Who Cares What Thomas Jefferson Thought about Patents - Reevaluating the Patent Privilege in Historical Context

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

Adam Mossoff†

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 the Founders’ writings, congressional reports, long-forgotten court decisions, and political and legal treatises, this Article explains how patent rights were defined and enforced using the social contract doctrine and the 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 doing so, 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 nearly universal misuse of history by lawyers and scholars who rely on Jefferson as an undisputed...
historical authority to critique 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.

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INTRODUCTION

In 1966, the Supreme Court discovered that Thomas Jefferson was the founder of American patent law. In *Graham v. John Deere Co.*, 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.” Jefferson continued to make guest appearances in Court decisions for

1 383 U.S. 1, 7–11 (1966).
the next two decades, leading patent law scholars to remark recently that Jefferson's "views... have proven influential, especially in the Supreme Court." 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. 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 a historical myth—what this Article calls the "Jeffersonian story of patent law." This conception of early American patent policy arguably results from the sideling of the Copyright and Patent Clause from many traditional debates in constitutional law. Whereas legal scholars have studied for many years the historical record underlying other constitutional clauses, such as the Commerce Clause, the history of the Copyright and Patent Clause remains largely unexplored. Patents, and intellectual property rights generally, receive short shrift in standard legal histories, and even then historians recite by rote the standard line of

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5 See infra notes 46-50 and accompanying text (identifying scholars' substantial reliance on Jefferson).
6 See U.S. CONST. art. I, § 8 ("The Congress shall have Power... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").
7 Two prominent constitutional law treatises do not discuss the Copyright and Patent Clause. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW (2d ed. 2002); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (2d ed. 1988). The Copyright and Patent Clause is also 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").
9 Before the 1990s, Bruce Bugbee's and Frank Prager's works comprised almost all citations to the history of American patent law. See, e.g., BRUCE W. BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW (1967); Frank D. Prager, A History of Intellectual Property from 1545 to 1787, 26 J. PAT. OFF. SOC'Y 711 (1944); Frank D. Prager, Proposals for the Patent Act of 1790, 36 J. PAT. OFF. SOC'Y 157 (1954).
10 There is no mention of patents or other intellectual property rights in MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977). Lawrence Friedman spends only seven pages discussing patents in his famous study of American legal
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."\footnote{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.\footnote{12} In *Eldred v. Ashcroft*,\footnote{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.\footnote{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.\footnote{15} Furthermore, professors and activists use it in criticizing the Supreme Court for being Janus-faced: the Court's expansive doctrinal developments in pat-

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\footnote{12}{Friedman, supra note 10, at 255. Later, Friedman writes that "[t]he patent monopoly was in some regards an anomaly, in an expansive, free-market economy." Id. at 436.}


\footnote{14}{537 U.S. 186 (2003).}

\footnote{15}{See Brief for Petitioners at 14–16, 24–28, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618), 2002 WL 3215676; Brief of Intellectual Property Law Professors as Amici Curiae Supporting Petitioners at 8–13, Eldred v. Ashcroft, 537 U.S. 186 (2003) (No. 01-618), 2002 WL 1041866; see also Ochoa & Rose, supra note 12, at 909 (noting that their article was an expanded version of their amicus brief filed in *Eldred*).}

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\footnote{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 these rights are viewed as "absolute property" and their "duration and scope . . . 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) (book review) (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, 398 (1989) (describing and critiquing the "more proprietor and anti-dissemination attitude toward information than that which the law has previously displayed"). A legal historian recently noted the historical claim of some intellectual property scholars lamenting "the ‘propertization’ of the field" in 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, 114 (2004).}
ent law and in other intellectual property fields 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 of . . . imposing limits on Congress’s power in the name of the Copyright and Patent Clause.”

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,” there are substantial references to patents as “privileges” in the early years of the American republic. On the basis of this historical evidence, Susan Sell asserts that the focus today on intellectual property rights obscure the fact that IP ‘rights’ are actually grants of privileges.” Judge Giles S. Rich, regarded by many as “the founding father of modern patent law,” also believes “that patents for inventions were historically, and always will be, grants of privileges.” Such broad-brushed declarations that patents were merely special legal privileges are wrong.

What is missing today in these oft-repeated historical claims is an appreciation of the intellectual context of the eighteenth and nineteenth centuries—an era dominated by the labor theory of property


17 See, e.g., MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (holding peer-to-peer file swapping network liable for indirect copyright infringement); Eldred, 557 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, 557 U.S. at 246 (Breyer, J., dissenting) (castigating the Eldred majority for ignoring the 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 333.

20 This includes Supreme Court Justices, such as Justice Joseph Story, see infra note 68 and accompanying text, and numerous other federal judges and Circuit Justices, see infra note 183 and accompanying text.


22 DONALD S. CHISUM ET AL., PRINCIPLES OF PATENT LAW 24 (3d ed. 2004). Judge Rich was “the principal architect of the 1952 Patent Act” and later served on the Court of Appeals for the Federal Circuit, the specialized appeals court created in 1982 with sole jurisdiction over patent cases. Id.

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.\textsuperscript{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."\textsuperscript{25} This 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.\textsuperscript{26}

In three parts, this Article will advance its thesis that the 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 intellectual property scholars today have adopted Jefferson's views of patents as a historical axiom. Second, it will explain how the social contract doctrine influenced the development of American patent law, as revealed in the historical identification of patent rights as privileges. In surveying primary sources from the eighteenth and nineteenth centuries, including the Founders' writings, congressional records, judicial decisions, and philosophical and legal treatises, 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 of reasserting this intellectual context back into the interpretation of the historical record.

This intellectual history has far-reaching consequences. First, as a 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

\textsuperscript{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 that the supporting theory of trade secrets doctrine 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. See generally Adam Mossoff, What Is Property? Putting the Pieces Back Together, 45 ARiz. L. REV. 371 (2003) (examining the impact on 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).


\textsuperscript{26} See infra Parts II, III.A.
from condemnation given only their social utility, then why did ante-bellum courts classify patents as property rights, develop liberal interpretative presumptions in favor of their validity, and create additional rights beyond those authorized in the patent statutes, such as a patentee’s right to obtain a “reissued” patent in order to correct a mistakenly defective patent? Furthermore, if patents were strictly limited privileges, why did Congress expressly provide for patent term extensions in the 1836 Patent Act? 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 the Jeffersonian story of patent law in claiming that historical authority undoubtedly supports a more restrictive 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 is at best a half-truth—at worst, it is an outright myth.

I

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 some antebellum politicians and jurists who viewed patents as “odious monopolies” that were granted to inventors given only their social utility. But the Jeffersonian story of patent law elevates this one viewpoint into unquestioned historical axiom, and the rest of the record is suppressed or

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27 See infra Part III.B.
28 See infra Part III.C.1.
29 See infra Part III.C.2.
30 See infra Part III.C.3.
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., Md. Const. of 1776, art. XXXIX (prohibiting monopolies because “monopolies are odious, contrary to the spirit of a free government, and the principles of commerce”); 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 from the public that which belongs to it” through “the exercise of the sovereign power”); 1 Op. Att’y Gen. 110 (1802) (stating that “[t]he [patent] privilege is a monopoly in derogation of common right”); see also The Case of Monopolies, 11 Co. Rep. 84b, 77 Eng. Rep. 1260, 1266 (K.B. 1602) (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”).
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 examine how the Supreme Court gave birth to the Jeffersonian story of patent law, and how intellectual property professors, legal historians, and policy activists have nurtured this myth.

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."\(^3\) To further establish Jefferson's *bona fides* on the subject of patents, the Court pointed out that "Jefferson was himself an inventor of great note."\(^4\)

The *Graham* Court quoted liberally from Jefferson's correspondence, including his now-famous 1813 letter to inventor Isaac McPher-son.\(^5\) At a minimum, this letter disabuses 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

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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.
should freely spread from one to another over the globe, for the
moral and mutual instruction of man, and improvement of his con-
dition, 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 dictum—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 Act37—its lengthy and numerous quotations from Jeff-
erson’s writings established his views as the historical policy founda-
tion 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 Jefferso-
nian story of patent law over the next two decades by continually re-
turning to Jefferson as the expositor of early American patent policy.40

36 Id. at 9 n.2 (citation omitted); see also Letter to Isaac McPherson, supra note 2, at 333-34.
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
wood, 52 U.S. (11 How.) 248, 267 (1850) (affirming an invalidation of a patent because
“the improvement is the work of the skilful mechanic, not that of the inventor”).
(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. Bd. of Educ., 330 U.S. 1, 16 (1947) (quoting Jeffers-
on’s letter to the Danbury Baptist Association about establishing “a wall of separation be-
tween Church and State” as a historical foundation for Establishment Clause jurisprudence); Reynolds v. United States, 98 U.S. 145, 163-64 (1878) (same). It is a curi-
ous coincidence that legal scholars also accuse the Everson Court of creating a historical
myth in its use of Jefferson’s letter to the Danbury Baptist Association. See generally Philip
Hamburger, Separation of Church and State (2002).
discussing Thomas Jefferson’s views on patents as the basis of patent law policy); Diamond
v. Chakrabarty, 447 U.S. 303, 308-09 (1980) (discussing Jefferson’s role in drafting 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 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 importantly, 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 other-


