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Patent Originalism

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PATENT ORIGINALISM

Richard A. Epstein[†]

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INTRODUCTION

The Patent and Copyright Clause—the choice of name is itself instructive—is the source of many interpretive and practical difficulties. Like all clauses of the Constitution, it is short, and it is precisely in its brevity that much of its difficulty arises. Thus, the familiar clause reads:

The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]¹

[†] The Laurence A Tisch Professor of Law, The New York University School of Law, The Peter and Kirsten Bedford Senior Fellow, The Hoover Institution, and the James Parker Hall Distinguished Service Professor of Law Emeritus and Senior Lecturer, The University of Chicago. This paper was initially prepared for a Conference on the Historical Origins of the Patent Clause, which was scheduled to be held on March 13–14 (2020) organized by the Classical Liberal Institute and held at NYU Law School. That conference never took place but the paper was presented online to the conference participants and benefited greatly from their comments. I have also benefitted from comments received at the NYU Work in Progress workshop held on November 2, 2020. My thanks to Kenneth Lee, Christian McGuire, Micah Quigley, and Riley Walters, of the University of Chicago Law School. I offer a special word of thanks to Tomás Gómez-Arostegui, whose knowledge of the relevant sources is seemingly inexhaustible, for his wise guidance on reviewing much of the historical material.

1. U.S. CONST. art. I, § 8, cl. 3.

As the title to this article indicates, I shall engage in some sort of a quasi-originalist inquiry into the proper interpretation of this clause, in an effort to find out how it was understood during the founding period. I shall largely restrict myself to the patent line of cases. The evidence will in some cases go beyond that period to cover nineteenth-century cases which offer an accurate reflection of the earlier thinking, insofar as they exhibit no intention to alter the law from the way in which it was originally formed. The issue is of no little importance because the recent decisions of the United States Supreme Court have tended to take a restrictive view of the rights of patentees, and the protection of patents under the law. Both *Mayo Collaborative Services v. Prometheus Laboratories*² and *Alice Corp. v. CLS Bank International*³ gave narrow accounts of the class of potential inventions that should be regarded as patent-eligible under Section 101 of the Patent Act,⁴ in the case of medical tests on the one hand, and financial analysis on the other.⁵ The case of *Oil States Energy Services, LLC v. Greene's*

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2. 566 U.S. 66 (2012). The issue discussed is orthogonal to the question of whether patents offer property rights. Instead, it holds that a method for calculating proper dosage of thiopurine to treat autoimmune diseases should be treated as an unpatentable law of nature. *Id.* at 72–73. The case represents a weird expansion of laws of nature to cover tests in particular context that require huge ingenuity to discover, and which cannot be simply derived as a matter of first principle from a set of formal axioms.
 3. 573 U.S. 208 (2014). For an application of its rule, see *American Axle & Manufacturing, Inc. v. NEAPCO Holdings LLC*, 309 F. Supp. 3d 218, 223–24, 228–29 (D. Del. 2018) (holding that the *Alice-Mayo* framework invalidates a method patent on how to construct and operate an automobile driveshaft as a law of nature).
 4. 35 U.S.C. § 101 (2012) (“Whoever invents or discovers any useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.”); *Mayo*, 556 U.S. at 86–87; *Alice*, 573 U.S. at 216–17.
 5. For a critique, see *The State of Patent Eligibility in America: Part 1: Before the S. Subcomm. on Intell. Prop.*, 116th Cong. (2019) (statement of Adam Mossoff, Professor of Law, George Mason University). For a defense of the current system, see *The State of Patent Eligibility in America: Part II: Before the S. Subcomm. on Intell. Prop.*, 116th Cong. (2019) (statement of David W. Jones, Exec. Dir., High Tech Inventors All.) (insisting that *Alice-Mayo* has not reduced investment in either biomedical or financial patents). For cases invalidating medical tests, see, for example, *Athena Diagnostics, Inc. v. Mayo Collaborative Services, LLC*, 915 F.3d 743, 757 (Fed. Cir. 2019) (holding that a medical test used to identify various neurological disorders is patent ineligible because the test is classified as a natural law and lacks a transformative element); *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371, 1379 (Fed. Cir. 2015) (holding that a non-invasive prenatal DNA test is similarly excluded on patent ineligibility grounds).

*Energy Group, LLC*⁶ holds that a patentee is not entitled to a jury trial in an Article III court to determine patent validity in an infringement action if the defendant moves the adjudication before the Patent Trial and Appeal Board (which is staffed by administrative judges appointed by the head of the Patent and Trademark Office).⁷ Finally, *eBay Inc. v. MercExchange, LLC*⁸ imposes important limitations on the ability of a patent holder to obtain an injunction, even in the case of deliberate patent infringement.⁹

The explanation for these diverse patent-restrictive decisions all stem in large part from the deep convictions of patent skeptics on the Supreme Court, backed by many industry and academic supporters, who believe that patent rights are to some extent second-class rights that are not entitled to the level of protection that is associated with the ownership of land, chattels, or animals, which have an indubitable common law heritage.¹⁰ It is important to note the rejection of this second-class status for patents (and copyrights) should not be regarded as equivalent to the proposition that these rights are absolute in all respects, because statements of that sort are not true of land or of any other forms of tangible property rights. The overall system of property rights is highly sensitive to the types of assets in play, even in cases where both assets are tangible—for example, the property rules for water are different from those for land. In addition, under the standard definitions, the exclusive rights to possession, use, and disposition¹¹ are

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6. 138 S. Ct. 1365 (2018).
 7. *Id.* at 1370–79 (“[I]nter partes review is a matter that Congress can properly assign to the PTO, a jury is not necessary in these proceedings.”).
 8. 547 U.S. 388 (2006).
 9. *See id.* at 390.
 10. *See, e.g.*, Tom G. Palmer, *Are Patents and Copyrights Morally Justified? The Philosophy of Property Rights and Ideal Objects*, in *COPY FIGHTS: THE FUTURE OF INTELLECTUAL PROPERTY IN THE INFORMATION AGE* 43, 43–44 (Adam Thierer, Clyde Wayne Crews & Clyde Wayne Crews Jr. eds., 2002).
 11. *See United States v. General Motors Corp.*, 323 U.S. 373, 377–78 (1945). In speaking about the definition of property in cases of eminent domain, the critical terms are “property,” “taken” and “just compensation.” It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase, *property*, has been the latter. *Id.* Note that the inference is irresistible that this same set of rights applies to patents, which also receive eminent domain protection.

still subject to abridgment in cases of necessity.¹² Such rights are also capable of transformation with changes in technology, as with the transformation of air rights when the upper air space, which formerly had no value, became useful for transformation.¹³ This topic deserves an extensive treatment of its own.¹⁴ All of these transformations may happen with different forms of intellectual property, but this entire ethos of transformation does not make sense if the exercise of the patent power is treated as a general right to exclude, without embracing the ability to alienate and license, or as a government subsidy that can be offered and removed at will. The originalist account does not purport to deal with every permutation in how patent rights are assigned and developed. But it does impose this important set of guard rails against the total elimination of patent protection by legislative or administrative action.

Property rights in these material assets are widely regarded as having a natural law grounding insofar as their creation is said to antedate the rise of the state and its enforcement of property rights, which is an essential feature of the Lockean tradition under which property rights come from below, after which they are protected by the state.¹⁵ That position resonates with Madison's general statement about the relationship of copyright to patent in Federalist 43, which reads:

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 provisions for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.¹⁶

The common law foundations for copyright were adjudicated at great length in *Millar v. Taylor*,¹⁷ and Madison's observation is that now that patents and copyrights are linked together in the same clause, the same level of protection for the same reason should be given to patents. That protection should be at the federal level because it is far

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12. *Ploof v. Putnam*, 71 A. 188 (Vt. 1908); *Vincent v Lake Erie Transportation Co.*, 124 N.W. 221 (Minn. 1910).
 13. *Hinman v. Pacific Air Transport* 84 F.2d 755 (9th Cir. 1936); *Swetland v. Curtiss Airports Corp.* 55 F.2d 201 (6th Cir. 1932).
 14. See Richard A. Epstein, *Legal Transitions Between Property Rights Regimes for Different Resources* (forthcoming).
 15. See Palmer, *supra* note 10, at 58.
 16. THE FEDERALIST NO. 43 (James Madison).
 17. (1769) 98 Eng. Rep. 201; 4 Burr. 2303 (KB).

more efficient to offer intellectual property protection once throughout the United States instead of doing so by multiple arguably inconsistent state laws. Federalist No. 43 also resonates with James Madison's short 1792 essay in the National Gazette, *Property*,¹⁸ which refers to "that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual."¹⁹ Madison's essay does not mention intellectual property, but it does advert to Blackstone's famous definition of property in the first sentence.²⁰

Against that position is the famous letter of Thomas Jefferson that made this oft-quoted remark: "[I]t 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."²¹ But if it is not the "fermentation" of any given mental state that is protected; it is the durable plan and description of the invention that derives from that mental effort. To be sure, natural law theory could not provide the institutional arrangements needed to protect intellectual property, which is one reason why it makes sense to call these rights "created" rather than "inherent." Moreover, Edward Walterscheid is surely correct when he notes that the Constitution did not obligate the federal government to create either patent or copyright protection, but only authorized the creation of these rights²²—which is how the text, which describes a power of Congress, reads. Put otherwise, there was no common law or constitutional right to obtain a patent, which was a "privilege" from the government.²³ But Madison used the explicit

18. James Madison, *Property*, NAT'L GAZETTE, Mar. 29, 1792, <https://founders.archives.gov/documents/Madison/01-14-02-0238>, [<https://perma.cc/5BJE-4VBF>].

19. *Id.* (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *1, *2).

20. *Id.*

21. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in THE WRITINGS OF THOMAS JEFFERSON 326 (Andrew A. Lipscomb ed., 1903). For a critique of Jefferson's view, see Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent "Privilege" in Historical Context*, 92 CORNELL L. REV. 953, 959–67 (2007). Mossoff tends to use natural law theories in opposition to consequentialist ones. I have long taken the opposite view, that utilitarian justifications do not undermine the strength of a natural law theory. For the explicit interrelationship between natural law and utilitarian theory in classical theory, see Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POL'Y 711 (1989).

