

CONGRESS'S POWER TO DEFINE PATENT RIGHTS

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Scholars and other commentators frequently debate whether patent rights should be structured according to a “property” or a “regulatory” framework, dividing over the extent of government involvement, control, and discretion. Recently, an increasing number of major patent stakeholders – industry organizations, prominent companies, and academics – have moved beyond debating how descriptively patent rights have been structured or how normatively patent rights should be structured. To them, patents must follow the “property” framework and be available as of right upon compliance with only technological criteria without government discretion or weighing of social value and must confer a strong exclusionary right without policy-based use rights or government regulation or control.

This Article identifies and evaluates these arguments. It finds minimal support for binding Congress to this “property” framework from the inherent nature of patent rights, originalist constitutional theory, or the varied theories that rely on long-standing historical practice and precedent to either fix or change constitutional meaning. Rather, the significant “regulatory” aspects of patent rights both before the Constitution and in the early American patent system suggest that the choice of the “property” or “regulatory” framework is simply a matter of policy within Congress’s discretion. This flexible view of patent rights is normatively desirable, given the non-static nature of innovation, the empirically ambiguous benefits of the patent system, and the inherently political choices involved.

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INTRODUCTION

The patent system today is rife with controversy. On one side, concerns abound about the imperfect fit between traditional patent rights and the Information Age, an excessive number of patents, overbroad patent rights, poor patent quality, and allegedly exploitative actors like so-called “patent trolls.”¹ On this view, patent rights are overly expansive, leading to recent patent reforms and proposed reforms that limit or restrict patent rights. On the other side, strong and broad patent rights are seen as essential to technological development and economic health, with concern that recent judicial and legislative actions have reduced the traditional strength of American patent rights in a way that undermines patent value, stunts research and development, and threatens the United States’ position in the global economy.

Related to, and underlying to some extent, the debate about the proper breadth and strength of patent protection is another “debate, one that has frequently bubbled to the surface, over how to classify patents. Some scholars view patents as property, in the same sense that a house or an automobile is property. Others conceive of a patent as a government license, akin to a license to emit a certain type of pollutant.”² The patent as property right versus patents as regulatory tool debate can take two distinct forms. First, one can debate the descriptive question of how patent rights *have been*

¹ See Paul Gugliuzza, *Patent Litigation Reform: The Courts, Congress, and the Federal Rules of Civil Procedure*, 95 B.U. L. REV. 279, 279-280 (2015).

² Jonathan S. Masur, *Institutional Design and the Nature of Patents*, Iowa L. Rev. (forthcoming 2019) (manuscript at 2-3).

historically structured in the United States. Professor Jonathan Masur suggests that much of the property-regulatory debate in patent law has preceded along what he describes as legal formalist lines of “determin[ing] the true, underlying nature of that instrument by reference to its extant form” based on historical practice and understanding.³ Second, one can debate the normative question of how patent rights *should be* structured as a matter of optimal public policy. Masur endorses this approach, which he describes as realist or functionalist, “ask[ing] first what functions patents should serve, or what policies they should promote, and then . . . delineat[ing] the legal metes and bounds of patents in the manner that best serves those functions.”⁴

In recent years, the patents as property rights versus patents as regulatory tool debate has taken a third distinct form. Increasingly, opponents of patent reforms or proposed reforms that depart from the “property” conception of patent rights and move in a more “regulatory” direction have contended that these reforms are not just departures from past practice or bad policy but are impermissible or unconstitutional.⁵ On this view, patents *must be* structured as private “property” rights, with Congress lacking the power to structure patent rights to be more like regulatory tools. These arguments, explicitly or implicitly, suggest that certain long-established characteristics of patent rights are necessary, and even constitutionally-required, and therefore cannot be changed by Congress: uniform availability as of right upon compliance only with technological criteria, without any government discretion or weighing of social value; a strong exclusionary right free from government control, government regulation, or policy-based use rights; and private enforcement with fully compensatory damages and injunctive relief.

Though present in the background of patent debates for a while, the argument that Congress’s power to define patent rights is limited by this “property” conception of patent rights came to the forefront during Supreme Court review in *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*.⁶ *Oil States* did not directly present a question about Congress’s power over patent rights under the Intellectual Property Clause of the United States Constitution. Rather, *Oil States* involved, and ultimately rejected, Article III and Seventh Amendment challenges to the America Invents Act of 2011’s creation of the Patent and Trademark Office’s (“Patent Office”) Patent Trial and Appeal Board (“PTAB”) to review and cancel issued patents that fail the

³ Masur, *supra* note __, at 13-14.

⁴ Masur, *supra* note __, at 16.

⁵ See Parts I.B, *infra*.

⁶ 138 S.Ct. 1365 (2018).

requisite statutory criteria for patent protection.⁷ However, because these questions depended on classification of patent rights as public rights (capable of non-Article III adjudication without a jury) or private rights (less amenable to such adjudication), much of the debate surrounding *Oil States* was about the nature of patent rights. Specifically, in the course of debating the issues raised in *Oil States*, prominent companies, leading industry organizations, advocates for patent owners, well-known scholars, and even two Supreme Court justices adopted or suggested a view that Congress's power to define patent rights under the IP Clause is limited by the "property" conception of patent rights. To them, structuring patent rights as more akin to regulatory tools would be "contrary to the constitutional conception of the nature of the patent property right."⁸ Rather, "patents for inventions are private property and stand on the same constitutional footing as land."⁹

Of course, opponents of legislative change to the status quo often appeal to constitutional arguments about Congress's limited power as a trump card in on-going policy debates or to overturn legislation from lost policy debates.¹⁰ When political winds were different last decade, some likewise contended that legislation to strengthen or expand intellectual property rights was beyond Congress's constitutional power.¹¹ Yet, the rhetoric that Congress is limited to the "property" conception of patent rights has impacted patent policy debates. The two dissenting justices in *Oil States* seemed to endorse this view, while the majority emphasized the narrowness of its holding in a way that leaves open the question of Congress's general power to depart from the "property" conception of patent rights.¹² Legislative efforts to move patent rights in a more "regulatory" direction have stopped,¹³ with the rhetoric that patents must reflect the "property" conception used to

⁷ Id. at 1379.

⁸ BIO Br., supra note __, at 2, 7 (emphasis added).

⁹ Br. of the Cato Institute et al. As Amici Curiae Supporting Petitioner at 3, *Oil States* ("Cato Br.").

