but in the Supreme Court. Prior to 1836, the patent system was governed by the 1793 Patent Act, which authorized the Secretary of State to issue patents upon application by inventors.[223] Sometime in the early nineteenth century, the

[219] *Ames*, 1 F. Cas. at 756.
[220] Allen v. Hunter, 1 F. Cas. 476, 477 (C.C.D. Ohio 1855) (No. 225).
[221] *See supra* notes 215-218 and accompanying text.
[222] *See* 35 U.S.C. §§ 251-56 (2000); Patent Act of 1836, ch. 357, § 13, 5 Stat. 117, 122 (repealed 1870). Congress adopted something akin to a reissue right shortly after the Supreme Court's 1832 decision in *Grant v. Raymond*, *see* An Act Concerning Patents for Useful Inventions, ch. 162, 4 Stat. 559 (1832) (repealed 1836), but this proved untenable and was replaced by § 13 of the 1836 Patent Act, which was the first statutorily authorized reissue right as it is known today.
[223] *See supra* note 205.

Secretary of State began permitting patentees to surrender mistakenly defective patents, and issued to them corrected versions for the rest of the original patent terms. Significantly, the Secretary of State acted without statutory authorization in granting these "reissued patents."

This practice came to a head in a lawsuit between a patentee armed with a reissued patent and defendants charged with infringement, reaching the Supreme Court in 1832 in *Grant v. Raymond*.[224] In *Grant*, the defendants (represented by Daniel Webster, who ironically argued for expansive copyright rights based on the natural right to property in *Wheaton*[225]) attacked the reissued patent's validity, arguing for a *restrictive* reading of the patent statutes. The defendants maintained that the "statute makes no provision for surrender, and the issuing of a new patent,"[226] and that in context of patent law, the "secretary has no power . . . except so far as authorized by statute."[227] Given that it was "impossible to reconcile such a [reissue] proceeding to the requisitions of the act,"[228] the defendants believed that the reissued patent in this case was invalid. If the Court chose to disregard the limited powers expressly provided to the Secretary in issuing patents, the defendants concluded, this would effectively amend the patent statutes, and "[t]he Court cannot add a new section to the [patent] act."[229] This was an argument that made

[224] 31 U.S. (6 Pet.) 218 (1832).
[225] *See supra* notes 152-153 and accompanying text.
[226] *Grant*, 31 U.S. at 227.
[227] *Id.* at 228.
[228] *Id.* at 227.
[229] *Id.* at 228. The defendants (via Webster) continued in this vein: "This would change the whole patent system. Its effects would be monstrous." *Id*. at 229. In saying this, the defendants identified the exact concerns about rent-seeking behavior that one finds animating the Jeffersonian story of patent law. First, "[p]atentees would try their claims under one specifications; they might fail; and they would call it inadvertence, and try another experiment." *Id.* In other words, patentees would act strategically in manipulating the patent system in order to obtain exclusive rights for themselves at the public's expense. Second, and more important, the patentee took into "public use" what was not actually secured under the (defective) patent grant; therefore, to permit a reissued patent was to withdraw from the public domain an invention that "becomes public property and can never be resumed." *Id.* at 229-230 (citing *Pennock v. Dialogue*). Given that concerns about monopolistic rent-seeking behavior by patentees were submitted to the *Grant* Court, the Court's affirmance of the reissue right is substantial evidence of its favorable view of patents as privileges—civil rights securing fundamental property rights.

sense only if the patent statutes secured special legal privileges granting monopoly franchises to inventors.

In delivering the opinion for the unanimous Court, Chief Justice Marshall rejected defendants' arguments wholesale. The *Grant* Court admitted that, under the 1793 Patent Act, the Secretary of State was merely "a ministerial officer," and that "the act of Congress contains no words which expressly authorize the secretary to issue a corrected patent."[230] But the Court found such authorization in "the general spirit and object of the law" in securing the "progress of useful arts" and "the reward [for the inventor] stipulated for the advantages derived by the public for the exertions of the individual."[231] The *Grant* Court waxed poetic in the patentee's favor: "That sense of justice and right which all feel, pleads strongly against depriving the inventor of the compensation thus solemnly promised, because he has committed an inadvertent or innocent mistake."[232] In the face of an explicit argument reflecting the basic tenets of the Jeffersonian story of patent law, the *Grant* Court expressly approved an expansive reading of the rights secured by the patent statues. Consistent with its adoption of similarly expansive interpretative canons, the Court had no qualm in treating patents substantively as privileges.