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, albeit not a Framer, 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 I The Republic of Letters: The Correspondence Between Thomas Jefferson and James Madison 1776-1790, at 562–66 (James Morton Smith ed., 1995); see also infra note 120 and accompanying text (noting the lack of commentary at the Constitutional Convention).
wise stated in dry, legalistic language in Article I, Section 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, the Court's elevation of it to the status of constitutional and historical policy foundation for American patent law greatly affected how scholars and lawyers viewed the history of American patent rights. Patent scholars largely concluded that the Copyright and Patent Clause originally authorized Congress to grant 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, academic scholarship has conferred on the Jeffersonian story of patent law the status of historical axiom. Rebecca S. Eisenberg, among many others, believes that Jefferson's letter to McPherson is

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44 See Edward C. Walterscheid, Patents and the Jeffersonian Mythology, 29 J. Marshall L. Rev. 269, 303 n.157 (1995) (noting that Jefferson's letter to McPherson was publicly disseminated in 1814). Frank Frager, 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 Justin Hughes, Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson, 79 S. Cal. L. Rev. 993, 1026–34 (2006) (discussing Jefferson's contradictory views on the legitimacy of patents and copyrights); 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 a primary historical authority in copyright law but accepting the historical claim that copyrights were viewed as "government-created monopolies").

proof that the “framers of the United States Constitution rejected the
notion that inventors have a natural property right in their inven-
tions.” In the increasingly acrimonious debate over the “propertiza-
tion” of intellectual property rights in digital media, Lessig and
others repeatedly cite Jefferson’s letter to McPherson as historical
authority that early Americans were “against the idea that patent protec-
tion was in some sense a natural right.” In reproducing Jefferson’s

47 Eisenberg, supra note 41, at 1024 n.27.
48 See supra note 15 and accompanying text.
49 LAWRENCE LESSIG, THE FUTURE OF IDEAS 95 (2001); see also id. at 58–59 (quoting
Jefferson’s letter to McPherson as supporting the historical claim that patents and copy-
rights 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 the 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 SIVA VAIIDHYANATHAN, 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”); 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, Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors, 66 U. CIN. L. REV. 177, 182 (1997) (quoting Jefferson’s letter to McPherson as evidence for the proposition that “information wants to be free” (citation omitted)); 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 the proposition that intellectual property is a monopoly); Raymond Shih Ray Ku, The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology, 69 U. CHI. L. REV. 265, 263 (2002) (leading off the article with a quote from Jefferson’s letter to McPherson); Raymond Shih Ray Ku, Grokking Grokster, 2005 Wis. L. Rev. 1217, 1280 (quoting Jefferson’s analogy of ideas to fire as a basis for understanding the dissemination of information over the Internet today); David L. Lange, Students, Music and the Net: A Comment on Peer-to-Peer File Sharing, 2005 DUKE L. & TECH. REV. 21 (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
letter to McPherson in their patent law casebook, Donald Chisum, Craig Nard, and others conclude that "Locke's natural rights theory and its impact with respect to intellectual property is dubious."  

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, states as simple historical fact: "It is important to recognize 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." 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 "privilege" in the final version that he submitted to Congress in 1786 (under the Articles of Confederation). Even prior to the 1780s, Walterscheid maintains that the patent regimes in the various American colonies and states "involve[ed] exclusive grants of privilege."  

Admittedly, Walterscheid and others criticize the Court's excessive reliance on Jefferson, but these are solely institutional or doctri-
in which they repeatedly reaffirm the Jeffersonian story of patent law: patents were special monopoly privileges that had the same "limitations" as other special monopoly privileges granted by the government. Moreover, when scholars 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 Roger Taney, the famously anti-monopolist Jacksonian Democrat, and Justice John McLean's 1832 decision in *Wheaton v. Peters*.

Contrary evidence suggesting that natural rights philosophy influenced early patent law doctrine is dismissed as either empty judicial "rhetoric" or merely rent-seeking.

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56 See, e.g., Burchfiel, supra note 55, at 209 (accusing the Court of failing to acknowledge "Jefferson's contemporaries" who had similar views as Jefferson about "the patent power and its limitations"); Walterscheid, supra note 44, 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. The *Charles River Bridge* 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).


59 33 U.S. (8 Pet.) 591 (1834); see infra Part II.B.2.

60 See, e.g., Oren Bracha, *The Commodification of Patents 1600–1836: How Patents Became Rights and Why We Should Care*, 38 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 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").
claims by self-interested inventors.\(^6\) Walterscheid definitively declares that modern patent rights evolved historically "for reasons having very little to do with any perceived 'natural law' right."\(^6\)

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 find vindication that the Jeffersonian story of patent law is historically accurate. Before one can show the influence that natural rights philosophy exerted on early American patent doctrines, 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 II 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 \textit{The Federalist No. 43} and the references to patents in \textit{Wheaton}, can be clarified. Finally, Part III 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.

\section*{II

\textbf{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.\(^6\) But an American patent 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.\(^6\) Patents no longer created, and sheltered from competition, manufacturing monopolies—they se-

\begin{footnotesize}
\begin{enumerate}
\item See Walterscheid, supra note 12, at 14–15 (claiming that, in contrast to the Framers' view of patents as special grants of "privilege," some "inventors, who had the most practical interest in the matter, . . . in the eighteenth century began to argue that they had a natural, inherent property right in their inventions").
\item Id. at 15.
\item See id.; see also 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").
\end{enumerate}
\end{footnotesize}
cured the exclusive control of an inventor over his novel and useful scientific or mechanical invention.\(^6\)

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."\(^6\) 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—\(^6\) repeatedly referred to patents as "privileges" in his own patent law decisions.\(^6\)

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 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 audiences 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.

\(^6\) 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.").

\(^6\) 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"); Am. 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 8 Reg. Deb. 996 (1832) (Sen. Dickerson) (opposing a bill granting U.S. patents to three British subjects as "[h]e was not willing to extend these privileges to foreigners").

\(^6\) 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 was one of the architects of American patent law").

\(^6\) 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"); 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"); 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").
Because the intellectual context of the eighteenth and nineteenth centuries has been lost to us today, 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 only by 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.

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.

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." 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."
Courts and legal scholars also employ this standard privilege versus right distinction. 73

The use of language in the law, though, admits of much finer and more specialized distinctions. Legal professionals have been splicing Standard English words into legal terms of art for hundreds of years, if not longer. 74 It is not surprising then that "privilege" is a legal term of 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. 75 State constitutions adopted during the American Revolution often guaranteed to the newly minted state citizens that they would retain "the privileges, immunities and estates" previously secured to them under their colonial charters, 76 including the "inherent privilege of every free man, the liberty to plead his own cause [in court]" 77 or the privilege to confront witnesses in criminal cases. 78 It is such fundamental civil

73 See, e.g., Cruz v. Hauck, 404 U.S. 59, 65 (1971) (acknowledging the now "discredited maxim that paupers' appeals are privileges, not rights"); Barsky v. Bd. of Regents, 347 U.S. 442, 451 (1954) ("The practice of medicine . . . is a privilege granted by the State under its substantially plenary power to fix the terms of admission."); Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 390 (1950) (explaining that the legislation under review would not be evaluated as "it merely withdraws a privilege gratuitously granted by the Government"); Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926) (approving zoning ordinances as a proper function of a state's police power because these regulations would, among other things, prevent apartment buildings from "depriving children of the privilege of quiet and open spaces for play"); Spring Valley Water Works v. Schottler, 62 Cal. 69, 107 (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"); see also Charles A. Reich, The New Property, 73 YALE L.J. 733, 740 (1964) ("The early law is marked by courts' attempts to distinguish which forms of [governmental] largess were 'rights' and which were 'privileges.' Legal protection of the former was by far the greater.").

74 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, Rhetorica, in THE BASIC WORKS OF ARISTOTLE 1318, 1374 (Richard McKeon ed., W. Rhys Roberts trans., 1941).

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

76 PA. CONST. of 1776, § 45.

77 GA. CONST. of 1777, art. LVIII (emphasis omitted).

78 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").
rights, among others, that the 1787 federal Constitution secured equally for all United States citizens in its own Privileges & Immunities Clause. 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 natural rights philosophy and this specialized meaning of privilege? Most legal professionals today are aware of the broad outlines of seventeenth- and eighteenth-century natural rights theory and its attendant social contract doctrine that dominated early American politics, especially John Locke's political theory. They typically view the Lockean social contract as a binary, one-to-one exchange: each person relinquished his "Executive Power" 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 this oversimplified, 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." 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. In other words, in creating civil society, individuals not only secured the protection of their natural rights but 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 centuries, scholars, jurists, and politicians came to refer to

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79 U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").
80 Although John Locke is arguably the most well-known natural rights philosopher who influenced the Founders, early American politicians and jurists were extremely well versed in all of the natural rights philosophers of the seventeenth and eighteenth centuries. See infra notes 128, 131 and accompanying text.
81 JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 128, at 352 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) [hereinafter LOCKE, SECOND TREATISE]. In the famous words of the Declaration of Independence, "We hold these truths to be self-evident; that 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 "to secure these rights, Governments are instituted among Men." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
82 LOCKE, SECOND TREATISE, supra note 81, § 130, at 353.
83 See id. § 124–26, at 350–51.
the 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. Blackstone explained that the original natural rights, such as liberty, were secured in civil society as "private immunities." But these were not the only rights secured in civil society. Blackstone further recognized that “society hath engaged to provide” additional rights secured by express law, which he called “civil privileges.” Thus arose the well-known locution in the federal and state constitutions, “privileges and immunities,” which referred to civil and natural rights, respectively.