¹⁰ See Paul M. Schwartz & William Michael Treanor, Eldred and Lochner: *Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 Yale L.J. 2331, 2390-96 (2003) (describing similar efforts to constitutionalize policy in early 2000s copyright and *Lochner* era); see also Mark A. Lemley, *The Constitutionalization of Technology Law*, 15 BERK. TECH. L.J. 529, 533 (2000) ("If you are a loser in this [legislative] process . . . [t]he Constitution is the perfect avoidance mechanism . . .").

¹¹ Lemley, *Constitutionalization*, supra note __, at 533.

¹² See Part I.B, infra.

¹³ Scott Graham, *After Years of Setbacks, Patent Owners Try to Turn Tide in Congress*, National Law Journal (June 28, 2017), <https://www.law.com/nationallawjournal/almID/1202791808946/After-Years-of-Setbacks-Patent-Owners-Try-to-Turn-Tide-in-Congress/?mcode=0&curindex=0&curpage=ALL>.

justify legislative efforts to undo past “regulatory” changes.¹⁴ Likewise, new Patent Office leadership has used this rhetoric to justify shifting away from reforms perceived as weakening or narrowing patent rights.¹⁵ And the idea that the “property” conception of patent rights is constitutionally required seems to have helped sway some libertarians, conservatives, and originalists to the cause of strong and expansive patent rights,¹⁶ a cause to which they are not necessarily natural allies.¹⁷

Despite traditional accounts of broad Congressional power over the patent system, those seeking to use the “property” conception to limit Congress’s power to define patent rights are often unclear on the theoretical basis for doing so. Importantly, their arguments are not limited to Congress’s power to legislate retroactively in a way that effects previously issued patents but more broadly reach Congress’s power to define the nature of patent rights, even prospectively for future patents. Most commonly, they simply confuse the familiar for the necessary. American patent rights have largely reflected the “property” conception of patent rights since the middle of the 19th century. But this descriptive statement does not explain why Congress today would be bound to continue this long-standing practice. To the extent they address this issue, proponents of limiting Congress to the “property” concept of patent rights mix arguments appealing to the inherent nature of patent rights, theories of constitutional originalism, and theories of the relevance of long-standing practice and precedent to constitutional interpretation.

This Article puts the arguments that Congress is bound by the “property” conception of patent rights in historical context and evaluates the theoretical basis for such arguments. After first describing the rise of these arguments in Part I, Parts II and III provide a historical account of the nature of patent rights over the course of United States history. Although the “property” conception of patent rights is so familiar that it might be mistaken

¹⁴ H.R. 6264 § 2, 115th Cong., 2d sess. (“A United States patent secures a private property right to an inventor. . . . This Act restores the patent system as envisioned by the Constitution of the United States.”).

¹⁵ Andrei Iancu, Remarks by Director Iancu at the Eastern District of Texas Bar Association Inaugural Texas Dinner (Oct. 18, 2018), (arguing that “we have overcorrected” in patent reforms and “must restore balance to our system” because “[t]he only time the word ‘right’ appears [in the Constitution] was to secure intellectual property rights. It was that important to our founders.”).

¹⁶ See Robin Feldman, Is there a conservative view on patent reform?, *The Hill* (June 9, 2015), <https://thehill.com/blogs/congress-blog/judicial/244330-is-there-a-conservative-view-on-patent-reform> (“[I]n the hopes of plucking the heart strings of conservatives, a number of commentators have begun calling patents “property rights.”); see also Part I.D, *infra*.

¹⁷ See Part I.C, *infra*.

as mandatory if one focuses only on the past 150-200 years, the early history of the American patent system – in the colonies before the Revolution, in the states before the Constitution, and in the United States in the first few decades under the IP Clause – involved patent rights that were treated much more akin to regulatory tools than akin to the “property” conception that would later emerge. Indeed, the limited evidence from the Framing and the more significant evidence from the early days of the United States patent system suggest that the assumption among the Framers and the contemporaneous public was that this approach would continue in the United States patent system. The “property” conception of patent rights only slowly emerged, coming to prominence by the 1820s.

Part IV evaluates theories for limiting Congress to the “property” conception in light of the historical account of Parts II and III. It finds arguments sounding in originalism – whether original intent or original public meaning – devoid of support. Likewise, arguments echoing various theories of how constitutional meaning can become liquidated or fixed through subsequent practice and precedent are unconvincing because the early practice in the United States was inconsistent with the “property” conception of patent rights. The most support for limiting Congress to the “property” conception of patent rights comes from “living” and other constitutional theories that would allow the meaning of the IP Clause to change over time based on the consistent practice and precedent in the 19th century reflecting the “property” conception. However, it is doubtful that theories of constitutional change would continue to bind today’s Congress to this 19th century conception of patent rights.

Finally, Part V tackles the normative implications of this analysis. It suggests that broad Congressional power to define patent rights is desirable to insure that a system meant to protect and encourage innovation can itself be capable of innovation and to insure that the politically-responsive branches of government are making the difficult choices of choosing economic winners and losers in the face of pervasive uncertainty about the social benefits and costs of the patent system. To be clear, this is not an Article about whether the “property” framework or the “regulatory” framework, or any particular patent reform, reflects optimal innovation *policy*. This is an Article about *power* – who gets to resolve debates over innovation policy.

I. THE CHALLENGE TO CONGRESS'S POWER TO DEFINE PATENT RIGHTS

A. *The Debate Over Patent Rights*

In the early 21st century, concerns about over-patenting, overly broad and strong patent rights, and abusive practices by some patent owners have led to changes or proposed changes to the nature of patent rights perceived as weakening or restricting patent rights.¹⁸ Some of these changes have come from the Supreme Court. Most significantly, in *eBay v. MercExchange*,¹⁹ the Supreme Court “eliminated the Court’s own general rule” that “a patent owner is entitled to permanent injunctive relief once a patent is adjudicated to be both valid and infringed.”²⁰ Moreover, the Court’s decisions over the past decade have harmonized the patent system – which pre-dates modern regulatory agencies – with the administrative state,²¹ emphasizing the regulatory aspects of patent rights in doing so.²² Scholars have proposed moving patent law even further in this direction.²³

Congress also has initiated change in the patent system in the past decade. The America Invents Act of 2011 (AIA) introduced the most significant changes to the patent system since 1952²⁴ and was even described by one commentator (hyperbolically) as “the most significant overhaul to our patent system since the founding fathers first conceived of codifying a grand

¹⁸ See generally Greg Reilly, Patent Litigation Reform in the United States, in Patent Law & Theory (2d ed. Toshiko Takenaka, ed.) (describing recent and proposed reforms and motivations behind them).