22. Edward C. Walterscheid, *Inherent or Created Rights: Early Views on the Intellectual Property Clause*, 19 HAMLINE L. REV. 81, 94, 98–99 (1995). According to Walterscheid, Madison "intended the term 'securing' to mean 'to obtain' or 'to provide' rather than 'to insure' or 'to affirm and protect.'" *Id.* at 98.

23. *Id.*

analogy between patents and copyrights to supply the intellectual ammunition to explain why in constitutional terms it was thought necessary to have a constitutional vehicle for the protection of both sets of rights. And it is surely noteworthy that at no time in our Constitution's history has Congress ever declined the invitation to legislate pursuant to its constitutional power.

It is therefore not surprising that the natural law definitions of property rights did influence state law protections for intellectual property prior to the adoption of the Constitution. The direct cases dealing with this issue again come from copyright law, under statutes that make explicit reference to the natural law tradition.²⁴ Thus, in 1783 Connecticut passed an “Act for the encouragement of literature and genius” that was explicitly rooted in natural law principles.²⁵ The Massachusetts Act of the same year “for the Purpose of securing to Authors the exclusive Right and Benefit of publishing their Literary Productions for Twenty-one years,” invoked both natural rights theory and the desirable incentive effects of property in the same breath.²⁶ Similar language is found in the Virginia Law of 1785 and the New York Law of 1786.²⁷ These statutes have language parallel to Article I, Section 8, Clause 8.

On the basis of these early decisions Paul Clement, in his recent article *Patent Rights vs. Property*,²⁸ explicitly draws a sharp contrast between property rights and patent protection in order to explain and justify the reduced level of protection offered in recent Supreme Court cases, especially *Oil States*.²⁹ I believe that all of those Supreme Court cases and similar decisions represent a serious break from a sound view of patents that make them a subclass of property rights—which can and should be enforced on a par with other forms of property rights *once* a particular patentee has received a patent grant.³⁰ The simplest

24. *Id.* at 88–89.

25. 1783 CONN. PUB. ACTS 133–34.

26. 1783 MASS. ACTS 369.

27. 1785 VA. ACTS 8–9; 1786 N.Y. LAWS 99–100. For references to these laws, see RANDOLPH MAY & SETH L. COOPER, *THE CONSTITUTIONAL FOUNDATIONS OF INTELLECTUAL PROPERTY: A NATURAL RIGHTS PERSPECTIVE* 44–46 (2015).

28. Paul C. Clement, *Patent Rights vs. Property, The Framers' Understanding of Patents* (2019), <https://www.hightechinventors.com/post/read-former-us-solicitor-general-paul-clement-s-new-paper-on-the-constitutional-purpose-of-patents> [<https://perma.cc/HBH6-NZR5>]. The paper was apparently prepared at the behest of the High Tech Inventors Alliance.

29. *Id.* at 16–17.

30. For more discussion of these general views, see Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 *STAN. L. REV.* 455 (2010). See also Richard A.

statement of the argument is that under Article I, Section 8, Clause 8, the government has the power to either grant or not grant patents in any particular case.³¹ Indeed, in 1790 the United States did not have to enact any Patent Act at all, but it in fact affirmatively enacted the first Patent Act.³²

There is, however, this huge caveat. Once the government issues a patent, that patent becomes—full stop—a form of property on a par with other forms of property, in part because the grant is in harmony with the natural law tradition that pervades the area.³³ This claim of vested rights pursuant to a patent grant does not require modern readers to solve any deep mystery, because the language of the 1790 Patent Act speaks in an idiom that is as easily recognized today as it was then. Thus, the patent is not a free grant from the government to whomever might request it. The grant is issued not as an act of government largesse but because of the work that the applicant has done to obtain the patent—namely, “that he, she, or they, hath or have invented or discovered any useful art, manufacture, engine, machine, or device, or any improvement therein not before known or used, and praying that a patent may be *granted* therefor.”³⁴ Later on in Section

Epstein, *What Is so Special About Intangible Property? The Case for Intelligent Carryovers*, in *COMPETITION POLICY AND PATENT LAW UNDER UNCERTAINTY: REGULATING INNOVATION* 42, 42–73 (Geoffrey A. Manne & Joshua D. Wright eds., 2011).

31. See, e.g., *Goldstein v. California*, 412 U.S. 546, 562 (1973) (“While the area in which Congress *may* act is broad, the enabling provision of Clause 8 does not require that Congress act in regard to all categories of materials which meet the constitutional definitions.”).
32. Patent Act of 1790, ch. 7, 1 Stat. 109.
33. I have developed this theme in multiple places. See, e.g., Richard A. Epstein, *Property Rights and Governance Strategies: How Best to Deal with Land, Water, Intellectual Property, and Spectrum*, 14 *COLO. TECH. L.J.* 181 (2016); Richard A. Epstein, *From Natural Law to Social Welfare: Theoretical Principles and Practical Applications*, 100 *IOWA L. REV.* 1743, 1744–52 (2015) (detailing the natural law tradition with respect to property rights). Note that property rights in land, chattels, and animals are not mere usufructuary rights as Gaius wrote because agriculture, which requires long term investment in land, has long, to coin an expression, taken root. The usufructuary interest in land only applies in a hunter-gatherer society. Thus, by extension, patents are not usufructuary rights. See Kai Yi Xie, Comment, *Improving the Patent System by Encouraging Intentional Infringement: The Beneficial Use Standard of Patents*, 165 *U. PENN. L. REV.* 1019, 1036 (2017).
34. Patent Act of 1790 § 1 (emphasis added). The current statute is still intricately connected to the original 1790 Act. See 35 U.S.C. § 101 (2018) (“Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor . . .”).

2, the Act goes one step further and states that the grantee or grantees of the patent:

[S]hall, at the time of granting the same, deliver to the Secretary of State a specification in writing, containing a description, accompanied with drafts or models, and explanations and models (if the nature of the invention or discovery will admit of a model) of the thing or things, by him or them invented or discovered³⁵

The rationale for these provisions is the same as it is under the modern Act. A patent does give an exclusive right, and the Patent Act of 1790 tries to ensure that the right shall not be given away too cheaply. Hence, in addition to making something of value, the patent applicant must disclose information that allows others to use that invention as a template upon which they can devise some other device that does not fall within the scope of the patent, but nonetheless can compete with it in the marketplace. The exclusive right, therefore, on this model is not a monopoly over a given field, a point repeatedly recognized in the nineteenth century cases.³⁶ It is a form of right that is compatible with the creation of the exclusive rights in other

35. Patent Act of 1790 § 2.

36. See, e.g., *Birdsall v. McDonald*, 3 F. Cas. 441, 442 (C.C.N.D. Ohio 1874) (No. 1,434) (Swayne, Circuit Justice) (dealing with a combined thrashing and hulling machine). In *Birdsall*, Circuit Justice Swayne wrote:

Inventors are a meritorious class of men. They are not monopolists in the odious sense of that term. They take nothing from the public. They contribute largely to its wealth and comfort. Patent laws are founded on the policy of giving to them remuneration for the fruits, enjoyed by others, of their labor and their genius. Their patents are their title deeds, and they should be construed in a fair and liberal spirit, to accomplish the purpose of the laws under which they are issued.

Id. at 444. Note the use of the term “title deeds.” The case then held that the reissue was valid because it was a new and useful invention, and that it covered modifications of the machine that today would be covered by the doctrine of equivalents. *Id.* See also *Allen v. Hunter*, 1 F. Cas. 476, 477 (C.C.D. Ohio 1855) (No. 225) (McLean, Circuit Justice) (considering the setting of mineral teeth on metallic plates). In *Allen*, Circuit Justice McLean writes:

Patentees are not monopolists. . . . No exclusive right can be granted for anything which the patentee has not invented or discovered. . . . [T]he law repudiates a monopoly. The right of the patentee entirely rests on his invention or discovery of that which is useful, and which was not known before. And the law gives him the exclusive use of the thing invented or discovered, for a few years, as a compensation for “his ingenuity, labor, and expense in producing it.” *Id.* at 477.

inventions that could be used in competition with it, just as the owner who has the exclusive right to one plot of land cannot thereby block his or her neighbor from using his or her property for a purpose that competes with his own.

When these pieces are put together, it becomes clear that a grant is not a free gift of government. Instead it only issues if the Secretary of State, of War, or the Attorney General, or any two of them “shall deem the invention or discovery sufficiently useful and important.”³⁷ Indeed, in the 1790 Act, some variation of the word *grant* (e.g. “grantee” or “granting”) is used ten times, and, in each case, the term has the same meaning that it does in ordinary English when the transfer of land takes place from a private grantor to a private grantee.³⁸ The same term, *grant*, also applies to the transfer of other property rights in Common Law, such as the right of a patron landowner to request the appointment of a nominee to an ecclesiastical benefice under old English law,³⁹ and as a more modern example, the right to vest power to either a private trustee or a legislative body.⁴⁰ At this point, the correct mode of interpretation is that any grantee under the act has the same right as any grantee in any other area. The distinctive feature about a patent for an invention or discovery is that the subject matter of the patent is in no sense in the possession of the United States prior to the time that the patent is granted. In this context, the “letters patent” issued are not identical to the transfer of, say, lands that the government already owns, which was the source of a huge amount of

37. Patent Act of 1790 § 1.

38. *Id.* §§ 1–5.

39. See generally F.W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* 32–33 (Alfred H. Chaytor & William J. Whittaker eds., 1958).