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.” However, civil society created additional privileges concerning property and its uses that did not exist in the state of nature, such as title deed requirements and formal contractual requirements for conveying property. These were the “civil advantages,” Blackstone explained to his American readers, that citizens received “in exchange for which every individual has resigned a part of his natural liberty.” 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.” These constitutions and civil laws secured fundamental property

84 See Daniel J. Boorstin, Preface to the Beacon Press Edition, in THE MYSTERIOUS SCIENCE OF THE LAW: AN ESSAY ON BLACKSTONE’S COMMENTARIES (Peter Smith ed., Beacon Press 1958) (1941) ("In the history of American institutions, no other book—except the Bible—has played so great a role as Blackstone’s Commentaries on the Laws of England"); Duncan Kennedy, The Structure of Blackstone’s Commentaries, 28 Buff. 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").

85 William Blackstone, 1 Commentaries *125 (emphasis added).

86 Id. (emphasis added).

87 See supra notes 75–79 and accompanying text.

88 Blackstone, supra note 85, at *134.

89 See id. (recognizing “the modifications 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”).

90 Id.

91 Locke, Second Treatise, supra note 81, § 50, at 302; see also id. § 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”).
rights essential to the functioning of a just society—they secured privileges.\textsuperscript{92}

In the Founding Era, Blackstone’s “privilege” nomenclature was as ubiquitous as the social contract doctrine that gave rise to it.\textsuperscript{93} In 1783, when George Washington welcomed Irish immigrants to New York City, he noted that the “bosom of America 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.”\textsuperscript{94} At the 1787 Constitutional Convention, James Madison argued forcefully that the new Constitution must guarantee that citizens of different states would share an “equality of privileges.”\textsuperscript{95} In \textit{The Federalist No. 7}, Hamilton echoed this concern about securing “equal privileges” to all citizens, noting specifically that the equal protection of these rights played a central role in promoting “habits of intercourse”—commerce—between citizens of the different states.\textsuperscript{96}

Perhaps one of the most significant examples of a Founder distinguishing between civil and natural rights is found in Madison’s remarks introducing in Congress the bills that would eventually become

\textsuperscript{92} Another example of a “privilege” is the just compensation requirement in the exercise of the eminent domain power. See Gardner \textit{v. Newburgh}, 2 Johns. Ch. 162, 166 (N.Y. Ch. 1816) (Kent, Chancellor) (justifying a just compensation requirement as inherent in the right of due process and “a deep and universal sense of its justice”). Although \textit{Gardner} does not use the legal terms “privilege” or “civil right,” its reasoning clearly reflects the social contract framework of natural rights philosophy.

\textsuperscript{93} For instance, \textit{Cato’s Letters}, the essays responsible for disseminating Locke’s ideas throughout Anglo-American society in the eighteenth century, embraced an identical usage of “privilege.” Letter No. 62 states:

\begin{quote}
But where property is precarious, labour will languish. The \textit{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 \textit{glorious privileges of liberty}, and its effects, to live in freedom, plenty, and safety.
\end{quote}

These are privileges that increase mankind, and the happiness of mankind.

\begin{quote}
1 John Trenchard \& Thomas Gordon, \textit{Cato’s Letters} 426, 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; and that tyranny cannot make men, or societies of men, happy, without departing from its nature, and giving them privileges inconsistent with tyranny.” \textit{Id.} at 433.
\end{quote}

\textsuperscript{94} Letter from George Washington to The Members of the Volunteer Association and Other Inhabitants of the Kingdom of Ireland Who Have Lately Arrived in the City of New York (Dec. 2, 1783), in 27 \textit{The Writings of George Washington}, 1783–1784, at 253, 254 (John C. Fitzpatrick ed., 1938).

\textsuperscript{95} \textit{1 The Records of the Federal Convention of 1787}, at 317 (Max Farrand ed., 1911) (criticizing the New Jersey proposal for failing to uniformly protect citizens’ privileges).

\textsuperscript{96} \textit{The Federalist No. 7} (Alexander Hamilton), supra note 43, at 63; see also \textit{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”).
the Bill of Rights.\textsuperscript{97} Madison noted that the bills expressly secured both natural rights and civil rights. The civil rights were “specif[ied] positive rights, which may seem to result from the nature of the compact.”\textsuperscript{98} Such rights, though, were as essential as “liberty” and the other pre-existing natural “rights which are exercised by the people in forming and establishing a plan of Government.”\textsuperscript{99} 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.”\textsuperscript{100} 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.\textsuperscript{101}

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 John Marshall referenced the “privilege to contracts,”\textsuperscript{102} a common identification of contract rights in Supreme Court decisions throughout the nineteenth century.\textsuperscript{103} 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,”

\begin{footnotes}
\footnotetext[1]{See 1 ANNALS OF CONG. 454 (Joseph Gales ed., 1789).}
\footnotetext[2]{Id.}
\footnotetext[3]{Id.}
\footnotetext[4]{Id.}
\footnotetext[5]{\textit{Id.}, 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).}
\footnotetext[6]{Harrison v. Sterry, 9 U.S. (5 Cranch) 289, 298 (1809).}
\footnotetext[7]{\textit{Id.}, supra note 24, at 256 (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) (acknowledging an argument by counsel 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); St. Jago de Cuba, 22 U.S. (9 Wheat.) 409, 417 (1824) (noting that “rights derived under maritime contracts” are “called liens or privileges”).}
\end{footnotes}
among many other rights. 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. The term "privilege" 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. 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, and even antiquarian legal dictionaries, in which the modern, standard meaning of privilege is used. Also, renowned 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

104 Corfield v. Coryell, 6 F. Cas. 546, 552 (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, Section 2, was "the palladium of equal fundamental civil rights for all citizens." CONG. GLOBE, 39th Cong., 1st Sess. 1836 (1866) (statement of Rep. Lawrence).

105 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., concurring) (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").

106 See, e.g., Adams v. Burks, 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. 1896) (No. 3,691) (noting that patents grant "special and exclusive privileges" to inventors in order to benefit the public); 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").

107 See, e.g., THOMAS BLOUNT, A LAW-DICTIONARY (2d ed. 1691) ("A Personal Privilege is that which is granted or allowed to any person, either against or besides the course of the Common-Law . . . ."); 2 JOHN BOUVIER, A LAW DICTIONARY 298 (1839) (defining privilege, in part, as "a particular law . . . which grants certain special prerogatives to some persons, contrary to common right"); GILES JACOB, A NEW LAW DICTIONARY (J. Morgan ed., 10th ed. 1782) (defining privilege, in part, as "whereby a private man, or a particular corporation is exempted from the rigor of the Common law") 2 STEWART RAPALJE & ROBERT L. LAWRENCE, A DICTIONARY OF AMERICAN AND ENGLISH LAW 1009 (1889) ("A privilege is an exceptional or extraordinary right, immunity or exemption."); 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 THE OXFORD ENGLISH DICTIONARY (2d ed. 1989) (quoting from a 1799 source that a privilege "in Roman jurisprudence, means the exemption of one individual from the operation of a law").
benefit to a particular individual. The conventional meaning ascribed to privilege today—a special grant contrary to or without right—is rooted in well-established historical practices.

This explication of the multiple senses of "privilege" in the eighteenth and nineteenth centuries 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 the "Framers clearly viewed patents and copyrights as monopolies and assumed that they would be treated as such," because the Framers allegedly embraced a "distinction between a patent privilege and a patent property right."

Walterscheid's logic—the logic of the Jeffersonian story of patent law—requires one to conclude 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, and that Justice Washington thought the same of the right to vote. 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. These observations establish a basic historiographical requirement: the Copyright and Patent Clause, the patent statutes it empowers Congress to enact, and the resulting federal case law 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.

108 Saint Thomas Aquinas, Summa Theologiae I–II, Q. 96, Art. 1, in On Law, Morality, and Politics 64, 66 (William P. Baumgarth & Richard J. Regan, S.J., eds., Fathers of the English Dominican Province trans., 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 Domo Sua, in The Speeches 132, 132–311 (N.H. Watts trans., 1923) (stating that a legal "measure is a 'privilege'" if it addresses only "private individuals").

109 See Mossoff, supra note 63, at 1287 (discussing cases litigated before the Privy Council in the late seventeenth century in which patents were identified as royally conferred privileges).

110 Walterscheid, supra note 12, at 297.

111 Id. at 14 (emphasis added).

112 See supra notes 84–102 and accompanying text.

113 See supra note 104 and accompanying text.

114 See supra notes 75–78 and accompanying text.
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, identifying who drafted which statutes, or highlighting uses of "privilege" in the historical record—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 as empty rhetoric, such as Madison’s remarks in *The Federalist No. 43*, 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. This is not a modern insight, as one late nineteenth-century court faced with interpreting

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115 See supra notes 46–50 and accompanying text.

116 See, e.g., supra note 53 and accompanying text.

117 For example, Walterscheid cites Fitch’s 1786 petition to Congress for a patent 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, but it provides no information to answer this vital question. See Edward C. Walterscheid, *Charting a Novel Course: The Creation of the Patent Act of 1790*, 25 AIPLA Q.J. 445, 460–66 (1997).

In another of his monographs, though, Walterscheid quotes from another petition by Fitch in which Fitch used “privilege” as a proper legal term of art. In this later petition, submitted to the First Congress during its deliberations on the bill that became the Patent Act of 1790, Fitch expressed concern about the absence of an explicit guarantee of a right to jury trial for patent infringement lawsuits. He noted that the right of “Juries to decide” the “matters of Fact respecting Property” is a “valuable privilege.” See Edward C. Walterscheid, *To Promote the Progress of Useful Arts: American Patent Law and Administration, 1798–1836*, at 129 (1998) [hereinafter To Promote the Progress of Useful Arts] (quoting petition to the Senate, Mar. 13, 1790) (emphasis added). This suggests that Fitch indeed understood the then-dominant and technically precise meaning of “privilege”: a civil right justified by natural rights philosophy. See supra notes 98–100 and accompanying text (discussing Madison’s natural-rights justification for the right to a jury trial).