Following *Grant* and the codification the reissue right in the 1836 Patent Act, courts did not discuss the reissue right often, but when they did, they confirmed that this right was regarded as a valuable privilege—as a civil right secured under the same labor-desert policies justifying all natural and civil rights to property. In 1868, for instance, a district court extolled the virtues of the reissue right, noting how "the privilege of surrender and reissue is . . . invaluable to inventors, for without it they would often lose that protection for the offspring of their skill and

[230] *Id.* at 240.
[231] *Id.* at 240-41.
[232] *Id.* at 241.

labor which it is the immediate object of all patent laws to afford."[233] The court detailed how patents are often undermined by simple drafting mistakes resulting in "a fatal and damaging error," which are then exploited by many people "devoted to assailing, circumventing or defeating them."[234] Given these heavy-handed attacks on patents, the court concluded that the "privilege of surrender and reissue, is therefore, necessary for the protection of inventors."[235]

Such technically precise references to the reissue right as a privilege—a civil right serving natural rights policies justifying protection of a property right—were not uncommon.[236] In 1844, Circuit Justice McLean, whose name is often invoked today as supporting the Jeffersonian story of patent law given his decision in *Wheaton*,[237] embraced the favorable treatment patentees received in the courts, noting simply that the *Grant* Court secured the reissue right *prior* to its statutory authorization in 1836.[238] Even when a court voided a reissued patent, such as an inventor exploiting the reissue mechanism improperly to expand the scope of his original patent, the court reiterated the fundamentally pro-patentee policies underlying this valuable privilege.[239] As another mid-nineteenth-century court bluntly stated: "[I]n the case of a reissue," the patentee's legal entitlement "is not of grace, but of right. It is secured by the statute."[240]

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[233] Blake v. Stafford, 3 F. Cas. 610, 612 (C.C.D. Conn. 1868) (No. 1,504).

[234] *Id.*

[235] *Id.*

[236] *See, e.g.*, *Ball*, 2 F. Cas. at 552 (discussing reissue right in context of securing a patentee's rights against "pirates," citing and quoting from *Grant*); Child v. Adams, 5 F. Cas. 613, 614-15 (C.C.E.D. Pa. 1854) (No. 2,673) (discussing reissue right and *Grant* decision in securing "valuable inventions" for "meritorious inventors"); *French*, 9 F. Cas. at 792 (justifying reissue right in part by canon favoring charitable constructions of patents). *But see French*, 9 F. Cas. at 792 (justifying reissue right in terms of "some benefit to be derived by the public").

[237] *See supra* note 154 and accompanying text.

[238] Brooks v. Jenkins, 4 F. Cas. 275, 277-78 (C.C.D. Ohio 1844) (No. 1,953).

[239] *See* Cahart v. Austin, 4 F. Cas. 997, 1000 (C.C.D.N.H. 1865) (No. 2,288) (Clifford, Circuit Justice). Circuit Justice Clifford noted that the reissue right "was intended to remedy that evil" in which patents "had frequently been adjudged invalid . . . from the insufficiency of the specification." *Id.* at 1000. However, in voiding the reissued patent, Clifford reminded the patentee that "this privilege was not given . . . in order that the patent may be rendered more elastic or expansive," which was what had occurred in this case. *Id.*

[240] *Ex parte* Dyson, 8 F. Cas. at 219.