¹⁹ 547 U.S. 388 (2006).

²⁰ Andrew Beckerman-Rodau, The Supreme Court Engages in Judicial Activism in Interpreting the Patent Law in *eBay, Inc. v. MercExchange, L.L.C.*, 10 Tul. J. Tech. & Intell. Prop. 165, (2007).

²¹ *Dickinson v. Zurko*, 527 U.S. 150 (1999) (subjecting the Federal Circuit’s review of Patent Office decisions to the Administrative Procedure Act’s review standards); *Cuozzo v. Lee*, 136 S.Ct. 2131, 2142-43 (2016) (applying ordinary administrative deference principles to the Patent Office’s statutory interpretation).

²² *Cuozzo*, 136 S. Ct. at 2144 (emphasizing “the public’s paramount interest in seeing that patent monopolies are kept within their legitimate scope” (quotations and alterations omitted)).

²³ See, e.g., Michael J. Burstein, Rules for Patents, 52 Wm. & Mary L. Rev. 1747, 1759-1760 (2011) (proposing Patent Office substantive rulemaking to develop patent law); Megan M. LaBelle, Public Enforcement of Patent Law, 96 B.U. L. Rev. 1865, 1870 (2016) (proposing Patent Office monitoring, investigating, and policing the validity of issued patents); Lauren Cohen, John M. Golden, Umit G. Gurun & Scott Duke Kominers, “Troll” Check? A Proposal for Administrative Review of Patent Litigation, 97 B.U. L. REV. 1775, 1782 (2017) (proposing a new federal agency to evaluate patent infringement claims).

²⁴ CRAIG ALLEN NARD, [THE LAW OF PATENTS](#) 26 (4th ed. 2017).

bargain between society and invention.”²⁵ Initially, the AIA’s most important reform seemed to be a shift from awarding patent rights to the first inventor to invent to the first inventor to file a patent application. Over time, the more significant AIA change was a series of procedures for Patent Office review and cancellation of issued patents, which increased government involvement with issued patents by expanding existing reexamination procedures and was thereby perceived as weakening patent rights.²⁶

Scholars have proposed a variety of other reforms to address perceived problems in the patent system in the 21st century, such as: a working requirement that patent owners use the invention within the United States;²⁷ a fair use defense to patent infringement similar to that in copyright;²⁸ and replacement of compensatory damages with judicial discretion to award optimal damages to achieve patent law’s balance between innovation and competition.²⁹

Unsurprisingly, these changes and proposed changes to the patent system have sparked significant opposition. Opponents have vigorously questioned the policy wisdom of these reforms as they relate to the patent system’s goals of promoting innovation and preserving competition.³⁰ They also have objected to departures from long-standing aspects of the patent system that they see as having worked well for a long time. But at least in part motivating debates over recent changes and proposed changes to the patent system is an underlying debate about the nature of patent rights. Indeed, Professor Masur has suggested that “[w]hen scholars argue about a variety of institutional patent law questions, they are at bottom arguing about a single issue: what a patent really is.”³¹

Some scholars contend that “[p]atent law is regulatory in the sense

²⁵ David Kappos, [Re-Inventing the U.S. Patent System](http://www.uspto.gov/blog/director/entry/re_inventing_the_us_patent), DIRECTOR’S FORUM: DAVID KAPPOS’ PUBLIC BLOG (Sept. 16, 2011, 5:45PM), http://www.uspto.gov/blog/director/entry/re_inventing_the_us_patent.

²⁶ Greg Reilly, *The Constitutionality of Administrative Patent Cancellation*, 23 B.U. J. Sci. & Tech. L. 377, 385 (2017).

²⁷ Trimble, *supra* note __, at 485, 488-489 (describing renewed interest).

²⁸ Maureen A. O’Rourke, *Toward a Doctrine of Fair Use in Patent Law*, 100 Colum. L. Rev. 1177, 1179-80 (2000).

²⁹ Sichelman, *supra* note __, at 566-567.

³⁰ *See, e.g.*, Greg Dolin, [The Costs of Patent “Reform”: The Abuse of the PTO’s Administrative Review Programs](https://sls.gmu.edu/cpip/wp-content/uploads/sites/31/2014/04/Dolin-Abuse-of-PTO-Review-Programs.pdf), CENTER FOR THE PROTECTION OF INTELLECTUAL PROPERTY (December 2014), <https://sls.gmu.edu/cpip/wp-content/uploads/sites/31/2014/04/Dolin-Abuse-of-PTO-Review-Programs.pdf>.

³¹ Masur, *supra* note __, at 3.

that its goal is to regulate primary conduct.”³² On this view, “patent law, is a kind of disguised industrial policy” because it involves the “regulation of competition, the equivalent of a decision about the distribution of resources.”³³ Specifically, patent rights are a form of “market entry and price regulation” by which “[t]he government grants a favored party the legal right to exclude others from entering the market at all . . . from entering the market under certain terms and conditions (via injunctions), or from entering the market without paying an entry tax (via a patent damages award).”³⁴ The result is that “a patent functions as a government-sponsored subsidy” because “[t]he government, through its patent regime, bestows upon the prospective innovator the right to charge the supra-competitive price, otherwise available only during the entry period, for a period of nearly twenty years.”³⁵

Under this “regulatory” view, patent rights are privileges or franchises granted by the government to serve the public interest.³⁶ “Instead of viewing patents as conferring a private right on the patentee . . . a patent confers a kind of private attorney general status on the patentee that allows it to collect payment on behalf of society, which is then immediately remitted in full to the patentee solely in order to optimize overall social innovation incentives.”³⁷ With a “regulatory” approach, “Congress has broad authority to create the patent right, to define the contours of that right, and to establish the conditions attached to the grant of that right.”³⁸ And this authority includes the power to alter the contours or conditions of patent rights over time.³⁹

Other scholars contend that “patents are private property rights,” instead of “special grants of privilege” or “legal tools of governmental economic policy.”⁴⁰ On first glance, the characterization of patent rights as “property” may not adequately distinguish this view of patent rights from the “regulatory” conception. Public franchises⁴¹ and government benefits⁴² are

³² Ghosh, *supra* note __, at 1381.

³³ Michael H. Davis, *Patent Politics*, 56 S.C. L. Rev. 337, 339 (2004).

³⁴ Mark A. Lemley, *Taking the Regulatory Nature of IP Seriously*, 92 Tex. L Rev. See Also 107, 107 (2014).