40. U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”). Note the use of the terms “granted” and “vested,” both property conceptions, which carry over well to public trust arrangements. On the close connection, see GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I. SEIDEMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 52, 53 (2010). Natelson discusses several common principles that underlay eighteenth-century fiduciary law: 1) “The Duty to Follow Instructions and Remain Within Authority;” 2) “The Duties of Loyalty and Good Faith;” 3) “The Duty of Care;” 4) “The Duty to Exercise Personal Discretion;” 5) “The Duty to Account;” and 6) “The Duty of Impartiality.” *Id.* at 56–60. Elsewhere Natelson has written: “I have not been able to find a single public pronouncement in the constitutional debate contending or implying that the comparison of government officials and private fiduciaries was inapt. The fiduciary metaphor seems to rank just below ‘liberty’ and ‘republicanism’ as an element of the ideology of the day.” Robert G. Natelson, *The Constitution and the Public Trust*, 52 *BUFF. L. REV.* 1077, 1086 (2004). So too with respect to grants.

nineteenth-century law.⁴¹ It is rather a constitutive act, which creates the property right because the individual in question has met the conditions set out in the Act.

This historical account of patent rights as property interests has been also challenged by Mark Lemley, who rejects any natural-law foundation of patent rights.⁴² Indeed, his own account of the subject goes far afield and tentatively takes the tenuous position that patents should not be regarded as property rights but as subsidies granted by the government. He thus writes:

Intellectual property is a form of government subsidy, designed to influence supply in the market away from the competitive norm just as support from the National Endowment of the Arts, the National Institutes of Health, or crop supports to farmers are. Recognizing this fact may be useful because it helps us to understand the comparison between this form of subsidy and other sorts of rewards, an area on which there is a burgeoning literature.⁴³

He also opines:

The fundamental differences between intellectual property rights and other forms of government subsidy have to do with how the recipients of that subsidy are selected and the size of the subsidy determined. While with most government subsidies the government makes both choices, in the case of intellectual property the government leaves those decisions to the very market it is attempting to influence. Because many criticisms of government subsidies focus on size and allocation, they may not apply to intellectual property.⁴⁴

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41. See, e.g., *United States v. Ala. Great S.R.R. Co.*, 142 U.S. 615, 621 (1892) (“We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that department—a construction which, though inconsistent with the literalism of the act, certainly consorts with the equities of the case—should be considered as decisive in this suit.”). Note that the course of dealing rule here was in tension with the literal interpretation. For a discussion of the general rules on grants, see Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 *YALE L.J.* 908 (2017). Note also that the decision has important implications for *Chevron v. NRDC*, 467 U.S. 837 (1984) and *F.C.C. v. Brand X Internet Services*, 545 U.S. 967 (2005), which take the opposite position, so that any last-minute shift in policy, whether or not explained, receives deference.
42. See Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 *TEX. L. REV.* 1031 (2005).
43. *Id.* at 1073–74 (emphasis in original).
44. *Id.* at 1073.

Despite Lemley's evident doubt about this position, the upshot is the same as Clement's. Intellectual property rights, once granted, are not to be treated as if they were property rights entitled to strong constitutional protection. Instead, like other subsidies, they remain more malleable by far.

Nonetheless, it is not sufficient to be suspicious of Lemley's analogy between intellectual property and government subsidies. It is important to reject it altogether. Lemley recognizes that the analogy is at best imperfect because in a patent system the applicant, not the government, secures the property right in question, so that the political economy of patents is different from that, say, of agricultural subsidies.⁴⁵ Yet what Lemley does not acknowledge is that, because of this massive distinction, his effort to degrade property rights into political subsidies falls of its own weight. But by referring to a "subsidy," he misses the central point, which is that the grant of the exclusive right is a win/win bargain between the public and the inventor. Not so with subsidies. All subsidies, whether in cash or in kind, result in the transfer of some asset in the possession of the government to some chosen beneficiary who does nothing in exchange. The patent, in contrast, does not result from a transfer of any preexisting state asset to private ownership, but from the submission of an invention that meets the general standards of patentability. Those standards, if met, imply that the wealth of the nation is greater with the issuance of the patent than it was before. It is therefore not possible to apply the standard criticism of subsidies to patent creation, namely: that the tax that is imposed either on the general public or, as by cross-subsidy to others, unduly reduces the supply of the taxed good while it unduly increases the supply of the subsidized products, leading to a distortion that is not found in competitive market. That objection can be raised decisively against various proposals to give broad-based tax subsidies in place of or in addition to patents, but it cannot be raised against the granting of patents themselves.⁴⁶

Indeed, the view that intellectual property rights should be treated like subsidies recently received a decisive refutation from the United States Supreme Court in *Matal v. Tam*,⁴⁷ when the Supreme Court held that the free speech protections that normally apply to speech also fully applied to Tam's application for the name of his Rock group, "The

45. *See id.*

46. *See* Daniel Hemel & Lisa Larrimore Ouellette, *Beyond the Patent Prizes Debate*, 92 TEX. L. REV. 303 (2013), effectively criticized in Charles Delmotte, *The Case Against Tax Subsidies in Innovation Policy*, 48 FLA. R. REV. (forthcoming 2021).

47. 137 S. Ct. 1744 (2017).

Slants.”⁴⁸ Tam chose this moniker in order to “reclaim” the term and “drain its denigrating force as a derogatory term for Asian persons.”⁴⁹ The government’s claim, a cousin of Lemley’s idea in the patent context, was that Tam sacrificed his constitutional rights of free speech by submitting his claim for the subsidy of trademark protection from the Patent and Trademark Office.⁵⁰ The Court rejected this argument, explaining that, though the government spends money on trademarks, trademark registration is “nothing like the [subsidy] programs at issue” in other cases.⁵¹ Once again, the trademark bargain gives exclusive right to a name or mark in perpetuity⁵² because only with exclusivity will the mark give consumers information as to the origin, and through that, the quality of the goods purchased. There is no monopoly exclusion of end uses which drives the law to give only limited terms of protection to the user, so that it is in the social, as well as the private, interest that trademarks should be protected in perpetuity. Thus, the use of property language captures a reality that the use of subsidy language conveniently obscures. And it is against this general background that the originalist inquiry has to be undertaken.

I. CAUTIOUS ORIGINALISM.

In light of these efforts to undermine the status of patents, it is important to take a closer look at the particular components of the Patent Clause. In this area, the inquiry is originalist in this limited sense: the analysis begins with the ordinary public meaning of the text as understood at the time the Constitution was signed. There are many cases where this approach has shortcomings that should be noted at the outset. The first of these is that it is often the case that a text is incomplete because of some implicit background assumptions that must be brought to the fore. Thus, it could well be that some terms in a particular provision—like “marque” and “reprisal”—have specialized meanings that are well understood within the profession, but are not of

48. *Id.* at 1747.

49. *Id.*

50. *See id.* at 1760 (“We next address the Government’s argument that this case is governed by cases in which this Court has upheld the constitutionality of government programs that subsidized speech expressing a particular viewpoint.”).

51. *Id.* at 1761.

52. *See* United States Patent and Trademark Office, “What is a Trademark?” (last modified Sept. 25, 2020) (“A trademark registration may remain in force for potentially unlimited consecutive ten-year periods as long as the owner meets the legal requirements for post-registration maintenance and renewal and timely files all necessary documents.”).

common use.⁵³ More fundamentally, virtually all procedural and substantive provisions of the Constitution are subject to a non-textual gloss that cannot be gotten or understood from parsing the text itself. For example, the pervasive notion of the police power in all substantive and procedural areas means that any particular claim may be subject to a set of qualifications.⁵⁴ Thus, it may be wrong to abridge the freedom of speech, but it is not wrong to impose civil or criminal liability for defamation, incitement to riot, fraud, intimidation, and the like.

That catalogue of exceptions to the free speech provision is not some random assortment of deviations. Rather, they all stem from the notion that any claim of an individual freedom is subject to limitations that come from the standard libertarian playbook that—in this limited compass at least—recognizes that speech used in aid of force or fraud is no more protected by the Constitution of the United States than it is protected by the common law.⁵⁵ To that a gloss is generally added that makes it clear that the freedom in question is not exempt from the antitrust laws,⁵⁶ or from general common carrier rules.⁵⁷ Nor is there any reason why, if high transaction costs block voluntary arrangements,

53. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 11.

54. *See, e.g.*, *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 116, 122 (1873) (Bradley, J., dissenting) (“Rights to life, liberty, and the pursuit of happiness are equivalent to the rights of life, liberty, and property. These are the fundamental rights which can only be taken away by due process of law, and which can only be interfered with, or the enjoyment of which can only be modified, by lawful regulations necessary or proper for the mutual good of all This right to choose one’s calling is an essential part of that liberty which it is the object of government to protect; and a calling, when chosen, is a man’s property and right. . . . A law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law.”). For a discussion of limitations on police power within the takings and due process context, see William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1057–58 (1980).

55. For my views on how the process of implication should work, see generally Richard A. Epstein, *Our Implied Constitution*, 53 WILLAMETTE L. REV. 295 (2017).

56. *See* *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (“The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary.”).

57. *See, e.g.*, *Bement v. Nat’l Harrow Co.*, 186 U.S. 70, 91 (1902) (“[A] telephone company, being in the nature of a common carrier, was bound to render an equal service to all who applied and tendered the compensation fixed by law for the service; that while the patentees were under no obligation to license the use of their inventions by any public telephone company, yet, having done so, they were not at liberty to place restraints upon such a public corporation which would disable it to discharge all the duties imposed upon companies engaged in the discharge of duties subject to regulation by law.”).

it should be impermissible to use compulsory licensing schemes so long as just compensation is provided.