3. *Patent Term Extensions*

The last, but certainly not least significant, evidence that patents were privileges—civil rights securing important and valuable property rights—is found in the prevalent congressional practice in extending patent terms in the antebellum years, which courts consistently affirmed and endorsed on natural-rights policy grounds. In fact, Congress expressly provided for seven-year term extensions in § 18 of the 1836 Patent Act.[241] This legislation represents the most striking evidence of the historical myth perpetrated by the Jeffersonian story of patent law, because in recent years professors and lawyers have engaged in a sustained study of the history of patent and copyright term extensions (prompted by the *Eldred* litigation[242]). Yet, beyond cursory references to the extension right in § 18, these historical studies fail to discuss or explore this valuable privilege provided to patentees by Congress in the organic patent statutes themselves.[243]

Unsurprisingly, in the 123 cases in the *Federal Cases* reporter involving 97 patents whose terms were extended,[244] courts identified the extension right codified in § 18 as a

[241] *See* Patent Act of 1836, ch. 357, § 18, 5 Stat. 117, 124. This provision was repealed in 1860 when Congress extended the standard patent term to seventeen years. *See* An Act in Addition to "An Act to promote the Progress of the Useful Arts," ch. 88, §§ 16-17, 12 Stat. 246, 249 (1861).

[242] The petitioner in this case failed in his constitutional challenge to the 1998 Copyright Term Extension Act. Pub. L. No. 105-298, 112 Stat. 2827–2828 (1998) (amending 17 U.S.C. §§ 302 and 304 by extending copyrights terms, both prospectively and retroactively). *See supra* note 18 and accompanying text (discussing *Eldred* and the role of the Jeffersonian story of patent law in this copyright case).

[243] *See, e.g.*, Tyler & Ochoa, *supra* note 12, at 929 n.119 (identifying § 18 in a footnote without any further explanation); Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. COPYRIGHT SOC'Y USA 19, 51-108 (2002) (providing most extensive extant analysis, but failing to discuss in any depth § 18 of the 1836 Patent Act and its resulting case law); Walterscheid, *supra* note 12, at 332-333 (stating only that the 1836 Patent Act "authorized an administrative term extension of seven years," and quoting the statutory provision); Edward C. Walterscheid, *Inventor Equity: The Case for Patent Term Extension*, 86 J. PATENT & TRADEMARK OFF. SOC'Y 599, 601 (2004) (noting only that "the 1836 Act now provided an administrative mechanism for term extension of seven years which did not require a private act of Congress"); Edward C. Walterscheid, *The Remarkable—and Irrational—Disparity Between the Patent Term and the Copyright Term*, 83 J. PATENT & TRADEMARK OFF. SOC'Y 233, 254-55 (2001) (devoting only one page to discussing patent extensions and citing a single case in which a patent term was extended).

[244] *Federal Cases* patent cases database on file with the author.

privilege.[245] In one case, Circuit Justice Woodbury revealingly contrasted the "rights *and* privileges" secured under the patent statutes against a "grant *or* privilege" secured in a single legislative act.[246] This conjunction of privilege and right, and the corresponding disjunction of privilege versus grant, is telling: It confirms that *privilege* referred to either a civil right justified under the social contract doctrine of natural rights philosophy or a special grant by the government to an individual contrary to natural or common law rights.

If there were any doubts that the patent term extension right was a privilege defined by natural rights philosophy and its social contract doctrine, Congress and the courts made clear that this was the background context for this term. Consistent with Madison's claim that patents were justified "with equal reason" as common-law copyrights,[247] the 1836 Patent Act expressly justified the seven-year extension on a labor-desert policy: If the patentee "failed to obtain, from the use and sale of his invention [during the fourteen-year patent term], a reasonable remuneration for the time, ingenuity, and expense" in creating the invention, he could obtain a seven-year term extension.[248] In adjudicating a patent extended under this provision, Justice McLean, riding circuit, reiterated this policy in securing for inventors the fruits of their inventive labors:

> The policy of the statute is a benign one. Its design is to foster genius and reward merit. Nothing can be more notorious than the poverty of great inventors. . . . This was known to the congress of 1836, and the above act [§ 18] was provided to deal justly, if not liberally, with inventors. . . . Some may call it a munificent act; but with much greater propriety it may be denominated an act of justice.[249]

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[245] *See, e.g.*, Blanchard v. Haynes, 3 F. Cas. 628, 628 (C.C.D. N.H. 1848) (No. 1,512) (Woodbury, Circuit Justice) (adjudicating a patent extended by special legislation in the context of discussing the "rights and privileges thereby created" by the patent statutes generally); Brooks v. Bicknell, 4 F. Cas. 247, 250 (C.C.D. Ohio 1843) (No. 1,944) (McLean, Circuit Justice) (identifying the extension right as "[t]his privilege, or right").