118 See supra note 43 (discussing this lack of Founding Era sources on patents).
the Copyright and Patent Clause confessed that "[w]hat immediate reasons operated upon the framers of the Constitution seem to be unknown."\textsuperscript{119} This was one of the few constitutional provisions 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.\textsuperscript{120}

Some scholars highlight statements by various Americans in the Founding Era condemning \textit{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 \textit{inventions}.\textsuperscript{121} Although

\textsuperscript{119} McKeever v. United States, 14 Ct. Cl. 396, 420 (1878).
\textsuperscript{120} 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. See \textit{2 The Records of the Federal Convention of 1787}, at 321–22, 324–35 (Max Farrand ed., 1911). The Committee presented the final version of the Copyright and Patent Clause to the Convention on September 5, 1787 and Madison's notes reflect that the "clause was agreed to nem. con" (without debate). \textit{Id.} at 509–10. But see Dotan Oliar, \textit{Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power}, 94 Geo. L.J. 1771, 1781–1818 (2006) (analyzing the Constitutional Convention record and concluding that the Clause's original meaning can be determined based on its textual structure and the proposals that led to it).

\textsuperscript{121} 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 Ochoa & Rose, \textit{supra} note 12, at 922–28. 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." \textit{Id.} at 927 (citation omitted). 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." \textit{Id.} (citation omitted). Ochoa and Rose explicitly invoke these statements in support of Jefferson's critical views about patents and copyrights. \textit{Id.} at 926 (stating that "Jefferson's concerns were widely shared by others at the time").

It is clear that Mason was not speaking of the Copyright and Patent Clause (in the above quotation) because he references "the general clause at the end of the enumerated powers," which is the Necessary and Proper Clause, \textit{not} the Copyright and Patent Clause. \textit{Id.} at 927 (citation omitted). Moreover, Mason was speaking of monopolies in "trade and commerce," which were terms of art in the eighteenth century, and thus would not have included \textit{property} rights defined by statute. See generally Barnett, \textit{supra} note 8 (examining the meaning of "commerce" as used in Founding Era sources). 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, \textit{supra} note 12, at 927–28, but they are obviously attempting to prove the Jeffersonian story of patent law by increasing the number of sources allegedly confirming this historical claim. In doing so they conflate two very different complaints: (1) condemnations of \textit{patents and copyrights} as monopolies, and (2) condemnations of \textit{commercial} monopolies. See also \textit{supra} note 149 (discussing evidence of this distinction in Madison's public condemnation of monopolies). Schwartz and Treanor make a similar
both 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. In his influential edition of Blackstone's Commentaries, for instance, St. George Tucker summarily rejected arguments that the Copyright and Patent Clause permitted the government "to establish trading companies." St. George Tucker concluded that "nothing could be more fallacious" because "such monopolies" were "incompatible" with a constitutional provision that secured only an "exclusive right" for "authors and inventors."

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 copyright of authors has been solemnly adjudged in Great Britain to be a right of 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

observation, but they focus more on "the potential breadth of powers" granted to Congress under the Constitution that animated Mason's complaint rather than on the question of what types of monopolies were of concern to Americans in the Founding Era. See Schwartz & Treanor, supra note 7, at 2378 n.272.

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, Trenchard and Gordon condemned monopolies, devoting two entire essays to the subject. See 2 TRENCHARD & GORDON, supra note 93, at 643–53 (Letter No. 90, Aug. 18, 1722; Letter No. 91, Aug. 25, 1722). Their blistering critiques focused solely on 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. See id. Notably, neither of these two essays ever mentions patents for inventions; rather, the authors devote themselves to exposing the odious nature of commercial monopolies as violations of every person's natural rights. In other essays, Trenchard and Gordon praise the development of arts and sciences in free countries and recognize that the source of arts and science is "invention and industry." 1 TRENCHARD & GORDON, supra note 93, 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 notes 53, 117 and accompanying text (discussing Fitch's 1786 petition).

123 St. George Tucker, Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia 266 (1803) (appendix to vol. 1).

124 Id.
of them have anticipated the decision of this point by laws passed at
the instance of Congress.125

Today, these brief remarks are criticized more than they are ap-
proved. Thomas Nachbar, for instance, points out that Madison was
“mistaken” in grounding the legal status of patents with non-existent
English common law copyright.126 Walterscheid further believes that
this was a vacuous justification for patents, as Madison “made no at-
ttempt to substantiate” his claim that patents and copyright served
both the public and individual good.127

These critiques miss the significance of Madison’s defense of the
Copyright and Patent Clause and his connection of patents to copy-
rights, because 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, the Declaration
of Independence “was intended to be an expression of the American
mind” and “[a]ll its authority rests then on the harmonizing senti-
ments of the day, whether expressed in conversation, in letters,
printed essays, or in the elementary books of public right, as Aristotle,
Cicero, Locke, Sidney, etc.”128 Madison likely presumed that the read-
ers of The Federalist Papers were aware of these basic principles, and

126 Thomas Nachbar, Patent and Copyright Clause, in The Heritage Guide to the Con-
stitution 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 carried binding authority for American courts. See Walterscheid,
supra note 12, at 202–12.
127 Edward C. Walterscheid, Musings on the Copyright Power: A Critique of Eldred v. Ash-
128 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 and relied on the work of the natural rights philosophers. For instance, Chancel-
lor Kent, in his famous and oft-cited Commentaries, declares that “Grotius [is] justly consid-
ered as the father of the law of nations,” and he lists Pufendorf, Wolfius, Burlamaqui, and
Rutherford 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 United States and France fol-
lowing the French Revolution, Jefferson also referred 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 128, at
317–19. 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 consid-
ered legitimate sources of authority for courts adjudicating run-of-the-mill legal disputes.
See, e.g., Pierson v. Post, 3 Cai. 175 (N.Y. Sup. Ct. 1805); see also Mossoff, supra note 24, at
406 n.140 (listing nineteenth-century property cases that expressly relied on or cited to
natural rights philosophers and legal scholars and noting this was common practice).
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, 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. In other words, Madison 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. As such, there was no better justification for a privilege than pointing out 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 right. Notably, Madison offered this same argument for securing civil rights, such as the right to a jury trial, when he introduced to the First Congress the bills that became the Bill of Rights. 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

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129 The Federalist No. 43, supra note 43, at 272.
130 See supra note 126 and accompanying text.
131 See Edward Coke, *The First Part of the Institutes of the Laws of England* § 213, at 142 (14th ed. 1791) (1658) (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"); 1 Kent, supra note 128, at 561 (explaining that the common law is "the application of the dictates of natural justice and of cultivated reason to particular cases").

The connection of natural justice, right, and reason is one of the central elements of seventeenth- and eighteenth-century natural rights philosophy. See 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"); Locke, *Second Treatise*, supra note 81, § 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."); 1 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").

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 Blackstone, *supra* note 85, at *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"). 1 Kent, *supra* note 128, 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").

132 See *supra* notes 97-100 and accompanying text.
congressmen who heard Madison's 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. Several states had already enacted statutes protecting copyrights 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." 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 labour and invention." In America, Chancellor Kent further explained that "literary property" is "[a] nother instance of property acquired by one's own act and power." In fact, Chancellor Kent made explicit Madison's implied policy connection between copyrights and patents by classifying both under the heading: "Of original acquisition by intellectual labor." Here, Chancellor Kent announced the unremarkable proposition of his day that "[i]t is just that [authors and inventors] should enjoy the pecuniary profits resulting from mental as well as bodily labor." 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 policy 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

133 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 Trenchard & Gordon, supra note 93, at 427 (Letter No. 62, Jan. 20, 1721).

134 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 14, 18–19 (Thorvald Solberg ed., rev. 2d ed. 1906).

135 William Blackstone, 2 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 Barbevrauc. Id.


137 2 Kent, supra note 128, at 497.

138 Id.
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.139

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 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 that inventors “shall have a like exclusive privilege . . . under the same privileges and restrictions hereby granted to, and imposed on, the authors of books.”140 The textual structure of South Carolina’s statute reflected the natural rights understanding of privilege, as it secured “privileges” (i.e., exclusive rights) and imposed separate “restrictions” (i.e., term limitations) on those rights. Unsurprisingly, this same structure is reflected in the Copyright and Patent Clause, which secures “the exclusive Right” for inventors but only “for limited Times.”141

If only this were the end of the story, as the historical record is rarely so straightforward. Madison was inconsistent in his public and private writings on the nature of patent rights.142 In private correspondence in 1788 with the eponymous source of the Jeffersonian

139 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.” The Federalist No. 43, supra note 43, at 272. This statement also 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 centuries viewed labor and consequentialist theories of copyrights (and patents) as “complementary.” Eldred v. Ashcroft, 537 U.S. 186, 212 n.18 (2003).

140 Copyright Enactments of the United States, supra note 134, at 21, 23.

141 U.S. Const. art. I, § 8, cl. 8.

142 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
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 the federal government from granting “monopolies.”143 In his reply, Madison rejected Jefferson’s request, but he ratified Jefferson’s reference to patents and copyrights as “monopolies.”144 Madison further defended these monopolies with the same utilitarian argument that Jefferson would later 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?”145 Madison repeated this sentiment in an undated note, published posthumously in 1946, in which he claimed that, with respect to “authors of Books, and of useful inventions . . . [t]here can be no just objection to a temporary monopoly in these cases.”146

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,147 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 when debating Anti-Federalists about whether the states should ratify the Constitution.