Similarly, there is nothing in the patent clause of the Constitution that talks about the ability to set aside patents on the ground that they were obtained by improper means. Thus Section 5 of the 1790 Act builds that notion into the statute that allows judges to set aside any patent that “was obtained surreptitiously by, or upon false suggestion,” which indicates that certain publicity and fraud-control provisions nowhere mentioned in the Constitution are seamlessly integrated into the basic structure of the 1790 Act.⁵⁸ To an ardent textualist those inclusions might seem unauthorized, but anyone who has worked with statutory material under either Roman or early common law knows that implications of this sort were common statutory practices before 1787, and it was understood at the founding that the Constitution, with its broad grants of power, must be read as subject to these implied limitations.⁵⁹

The point here, it must be stressed, is *not* an open invitation to a “living constitution,” which has so many degrees of freedom that at any point in time it is possible to turn any clause of the Constitution upside down.⁶⁰ But the police power implications, the rules dealing with unconstitutional conditions, or the implied immunities are the stuff of everyday constitutional interpretation whose substantive contours were roughly the same at the time of the Founding as they are today. Why? Because the corrections that they authorize stem from one set of basic principles, which are as valid today as they were in earlier times. For a simple benchmark, the law of sales and partnerships surely has improved since Roman times, but the Romans’ central contributions to that body of law survive quite well in a modern setting. The reason is that while the subject of complex transactions may change from togas to spacesuits, the standard warranties of merchantability and title are as good today as they were in earlier times. Hence the question of implication, as in dealing with the rules for obtaining patent by fraud or material nondisclosure, follow closely to historical standards. Any system of originalism that seeks to rule out these elements from the larger picture is not faithful to the interpretive stance of the past. With these issues in mind, it is now useful to look closely first at the

58. Patent Act of 1790, ch. 7, § 5, 1 Stat. 109, 111.

59. Epstein, *supra* note 55, at 309. Note that the method here described is likely compatible with “original methods originalism,” which seeks to understand the Constitution by employing the same interpretive methods which were commonly in use at the time of its ratification. See John O. McGinnis and Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 N.W. L. Rev. 751 (2009).

60. For one modern defense, see JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

background assumptions to the Patent Clause, and then to the interpretive analysis of all its moving parts.

II. ARE PATENTS REGULATED BY NATURAL LAW?

One of the constant themes of the modern patent critics is that patents necessarily form a second tier of rights because they are not recognized at natural law. There are, of course, many statements in extrajudicial writings and opinions that make this point, but it is important to place them in context, by noting first and foremost that no one is claiming that these rights exist solely by natural law, but rather they exist because of the grants made by the United States pursuant to the Patents Clause. Thus, one of the most famous remarks of this sort is found in the writings of Thomas Jefferson, who stated:

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 any body.⁶¹

Yet that was precisely the logic that was used in the states that offered protection for copyrights before the adoption of the Constitution, which was, as noted above, a mixture of natural law that was always keenly aware of the incentive arguments. Clement understates the status of patents when he writes:

[P]atent rights are not natural rights, they do not come from the common law, and they have no basis in the tradition of property rights tracing back to John Locke. To the contrary, a patent is a form of government regulation that *restrains* members of the public in the exercise of their natural rights to liberty and property—rights that *do* come from nature and *are* protected by the common law.⁶²

Ironically, Clement misses the huge common law component of patents. As Giles Rich pointed out long ago, the only thing that that the federal government gives through the patent grant is the right to exclude others from making or selling the patented invention.⁶³ But the

61. Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), *in* 6 THE WRITINGS OF THOMAS JEFFERSON 175, 181 (Henry A. Washington ed., 1854).

62. Clement, *supra* note 28, at 1.

63. Giles S. Rich, *The Relation Between Patent Practices and the Anti-Monopoly Laws*, 24 J. PAT. OFF. SOC'Y 159, 168 (1942) (approvingly quoting *Bloomer v. McQuewan*, 55 U.S. 539, 549 (1853), in which the

inventor gets his own right to make and sell not from the federal government (with its limited powers) but from state common law that applies with the same force to the patented invention as it does to any other good or service.⁶⁴ If the right to make and sell other things has a common law origin, and if the common law has the natural law at its core, then the guts of any patent licensing system has the same natural-law origin as the rights to liberty and property that Clement concedes “do come from nature and are protected by the common law,” and which are then protected from confiscation under the federal Constitution.⁶⁵

In light of this history, it is simply a mistake to call patents either a form of government regulation or subsidy when the Patent Act treats them as a grant. In particular, a “restraint” does not give a party the right to license or sell the subject matter. It just says what the restricted party may not do. But clearly the value of patents comes in large measure from the ability to introduce them into commerce by voluntary transactions. On this score, I take the position, reflected in nineteenth-century cases,⁶⁶ that transacting parties to any patent deal should be able to attach what terms and conditions they wish on patents, so that the original owner can control the devolution of property rights, much

Court said, “[t]he franchise which the patent grants consists altogether in the right to exclude every one from making, using or vending the thing patented without the permission of the patentee” (emphasis in original)).

64. See *id.* at 172 (describing the “[r]ights to make, use, or vend” as “‘natural’ or common law rights,” and going on to say that “[s]ince [these rights] do not involve the exercise of any right to exclude, they are not and cannot be the exercise of any right given by the patent statutes”).

65. Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972):

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. at 577. Note that the full composition of patents (and copyrights) is a composite of state and federal law.

66. See, e.g., Bement v. Nat’l Harrow Co., 186 U.S. 70, 88–89 (1902) (“The plaintiff, according to the finding of the referee, was at the time when these licenses were executed the absolute owner of the letters patent relating to the float spring tooth harrow business. It was, therefore, the owner of a monopoly recognized by the Constitution and by the statutes of Congress. An owner of a patent has the right to sell it or to keep it; to manufacture the article himself or to license others to manufacture it; to sell such article himself or to authorize others to sell it.”).

as the owner of land can do so through covenants and easements.⁶⁷ To call these robust grants mere restrictions on the rights of others makes no more sense for intellectual property than it does for land grants, which also restrict other people from trenching on the exclusive rights of the grantee. Indeed, any recognition of private property necessarily restricts the ability of others by limiting their natural rights to wander unimpeded around the face of the globe.⁶⁸ The simple point here is that Jefferson is surely right to say that patents require a government grant. But he has not said, nor could he say, that once the grant is given patents are not protected to the same degree as common law rights of property. The positive law, as it were, has filled any gap in the common law.

Clement, Lemley, and others writing from this point of view are also wrong to think that the natural-law tradition at common law does not have the same utilitarian foundations as it does for patent law. For starters, the only reason why patents cannot be property rights “in nature” is that nature does not have social institutions that allow for these rights to be defined, recorded, and enforced. Indeed, early on, without the existence of reproducible technologies, there would be no reason for a patent law at all. But by the same token, it must be observed that in a state of nature the property rights that are obtained by occupation—first possession—of things that were unowned in the state nature did not follow from any ineluctable law that said such forms of property had to be recognized.⁶⁹ There is indeed a huge, long-standing literature that attacks the very notion that any given individual can use his unilateral power of possession to subject something to private ownership without the consent of others.⁷⁰ Thus, many

67. Richard A. Epstein, *The Disintegration of Intellectual Property? A Classical Liberal Response to a Premature Obituary*, 62 STAN. L. REV. 455, 503–08 (2010). The case law tends to run the other way, as in *Quanta Computer, Inc. v. LG Electronics, Inc.*, 553 U.S. 617, 637–38 (2007) (adopting the “exhaustion” doctrine to bar patentee’s suit against the subsequent lawful purchaser of the patented item).

68. For a discussion of these parallels, see generally Richard A. Epstein, *Liberty Versus Property? Cracks in the Foundation of Copyright Law*, 42 SAN DIEGO L. REV. 1 (2005).

69. For the basic texts, see G. INST. 2.66 (W.M. Gordon & O.F. Robinson trans., 1988); J. INST. 2.1.12 (J. B. Moyle trans., 5th ed. 1913).

70. See, e.g., RICHARD SCHLATTER, PRIVATE PROPERTY: THE HISTORY OF AN IDEA 130, 154 (1951) (“In fact, the ‘own’ which the laws of property protect is whatever an individual has managed to get hold of, and equality of right, applied to property, means only that every man has an equal right to grab. . . . The problem, then, was to show how it came about that when one man took a portion of the common stock, the rest of mankind was obliged to respect that portion as his private property.”). See also

people erroneously think that the occupation of any tract of land is a usurpation of the rights of others to use that property. This mistake finds its precise analogue in Clement’s work when he claims:

The Supreme Court has also been a consistent voice in the chorus stressing that patents represent a derogation from the traditional rights of others to use their property and energies in economic pursuits free from government-imposed monopolies. As the Court put it in *United States v. American Bell Telephone Co.*, 128 U.S. 315, 370 (1888), “[t]he United States, by issuing the patents . . . , has taken from the public rights of immense value, and bestowed them upon the patentee. In this respect the government and its officers are acting as the agents of the people, and have, under the authority of law vested in them, taken from the people this valuable privilege, and conferred it as an exclusive right upon the patentee.” Thus, the Court has long explained that unlike traditional forms of property, patents find their justification only in the benefits they contribute to the public—and that the rights of a patent holder should therefore be defined so as to maximize the benefit to the public.⁷¹

Hence his claim—that patent rights are somehow “unlike traditional property rights” insofar as they need a utilitarian justification while property rights in land do not—is to wholly misunderstand the intellectual history of private property rights. As I wrote many years ago, it is a mistake to think that natural law rights somehow survive and prosper even though they have no utilitarian foundations.⁷² The truth is quite the opposite: the creation of exclusive rights in land works, because once agriculture becomes the dominant means of production, it is necessary to have permanent rights in land in order for people who sow to know that they will be able to reap—a point well understood by Blackstone.⁷³ The only way in which this can be done is to give secure property rights to others to treat the entire earth as a common open to their use. Clement writes:

That condition underscores what the Framers and their forebears well understood: patent rights are not natural rights, they do not come from the common law, and they have no basis in the tradition of property rights tracing back to John Locke. To the

LAWRENCE C. BECKER, *PROPERTY RIGHTS: PHILOSOPHICAL FOUNDATIONS* (1977).

71. Clement, *supra* note 28, at 8. See *infra* pp. 727–28 for a discussion on the inexact equivalence of exclusive rights compared to monopolies.

72. See generally Epstein, *supra* note 21 (explaining that the connection between natural rights and utilitarian concerns has faded over time).