[246] *Blanchard*, 3 F. Cas. at 628 (noting that the private act extending Blanchard's patent term "contained no grant or privilege in favor of" his former licensee who was now accused of infringement under the extended term).

[247] *See supra* note 117 and accompanying text.

[248] Patent Act of 1836, ch. 357, § 18, 5 Stat. 117, 125 (repealed 1860).

[249] Brooks v. Bicknell, 4 F. Cas. 253, 255 (C.C.D. Ohio 1845) (No. 1,945). Similarly, in instructing a jury in a patent trial about the requirements of § 18, Circuit Justice Nelson stated that that "if a patentee . . . can satisfy

Shortly after Circuit Justice McLean uttered these words, the Supreme Court affirmed the constitutionality of § 18, reiterating its essential labor-rewarding policy that "the patentee may have his patent extended" on the basis of having "only to show that he has not been reimbursed" for his inventive efforts.[250]

Courts not only promoted the labor-rewarding policy underlying the term extension provision, they drew the logical connection with the tangible property concepts and doctrines similarly justified by the same labor-rewarding policy. Circuit Justice Clifford, for instance, recognized that the 1836 Patent Act established "not only an inchoate right to obtain letters-patent . . . but also a further *inchoate right* to have the term extended."[251] In both situations—applying for a patent and obtaining a tem extension—the inventor perfected his right by securing it as a privilege. Justice Clifford admitted that "the title of the inventor to an extension" rests on the "condition" that he fail to secure the fruits of his labors, but this condition "does not change the nature of the right."[252] The extension right was an important privilege securing as a property right an inventor's fruits of his labors. Furthermore, in adjudicating this right, courts applied the same liberal canon used to secure other patent and property rights,[253] holding that inventors who failed to profit from their inventions simply given costs incurred in litigating their patents still had a right to obtain term extensions.[254]

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the commissioner of patents that he has not been remunerated by the profits of his invention," then it is "the duty of that officer to extend the term . . . [in order to ensure] a reasonable compensation for his genius and his labor." Blanchard v. Beers, 3 F. Cas. 617, 617 (C.C.D. Conn. 1852) (No. 1,506).

[250] Wilson v. Rousseau, 45 U.S. (4 How.) 646, 690 (1846). *See also Blanchard*, 3 F. Cas. at 617 (declaring that it is "the duty of that officer to extend the term . . . [in order to ensure] a reasonable compensation for his genius and his labor").

[251] *Clum*, 5 F. Cas. at 1102.

[252] *Id.* (emphasis added).

[253] *See supra* Part IV.C.1.

[254] *See, e.g.*, *Allen*, 1 F. Cas. at 471; *Blanchard*, 3 F. Cas. at 617. *See also Carew*, 5 F. Cas. at 57 (citing *Wilson*, 45 U.S. (4 How.) at 646) (holding that "although in express terms the eighteenth section of the act of 1836 only authorizes the grant of an extension to the patentee himself, the court has sustained the grant of an extension to an executor or administrator").

Finally, it is well known that Congress provided individual patent extensions long before the 1836 Patent Act codified this privilege in a formal administrative proceeding before the patent commissioner, and that courts repeatedly upheld this congressional practice when these extended patents were challenged in court.[255] It is even more significant that Congress continued to engage in this practice even after it adopted the formal administrative proceeding in § 18 of the 1836 Patent Act.[256] In several patent infringement trials implicating these extended patents, four Circuit Justices, including Justice Story, advanced the proposition that Congress had the constitutional "power, after a patent has expired, to provide for its extension."[257] This expansive view of congressional power to secure patent rights—even after the patents had fallen into the public domain—was justified by the labor theory of property that animated the definition of patents as privileges. As one court declared in a patent infringement trial in the midst of the Civil War: "Congress has wisely provided by law that inventors shall exclusively enjoy, for a limited

[255] *See, e.g.*, An act to renew the patent of Thomas Blanchard, ch. 213, 6 Stat. 589 (1834); An act for the relief of Oliver Evans, ch. 13, 6 Stat. 70 (1808). These extended patents were challenged and ultimately upheld. *See* Evans v. Jordan, 13 U.S. (9 Cranch.) 199 (1815) (affirming Congress's private act extending patent term of Oliver Evans despite doubts by the Court as to validity of Evans's patent); *Blanchard*, 3 F. Cas. at 628 (recognizing, in addition to this case, that "cases have frequently occurred" in which "congress had [exercised its] constitutional right to confer a new and further term on [a] patentee").