If true, though, this criticism cuts against the Jeffersonian story of patent law because 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 an

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143 Ochoa & Rose, supra note 12, at 925–26 (quoting correspondence between Jefferson and Madison).
144 Id. at 925–26 (quoting Letter from Thomas Jefferson to James Madison (July 31, 1788)).
145 Id. at 926. 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 instructive to mankind.” 2 Kent, supra note 128, 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 139 (discussing consequentialist nature of natural rights philosophy).
146 James Madison, Detached Memoranda, in WRITINGS 745, 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).
147 See supra note 60 and accompanying text.
interesting question: assuming that Madison agreed with Jefferson's view of patents and copyrights, 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 Madison knew that 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 likely did not agree with the Jeffersonian story of patent law because the arguments that Madison actually 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. The Jeffersonian story of patent law survives today in court opinions and scholarship precisely because it represents a 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.

2. Wheaton v. Peters and Patents as Privileges

The Supreme Court's 1834 decision in Wheaton v. Peters 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 copyright and patent 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. Accordingly, intellectual property professors and historians often cite Wheaton as conclusive proof of the

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148 See supra notes 128-41 and accompanying text.
149 Further evidence of 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. Madison, Property, supra note 146, at 515–17. There, Madison excoriated “arbitrary restrictions, exemptions, and monopolies” imposed by government fiat as violations of the citizens’ property rights. Id. at 516. He illustrated these unjust “monopolies” by referencing examples of exclusive commercial franchises; he did not mention patents or copyrights. See id. at 515–17. 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 121–22 and accompanying text.
150 33 U.S. (8 Pet.) 591 (1834).
151 See id. at 657–58.
Jeffersonian story of patent law. 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, but for the purposes of this Article, it is important only to explain 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]." Wheaton further explained to the Supreme Court: "Although united in this clause [in the Constitution], and for 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." 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, from the outset, counsel raised arguments concerning the nature of patents in disputing whether reports of Supreme Court decisions were secured by copyright.

As would be expected, Peters maintained in his defense that copyright and patent were "[a]nalagous rights," because neither required "actual possession and use," which was the well-known standard for recognizing property rights at common law (and justified by the natural law). Peters further noted that the Court had already established this in its patent law jurisprudence, as it was now settled law that

152 See, e.g., Lyman Ray Patterson, Copyright in Historical Perspective 209 (1968) ("The basic premise in the majority opinion [in Wheaton] was simply that copyright is a monopoly."); 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 their 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").


154 Wheaton, 33 U.S. at 600.

155 Id. at 598.

156 Id. at 626; see also Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573 (1823) (discussing the discovery rule by which "title might be consummated by possession"); Pierson v. Post, 3 Cai. 175, 176-77 (N.Y. Sup. Ct. 1805) (discussing the rule of capture as an application of the rule of first possession); Grotius, supra note 131, 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 doubt in accord with the law of nature . . . ").
mere public disclosure of an invention prior to applying for a patent would defeat an inventor’s right to receive the patent.\textsuperscript{157} He framed the public disclosure rule in patent law in terms of the first-possession requirement at common law, noting, “let an inventor lose his possession, and his privilege is gone.”\textsuperscript{158} 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.”\textsuperscript{159} 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.”\textsuperscript{160}

Perhaps sensing the Justices’ receptiveness to Peters’s argument, one of Wheaton’s attorneys (the famed Daniel Webster) invoked the labor theory of property in his closing argument. He asked, in seemingly rhetorical fashion, whether there has “been an indefensible use of the [plaintiff’s] labours?”\textsuperscript{161} The answer was obviously yes, as an author has “[t]he right...to the production of his mind,” and thus it “is his property. It may be true that it is property which requires extraordinary legislative protection, and also limitation. Be it so.”\textsuperscript{162}

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’s sophisticated legal analysis concerning the Copyright and Patent Clause, Justice McLean’s opinion for the Court stated simply, “the 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.”\textsuperscript{163} The conclusion was clear: if the common law protected natural rights\textsuperscript{164} and patents were not protected at common law, then patents (and by

\begin{footnotes}
\item[157] See Wheaton, 33 U.S. at 625–26. Here, Peters cited Justice Story’s decision in *Pennock v. Dialogue*. See 27 U.S. (2 Pet.) 1, 23–24 (1829) (holding “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 a patent if he permits the invention to be publicly disclosed more than a year before filing his patent application).
\item[158] Wheaton, 33 U.S. at 625 (emphasis added).
\item[159] Id. at 626.
\item[160] Id. at 641.
\item[161] Id. at 652.
\item[162] Id. at 653.
\item[163] Id. at 661; see also id. at 658 (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”).
\item[164] See supra note 191 and accompanying text.
\end{footnotes}
implication copyrights) were not protected under the Constitution as natural rights. In a significant antebellum copyright case, the Wheaton Court seemingly declared the truth of the Jeffersonian story of patent law.

But this now-familiar account of Wheaton's 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 only because of its social utility—is glaringly absent from the Wheaton decision. A single attorney's reference to a patent as a "legalized monopoly" stands alone as the only evidence of the Jeffersonian story of patent law in this vital, early decision on the legal status of copyrights and patents.  

Second, neither the Justices nor the attorneys, not even Daniel Webster, argued that there was a common law right to a patent. As confirmed by Peters's winning argument before the Court, in which he referred to a patent as a "privilege," 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 evidenced in the Wheaton Court adopting Webster's appeal to the labor theory of property,  despite rejecting his legal conclusion, and then using this labor theory to justify 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." In other words, certain types of property can be pro-

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165 Wheaton, 33 U.S. at 598. 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. Mr. Paine's qualification of patents as contradicting natural rights only "in some measure" undermines the claim scholars make today that Wheaton clearly supports the Jeffersonian story of patent law. See supra note 152 and accompanying text.

166 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).

167 Id. at 625.

168 See supra notes 161–62 and accompanying text.

169 Wheaton, 33 U.S. at 658. With respect to the Court's use of "regulation," see Claey's, supra note 70, 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).
tected only in civil society, and we identify these important civil rights by reference to the same policy that justifies natural rights in property—securing to each person the fruits of his labors.

Significantly, this was the same policy justification that Madison obliquely referenced in The Federalist No. 43 and that Chancellor Kent developed more explicitly in his Commentaries. It was a policy argument that was derived from the social contract doctrine of natural rights philosophy, which ultimately defined and justified the fundamental privileges in property secured in civil society for all citizens. In its proper historical context, Wheaton corroborates that patents were privileges—civil rights in property justified by the same labor-desert policy animating the natural right to property.

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 III, this intellectual context also is necessary in exploring the evolution of American patent law in the early nineteenth century. It explains why 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.

III

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 II, 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.

170 See supra note 125-35 and accompanying text.
171 See supra notes 136-39 and accompanying text.
172 See supra notes 84-105 and accompanying text.
This growth seems puzzling at first. If it were true that early Americans believed that patents were special legal privileges saved from condemnation given only 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. In fact, the government would have treated patents no differently than other special grants of legal monopolies, such as the extremely limited rights accorded to owners of public franchises in bridges.

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 a liberal interpretation of both the patent statutes and patents, and 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 III 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 patent was neither a natural right nor a common law right. In 1862, a district court could declare with little fear of being

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173 See supra Part I (discussing the Jeffersonian story of patent law); see also 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”).

174 See Charles River Bridge v. Warren Bridge, 36 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).


176 See supra note 166 and accompanying text. However, by the eighteenth century, patents were adjudicated solely in the common law courts, as the 1623 Statute of Monopolies required. See Mosoff, supra note 68, 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).
mislunderstood: "The patent itself, with all the privileges which it confers, is the creature of the statute . . . ."\textsuperscript{177} Patents were privileges—civil rights securing to inventors "the fruition of their labors" for which this "privilege is granted."\textsuperscript{178}

Throughout the nineteenth century, courts reaffirmed their view of patents as civil rights on par with contract and property rights similarly identified as privileges.\textsuperscript{179} One federal 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."\textsuperscript{180} The court’s repeated references to patent rights conferred by the assignment contract as "the local privilege" reflects that privilege was a basic norm of legal discourse at the time.\textsuperscript{181} Similarly, another court rejected a patentee’s "precise and rigid" reading of the "privilege" conferred in a license, observing that the patentee was "seeking to deprive a party of a privilege for which he undoubtedly paid a full consideration."\textsuperscript{182} 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.\textsuperscript{183} It would be anachronistic to interpret these court decisions as

\textsuperscript{177} Jacobs v. Hamilton County, 13 F. Cas. 276, 278 (C.C.S.D. Ohio 1862) (No. 7,161).

\textsuperscript{178} Goodyear v. Hills, 10 F. Cas. 689, 690 (C.C.D.C. 1866) (No. 5,571a) (bemoaning the unfortunate fact that for many inventors to whom "the privilege is granted are never to see the fruition of their labors"); Cox v. Griggs, 6 F. Cas. 678, 679 (C.C.N.D. Ill. 1861) (No. 3,302) (explaining that it is "the right and privilege of a party, when an idea enters his mind in the essential form of an invention . . . to perfect . . . his original idea, so as not to be deprived of the fruit of his skill").

\textsuperscript{179} See supra notes 95-105 and accompanying text (discussing identification of contract and other rights as privileges by Chief Justice Marshall, Justice Washington, and others).

\textsuperscript{180} Chase v. Walker, 5 F. Cas. 524, 525 (C.C.E.D. Pa. 1866) (No. 2,630).

\textsuperscript{181} \textit{Id.} at 525-26.

\textsuperscript{182} Belding v. Turner, 3 F. Cas. 84, 85 (C.C.D. Conn. 1871) (No. 1,243).