³⁵ Davis, *supra* note __, at 340-341.

³⁶ Br. for Federal Respondent at 36-37, *Oil States* (“U.S. Br.”).

³⁷ Sichelman, *supra* note __, at 569.

³⁸ Br. for Respondent Greene’s Energy Group, LLC at 13, *Oil States* (“Greene’s Br.”).

³⁹ *Oil States*, 138 S. Ct. at 1378.

⁴⁰ *Mossoff Br.*, *supra* note __, at 14-18.

⁴¹ *Oil States*, 138 S. Ct. at 1375 (“Patents convey only a specific form of property right—a public franchise.”).

⁴² *Roth*, 408 U.S. at 576 (1972) (finding that a party can “have a property interest in a [government] benefit” if the party has “a legitimate claim of entitlement to it”).

recognized property interests. Today, even real property is subject to extensive government regulation, limits, and conditions.⁴³ Modern theory tends to focus more on what “bundle of sticks” – what rights, obligations, privileges, etc. – a legal interest conveys than on whether it can be classified as “property” in some absolute sense.⁴⁴

However, those advocating the patents as property view seem to have a particular conception of the patent property right. Some have suggested that this conception focuses on “the *traditional* rights associated with real and other tangible forms of property”⁴⁵ or “an idealized Blackstonian conception of property rights as exclusive and inviolate.”⁴⁶ This conception deemphasizes “any interest outside that of the proprietor,”⁴⁷ and instead emphasize that patent rights are a “*substantial* property right”⁴⁸ and “one of most fundamentally important forms of property”⁴⁹ that provide “strong protection”⁵⁰ free from “plenary government control.”⁵¹ To them, “[t]he Government’s obligation is to safeguard and perfect pre-existing inchoate property rights earned by the inventor’s own efforts, not to diminish them.”⁵²

Some advocating the view that patents are “property” may have a theoretical conception of property in mind. However, many seem to characterize patent rights as “property” less to invoke a theoretical concept of property rights and more as shorthand for a collection of long-standing historical characteristics of patent rights that may have analogs in the traditional law of real property and are generally favorable to patent owners: (1) availability as of right upon compliance with uniform technological criteria without any legislative or Patent Office discretion, policy weighing, cost-benefit analysis, or evaluation of social merit; (2) a near-absolute right

⁴³ Lemley, *Free Riding*, supra note __, at 1069.

⁴⁴ Deepa Varadarajan, *Of Fences and Definite Patent Boundaries*, 18 *Vand. J. Ent. & Tech. L.* 563, 594–595 (2016) (“Amongst property scholars, such an absolutist definition of property that emphasizes the primacy of the right to exclude gave way in the twentieth century to a more malleable, less exclusion-focused conception of property: property as a ‘bundle of rights’” that “balances the exclusionary rights of owners against competing equity and efficiency concerns in a number of contexts.”).

⁴⁵ Menell, supra note __, at 37; see also Lemley, *Free Riding*, supra note __, at 1031-32; Cato Br., supra note __, at (“[P]atents for inventions are private property and stand on the same constitutional footing as land.”).

⁴⁶ Menell, supra note __, at 37-38.

⁴⁷ Davis, supra note __, at 376.

⁴⁸ IPO Br., supra note __, at 2.

⁴⁹ *Lauder Br.*, supra note __, at 2.

⁵⁰ *Br. of Amicus Curiae The Association of Amicus Counsel in Support of Neither Party at 16, Oil States* (“*Amicus Counsel Br.*”).

⁵¹ *3M Br.*, supra note __, at 3.

⁵² *BIO Br.*, supra note __, at 8.

to exclude others from making, using, or selling the disclosed invention, without policy-based third-party use rights or compulsory licensing; (3) near-complete patent owner discretion as to whether, or how, to use the invention (e.g., commercializing, licensing, or not at all); (4) no significant government role in regulating, enforcing, or reconsidering patent rights; and (5) enforceability via a private right of action in federal court with a presumption of validity and the ability to recover compensatory damages and an injunction as a matter of course.⁵³

B. The “Property” Framework As a Limit on Congress’s Power to Prospectively Define Patent Rights

Increasingly, opponents of recent or proposed reforms that move the American patent system away from the traditional “property” conception of patent rights and in a more “regulatory” direction contend that the reforms are impermissible, illegitimate, and even unconstitutional because the “property” conception is a necessary feature of the patent system that imposes a limit – perhaps a Constitutional limit – on Congress’s power to dictate the terms, conditions, and procedures for patent protection. This argument is most apparent in the context of the Supreme Court’s *Oil States* case, as explained in the first section below. However, the second section details how it extends beyond the question of administrative review and cancellation of issued patents raised by that case. Both in *Oil States* itself, and as a recurring response to other reforms and proposed reforms, proponents have made clear that they view the “property” conception of patent rights as a general limit on Congress’s power to define the nature of patent rights.

1. *Oil States* & the “Property” Conception As a Limit on Congress’s Power

The *Oil States* case raised issues related to Article III’s guarantee of an independent federal judiciary and the Seventh Amendment’s guarantee of trial by jury. However, these questions turned, in significant part, on whether the right in question was a “public right” – and therefore amenable to administrative resolution without a jury – or a “private right” – and therefore less amenable to administrative resolution without a jury. In this context, the terms “public right” and “private right” have specialized meanings that do not necessarily equate with whether the legal interest involved can be characterized as a private property right for other purposes.⁵⁴ Yet, much of the briefing in *Oil States* treated the Article III and Seventh Amendment

⁵³ See Greg Reilly, Our 19th Century Patent System, 7 IP THEORY Iss. 2 Article 3 (2018)

⁵⁴ Reilly, The Constitutionality of Administrative Patent Cancellation

questions as depending on whether patent rights were better characterized by the “property” conception or the “regulatory” conception.