[256] *See* An Act for the Relief of Martha M. Jones, Administratrix of Samuel T. Jones, ch. 124, 15 Stat. 375 (1869); An Act for the Relief of John Goulding, ch. 88, 12 Stat. 904 (1862); An Act for the Relief of Thomas Blanchard, ch. 10, 9 Stat. 683 (1847); An Act to Extend a Patent Heretofore Granted to William Woodworth, ch. 27, 6 Stat. 936 (1845); An Act to Amend, and carry into Effect, the Intention of an Act entitled, "An Act to Renew the Patent of Thomas Blanchard," approved June Thirteenth, Eighteen Hundred and Thirty-Four, ch. 14, 6 Stat. 748 (1839). These patents were involved in litigation, too. *See, e.g.*, Jordan v. Wallace, 13 F. Cas. 1104 (C.C.E.D. Pa. 1871) (No. 7,523) (involving patent extended for John Goulding); Jones v. Osgood, 13 F. Cas. 1002 (C.C.S.D.N.Y. 1869) (No. 7,487) (involving patent extended for Martha Jones); Bloomer v. Gilpin, 3 F. Cas. 726 (C.C.S.D. Ohio 1859) (No. 1,558) (involving patent extended in 1845 for William Woodworth).

[257] Jordan v. Dobson, 13 F. Cas. 1092, 1095 (C.C.E.D. Pa. 1870) (No. 7,519) (Strong, Circuit Justice); *see also* Blanchard v. Haynes, 3 F. Cas. 628, 628 (C.C.D.N.H. 1848) (No. 1,1512) (Woodbury, Circuit Justice) (holding same); Blanchard's Gun-Stock Turning Factory v. Warner, 3 F. Cas. 653, 657 (C.C.D. Conn. 1840) (Nelson, Circuit Justice) (holding same); Blanchard v. Sprague, 3 F. Cas. 648 (C.C.D. Mass. 1839) (No. 1,518) (Story, Circuit Justice) (holding same).

Justice Strong also denigrated the idea that the public domain automatically creates rights in individuals to use an invention at a certain time, because, under the Constitution, the duration, expiration, extension, and recommencing of a patent term "is left to the discretion of congress." *Jordan*, 13 F. Cas. at 1095. Justice Strong continued: "Congress may be trusted, and they are trusted, to take care that in protecting the inventor, the public shall not be injured." *Id.*

season, the fruits of their inventions."[258] The salience of the labor theory of property made sense to Congress and courts because patents were privileges—civil rights securing property rights.

Ultimately, this Part has shown that much of the early evolution of American patent law resulted from patents being treated as a civil right within the then-dominant political and constitutional context of natural rights philosophy. It is important to bear in mind that not all congressmen and jurists embraced a natural rights justification for patent privileges; as always, the supporting sources for the Jeffersonian story of patent law are there to be uncovered in any diligent search.[259] The historical record is mixed. The purpose here simply is to show both the influence of natural rights philosophy on American patent law and its determinative role in the evolution of several patent doctrines. Some of these patent doctrines remain in force today, such as the reissue right and the interpretative canon employed by courts in applying both patents and the patent statutes. In this way, natural rights philosophy played an important role, albeit hardly single-handedly, in defining and protecting patents as privileges in the early American republic.