\textsuperscript{183} See, e.g., Henry v. Providence Tool Co., 11 F. Cas. 1182, 1183 (C.C.D.R.I. 1878) (No. 6,384) (noting that the "privileges which the act of congress grants to an inventor" are provided to an inventor through both "show[ing] his right by invention" and by his exercising "[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"); 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."); 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 "privilege[s] granted . . . only to the inventor"); 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
holding that contract and patent rights were merely specially conferred grants of benefits to citizens.

Significantly, a "Note" in one of the Federal Cases reporters further explains this background context for American patent law. 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." 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." In the United States, 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." In sum, patents were privileges—civil rights securing property rights.

B. The Framing of Patent Privileges as Property Rights

In defining patents as privileges—civil rights securing property rights—courts felt no compunction in identifying patents as property and treating them as such. Federal courts 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." 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." 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." Such property rhetoric was not unusual, as references to pat-

(C.C.D.C. 1858) (No. 4,409) (identifying "the right" secured to an inventor under the 1836 Patent Act as "the privilege"); Blanchard's Gun-Stock Turning Factory v. Warner, 3 F. Cas. 653, 657 (C.C.D. Conn. 1846) (No. 1,521) (recognizing power in Congress to provide a patentee the ability to transfer to assignees his "rights and privileges"); Bryan v. Stevens, 4 F. Cas. 510, 511 (C.C.S.D.N.Y. 1841) (No. 2,066a) (recognizing that a right conferred to a licensee by a patentee "is but a privilege under the patent").

See 3 F. Cas. at 85 (following Belding v. Turner).

Id.

Id.

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").

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


Hawes v. Gage, 11 F. Cas. 867, 867 (C.C.N.D.N.Y. 1871) (No. 6,297).
ents as property are omnipresent in nineteenth-century patent law jurisprudence. Courts thus accused patent infringers of committing trespass and, even more commonly, piracy.

See, e.g., Allen v. New York, 1 F. Cas. 506, 508 (C.C.S.D.N.Y. 1879) (No. 232) (recognizing that "the [patent] right is a species of property"); Henry v. Providence Tool Co., 11 F. Cas. 1182, 1185 (C.C.D.R.I. 1878) (No. 6,384) (rejecting the argument by the 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"); Holbrook v. Small, 12 F. Cas. 324, 325 (C.C.D. Mass. 1876) (No. 6,595) (referring to patents at issue in the case as "the property of the plaintiffs"); Henry v. Francetown Soap-Store Co., 11 F. Cas. 1180, 1181 (C.C.D.N.H. 1876) (No. 6,382) (referring to the "property in the letters patent"); 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) (discussing the "right to enjoy the property of the invention"); Gay v. Cornell, 10 F. Cas. 110, 112 (C.C.S.D.N.Y. 1849) (No. 5,280) (recognizing that "an invention is, within the contemplation of the patent laws, a species of property"); Bryan v. Stevens, 4 F. Cas. 510, 511 (C.C.S.D.N.Y. 1841) (No. 2,066a) (noting defendants as lacking standing as they have "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").

192 See Goodyear Dental Vulcanite Co. v. Van Antwerp, 10 F. Cas. 749, 750 (C.C.D.N.J. 1876) (No. 5,600) (analogizing patent infringement to a "trespass" of horse stables and unauthorized use of horses in determining a rule for damages owed to a patentee); Burleigh Rock-Drill 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 having "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) (analogizing a plaintiff's ability to split a patent infringement claim to a plaintiff's ability to split a trespass claim for land held under "distinct titles"); Eastman v. Bodfish, 8 F. Cas. 269, 270 (C.C.D. Me. 1841) (No. 4,255) (Story, Circuit Justice) (comparing evidentiary rules in a patent infringement case to relevant evidentiary rules in a trespass action); 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 breach of the boundaries of the patent right).

193 See Pennock v. Dialogue, 27 U.S. (2 Pet.) 1, 12 (1829) (Story, J.) (recognizing that "if the invention should be pirated, the use or knowledge... obtained by the piracy" would not prevent the inventor from obtaining a patent); Irwin v. McRoberts, 13 F. Cas. 124, 124 (C.C.N.D. Ill. 1879) (No. 7,085) ("I know patentees are much troubled with piracies upon their inventions...."); Am. 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. 1868) (No. 5,717) (recognizing "extraordinary exertions" by the patentee "to prevent piracies"); Goodyear v. Dunbar, 10 F. Cas. 684, 685 (C.C.D.N.J. 1860) (No. 5,570) (noting the 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
Beyond using property rhetoric, courts treated patents as property in more substantive, legally precise ways. They identified a patent as a "title" that was possessed and owned by a patentee, and accordingly, they identified multiple owners of a patent as "tenants in common."
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.”

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. The courts declared the same was 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.” This “inchoate property which [is] vested by the discovery,” he explained, is “perfected by the patent.” He concluded that it was the “constitution and law, taken together, [that gave] to the inventor, from the moment of invention, an inchoate property therein, which is completed by suing out a patent.” 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 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.

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195 See Dunham v. Indianapolis & St. Louis R.R. 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 (holding that multiple owners of undivided interests in a patent are “tenants in common”).
197 See BLACKSTONE, supra note 135, at *311–12; see also 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”); 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 (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); Willets v. Van Alst, 26 How. Pr. 325, 333 (N.Y. Sup. Ct. 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).
199 Id. at 874.
200 Id. at 873.
201 Id.
203 Id. at 10.
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. Courts also recognized the implications of recognizing that a patent comprised a perfected title in property; one circuit court instructed a jury that the "assignees [of a patent] become the owners of the discovery, with a perfect title," and thus "[p]atent interests are not distinguishable, in this respect, from other kinds of property." It was a widespread judicial practice to invoke these fundamental concepts in real property law throughout nineteenth-century patent law decisions.

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 successful argument in Pennock, in which he analogized an inventor's discovery to "an inchoate right to land," but courts also made such connections themselves. In assessing whether a patent licensee could further convey 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 Abridg-

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205 Carr v. Rice, 5 F. Cas. 140, 146 (C.C.S.D.N.Y 1856) (No. 2,440).
206 See Henry v. Providence Tool Co., 11 F. Cas. 1182, 1186 (C.C.D.R.I. 1878) (No. 6,384) (Clifford, Circuit Justice) (noting that extension rights provided in the 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" in securing a patent); Hoeltge v. Hoeller, 12 F. Cas. 289, 289 (C.C.S.D. Ohio 1870) (No. 6,574) (observing 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); Ellithorp v. Robertson, 8 F. Cas. 562, 567 (C.C.D.C. 1858) (No. 4,409) (recognizing that an inventor may "perfect his inchoate right by patent"); Hill v. Dunklee, 12 F. Cas. 151, 154 (C.C.D.C. 1857) (No. 6,489) (noting that 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 v. Brewer, 5 F. Cas. 1097, 1102 (C.C.D. Mass. 1855) (No. 2,909) (Curtis, Circuit Justice) (noting that "perfection" in a patent represents the "completion" of the "inchoate right" created by the act of invention); 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" (emphasis added)).

207 Pennock, 27 U.S. at 10; see supra note 205 and accompanying text.
208 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 the basis for framing scope of patent rights); Johnson v. Onion, 13 F. Cas. 777, 778 (C.C.D. Md. 1870) (No. 7,401) (upholding the validity of a patent term extension on the 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).
ment, and Bacon’s Abridgement, among others. 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.” Today, one rarely sees such feudal property rules beyond the confines of first-year property casebooks!

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. Patents were indeed privileges—civil rights securing property rights. Circuit Justice Noah Swayne succinctly summarized this historical understanding of patents in 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 the administration of civil justice.

It is undeniable, of course, that there were jurists who agreed with Jefferson that patents were merely special, limited monopoly privileges. Unfortunately, modern scholars and jurists myopically focus on those cases, creating thereby the historical myth that is the Jefferso-

209 Brooks v. Byam, 4 F. Cas. 261, 268–70 (C.C.D. Mass. 1843) (No. 1,948) (Story, Circuit Justice); cf. Pennock, 27 U.S. at 16 (Story, J.) (analogizing an inventor’s public use of an invention prior to applying for a patent to a land owner’s dedication of an “easement to the public” with a similar “permanent right of user” by the public).

210 Dobson v. Campbell, 7 F. Cas. 783, 785 (C.C.D. Me. 1833) (No. 3,945) (Story, Circuit Justice). 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-assinee. 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.

211 See supra Part II.B.1.

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

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 abandons the same to the public . . . .

Jones v. Sewall, 13 F. Cas. 1017, 1020 (C.C.D. Me. 1875) (No. 7,495) (Clifford, Circuit Justice), rev’d on other grounds, 91 U.S. 171 (1875).

213 See, e.g., Livingston v. Jones, 15 F. Cas. 669, 674 (C.C.W.D. Pa. 1861) (No. 8,414) (Grier, Circuit Justice) (referring to a patent as securing “the monopoly of use of a pat-
alian story of patent law. It is time the complete historical record is uncovered, recognizing the palpable influence exerted by the 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 procedural and substantive respects. As patents were privileges, courts expansively promoted these civil rights in property, treating them like other property and contract privileges justified by the same natural-rights policies. As this Section explains, courts provided patents with expansive procedural guarantees, adopting canons of liberal construction for both patents and the patent statutes. Furthermore, Congress (with support from the Supreme Court) adopted expansive substantive patent doctrines, such as patent term extensions. In sum, antebellum courts and legislators treated patents quite differently from traditional legal monopolies granted to American citizens, such as bridge franchises, which indeed were viewed with suspicion and which courts narrowly construed against the grantee.