73. 2 WILLIAM BLACKSTONE, *COMMENTARIES* *6–7.

contrary, a patent is a form of government regulation that *restrains* members of the public in the exercise of their natural rights to liberty and property—rights that *do* come from nature and *are* protected by the common law.⁷⁴

Clement misses the close parallelism between the law of land and the law of intellectual property, because private ownership of land restricts the ability of others in the exercise of the natural rights to move across areas, and the general proposition here is that the necessity of privatization to give incentive to develop works as much for land as it does for intellectual property.⁷⁵ The basic conceit is that the overall improvements in product are so vast that one does not have to worry about any distributional constraint—precisely because the right of occupation is open to all individuals and thus does not obviously favor one person over another. Clearly this assumption can be subject to attack as human density increases, but there is little doubt that the so-called natural law uses the same arguments to get private property rights in land as it does for intellectual property. That is as utilitarian as it gets.

It is also worth noting that utilitarian theories fully understand that regimes of private ownership cannot extend to all physical elements. Early on in Book II of Justinian's *Institutes*, for example, he recognizes a class of common property—water, air, the beach—that cannot be reduced to private ownership.⁷⁶ And it is only on utilitarian grounds that it is possible to explain why this distinction is drawn in the way it is, and why it continues to endure to this very day. Rivers and trails and highways are long and skinny, and they are only of value if they allow people to commute from one place to another. Hence where the risks of holdout are high, property rights tend to be held in common, with narrow exceptions made for private use—you may take refuge on the beach during a storm.⁷⁷ But where the need for production is greater, private property with the right to exclude becomes the dominant mode—again with exceptions in cases of necessity where one person might take refuge in the hut or the dock of another in times of stress. Exactly that distribution of rights exists for intellectual property, for all the individual branches like patents and copyrights presuppose that there is a core of public domain elements.⁷⁸ The parallel

74. Clement, *supra* note 28, at 1.

75. See Epstein, *supra* note 68, at 16.

76. J. INST. 2.1.pr. to 2.1.1 (J.B. Moyle trans., 5th ed. 1913).

77. See *id.* at 2.1.5; see also John Alan Cohan, *Private and Public Necessity and the Violation of Property Rights*, 83 N.D. L. REV. 651, 655–62 (2007).

78. For discussion of the parallels, see Richard A. Epstein, *The Basic Structure of Intellectual Property Law*, in THE OXFORD HANDBOOK OF INTELLECTUAL PROPERTY LAW 24, 27–29 (Rochelle C. Dreyfuss & Justine Pila eds., 2018).

structures in both areas make it quite clear that intellectual property rights are indeed full-fledged property rights, for which full protection is appropriate.

III. THE PARTICULARS OF THE PATENT CLAUSE

This general orientation sets the stage for an examination of the various parts of Article I, Section 8, Clause 8.

A. To Promote the Progress of Sciences and the Useful Arts.

The opening words of the Patent Clause are “[t]o promote the Progress of Science and useful Arts,”⁷⁹ which clearly operates as a limitation on the overall scope of the grant. The use of the phrase “useful [a]rts” is a cross between ordinary English and established historical practice. In particular, it has been written that the notion of useful art is bound up with the Greek term “*techne*,” which appears to cover at the very least such skills as architecture and mechanical drawing, and which is evoked when patent law refers to “persons having ordinary skill in the art” (often abbreviated as PHOSITA)—a general test that is not, and cannot be, tied to any particular field.⁸⁰ Yet it is not only important to figure out what these initial words include, but also to gain some sense of what they exclude. The strongest evidence comes from Adam Mossoff, who explains that the Crown granted patents for exclusive rights for many reasons that had nothing to do with the promotion of either invention or the useful arts.⁸¹ Most notably, patents could be (and were) used to secure to private parties exclusive rights to

79. U.S. CONST. art. I, § 8, cl. 8.

80. Michael Abramowicz & John F. Duffy, *The Inducement Standard of Patentability*, 120 YALE L.J. 1590, 1604 (2011); see Karl B. Lutz, *Patents and Science: A Clarification of the Patent Clause of the U.S. Constitution*, 32 J. PAT. OFF. SOC’Y 83, 87 (1950); Sean M. O’Connor, *The Lost “Art” of the Patent System*, 2015 U. ILL. L. REV. 1397, 1401–06 (2015). O’Connor notes: “Useful arts” originally referred to the practical skills and methods of manufacture and craftsmanship taught as vocational subjects (i.e., ways of *making*) as distinct from “liberal arts” which were academic subjects taught for intellectual development (i.e., ways of *thinking*). *Id.*

For an exhaustive modern explanation of the relationship between art and *techne*, see *id.* at 1399. (“The intellectual worldview in the West long distinguished the mechanical arts from both sciences and liberal arts (and later the fine arts). Patent systems emerged during the Renaissance to incentivize invention, disclosure, and commercialization of advances in the ‘useful’ (i.e., practical, mechanical) arts. In the United States, Madison and the Framers likely relied in substantial part on the famous French *Encyclopédie* construction of ‘art’ as artisanal skill to authorize Congress to grant exclusive rights to promote the progress of such skills.”).

81. Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550–1800*, 52 HASTINGS L.J. 1255, 1259–64 (2001).

import certain goods from overseas for sale in the United Kingdom.⁸² These patents were in no sense a quid pro quo for any invention or discovery; the patents were for things that had already been invented and discovered.⁸³ Accordingly, these transactions did not secure the advancement of human knowledge and well-being by rewarding private parties for their new inventions and discoveries. Mossoff offers an account of how Queen Elizabeth I issued patents that were in fact complex bargains with private individuals, whereby a party who received a letters patent from the Crown got the exclusive right to introduce the new substance into the realm in ways that did not conflict with established industries, and which served to train apprentices to work in the relevant field.⁸⁴ This theme is a variation on policies for the protection of infant industries. The practice also created the ability to create monopoly rents, which was not offset by any technological advance. As Mossoff writes,

[L]etters patent had nothing to do with legal rights or even inventions per se, but rather they represented royal privileges that supported royal policies. In this case, the royal policy was the introduction of new industries and manufactures to the realm, and the royal privilege was a monopoly grant ascertained through a letter patent.⁸⁵

Economically, the exclusive franchise for importation should be regarded as an alternative technique for the Crown to raise revenues by imposing tariffs on goods imported from abroad, but that simple taxing tool did not have the complex effects associated with the conditions attached to the letters patent.⁸⁶ The use of the introductory phrase, “[t]o promote the Progress of Science and useful Arts,” is thus best understood as an effort to prevent the use of patents as a franchise tool or revenue device that would distort the competitive processes in the United States. None of the patents issued under the Patent Act of 1790

82. *Id.* at 1259–60.

83. *See id.* at 1259–61; OREN BRACHA, *OWNING IDEAS: THE INTELLECTUAL ORIGINS OF AMERICAN INTELLECTUAL PROPERTY, 1790–1909*, at 18 (2016).

84. Mossoff, *supra* note 81, at 1261–63.

85. *Id.* at 1261.

86. *See id.* at 1259–64; *see also* Alfred Rive, *A Brief History of Regulation and Taxation of Tobacco in England*, 9 WM. & MARY Q. 1, 4–5 (1929); Stephen D. Billington, *Patent Costs and the Value of Inventions: Explaining Patenting Behaviour between England, Ireland and Scotland, 1617–1852*, at 9 (Queen’s University Centre for Economic History, Working Paper No. 2018–10, 2018), http://www.queh.org.uk/uploads/1/0/5/5/10558478/wp_18-10.pdf [<https://perma.cc/P8CP-K7X2>] (refuting that patents were primarily meant to provide revenue to the Crown).

had anything to do with franchises issued to importers,⁸⁷ for the language of the statute tracks the language of the Patent Clause insofar as it is limited to people who “have invented or discovered any useful art.”⁸⁸ There could be some difficulty in figuring out the range of useful arts, which from the scientific context, like draftsmanship and model building, probably did not mean to include literature or the decorative or dramatic arts within the scope of the constitutional grant, general literary and artistic endeavors are protected as writings.

Yet the one position that is surely incorrect is the suggestion that this initial limitation in any way was meant to express any form of disfavor to those patents covered by the 1790 Act, all of which remain comfortably protected within the confines of the constitutional provision. Paul Clement seriously misreads the clause when he writes:

The patent system must “promote the Progress of Science and useful Arts,” rather than the private advantage of inventors and speculators who do more to impede than to advance such progress. Particularly problematic are systemic flaws that lead the government to issue scores of patents that serve no legitimate end.⁸⁹

His fanciful reference to inventors and speculators is intended to plant the suggestion that somehow a large subset of persons who meet the requirements of the 1790 Patent Act should be condemned if they fall into the latter category. But the short answer to this contention is that the substantive requirements to obtain a patent supply all the indicia that the patent granted is one that serves a sensible social purpose. Therefore, uncertainty cuts in both directions, so that the Clause could be read to indicate an uneasiness about using ad hoc tools to block sensible patents that indeed do advance the useful arts.