## V. THE HISTORICAL PATENT PRIVILEGE REDISCOVERED: IMPLICATIONS FOR TODAY[260]

A proper intellectual history of American patent law has consequences on the legal and policy disputes surrounding patent and other intellectual property rights today, especially given the omnipresence of the Jeffersonian story of patent law. A complete discussion of these normative debates is beyond the scope of my thesis, which establishes only a descriptively accurate account of this intellectual history. Thus, patent scholars and lawyers are still free to criticize expansive, pro-patent developments in the law today,[261] but, at a minimum, this Article

[258] Clark Patent Steam & Fire Regulator Co. v. Copeland, 5 F. Cas. 987, 988 (C.C.S.D.N.Y. 1862) (No. 2,866) (adjudicating a patent extended under § 18 of the 1836 Patent Act).

[259] *See, e.g.*, Day v. Union India-Rubber Co., 7 F. Cas. 271, 275 (C.C.S.D.N.Y. 1856) (No. 3,691) (explaining, in the context of a discussion of the extension right, that the "exclusive privileges" conferred on patentees serve "the ultimate benefit of the public, and [are] not for the sole benefit of inventors and patentees").

[260] Many thanks to Mark Lemley and Thomas Nachbar for calling attention to the need for Part V.

[261] *See supra* notes 14-15, 21, 49 and accompanying text.

establishes that they cannot continue to use the Jeffersonian story of patent law to do the descriptive heavy lifting in these normative arguments.

For many years, lawyers and scholars have been claiming normative traction in their legal and policy arguments by invoking the Jeffersonian story of patent law. They have mixed modern policy arguments with historical claims,[262] and their most recent defeats in *Grokster* and *Eldred* have not deterred them in continuing to advance a comprehensive critique of expansive protections for patent and other intellectual property rights. Paul Schwartz and William Treanor recently wrote that "*Eldred* has not put an end to the litigation in this area."[263]

This suggests two reasons to care about a proper intellectual history of American patent law. The first is doctrinal. The Court draws heavily on the history of American patent rights as one of several factors in analyzing current patent doctrines.[264] For example, the Court recently held that nineteenth-century patent rights, such as those discussed in Part IV, constitute "the legitimate expectations of inventors in their property."[265] As shown earlier, this identification of patents as *property* itself reflects a long-standing historical treatment of patents in both Congress and the courts. If the Court assumes that this history informs patentees' reasonable expectations today—a not-so-veiled reference to the constitutional protection of patents under takings

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[262] *See supra* notes 14-15, 18, 46-50 and accompanying text. *See also* Adam Mossoff, *Is Copyright Property?*, 42 SAN DIEGO L. REV. 29 (2005) (describing how normative arguments against copyright in digital media are predicated on descriptive, historical claims about the nature of intellectual property rights).

[263] Schwartz & Treanor, *supra* note 7, at 2362 (discussing *Golan v. Ashcroft*, 31 F. Supp. 2d 1215 (2004)). *See also* Aharonian v. Gonzalez, No. C 04-5190 MHP, 2006 WL 13067 (N.D. Cal. Jan. 3, 2006) (rejecting constitutional challenge to copyright protection for software code).

[264] *See supra* notes 1, 3, 33-40 and accompanying text (discussing cases). Even when the Court has not gone back as far as Jefferson's writings, it has relied on nineteenth-century case law and treatises in adjudicating patent cases today. *See, e.g.*, Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd., 535 U.S. 722, 738 (2002) (affirming the doctrine of prosecution history estoppel in patent law given, in part, how courts construed this equitable defense in the nineteenth century); Warner-Jenkinson Co. v. Hilton Davis Chemical Co., 520 U.S. 17, 26 n.3 (1997) (maintaining that nineteenth-century court decisions creating the doctrine of equivalents are controlling today despite litigant's argument that Congress's enactment of the 1952 Patent Act impliedly repealed these decisions).

[265] *Festo Corp.*, 535 U.S. at 739. The Court further warned the Federal Circuit that it "must be cautious before adopting changes that disrupt the settled expectations of the inventing community." *Id.*

law[266]—it behooves lawyers and jurists to better understand the nature of these expectations and their supporting policy justifications.