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. Today, section 282 of the 1952 Patent Act mandates the liberal construction of patents, which is justified on the ground that the Patent and Trademark Office (PTO) only grants those patent applications that meet the statutory patentability requirements. This examination system was put into place by the 1836 Patent Act, and thus scholars today believe that this is when

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214 See supra Part I.B.
216 See, e.g., Intervet Am., Inc. v. Kee-Vet Labs., 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."); Am. 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").
217 See Patent Act of 1836, ch. 357, § 7, 5 Stat. 117, 119 (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").
courts began to apply the presumption of validity for all issued patents.218 This assumption is untrue.

Although there was no examination system between 1793 and 1836,219 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.”220 Four years later, Circuit Justice Henry Baldwin instructed a jury in another patent infringement trial that they should be “looking on [the patent documents] as a statement of the patentee’s right and title, [in which the jury] will overlook all defects in the mode of setting it out.”221 Thus, several years before the creation of the examination system, Circuit Justice Story announced the well-settled rule that “[p]atents for inventions 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.”222 The courts expressly adopted a policy of treating patents as they treated other property privileges, such as title deeds, which they construed favorably to best secure these property interests.223

218 See, e.g., 2 Donald S. Chisum, Chisum on Patents § 5.06[2][a], at 5-759 (2005) (“After creation of the Patent Office in 1836 and implementation of the examination system, the courts recognized the presumptive validity of issued patents.” (citation omitted)).

219 The 1793 Patent Act, however, provided that before the Secretary of State issued a patent, the Attorney General would “examine[ ]” applications to determine if they were “conformable to this act.” Patent Act of 1793, ch. 11, § 1, 1 Stat. 318, 321 (repealed 1836). Contrary to this mandate, 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. See To Promote the Progress of Useful Arts, supra note 117, at 250 (“As long as the ministerial requirements were met and the fee paid, a patent would issue even though it was known to be for unpatentable subject matter.”).


222 Ames v. Howard, 1 F. Cas. 755, 756 (C.C.D. Mass. 1833) (No. 326) (Story, Circuit Justice). 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.; see also supra note 32 and accompanying text (explaining how Justice Story’s use of the term “odious” reflected a long-standing, customary condemnation of monopolies).

223 After the 1836 Patent Act created the examination system, courts still recognized that the “liberal spirit in which the patent law ought to be construed in favor of honest patentees” existed before 1836. Ex parte Dyson, 8 F. Cas. 215, 219 (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 & Worcester R.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 . . . 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”).
Significantly, this pro-patent presumption 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."\(^{224}\) In the famous 1837 anti-monopoly case, *Charles River Bridge v. Warren Bridge*,\(^ {225}\) the Court used this canon to narrowly construe the property rights secured in a state-granted monopoly franchise in a bridge.\(^ {226}\) In fact, Chief Justice Taney, the author of the *Charles River Bridge* opinion,\(^ {227}\) believed that a similarly restrictive canon should apply to patents. Such beliefs were offered in dissents in patent decisions.\(^ {228}\) The antebellum courts' refusal to apply to patents well-established canons requiring strict construction of monopoly franchises further evidences 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.\(^ {229}\) Notably, the then-governing 1793 Patent Act did not empower the Secretary of State to grant reissued patents. Nonetheless, the Court held that the patent "laws . . . ought, we think, to be construed in the spirit in which they have been made," highlighting both

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\(^{224}\) *Brown v. Barry*, 3 U.S. (3 Dall.) 365, 367 (1797); see also 3 Norman J. Singer, *Statutes and Statutory Construction* § 61:1 (6th ed. 2001) ("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.").

\(^{225}\) 36 U.S. (11 Pet.) 420 (1837).

\(^{226}\) 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. (7 Pick.) 344, 467 (1829), aff'd, 36 U.S. (11 Pet.) 420 (1837). The Massachusetts Supreme Judicial Court concluded that it "ought . . . to adopt a more limited and restricted" construction of the franchise. *Id.* at 467–68. The U.S. Supreme Court agreed, and continued thereafter to rely on *Charles River Bridge* to construe narrowly any "grant of certain privileges by the public, to a private corporation." *Richmond, Fredericksburg, & Potomac R.R. Co. v. Louisa R.R. Co.*, 54 U.S. (13 How.) 71, 81 (1851). The established "rule of construction" for such franchises was that "any ambiguity in the terms of the contract must operate against the corporation, and in favor of the public." *Id.* (quoting *Charles River Bridge*, 36 U.S. (11 Pet.) at 544).

\(^{227}\) See supra note 58 (discussing Chief Justice Taney and the *Charles River Bridge* decision).

\(^{228}\) See, e.g., *Winans v. Denmead*, 56 U.S. (15 How.) 330, 345 (1853) (Campbell, J., dissenting) (arguing in a dissent joined by Chief Justice Taney against expansive infringement doctrines, as a patentee should be restricted to "exactly the limits of his invention." (citation omitted)).

\(^{229}\) See *Grant v. Raymond*, 31 U.S. (6 Pet.) 218, 249 (1832).
the progress of the useful arts and the "reward" secured to the inven-
tor by the patent statutes.\textsuperscript{290} 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."\textsuperscript{291} By
the mid-nineteenth century, the Supreme Court cited these earlier de-
cisions in reaffirming its commitment to the canon that patents "are
to be construed liberally, in accordance with the design of the Consti-
tution and the patent laws of the United States."\textsuperscript{292}

Contrary to early American courts' restrictive treatment of "mo-
nopolies odious in the eyes of the law,"\textsuperscript{293} 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 an invention."\textsuperscript{294}
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 properly secure 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 additional rights to patentees
beyond those expressly authorized in the patent statutes. One such
example was the reissue right, which was discussed earlier in illustrat-
ing the courts' expansive construction of the patent statutes in favor
of patentees.\textsuperscript{295} 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,\textsuperscript{296} the provenance of this valuable remedial right is found not in

\textsuperscript{290} Id. at 242.
\textsuperscript{291} Blanchard v. Sprague, 3 F. Cas. 645, 646 (C.C.D. Mass. 1838) (No. 1,517). Ulti-
mately, Circuit Justice Story held that 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 con-
struing it in favor of the patentee. Id.
\textsuperscript{292} Winans, 56 U.S. (15 How.) at 341-42 (citing Grant, 31 U.S. (6 Pet.) at 218;
Blanchard, 3 F. Cas. at 648).
\textsuperscript{293} Ames v. Howard, 1 F. Cas. 755, 756 (C.C.D. Mass. 1833) (No. 326).
\textsuperscript{294} Allen v. Hunter, 1 F. Cas. 476, 477 (C.C.D. Ohio 1855) (No. 225).
\textsuperscript{295} See supra notes 229-32 and accompanying text.
(repealed 1870). Congress adopted something akin to a reissue right shortly after the
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. Sometime in the early nineteenth century, the State Department’s Superintendent of Patents, Dr. William Thornton, began permitting patentees to surrender mistakenly defective patents, and issued to them corrected versions for the rest of the original patent terms. Significantly, Dr. Thornton 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. In Grant, the defendants (represented by Daniel Webster, who ironically argued for expansive copyright rights based on the natural right to property in Wheaton) 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 any surrender, and the issuing of a new patent,” and that in context of patent law, the “secretary has no power . . . except so far as authorised by statute.” Given that it was “impossible to reconcile such a [reissue] proceeding to the requisitions of the act,” 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.” This argument made sense only if the patent statutes

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237 See supra note 219 (discussing the issuance of patents under the 1793 Patent Act).
238 See supra note 219 (discussing the issuance of patents under the 1793 Patent Act).
239 See id. at 265–66.
240 Id. at 266.
242 See supra notes 161–62 and accompanying text.
244 Id.
245 Id. at 228.
246 Id. at 227.
247 Id. at 229 (emphasis omitted). The defendants (via Webster) continued in this vein: “This would change the whole patent system. Its effects would be monstrous.” Id. at 230. In saying this, the defendants identified the exact concerns about rent-seeking behavior that animate the Jeffersonian story of patent law. First, “[p]atentees would try their claims under one specification; they might fail; and they would call it inadvertence, and try another experiment.” Id. (emphasis omitted). In other words, patentees would act strategically in manipulating the patent system to obtain exclusive rights for themselves at the
secured special legal privileges granting monopoly franchises to inventors.

In delivering the opinion for the unanimous Court, Chief Justice Marshall rejected the 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 authorise the secretary to issue a corrected patent.” 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.” The *Grant* Court waxed poetic in the patentee’s favor: “That sense of justice and of 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.” 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 statutes. Consistent with its adoption of similarly expansive interpretative canons, the Court had no qualms in treating patents substantively as privileges.