Specifically, much of the briefing supporting the Article III and Seventh Amendment challenges reflected, to varying degrees, the view that the “property” conception of patent rights is a mandatory limit on Congress’s power under the IP Clause to define patent rights. An amicus brief contended that “the historical understanding of the nature of patent rights” was that “patents for inventions are private property and stand on the same constitutional footing as land.”⁵⁵ Thus, per a major industry organization, “once the patent has issued, the rights it conveys are private property rights—no less than the right to land granted by a government-issued land patent or the right to a chattel conveyed by a government sale.”⁵⁶ And an amicus brief for twenty-seven prominent academics argued that “[c]ontrary to the English view of patents as solely legal tools of governmental economic policy, the U.S. clearly and definitively recognized that American patents secured the property in the mind-work of the inventor, as specifically authorized under the Patent and Copyright Clause in the Constitution.”⁵⁷

Importantly, the challenge in *Oil States* was not just to Congress’s power to retroactively make already issued patents subject to administrative review and cancellation but also to Congress’s power to issue future patents subject to the condition that they be reviewed and cancelled in administrative proceedings. Thus, the arguments that Congress was limited to the “property” framework were not just arguments that issued patents confer property interests protected by the Due Process Clause and/or Takings Clause.⁵⁸ They were arguments that the “property” conception of patent rights limits Congress’s power to prospectively define the terms, conditions, and rights of future patents.

Rejecting the argument that patent validity must be a “private rights” issue for Article III courts using a Seventh Amendment jury because patents

⁵⁵ Cato Br., supra note __, at 2-3.

⁵⁶ PhRMA Br., supra note __, at 6.

⁵⁷ Mossoff Br., supra note __, at 14 (quotations omitted).

⁵⁸ Like other statutory entitlements creating important rights under modern case law, once issued, patents likely create a property interest that cannot be deprived without due process of law.⁵⁸ *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). The Supreme Court also suggested in dicta that, once issued, patents may qualify as property that cannot be appropriated by the government without just compensation under the Takings Clause. *Horne v. Department of Agriculture*, 135 S. Ct. 2419, 2427 (2015); but see Jonathan S. Masur & Adam K. Mortara, *Patents, Property, and Prospectivity*, 71 *Stan. L. Rev.* (forthcoming 2019) (working draft at 24-30 Mar. 2018), <https://ssrn.com/abstract=3141520> (suggesting significant uncertainty about patents’ status under the Takings Clause).

were private property rights,⁵⁹ the Court held that “[p]atents convey only a specific form of property right—a public franchise” and the Patent Act expressly conditioned this property interest on the other provisions of the statute, meaning that it can be subject to statutory conditions, qualifications, and reserved governmental authority like the AIA proceedings.⁶⁰ At the same time, the Court “emphasize[d] the narrowness of [its] holding . . . address[ing] the constitutionality of inter partes review only.”⁶¹ It specifically noted that “our decision should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause.”⁶² Proponents of the “property” conception of patent rights have recognized *Oil States*’ potentially “powerful implications for the future direction” of patent law⁶³ but also that “the Court . . . did not provide a comprehensive explanation of these concepts [about the nature of patent rights] in *Oil States* but rather left most questions for resolution in later disputes.”⁶⁴ After *Oil States*, commentators continue to oppose proposed patent reforms on the grounds that the “property” conception of patent rights is a limit on Congress’s power under the IP Clause.⁶⁵

Indeed, the dissent by Justice Gorsuch, joined by Chief Justice Roberts, seemed to endorse this view of patents, noting that “[u]ntil recently, most everyone considered an issued patent a personal right—no less than a home or farm.”⁶⁶ Per the dissent, under the IP Clause, “courts treated American invention patents as recognizing an inchoate property that exists from the moment of invention” and therefore “when the federal government grants a patent the grantee is entitled to it *as a matter of right*, and does not receive it, as was originally supposed to be the case in England, as a matter of grace and favor.”⁶⁷ Patents were not public franchises because “by the time of the founding the law treated patents protected by the Patent Clause

⁵⁹ 138 S. Ct. at 1370.

⁶⁰ *Id.* at 1375-77.

⁶¹ *Id.* at 1379.

⁶² *Id.*

⁶³ Richard Epstein, *The Supreme Court Tackles Patent Reform: Inter Partes Review Under the AIA Undermines the Structural Protections Offered by Article III Courts*, 19 *Federalist Soc’y Rev.* 132, 133 (2018).

⁶⁴ Adam J. McLeod, *Public Rights After Oil States Energy* 41 (working paper Feb. 2019), <https://ssrn.com/abstract=3327002>.

⁶⁵ See Kathleen Wills, *Proposed Misuse of Section 1498 Relies on the False Claim That Patents Are Not Property*, Center for the Protection of Intellectual Property – George Mason University Antonin Scalia Law School (Nov. 14, 2018) (arguing “that Congress had to treat patents as vested property rights in the patent owner” in opposing a means for price controls for patented pharmaceuticals)

⁶⁶ 138 S. Ct. at 1380 (Gorsuch, J., dissenting).

⁶⁷ *Id.* at 1383-84 (quotations omitted; emphasis in original).

quite differently from ordinary public franchises,” particularly “when it came to governmental invasions.”⁶⁸ Specifically, “courts routinely applied to invention patents protected by the Patent Clause the liberal common sense construction that applies to other instruments creating private property rights, like land deeds.”⁶⁹ The dissent concluded that “[t]he law requires us to honor those historical rights, not diminish them.”⁷⁰

Perhaps the *Oil States* dissent could be read as primarily a descriptive account of the historical treatment of patent rights as “private rights” in American patent law and an argument based specifically on the original understanding of Article III.⁷¹ However, the better reading of the dissent is that it endorsed the “property” conception of patent rights as a limit on Congress’s power to define patent rights under the IP Clause. Specifically, it noted that “by the time of the founding the law treated patents protected by the Patent Clause quite differently from ordinary public franchises”; described the historical adoption of the “property” framework as being “[i]n light of the Patent Clause[]”; and concluded that a 19th century Supreme Court case strongly endorsing the “property” framework rested on constitutional, not statutory, grounds.⁷²

2. The “Property” Conception As a Limit on Congress’s Power to Define Patent Rights Beyond Administrative Cancellation of Issued Patents

Those advocating the “property” conception of patent rights in *Oil States* did not limit themselves to an argument that Congress lacked the power to adopt the administrative cancellation specifically at issue in *Oil States* for unique reasons related to Article III’s guarantee of an independent judiciary⁷³ or concerns with administrative adjudication generally.⁷⁴ One brief suggested that “strong protection for the private intellectual property rights of the individual” was a “fundamental constitutional right[].”⁷⁵ An industry group argued that because patents protect “rights that are not created and conferred by the Government . . . [t]he Government’s *obligation* is to

⁶⁸ Id. (quotations omitted).

⁶⁹ Id. (quotations omitted).

⁷⁰ Id.

⁷¹ 138 S. Ct. at 1383-84 (Gorsuch, J., dissenting) (describing how “courts took the view” of the “property” framework, which “held firm for most of our history”); id. at 1381.