The second reason is that a sound appreciation of the history of American patent law matters so that scholars and lawyers are careful not to use bad history as a substitute for careful normative policy arguments. For instance, Lessig's critique that the modern Court contradicts its own "long history" in limiting patent and copyright is wrong,[267] as is the historical assumption in the complaint today that patents and other intellectual property rights are being "propertized."[268] The expansion in patent rights today is in accord with the similarly expansive development in patent rights under the guiding influence of natural rights philosophy in the early nineteenth century. Modern developments in patent and copyright law may be criticized on the basis of policy concerns, such as emphasizing monopoly costs or championing the value of the public domain, but invocations of history cannot serve as a proxy for such arguments.

Nor can scholars now claim that this history is moot to these modern debates. The legal realists reminded us that "[l]egal criticism is empty without objective description of the causes and consequences of legal decisions,"[269] and many have adopted this motto in their own critiques of intellectual property developments today. In sum, scholars and lawyers cannot have their cake and eat it, too. To reject as irrelevant a historical record they have been relying on for years raises the specter of Kramer's "law firm history" critique—that lawyers only use history for

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[266] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1034 (1992) (recognizing in the context of regulatory takings doctrine that a property-owner's "reasonable expectations must be understood in light of the whole of our legal tradition"); Penn Central Trans. Co. v. City of New York, 438 U.S. 104, 124 (1978) (identifying "investment-backed expectations" as a factor in assessing whether a government regulation results in a compensable taking of property under the Fifth Amendment).

[267] *See supra* note 18 and accompanying text.

[268] *See supra* notes 15, 49 and accompanying text. Lessig and others are not entirely to blame, however, because the Court is responsible for creating the modern historical myth that is the Jeffersonian story of patent law. *See supra* notes 33-39 and accompanying text.

[269] Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 849 (1935).

supporting preconceived policy goals.[270] In fact, the Jeffersonian story of patent law is an example of law firm history—it is an incomplete account of history in service of modern policy arguments. In this respect, a proper intellectual history of patent law indicates how and in what way labor theories of property and social contract doctrines may continue to influence legal disputes and intellectual property debates today.[271]

## VI. CONCLUSION

Federal Circuit Judge Timothy Dyk recently remarked that "[p]atent law is not an island separated from the main body of American jurisprudence."[272] This Article has endeavored to prove this by situating early American patent law within the political and constitutional context of the eighteenth and nineteenth centuries—an era dominated by the labor theory of property and social contract doctrine of natural rights philosophy. In such a context, patents indeed were privileges—civil rights securing property rights. Of course, the conception of patents as special, utility-enhancing monopoly privileges had its advocates in early American courts and among public officials. It is not my purpose to suggest that Jefferson has been misinterpreted, nor that his view of patents was atypical among his contemporaries. Neither claim is true; the problem is the ubiquitous approval of the Jeffersonian story of patent law today that results in the same lopsided presentation and misinterpretation of the historical record.

In reviewing primary historical sources in the eighteenth and nineteenth centuries, it is apparent that the Jeffersonian story of patent law is an historical myth. Judge Rich once criticized

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[270] *See* Kramer, *supra* note 25, at 389-94 (complaining about the bad historiography of lawyers, who produce "law firm history" intended only "to generate data and interpretations that are of use in resolving modern legal controversies").

[271] *See, e.g.*, Shubha Ghosh, *Patents and the Regulatory State: Rethinking the Patent Bargain Metaphor after* Eldred, 19 BERKELEY TECH. L.J. 1315 (2004) (assessing function of social contract doctrine in modern patent law jurisprudence); *Eldred*, 537 U.S. at 212 n.18 (noting "complementary" relationship between utilitarian and labor-desert policies as justifications for copyright).

[272] Knorr-Bremse Systeme Fuer Nutzfahrzeuge GMBH v. Dana Corp., 383 F.3d 1337, 1351 (Fed. Cir. 2004) (en banc) (Dyk, J., concurring).

labeling patents as monopolies due to the negative "emotional" baggage that the term "monopoly" carried with it.[273] He recognized "that talk of the 'patent monopoly' weds patents to prejudice, which is not conducive to clear thinking."[274] The same must be said about the Jeffersonian story of patent law, which weds American patents to English royal monopoly privileges, and thus masks the development of early American patent law under the meaningful guidance of the social contract doctrine and labor theory of property of natural rights philosophy.

[273] Rich, *supra* note 23, at 239.
[274] *Id*.