More concretely, there are no useful inventions or improvements thereon that surreptitiously create some form of illicit speculative gamble. Indeed, Section 6 of the Patent Act does not restrict the parties who can bring the action to the patentees, but it also includes executors and administrators to cover cases where the patent passes either by will or intestacy, or by assignment, which can take place by contract during life, in much the same way as any other asset could be transferred.⁹⁰ The basic theory is the same as it is for all other forms of property, which is that assignment is encouraged because it tends to move any

87. See BRACHA, *supra* note 83, at 220.

88. Patent Act of 1790, ch. 7, § 1, 1 Stat. 109, 109–11.

89. Clement, *supra* note 28, at 2.

90. Patent Act of 1790 § 6.

asset, patents included, from a lower to a higher use.⁹¹ There is throughout the patent law a studious effort, fully evidenced in the 1790 Act, which conditions the grant of a patent on some showing that it will find commercial success or turn a profit for its owner.⁹² Clearly the inventors are not likely to patent various devices if they have no commercial value, so the system of self-selection is what determines which subjects get patented and which do not. It is a grossly misleading statement to assume that the introductory clause, which was designed to deal with patents to non-inventors, is somehow there in order to prevent “the government [from] issu[ing] scores of patents that serve no legitimate end,” a claim for which Clement offers no evidence of any kind.⁹³

Nor is it accurate to claim, as Clement does, that the initial clause should shape the way the Patent Clause should be read because Article I, Section 8, Clause 8 “is alone among Congress’ enumerated powers in that the Framers conditioned it on the performance of a specific public purpose.”⁹⁴ Those patents that are issued in accordance with the norms stated in the statute satisfy that test, and meet that purpose. The patent law operates at the wholesale level, and does not impose any special limitations to eliminate certain patents on the kinds of grounds that Clement nowhere specifies. Indeed, the proposition that the system is rife with dubious patents has been attacked powerfully in many articles.⁹⁵ The creation of this patent system itself is imbued with a critical social purpose. Indeed, the great danger is that if excessive limits are imposed on patent grants, the system will fail its great social purpose, as many valid patents will be unfairly invalidated or given insufficient remedial protection, which is what happens with *Alice/Mayo* on the one side, and *eBay* on the other.⁹⁶ Nothing suggests that the

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91. See Harold Demsetz, *Some Aspects of Property Rights*, 9 J.L. & ECON. 61, 62 (1966).
92. Patent Act of 1790 §§ 1, 2, 4; see Chauncey Smith, *A Century of Patent Law*, 5 Q.J. ECONOMICS 44, 61–64 (1890).
93. Clement, *supra* note 28, at 2.
94. *Id.* at 6–7.
95. See, e.g., Gregory Dolin, *Dubious Patent Reform*, 56 B.C. L. REV. 881, 883 (2015) (“Importantly, more opportunities to challenge issued patents also means more opportunities to engage in abusive practices to undermine legitimate patent rights.”). Dolin then shows how the efforts to rid the system of low-quality patents ignore the costs of its cure. *Id.* at 897–99.
96. *Id.* at 882–83; Edward Van Gieson & Paul Stellman, *Killing Good Patents to Wipe out Bad Patents: Bilski, the Evolution of Patentable Subject Matter Rules, and the Inability to Save Valuable Patents Using the Reissue Statute*, 27 SANTA CLARA COMPUT. & HIGH TECH. L.J. 403, 439 (2010); *Alice Corp. v. CLS Bank Int’l*, 573 U.S. 208, 212, 216–18, 225–26 (2014); *Mayo Collaborative Servs. v. Prometheus Laboratories, Inc.*, 566 U.S. 66, 70–73,

introductory phrase of the Patent Clause was intended to signal that patents are less than full-fledged property rights.

B. “By securing . . . the exclusive right.”

The second component of the Patent Clause provides for “securing” exclusive rights for authors and inventors. The question here is what meaning should be attached to that phrase. Start with the term “security,” whose standard definition connotes freedom from risk, fear, or anxiety, typically without specifying either the interest to be protected or the source of the threat.⁹⁷ More concretely for these purposes, the term in the eighteenth century was closely associated with the security of possession.⁹⁸ That notion is prominent in the writings of David Hume, who writes: “[I]t is well known, that men’s happiness consists not so much in an abundance of [the commodities and enjoyments of life], as in the peace and security with which they possess them.”⁹⁹ Or elsewhere: “Who sees not, for instance, that whatever is produced or improved by a man’s art or industry ought, for ever, to be secured to him, in order to give encouragement to such *useful* habits and accomplishments?”¹⁰⁰

The point here is simple enough. If persons do not have the security of possession, then others are able to take what they have with impunity and turn it to their own advantage, until they too are forced out of their possession. The issue was so important historically that it was commonly said that the protection of real estate was heavily organized around the notion of possession. An example is the writ *novel disseisin* (recent dispossession), which allowed the party dispossessed of property to regain it from the party who took it without having to show ownership of the property in question.¹⁰¹ That tension between possession and

77–78, 82, 87, 92 (2012); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391–94 (2006).

97. See, e.g., *Security*, DICTIONARY.COM, <https://www.dictionary.com/browse/security> [<https://perma.cc/E6F5-G27S>] (last visited Oct. 10, 2020); *Security*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/security> [<https://perma.cc/YCP2-EDB6>] (last visited Oct. 3, 2020).

98. See 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1777).

99. 1 DAVID HUME, ESSAYS AND TREATISES ON SEVERAL SUBJECTS 49 (n. ed. 1825) (1742).

100. DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS 28 (1751).

101. MAITLAND, *supra* note 39, at 22–23. The so-called possessory assizes also included *mort d’ancestor*, which allowed the descendant of the decedent to recover possession of the land from an interloper who took possession of it after the death of the ancestor but before the ancestor could enter the property in possession. *Id.* at 22–25.

ownership was demonstrated by the proposition that in *novel disseisin* it was not part of the plaintiff's prima facie case to show that he had a higher title to the property.¹⁰² The use of an expeditious remedy to restore possession had the great advantage that in most cases it put an end to the dispute, for in the large run of cases the party in possession was also the true owner of the property in dispute.¹⁰³ The simplification thus allowed the true owner to win while sparing him the need to trace back title to some indisputable grant, such as one from the Crown. And in those where the title was in dispute, the dispossessor could, after he was required to surrender position, maintain an action called the Writ of Right to establish that superior title in the few cases where ownership and possession were separated.¹⁰⁴

Note that in all these cases the remedy for the dispossession was the return of the possession.¹⁰⁵ It was never the case that the party who was forced off the land was told to make do with a sum of money that represented the fair market value of the property in question. These private forced purchases would have routinely circumvented voluntary market transactions, leaving the true owner out in the cold with a genuine uncertainty of whether he would be paid in due course a suitable amount, which is hard to determine with land because of its inherent subjective value. Damages are thus a wholly inadequate remedy, and the widescale situation in which dispossession routinely occurs is ample evidence that the security of possession is necessary for civil peace in society.

To be sure, over time, the notion of “clean-up” damage for the loss of interim use, or for the partial destruction of the property in question, was made part of the overall picture.¹⁰⁶ And surely if dispossession was followed by the destruction of structures or the removal of valuable minerals, a full system of rewards would have to strip the defendant of those gains in order to make sure that this willful circumvention of the legal rules did not have disastrous collateral consequences.¹⁰⁷ Thus it is often the case that a mixture of injunctive relief and damages is

102. *See id.* at 22–23.

103. *See* Tessa Shepperson, *The Petty Assizes and the Development of the Jury System*, HIST. L. BLOG, <http://historyoflaw.co.uk/petty-assizes-development-of-jury-system/> [https://perma.cc/G22P-MS5N] (last visited Oct. 10, 2020).

104. *Id.*; MAITLAND, *supra* note 39, at 23–24.

105. *See* MAITLAND, *supra* note 39, at 22–25.

106. Brian M. Hoffstadt, *Dispossession, Intellectual Property, and the Sin of Theoretical Homogeneity*, 80 S. CAL. L. REV. 909, 915–16 (2007).

107. *See* A. Leo Levin, *Equitable Clean-Up and the Jury: A Suggested Orientation*, 100 U. PA. L. REV. 320, 349–52 (1951); *see also* *Wooden-ware Co. v. United States*, 106 U.S. 432, 434, 437 (1882).

required, so that it becomes a mistake to follow the analysis of Guido Calabresi and A. Douglas Melamed, who posit that injunctions and damages are opposites, not complements, in particular cases, and then proceed to show the serious holdout questions that arise from injunctions and the risks of misappropriations that arise from damages.¹⁰⁸ As I have written elsewhere:

[U]nlike the oversimplified model of damages *versus* injunctive relief developed by Professors Guido Calabresi and Douglas Melamed, the use of injunctions and damages are more often complements than substitutes. The injunctive side of the equation allows for conditional injunctions, bound by levels and time of emissions. The damage side picks up the slack where the injunctive relief backs off. By starting with the former and moving cautiously to the latter, the total level of dislocations is far lower than moving to a corner position in which one of these remedies is adopted to the exclusion of the other.¹⁰⁹

This discussion sets the stage for the protection of patents. It is commonly understood that intellectual property is in some sense a non-rivalrous good.¹¹⁰ Unlike the situation with land, an invention can be used both by the party who owns it and by some outsider. The use by the second party, or indeed any number of second parties, does not prevent any person from using it himself. This argument has often been used to suggest that no patent protection is needed at all, because so long as the owner is not forced to abandon use of the patented technology, why worry if someone else uses it?¹¹¹ Yet that argument does not meet the constitutional standard, because the Constitution is not limited to protecting the right of an inventor to use his own inventions. It also protects the *exclusive* right to those inventions, which presumptively means that no one else is allowed to use that invention in another physical instantiation without the permission of the owner.

108. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1115–23 (1972).

109. Richard A. Epstein, *Positive and Negative Externalities in Real Estate Development*, 102 MINN. L. REV. 1493, 1509 (2018) (footnotes omitted).

110. See, e.g., Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 GEO. L.J. 1771, 1797 (2006).

111. See Stan Liebowitz, *Intellectual Property*, LIBR. ECON. & LIBERTY, <https://www.econlib.org/library/Enc/IntellectualProperty.html> [<https://perma.cc/P9N5-ZY6U>] (last visited Oct. 18, 2020); Brink Lindsey & Daniel Takash, *Why "Intellectual Property" is a Misnomer*, NISKANEN CTR., Sept. 10, 2019, at 5–8, 10–13, https://www.niskanencenter.org/wp-content/uploads/2019/09/LT_IPMisnomer-2-1.pdf [<https://perma.cc/UQ8F-C8T6>].

Clearly, that exclusive element really matters, for if others are entitled to use the invention freely, then they are also free to sell it to other individuals, who can also make use of the technology without denying to its owner the right to exclusive use. In their paper, *Why 'Intellectual Property' is a Misnomer*,¹¹² Brink Lindsey and Daniel Takash take the position that I can still sing a tune that I wrote even if my neighbor may sing it as well.¹¹³ That is clearly a case of copyright, and it is worth noting that nobody who has ever sold sheet music or records has insisted that the party who buys it never sing the song privately—a total absurdity, as holding one liable for copyright infringement for a *public* performance lies at the heart of copyright violations.¹¹⁴ Rather, the expectation is that the gains from sale will be increased if the buyer is entitled to make that private use. Indeed, the social expectation with songs is that the exclusive right of copyright never prevents that from taking place.