⁷² 138 S. Ct. at 1383-85 (Gorsuch, J., dissenting).

⁷³ *Stern v. Marshall*, 564 U.S. 462, 483 (2011) (describing Article III’s function as protecting separation of powers and individual liberty).

⁷⁴ Gillian E. Metzger, 1930s Redux: The Administrative State Under Siege, 131 Harv. L. Rev. 1, 22 (2017) (connecting *Oil States* to a general attack on administrative adjudication).

⁷⁵ Amicus Counsel Br., supra note __, at 16.

safeguard and perfect pre-existing inchoate property rights earned by the inventor's own efforts, not to diminish them . . .⁷⁶ A group of major companies agreed that patent rights “are neither solely derived from, nor solely exist by, the will of Congress” because “[f]or nearly two centuries, this Court's precedents have reaffirmed that issued patents are private property, protected by the same constitutional principles and common-law doctrines that protect other forms of private property.”⁷⁷

Reform opponents specifically rejected Congress's power to adopt a “regulatory” framework for patent rights. According to a patent owners' group, “[p]atent rights do not exist to facilitate the federal [regulatory] scheme” and “are not mere stepping stones along the way to some regulatory object,” but rather “the ‘federal regulatory scheme’ regarding patents thus exists to facilitate and protect patent rights.”⁷⁸ The leading American companies rejected the idea that patent rights could be “subject to plenary government control.”⁷⁹ An industry group contended that treating patent rights as “analogous to statutory benefits” was “contrary to the constitutional conception of the nature of the patent property right.”⁸⁰ And another industry group rejected Congress's power to “regulate [issued patent rights] and prescribe such rules of determination as they may think just and needful.”⁸¹

Some opponents identified specific patent reforms – beyond the administrative cancellation at issue in *Oil States* – that they believed were beyond Congress's power because of the mandatory “property” framework. At the broadest, a group of companies argued that Congressional power to “eliminate the entire patent system . . . border[s] on the absurd.”⁸² The patent owners' group contended that “[b]y Constitutional mandate, the power of Congress concerning patents” is limited to “[t]he granting and securing of patent rights” and therefore Congress's power is “exhausted once the patent is granted,”⁸³ suggesting no Congressional power to regulate or control issued patents. The major companies contended that “[a] granted patent *necessarily* carries with it a *judicially-enforceable* right to exclude others from the use of a claimed invention,”⁸⁴ presumably preventing Congress from replacing the

⁷⁶ BIO Br., supra note __, at 8.

⁷⁷ 3M Br., supra note __, at 2, 7; see also Blackwell Br., supra note __, at 4 (rejecting idea that patent rights were “created by the grace of Congress”).

⁷⁸ Lauder Br., supra note __, at 17.

⁷⁹ 3M Br., supra note __, at 3.

⁸⁰ BIO Br., supra note __, at 2, 7.

⁸¹ IPO Br., supra note __, at 11.

⁸² Interdigital MCM Br., supra note __, at 18.

⁸³ Lauder Br., supra note __, at 17.

⁸⁴ 3M Br., supra note __, at 2-3 (emphasis added)

private right of action for patent infringement with government enforcement or a mandatory compensation system. Similarly, an industry group suggested that departing from “the prevailing view of patents as constitutionally protected private property . . . might embolden government proposals to implement compulsory licensing programs in which patent rights are forcibly made available to a patent owner’s competitors” or government “attempt[s] to restrict the transfer or licensing of patents.”⁸⁵

The arguments in *Oil States* reflect an undercurrent of thought that has bubbled in the background of patent debates, both historically and in more recent times. The view that patents *must* be available as of right upon compliance with only technological criteria and must confer near-absolute control on their owners has appeared occasionally throughout American history, with even some Supreme Court support at one point.⁸⁶ The more recent emphasis on the “property” conception as a limit on Congress’s patent power can be traced to the debate surrounding the *eBay* case. In both the briefing and post-decision criticism in *eBay*, some argued – to no avail⁸⁷ -- that injunctive relief was necessary because “patents are unique property and should be protected from infringement, like other unique property, by permanent injunctive relief.”⁸⁸ Similarly, opponents of recent changes that align the the patent system with general principles of administrative law suggest such efforts are improper because of the nature of patent rights and the patent system as a private law mechanism based on property and contract.⁸⁹ Opponents even contended that the AIA’s shift to a first to file system was impermissible because it violated the “property” framework of patent rights.⁹⁰

⁸⁵ IPO Br., *supra* note __, at 9-11.

⁸⁶ *James v. Campbell*, 104 U.S. 356, 358 (1881) (“The United States has no such prerogative . . . by which it can reserve to itself . . . a superior dominion and use in that which it grants by letters-patent . . . [W]hen it grants a patent the grantee is entitled to it as a matter of right, and does not receive it . . . as a matter of grace and favor.”); see also Karl B. Lutz, *Are the Courts Carrying Out Constitutional Public Policy on Patents?*, 34 J. Pat. Off. Soc’y 766, 774-780, 790-791 (1952) (describing the traditional “liberal view toward patentees” as “constitutional patent policy”).

⁸⁷ 547 U.S. at 392 (holding that patents are property subject to the other statutory provisions, which condition injunctive relief on normal equitable principles).

⁸⁸ Beckerman-Rodau, *supra* note __, at 181-182 (summarizing briefing); see also Menell, *supra* note __, at 36 (describing briefing); see also, e.g., Beckerman-Rodau, *supra*, at 203, 208 (criticizing decision).

⁸⁹ See Orin S. Kerr, *Rethinking Patent Law in the Administrative State*, 42 Wm. & Mary L. Rev. 127 (2000). Kerr’s argument is primarily descriptive and normative, but he also suggests that his theory is the “holy grail” that resolves theoretical disputes about the inherent nature of patent rights. *Id.* at 178-180.

⁹⁰ See, e.g., Adam Mossoff, *The America Invents Act, a First-to-Invent Patent System, and “Obama-Birther” Accusations*, Truth on the Market (July 6, 2016).

In sum, sophisticated participants in the patent system – major corporations, leading industry groups, and academics – have adopted a general view that the “property” conception of patent rights is an essential feature of the patent system that broadly limits Congress’s power under the IP Clause to define patent rights.