Following *Grant* and the codification of the reissue right in the 1836 Patent Act, courts seldom discussed the reissue right, but when they did, they confirmed that this right was regarded as a valuable privilege—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 labor which it is the immediate object of all patent laws to afford.” The court detailed how patents were often undermined by simple drafting mistakes resulting in “a fatal or damaging error,” which was then exploited by many people “devoted to assailing, circumventing or defeating them.” Given these heavy-handed attacks

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248 Id. at 241.
249 Id. at 241–42.
250 Id. at 242.
251 Blake v. Stafford, 3 F. Cas. 610, 612 (C.C.D. Conn. 1868) (No. 1,504).
252 Id.
on patents, the court concluded that the "privilege of surrender and reissue is, therefore, necessary for the protection of inventors."\(^{253}\)

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.\(^{254}\) In 1844, Circuit Justice McLean, whose name is often invoked today as supporting the Jeffersonian story of patent law given his decision in *Wheaton*,\(^{255}\) embraced the favorable treatment that patentees received in the courts, noting simply that the *Grant* Court secured the reissue right *prior* to its statutory authorization in 1836.\(^{256}\) Moreover, even when a court voided a reissued patent, such as when an inventor exploited the reissue mechanism improperly to expand the scope of the original patent, the court reiterated the pro-patentee policies underlying this valuable privilege.\(^{257}\) 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."\(^{258}\)

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 section 18 of the 1836 Patent Act.\(^{259}\) This legislation represents the most striking evidence of the historical myth perpetrated by the Jeffersonian story

\(^{253}\) *Id.*

\(^{254}\) *See*, e.g., *Ex parte Ball*, 2 F. Cas. 550, 552 (C.C.D.C. 1860) (No. 810) (discussing the reissue right in the context of securing a patentee’s rights against "pirates" (citing *Grant*, 31 U.S. (6 Pet.) at 218)); *Child v. Adams*, 5 F. Cas. 613, 614–15 (C.C.E.D. Pa. 1854) (No. 2,673) (discussing the reissue right and the *Grant* decision in securing "valuable inventions" for "meritorious patentees"); *French v. Rogers*, 9 F. Cas. 790, 792 (C.C.E.D. Pa. 1851) (No. 5,103) (justifying the reissue right in part by canon favoring charitable constructions of patents). \*But see* *French*, 9 F. Cas. at 792 (justifying the reissue right in terms of "some benefit to be derived by the public").

\(^{255}\) *See supra* note 163 and accompanying text.

\(^{256}\) *Brooks v. Jenkins*, 4 F. Cas. 275, 277–78 (C.C.D. Ohio 1844) (No. 1,953).

\(^{257}\) *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.* However, in voiding the reissued patent, Circuit Justice 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.*

\(^{258}\) *Ex parte Dyson*, 8 F. Cas. 215, 219 (C.C.D.C. 1860) (No. 4,228).

of patent law, because recently scholars and lawyers have engaged in a sustained study of the history of patent and copyright term extensions (prompted by the Eldred litigation). Yet, beyond cursory references to the extension right in section 18, these historical studies fail to discuss this valuable privilege provided to patentees by Congress in the organic patent statutes themselves.

Unsurprisingly, in the 123 cases in the Federal Cases reporter involving 97 patents whose terms were extended, courts repeatedly identified the extension right codified in section 18 as a privilege. 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. Circuit Justice Woodbury's conjunction of privilege and right, and his corresponding disjunction of privilege and grant, confirms that "privilege" referred to either a civil right justified under the social contract doctrine of natural rights philosophy or to a special governmental grant to an individual contrary to natural or common law rights. It is equally clear
which sense he intended to apply to the “rights and privileges” secured under the patent statutes.\textsuperscript{265}

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 particular statutory privilege. Consistent with Madison’s claim that patents were justified “with equal reason” as common law copyrights,\textsuperscript{266} 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.\textsuperscript{267} In adjudicating a patent extended under this provision, Circuit Justice McLean 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 [section 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.\textsuperscript{268}

Shortly after Circuit Justice McLean uttered these words, the Supreme Court affirmed the constitutionality of section 18, reiterating its 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.\textsuperscript{269}

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

\textsuperscript{265} Blanchard, 3 F. Cas. at 628.
\textsuperscript{266} See supra note 125 and accompanying text.
\textsuperscript{268} 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 section 18, Circuit Justice Nelson stated that “if a patentee . . . can satisfy 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 . . . [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).
\textsuperscript{269} Wilson v. Rousseau, 45 U.S. (4 How.) 646, 690 (1846); see also Blanchard, 3 F. Cas. at 617.
the term extended." 270 In both situations—applying for a patent and obtaining a term extension—the inventor perfected his right by securing it as a privilege. Circuit Justice Clifford admitted that "the title of an 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." 271 The extension right was an important privilege securing a property right in the fruits of an inventor's labors. Furthermore, in adjudicating this right, courts applied the same liberal canon used to secure other patent and property rights, 272 holding that inventors who failed to profit from their inventions simply given costs incurred in litigating their patents still had the right to obtain term extensions. 273

Finally, it is well known that Congress provided individual patent extensions long before the 1836 Patent Act codified this privilege and that courts repeatedly upheld this congressional practice when these extended patents were challenged in court. 274 It is even more significant that Congress continued to engage in this practice even after it adopted the formal administrative proceeding in section 18 of the 1836 Patent Act. 275 In several patent infringement trials involving these extended patents, four Circuit Justices, including Justice Story, declared that Congress had the constitutional "power, after a patent

271 Id.
272 See supra Part III.C.1.
273 See, e.g., Allen v. Hunter, 1 F. Cas. 476, 476 (C.C.D. Ohio 1855) (No. 225); see also Carew v. Boston Elastic Fabric Co., 5 F. Cas. 56, 57 (C.C.D. Mass. 1871) (No. 2,398) (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" (citing Wilson, 45 U.S. (4 How.) at 646)).
274 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 the patent term of Oliver Evans despite the Court expressing doubts as to the 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").
has expired, to provide for its extension."\textsuperscript{276} This expansive view of congressional power to secure patent rights—even when patented inventions 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 season, the fruits of their inventions."\textsuperscript{277} The salience of the labor theory of property made sense to Congress and courts because patents were privileges—civil rights securing property rights.

Ultimately, 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 of patent privileges. As always, the supporting sources for the Jeffersonian story of patent law are there to be uncovered in any diligent search.\textsuperscript{278} The historical record is mixed, sometimes even within a single court opinion.

For instance, at the same time the Grant Court expansively construed the patent statutes in favor of patentees, it still employed rhetoric that supports the Jeffersonian story of patent law, declaring that the "great object and intention of the [patent] act is to secure to the public the advantages to be derived from the discoveries of individuals."\textsuperscript{279} Such remarks, though, appear to have had no impact on Chief Justice Marshall's decision in \textit{Grant}, which expansively secured to patentees non-statutorily authorized rights in direct opposition to a claim by a member of the public to the contrary.\textsuperscript{280} Perhaps even more noteworthy is that this contrasts with the cases in which the Court gave

\begin{itemize}
  \item \textsuperscript{276} Jordan v. Dobson, 13 F. Cas. 1092, 1095 (C.C.E.D. Pa. 1870) (No. 7,519) (Strong, Circuit Justice); see also Blanchard, 3 F. Cas. at 628 (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).
  \item \textsuperscript{278} 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 a patentee's "exclusive privileges" serve "the ultimate benefit of the public, and [are] not for the sole benefit of inventors and patentees").
  \item \textsuperscript{279} 31 U.S. (6 Pet.) 218, 243 (1832).
  \item \textsuperscript{280} See supra notes 244-50 and accompanying text.
\end{itemize}
doctrinal effect to such sentiments by strictly limiting state monopoly franchises to secure the public interest.281

This Part sought 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 expansive interpretative canon courts employ when interpreting 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.

IV
THE HISTORICAL PATENT PRIVILEGE REDISCOVERED: IMPLICATIONS FOR TODAY282

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.283 At a minimum, though, this Article 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,284 and their most recent defeats in Grokster and Eldred have not deterred them from continuing to advance a comprehensive critique of expansive protections for patent and other intellectual property rights. As Paul M. Schwartz and William Michael Treanor recently wrote, “Eldred has not put an end to litigation in this area.”285

281 See supra note 226 and accompanying text.
282 Many thanks to Mark Lemley and Thomas Nachbar for calling attention to the need for Part IV.
283 See supra notes 14–15, 21, 49 and accompanying text.
284 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); Oliar, supra note 120, at 1778 (noting simply that “[i]ntellectual property scholars generally agree on the importance of history (and particularly the Framing history) to understanding the [Copyright and Patent] Clause”).
285 Schwartz & Treanor, supra note 7, at 2362 (discussing Golan v. Ashcroft, 310 F. Supp. 2d 1215 (D. Colo. 2004)); see also Kahle v. Gonzales, 474 F.3d 665, 667 (9th Cir.
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. For example, the Court recently held that nineteenth-century patent rights, such as those discussed in Part III, constitute "the legitimate expectations of inventors in their property." 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 law—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 contra-
dicts its own "long history" in limiting patent and copyright is profoundly mistaken, as is the historical assumption that patents and other intellectual property rights are being "propertized" today. 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," 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 scholars have been relying on for years raises the specter of Kramer's "law office history" critique—that lawyers only use history for supporting preconceived policy goals. In fact, the Jeffersonian story of patent law is an example of law office history—it is an incomplete account of history in the service of modern policy arguments. In this respect, a proper intellectual history of patent law indicates how labor theories of property and social contract doctrines may continue to influence legal disputes and intellectual property debates today.

CONCLUSION

Federal Circuit Judge Timothy Dyk recently remarked that "[p]atent law is not an island separated from the main body of American jurisprudence." This Article has endeavored to prove this principle by situating early American patent law within the political and

290 See supra note 18 and accompanying text.
291 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.
293 See Kramer, supra note 25, at 389–94 (complaining about the bad historiography of lawyers, who produce "law office history" intended only "to generate data and interpretations that are of use in resolving modern legal controversies" (citations omitted)).
constitutional context of the eighteenth and nineteenth centuries—an era dominated by the labor theory of property and the 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 a historical myth. Judge Rich once criticized labeling patents as monopolies due to the negative “emotional” baggage that the term “monopoly” carries with it.296 He recognized that “talk of the ‘patent monopoly’ weds patents to prejudice, which is not conducive to clear thinking.”297 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 the labor theory of property of natural rights philosophy.

296 Rich, supra note 23, at 239.
297 Id.