But there are two decisive objections to this example. The first is that it is quite a different proposition if the outsider goes into the business of selling sheet music or recordings himself. He can prepare these at a lower cost than the original composer because he need not incur the cost of composition, but only the costs of selling the completed work. This creates a complete inversion in the marketplace, where the returns from sale are greater for the interloper than for the original composer. Exactly the same thing takes place with inventions. Absent patent protection, commercialization for sales to third parties is more cheaply done by the infringer than by the inventor—which clearly has massive impacts on the willingness to create the invention in the first place.¹¹⁵ And, unlike the copyright, inventions do not have that nice feature that everyone can sing along. It is of course the case that you can lend your patented tool to your neighbor, which increases the amount that can be commanded on the original sale. But again, the right of commercialization—making a new article of that same tool for sale by the non-inventor—is the death knell to an invention because it puts the inventor at a systematic disadvantage to the interloper. Lindsey and Takash wholly ignore this important competitive situation.

At this point, it becomes clear why the Patent Clause refers to exclusive rights: it is only that configuration that allows the inventor (or assignee) to sue for an injunction that stops unauthorized commercialization and prevents the collapse of innovation in product and service markets. Once the injunction is in place, it means the interloper

112. Lindsey & Takash, *supra* note 111.

113. *Id.* at 5–7.

114. See Copyright Act of 1976, 17 U.S.C. §§ 101, 106 (2018) (containing extensive provisions that govern various kinds of public performances).

115. See Maureen K. Ohlhausen, *Patent Rights in a Climate of Intellectual Property Rights Skepticism*, 30 HARV. J.L. & TECH. 103, 147 (2016).

presumptively can be stopped from making or selling the infringing product, which is the first step in stopping the loss of patent rights. But injunctions in patent cases have to share many of the attributes that they have in nuisance and other cases, because they cannot be considered automatically proper in the full range of cases. For example, injunctions are often insufficient in those cases in which the inventor is unaware that some infringing goods have already been sold to third persons who may or may not know about their infringing nature.

At this point, it is quite clear that the constitutional text does *not* offer a complete guide as to what remedial choices are appropriate. That point is recognized by Section 4 of the Patent Act of 1790, which contains additional remedies that explicitly vindicate “the sole and exclusive right” of the patentee and various assignees by holding that:

[E]very person so offending, shall forfeit and pay to the said patentee or patentees, his, her or their executors, administrators or assigns such damages as shall be assessed by a jury, and moreover shall forfeit to the person aggrieved, the thing or things so devised, made, constructed, used, employed or vended, contrary to the true intent of this act, which may be recovered in an action on the case founded on this act.¹¹⁶

These non-injunctive remedies were, if anything, strengthened in both the 1793 Patent Act which allowed at least three times the standard royalties,¹¹⁷ and in the 1800 Patent Act which allowed for “a sum equal to three times the actual damage sustained.”¹¹⁸ This tightening set of damage awards is flatly inconsistent with the view that the Framers treated patent rights as second-class rights. Indeed, the purpose of all these damages is to replicate the same objective that is sought in cases of willful conversion of tangible objects, where the willful wrongdoer is forced to turn over the compensation that he receives without getting any offset for the costs needed to produce the object in question.¹¹⁹ The purpose of this rule is to create strong incentives not to take property by making sure the willful infringer is always left worse off after the breach than if no breach had occurred at all.¹²⁰ The rule was different in cases of innocent conversion—that is, those situations where there was an intention to take the property in question, but in

116. Patent Act of 1790, ch. 7, § 4, 1 Stat. 109, 111.

117. Patent Act of 1793, ch. 11, § 5, Stat. 318, 322 (“[A] sum, that shall be at least equal to three times the price, for which the patentee has usually sold or licensed to other persons, the use of the said invention . . .”).

118. Patent Act of 1800, ch. 26, § 3, 2 Stat. 37, 38.

119. *See, e.g.*, *Wooden-Ware Co. v. United States*, 106 U.S. 432, 434–37 (1882); *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1928–29 (2016).

120. *Wooden-Ware Co.*, 106 U.S. at 437; *Halo Elecs.*, 136 S. Ct. at 1928–29.

the honest belief that the taker was either the owner of the property or had received a license from the owner to take the goods in question. There, deterrence is not an issue, so the emphasis switches to ensuring that the owner of the property is not unjustly enriched by the innocent contribution of the good faith improver.¹²¹

These rules are well-entrenched for physical property, but it is unclear from the text of Section 4 whether some adjustments in the remedial structure should be taken in the few cases of innocent infringement. It is, in contrast, clear that while the 1790 Patent Act does not refer to an injunction, it can hardly be said by way of gloss that this remedy should be ruled out of bounds as a matter of course just because damages and seizure of goods exist as potential remedies for all cases. At this point it is instructive to note that in Article III, Section 2, it says that “[t]he judicial Power [of the United States] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties,” which surely covers cases under the 1790 Patent Act.¹²² This Clause also makes it clear that an injunction, as a close substitute to the statutory provisions under Section 4, should be allowed to achieve the same end as the statutory remedies in Section 4. It is equally clear that subsequent statutes are well within the constitutional ambit when they offer injunctive relief as part of the standard suite of equitable remedies for any continuing violation of a property right, in parallel to the copyright decision in *Morse v. Reid*.¹²³ Thus the key provision of 35 U.S.C. § 283 rounds out the circle when it says:

The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.

The sensible way to read this provision is to follow the general principles of equity by starting with the use of the injunction, which is in turn modified to take into account exceptional circumstances. An innocent manufacturer, in good faith, could receive the right to sell goods already made. For example, the manufacturer could be allowed to sell existing stock in exchange for the payment of a higher-than-usual royalty within some limited period, even if it is prohibited from making

121. See RESTATEMENT (THIRD) RESTITUTION AND UNJUST ENRICHMENT § 40 & Illus. 14 (AM. LAW INST. 2011); *Wetherbee v. Green*, 22 Mich. 311, 313–14 (1871).

122. U.S. CONST. art. III, § 2, cl. 1; Patent Act of 1790 § 4.

123. See *supra* notes 116–118; *Morse v. Reed*, 17 F. Cas. 873, 873 (C.C.D.N.Y. 1796) (Case No. 9,860); see also John D. Gordan, III, *The First Reported Federal Copyright Case*, 11 L. & HIST. REV. 21, 22 (1993).

new items within the same class. (That option appears to be foreclosed under the 1790 Act.) At this point the infringer has the opportunity to redesign the infringing product to eliminate its infringing conditions. But these “principles of equity”¹²⁴ are not meant to repeal the basic rule that enjoins direct competition from an infringer. Accordingly, the rule in *eBay Inc. v. MercExchange, L.L.C.* bears no relation to the tests for injunctions needed to protect the patent’s exclusive right. The *eBay* test is as follows:

[A] plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.¹²⁵

The exact origin of this test is somewhat mysterious because it is not anchored in any reference to earlier practice. Indeed, earlier practice proceeded along very different lines.¹²⁶ The first two provisions invert the correct analysis, which starts with the presumption that the injunction is the remedy of course and then limits that remedy to avoid any possible abuse of right. This presumption is warranted because damages alone are always inadequate as a sole remedy to deal with future, deliberate patent violations uncertain in scope and severity. Damages reduce the status of the patent holder to that of an unsecured creditor seeking payment that could take years to collect from a party who could, in the interim, secrete assets elsewhere or go out of business. The third *eBay* factor compounds the blunder when it introduces a balance-of-hardships test, which formed no part of any of the earlier rules that treated actual damages, multiples of actual damages, and forfeiture of goods as routine remedies. Hardship may allow for marginal adjustments in the timing and scope of the remedy, but that approach never revisits the question of whether “a remedy in equity” is warranted, when the norm is that such is routinely allowed. And the fourth factor introduces the wild card of the “public interest” on a case-by-case basis, which is contrary to the working presumption that the advancement of knowledge secured by patents makes their protection a matter of the highest public interest. On the proper view, it would take some dire public necessity—when all property rights are routinely

124. 35 U.S.C. § 283 (2012).

125. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

126. See Brief Amici Curiae of 52 Intellectual Property Professors in Support of Petitioners at 2–3, *eBay, Inc. v. MercExchange* 547 U.S. 388 (2006) (No. 05-130), 2006 WL 1785363.

abridged for the duration of the necessity—to suspend the injunction. It should therefore be painfully clear that Paul Clement gets matters grievously out of whack when he writes:

The government has taken a number of steps to address the problems outlined above. These developments include Congress' decision in 2011 to enact inter partes review, which makes it easier for the PTO to identify and cancel patents that were issued in error, and the Supreme Court's decision in [*eBay*], which ensures that patents do not receive favorable treatment compared to traditional property rights when seeking injunctions in court. Together these developments help bring the patent system somewhat closer to the constitutional vision the Framers had for it.¹²⁷

At this point Clement defends the Supreme Court decision in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*,¹²⁸ which allows for the Patent Trial and Appeal Board to reexamine patents after they have been issued.¹²⁹ I have critiqued Justice Thomas's opinion in great detail elsewhere, concluding that he misread *every* case he cited in *Oil States*.¹³⁰ Suffice it to say that the 1790 Act recognized that patents were grants from the United States government. These grants, like grants of real property, vest at the time that they are made, so that the only way in which they can be set aside is in a judicial forum by showing some defect in their formation. Justice Thomas sought to deflect that conclusion by insisting that patents should be regarded as public rights under the doctrine of *Murray's Lessee v. Hoboken Land & Improvement Co.*¹³¹ *Murray's Lessee* applied the public rights doctrine to customs disputes and extended it to cover any case in which a property right had been created pursuant to statute, including, of

127. Clement, *supra* note 28, at 16 (internal citation omitted).

128. 138 S. Ct. 1365 (2018).

129. *Id.* at 1371–72, 1374.