*C. Identifying a Theoretical Basis for Limiting Congress to the
“Property” Conception of Patent Rights*

Arguments that patent rights *must* reflect the “property” framework run counter to traditional descriptions of Congress’s broad power over the patent system, at least prospectively for future patents.⁹¹ In providing that “[t]he Congress shall have Power . . . [t]o promote the Progress of . . . useful Arts, by securing for limited Times to . . . Inventors the exclusive Right to their . . . Discoveries,” the Constitution does not itself create patent rights, nor mandate that Congress do so, but rather gives Congress the discretion to create patent rights by statute.⁹² Congress is empowered to “*define* the scope of the substantive right”⁹³; “set out conditions and tests for patentability”;⁹⁴ and “provide such instrumentalities in respect of securing to inventors the exclusive right to their discoveries as in its judgment will be best calculated to effect that [constitutional] object.”⁹⁵

The explicit text of the IP Clause imposes “certain [well-recognized] limitations upon the exercise of that power”: patents must be limited in time, for new inventions with practical applications, and issued to actual inventor.⁹⁶

⁹¹ *McClurg v. Kingsland*, 42 U.S. 202, 206 (1843) (“The powers of Congress to legislate [prospectively] upon the subject of patents is plenary by the terms of the Constitution.”).

⁹² U.S. Const., Art. I § 8; Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause As a Absolute Constraint on Congress*, 2000 *Univ. Ill. L. Rev.* 1119, 1166-67 (“The framers . . . gave Congress broad discretion within the confines of the Clause.”). The IP Clause does not actually mention patents but its parallel structure is traditionally viewed as authorizing patents for inventors and copyrights for authors. EDWARD C. WALTERSCHEID, *THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE* 255 (William S. Hein & Co. 2002).

⁹³ *Eldred v. Ashcroft*, 537 U.S. 186, 218 (2003) (analogous discussion of copyright); *see also Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 168 (1989) (“It is for Congress to determine if the present system of design and utility patents” satisfies the constitutional purpose.)

⁹⁴ *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966).

⁹⁵ *United States v. Duell*, 172 U.S. 576, 583 (1899).

⁹⁶ *Bonito*, 489 U.S. at 146; *Graham*, 383 U.S. at 5; Timothy R. Holbrook, *The Treaty Power and the Patent Clause: Are There Limits on the United States’ Ability to Harmonize?*, 22 *Cardozo Arts & Ent. L.J.* 1, 8-11 (2004); Edward C. Walterscheid, “*Within the Limits of the Constitutional Grant*”: *Constitutional Limitations on the Patent Power*, 9 *J. INTELL. PROP. L.* 291, 301-318 (2002)

Even with regard to these recognized limits, Congress has significant leeway in determining whether a particular enactment satisfies broad and open-ended terms “limited Times,” “useful arts,” “Inventors,” “Discoveries,” and “Progress.”⁹⁷ Other debated and proposed limits would further limit Congress’s power to *expand* or *strengthen* intellectual property rights in response to past Congressional efforts to do so, particularly in the copyright context.⁹⁸ Traditionally, however, the consensus was that “Congress may be more *restrictive* [in providing patent protection] than the limitations set by the constitutional language.”⁹⁹

But those trying to limit Congress to the “property” conception of patent rights contend that it imposes a limit on Congress’s power to restrict or weaken patent rights. They are vague in the theoretical basis for this contention. Sometimes they echo interrelated strands of conservative and libertarian thought variably labeled as new property essentialism;¹⁰⁰ the property rights movement;¹⁰¹ and anti-administrativism.¹⁰² Yet, even conservatives and libertarians themselves are deeply divided on the applicability of these theories to patent rights.¹⁰³

⁹⁷ Heald & Sherry, *supra* note __, at 1166-67; see also *Eldred*, 537 U.S. at 206 n.11 (favorably quoting the Register of Copyrights that “there really isn’t a very good indication on what limited times is”); *Graham*, 383 U.S. at 11-12 (noting “the generality of the constitutional grant” and that “the word ‘invention’ cannot be defined in such manner as to afford any substantial aid” (quotations and alterations omitted)).

⁹⁸ See Holbrook, *supra* note __, at 6 (noting debate over whether the IP Clause’s preamble “[t]o promote the Progress” limits Congress’s power); Heald & Sherry, *supra* note __, at 1183-87 (describing uncertainty over a constitutional standard of invention beyond novelty); see also, e.g., Jeanne Fromer, *The Intellectual Property Clause’s External Limitations*, 61 DUKE L.J. 1329, 1331 (2012) (using hypotheticals involving expansion of IP rights); Heald & Sherry, *supra* note __, at 1168 (providing framework to evaluate “recent extensions” of IP rights); Robert Patrick Merges & Glenn Harlan Reynolds, *The Proper Scope of the Copyright and Patent*, 37 HARV. J. ON LEGIS. 45, 46 (2000) (arguing for “limits on Congress’s power to create and extend intellectual property interests”); Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 274 (2004) (analyzing whether the Constitution “establish[es] a general prohibition against granting certain kinds of [IP] protection”).

⁹⁹ Walterscheid, *Constitutional Limitations*, *supra* note __, at 292 (emphasis added).

¹⁰⁰ Katrina M. Wyman, *The New Essentialism in Property*, 9 J. Legal Analysis 183 (2017)

¹⁰¹ Menell, *supra* note __, at 37.

¹⁰² Metzger, *supra* note __.

¹⁰³ See Stephan Kinsella, *Mossoff: Patent Law Really Is as Straightforward as Real Estate Law*, Center for the Study of Innovative Freedom (Aug. 17, 2012), <http://c4sif.org/2012/08/mossoff-patent-law-really-is-as-straightforward-as-real-estate-law/> (arguing that “it is quite ridiculous to view patents as similar to real property rights” because patents “are state-granted anticompetitive monopoly privileges that violate pre-existing property rights”); see also Adam Mossoff, *Patents Are Property Rights, Not A “Bizarre*

More typically, those seeking to limit Congress to the “property” conception of patent rights rely on “an unbroken line of cases” dating “[f]rom the early days of the Republic” – specifically, “[a]s early as 1813” – that “reaffirm[], time and again, that patents for inventions are private property and stand on the same constitutional footing as land”¹⁰⁴ Often, these arguments simply confuse familiarity for constitutional necessity.¹⁰⁵ However, sometimes unknowingly, sometimes implicitly, and occasionally explicitly¹⁰⁶ they invoke constitutional theories and precedent “giv[ing] weight to post-Founding governmental practice.”¹⁰⁷ For example, the *Oil States* dissent relied on one such case to conclude that “the fact that for almost 200 years ‘earlier Congresses avoided use of [a] highly attractive’—and surely more efficient—means for extinguishing patents should serve as good ‘reason to believe that the power was thought not to exist’ at the time of the founding.”¹⁰⁸

Finally, arguments to limit Congress to the “property” conception of patent rights often invoke originalist theories of constitutional interpretation. Some just make conclusory assertions about the “framers,” “founding,” or the supposedly clear textual meaning of the IP Clause.¹⁰⁹ Others

Regulatory Lobby,” TownHall (Mar. 13, 2017) (acknowledging that “some conservatives and libertarians – the very people who should be defending all property” believe “that patents are not property rights like other ‘natural’ property rights in land and tangible goods”).