130. Richard A. Epstein, *The Supreme Court Tackles Patent Reform: Post-Decision Article: Inter Partes Review Under the AIA Undermines the Structural Protections Offered by Article III Courts*, 19 FEDERALIST SOC'Y REV. 132 (2018). For two earlier companion pieces, see Richard A. Epstein, *The Supreme Court Tackles Patent Reform: Pre-Argument Article: Why the Supreme Court Should End Inter Partes Review in Oil States*, 19 FEDERALIST SOC'Y REV. 116 (2018); Richard A. Epstein, *The Supreme Court Tackles Patent Reform: Post-Argument Article: Further Reflections on the Oil States Case after Oral Argument Before the Supreme Court*, 19 FEDERALIST SOC'Y REV. 124 (2018).

131. 59 U.S. (18 How.) 272, 284 (1856); *Oil States Energy Servs.*, 138 S. Ct. at 1373–74 (quoting *Murray's Lessee*, 59 U.S. at 284).

course, patents.¹³² By Justice Thomas's logic, the entire judicial system could be ousted in all patent disputes, not just at the trial level but also on all appeals. Yet clearly the judicial power must cover statutory causes of action, for the entire system of separation of powers is at an end if the resolution of all disputes arising under statute can be removed to administrative tribunals that have none of the safeguards of Article III courts.

To reach his result, Justice Thomas gave a highly inaccurate account of the relevant precedents, which all held that once the grant—whether of land or a patent—was final, it could be set aside only in a judicial proceeding.¹³³ Thus, the Supreme Court in *McCormick Harvesting Machine Co. v. Aultman*¹³⁴ could not have been more explicit when it wrote:

It has been settled by repeated decisions of this court that when a patent has received the signature of the Secretary of the Interior, countersigned by the Commissioner of Patents, and has had affixed to it the seal of the Patent Office, it has passed beyond the control and jurisdiction of that office, and is not subject to be revoked or cancelled by the President, or any other officer of the Government. *United States v. Schurz*, 102 U.S. 378; *United States v. Am. Bell Telephone Co.*, 128 U.S. 315, 363. It has become the property of the patentee, and as such is entitled to the same legal protection as other property. *Seymour v. Osborne*, 11 Wall. 516; *Cammeyer v. Newton*, 94 U.S. 225; *United States v. Palmer*, 128 U.S. 262, 271, citing *James v. Campbell*, 104 U.S. 356.

The only authority competent to set a patent aside, or to annul it, or to correct it for any reason whatever, is vested in the courts of the United States, and not in the department which issued the patent. *Moore v. Robbins*, 96 U.S. 530, 533; *United States v. Am. Bell Telephone Co.*, 128 U.S. 315, 364; *Michigan Land and Lumber Co. v. Rust*, 168 U.S. 589, 593. And in this respect a patent for an invention stands in the same position and is subject to the same limitations as a patent for a grant of lands.¹³⁵

All of the cited cases stand for the propositions cited, and Justice Thomas was plainly wrong to treat those decisions as though they were

132. *Murray's Lessee*, 59 U.S. at 284–85.

133. *Oil States Energy Servs.*, 138 S. Ct. at 1376 (citing *McCormick Harvesting Mach. Co. v. Aultman*, 169 U.S. 606, 609 (1898); *United States v. Am. Bell Tel. Co.*, 128 U.S. 315, 364, 371 (1888)).

134. 169 U.S. 606 (1898).

135. *Id.* at 608–09.

quirks of the Patent Act of 1870.¹³⁶ Rather, the principle that patent grants confer property rights unalterable by administrative agencies is a general one that applies to all transactions, regardless of which particular patent statute is in effect at any given time. “But those cases were decided under the Patent Act of 1870.”¹³⁷ His reasoning gets it exactly backwards. The Patent Act of 1870 did not include such a provision because it was widely understood that such a provision was unconstitutional. *Oil States* was wrongly decided precisely because it rejected the notion that patent grants create exclusive property rights, just as was intended by the constitutional Framers.

C. Limited Terms.

The last relevant feature of the constitutional design for patents is the requirement that these patents be only for limited terms.¹³⁸ That limitation was inserted because it tracked past practices for patents. The source of the limitation is both simple and profound. A patent, by creating an exclusive right, does limit the use of a given invention; this counts as a social loss offset by the incentive to invent. It should be stressed that an exclusive right is not a monopoly unless there are no close substitutes for an invention, just as the exclusive right to 100 Main Street does not make it the only house in town. And the patent law is so structured that one cannot patent a field but only an invention, which leaves the way open for new entrants who can take advantage of the knowledge that the successful patentee had to include in his patent application.¹³⁹ The existence of an exclusive right does not, of course, eliminate the prospect that the holder of the device will receive Ricardian rents, which are always obtainable in competitive markets, by obtaining some of its inputs at below-market prices.¹⁴⁰ This

136. *Oil States Energy Servs.*, 138 S. Ct. at 1376 (“That version of the Patent Act did not include any provision for post-issuance administrative review.”).

137. *Id.*

138. U.S. Const. art. I, § 8, cl. 8.

139. See *General Information Concerning Patents*, U.S. PAT. & TRADEMARK OFF. (Oct. 2015), <https://www.uspto.gov/patents-getting-started/general-information-concerning-patents#heading-4> [<https://perma.cc/7HCB-TN2L>].

140. Suppose there are two parties who own coal, one of whose coal is close to the surface and therefore easy to extract at a cost of \$10. The other’s coal lies deeper and can be extracted at the cost of \$20. If the price of coal is \$25, the first earns \$10 in Ricardian rents that the second does not, but both sell at the competitive price of say, \$25. The situation is quite different if all coal miners could agree on a price of \$30, which would create distortions. Note that if the first party sells his property to another, the sales price will include the present discounted value of the future Ricardian rents from the property so that his buyer will only earn the normal competitive rate of return. Note also that Ricardian rents do not create an umbrella for new entry, but

point seems implicitly acknowledged in the nineteenth-century cases that distinguished between exclusive rights, which are usually pro-competitive, and monopoly power, which is definitionally anti-competitive.¹⁴¹

Yet there are cases in which the new patented object does not face any direct competitors, and thus will be able to extract a set of monopoly rents. The limitation of terms is a limit on that power as well: after the time has run, others can make the invention so that the original patentee forgoes the initial benefit of his exclusive right. The exact period of time is not specified in the Constitution, but it seems clear that a limited term cannot be, say, a million years, which is functionally indistinguishable from perpetual ownership. The 1790 Patent Act set the term at a maximum of fourteen years, with no allowance for periods of renewal.¹⁴² This stands in stark contrast to the far longer periods allowed for copyrights, which at present under the Copyright Term Extension Act may extend up to 70 years after an author's death: the commercial context offers no strong rationale to tie the duration of a copyright to the life of the inventor.¹⁴³ For patents, there is nothing magical about fourteen years, and in some cases, as with pharmaceutical patents covered by the Hatch-Waxman Act of 1984, allowances have to be made for those patented devices that cannot be sold because they are tied up in reviews by the Food and Drug Administration.¹⁴⁴ Yet even if copyrights can run too long, the difference between patents and copyrights is evident because there are few inventions that will not be discovered in the ordinary course of business. So, for example, a ninety-nine-year patent period for a telephone would overlook the simple fact that there were rival applications before the Patent Office when Alexander Graham Bell received his patent.¹⁴⁵ So, the patent is intended to speed up production by awarding protection only for the rate at which discovery is usefully hastened.

monopoly rents do. See Joseph Shaanan, *Ricardian or Monopoly Rents? The Perspective of Potential Entrants*, 32 E. ECON. J. 19, 19–20 (2006).

141. See *supra* note 36 and accompanying text.

142. Patent Act of 1790, ch. 7, § 1, 1 Stat. 109, 109–10.

143. Copyright Term Extension Act, Pub. L. No. 105–298 § 102, 112 Stat. 2827, 2827–28 (1998) (codified at 17 U.S.C. § 302).

144. Drug Price Competition and Patent Term Restoration (Hatch-Waxman) Act, Pub. L. No. 98–417 § 201, 98 Stat. 1585, 1598 (1984) (codified at 35 U.S.C. § 156).

145. *Who is Credited With Inventing the Telephone?*, LIBR. OF CONG. (Nov. 19, 2019), <https://www.loc.gov/everyday-mysteries/item/who-is-credited-with-inventing-the-telephone/> [<https://perma.cc/8NEC-CMB9>].

The system of limited terms makes perfectly good sense, but it does not detract from the observation that patents, so limited, are fully vested property rights in the same fashion as leases and life estates. For patents to be efficient during the period for which they run, they have to have all the attributes that were recognized in the 1790 Patent Act, which includes the rights to sue and to license, and to obtain strong protection against intruders.¹⁴⁶ The term limit therefore does nothing to undermine the claim that patents are property in the strong sense of the word, which is just the way the matter was understood during the Founding period.

CONCLUSION

Patent protection goes through strong and weak cycles. For the past twenty years there has been a determined effort to cut back on the scope of patent rights, both by judicial decision and the passage of the America Invents Act.¹⁴⁷ I regard most of these initiatives as unwise not because I believe everything should be patented, nor that all patents should receive the strongest possible protection for the longest period of time. Rather, the defense of the earlier order is more nuanced, and it starts with the claim that patent rights are property rights that should receive the appropriate level of protection. That does not mean that patent rights should be able to obliterate the patent commons of general ideas and natural substances; nor does it mean that they should be perpetual in length or subject to injunctive relief in any and all cases. But it does mean that the efforts to reframe patent law should not be curbed by the *Alice/Mayo* doctrine. Further, injunctions and strong damages should be the presumption in cases of deliberate infringement, and patents should not be routinely invalidated through administrative proceedings. Patent rights are obtained by grant, and they should be protected by the remedies ordinarily given to grantees. There have been many efforts, such as that by Paul Clement, to insist that patents did not receive this form of protection during the Founding Period. But those claims are demonstrably false, as there is no indication that either the Constitution or the Patent Act of 1790 tend to withhold from patents, once issued, the same level of protection that was, and is, afforded other forms of property. What were sound constitutional principles then are sound constitutional principles today, and the recent cases that have deviated from those principles should be condemned for their constitutional infidelity and for the social inefficiencies that they introduce.

146. Patent Act of 1790 § 4.

147. See Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).