¹⁰⁴ Cato Br., supra note __, at 3-6; see also Mossoff Br., supra note __, at 2, 6-17 (citing cases starting in 1824 as “the substantial case law . . . reaching back to the early American Republic that patents are private property rights secured under the Constitution”); PhRMA Br., supra note __, at 8 (stating that “by 1824,” “[t]his Court and its members concluded long ago that patent rights, once issued, are private property”); Blackwell Br., supra note __, at 4-8 (relying on cases starting in 1813 to argue that “[t]he historical record reflects a striking unanimity in the judicial decisions construing patents as private property rights”).

¹⁰⁵ Lauder Br., supra note __, at 4-5 (arguing that administrative control of issued patents is “fundamentally at odds with the historical roots of patent rights”); Cato Br., supra note __, at 3 (arguing that administrative patent cancellation “finds support neither in historical understanding of patent rights nor the precedents of this Court.”).

¹⁰⁶ See, e.g., PhRMA Br., supra note __, at 10-11 (citing Supreme Court cases relying on historical practice in arguing that Congress’s past failure to provide for administrative patent cancellation “suggests an assumed absence of such power”); Abbvie Br., supra note __, at 15 (citing Supreme Court case relying on historical practice in arguing that “Congress’s early exercise of its constitutional power” mandates the “property” framework).

¹⁰⁷ Curtis A. Bradley & Neil S. Siegel, Historical Gloss, Madisonian Liquidation, and the Originalism Debate 2 (working paper Feb. 9, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3331588.

¹⁰⁸ *Oil States*, 138 S. Ct. at 1384 (Gorsuch, J., dissenting) (quotation omitted).

¹⁰⁹ See, e.g., Lauder Br., supra note __ at 13 (making conclusory textual argument and citing post-founding precedent); BIO Br., supra note __, at 7-8 (largely making conclusory textual argument but also citing other portions of Constitution).

“collapse . . . different generations together”¹¹⁰ by relying on 19th century views and precedent as that of the “framers” or “founding,” rather than the 1787-1789 period actually probative for originalist theories.¹¹¹ Those actually using originalist methodologies often focus on the original intent of the Framers, arguing for example that “the framers of the Constitution deemed patent rights to be so important”¹¹² that, consistent with the “property” framework, “the role envisioned [by the Framers] for Congress with respect to patents was relatively limited.”¹¹³ Occasionally, patent essentialists rely implicitly or explicitly on the supposed original public meaning of the terms “secure” or “exclusive right” in the IP Clause or of the Clause as a whole.¹¹⁴

II. THE NATURE OF PATENT RIGHTS AT THE ORIGINS OF THE AMERICAN PATENT SYSTEM

A. The Nature of Patent Rights in England Before the Constitution

Patent historians, and even some trying to limit Congress’s power to define patent rights,¹¹⁵ recognize that the English patent system before the Constitution departed significantly from the “property” conception of patent rights, with broad government power to define the patent’s terms, conditions, and rights.¹¹⁶ Traditionally, English patents for inventions were ad hoc exercises of royal prerogative, available solely at the sovereign’s discretion

¹¹⁰ See Jack M. Balkin, What Republican Constitution?, 32 Constitutional Commentary 31, 38-39 (2017).

¹¹¹ See Ilan Wurman, A Debt Against the Living: An Introduction to Originalism 103 (Cambridge Univ. Press 2017); see also Josh Blackman, Defiance and Surrender, 59 S. Tex. L. Rev. 157, 158, 165 (2017) (describing limited relevance for originalism of views from Jacksonian era onward).

¹¹² Eagle Forum Br., supra note __, at 10.

¹¹³ Abbvie Br., supra note __, at 14-15.

¹¹⁴ Id. at 13-15 (citing usage in contemporaneous dictionaries and other Constitutional provisions but also using Framers’ intent and post-Framing precedent).

¹¹⁵ See, e.g., Blackwell Br., supra note __, at 29 (contrasting “property” framework of American patent system with the approach in 18th century England); but see, e.g., 3M Br., supra note __, at 3 (attributing the “property” framework to “the English common-law era”).

¹¹⁶ See, e.g., B. Zorina Khan, The Democratization of Invention: Patents and Copyrights in American Economic Development, 1790-1920 36 (Cambridge Univ. Press 2005) (“British patents . . . were subject to any restrictions that the government cared to impose”); Edward C. Walterscheid, The Early Evolution of the United States Patent Law: Antecedents (Part 4), 78 J. Pat. & Trademark Off. Soc’y 77, 90 (1996) (“[T]he early English patent custom because . . . did not involve the creation of a property right at common law.”).

based on its evaluation of public policy or other considerations.¹¹⁷ Patent rights were not standardized but instead reflected individualized “deals” with unique scope, terms, conditions, and obligations.¹¹⁸ They often included “regulatory” conditions on the use of the patent or the conduct of the patent owner, such as working requirements mandating that the patentee practice the invention to maintain the exclusive rights; stipulations of quality and price for the covered product; and apprentice clauses that required training local workers.¹¹⁹ English patents could be revoked by the crown’s Privy Council, including on discretionary, public policy grounds.¹²⁰

Over time, common law developments and the Statute of Monopolies imposed some limits on royal discretion, requiring a form of novelty, a specification describing the invention, and a duration of less than fourteen years.¹²¹ Moreover, with a waning royal interest in patents as patronage or policy tools in the second half of the 1700s, patents became more standardized and issued as a matter of course through a cumbersome bureaucratic process but with limited substantive evaluation or official discretion.¹²² In addition to, or perhaps because of, this routinization of patents, currents of thought emerged that described patents as a “property right” and perhaps even a “natural right.”¹²³

However, the formal law and judicial treatment of patents remained quite different than the “property” conception of patents that would later emerge in the United States.¹²⁴ Discussions of patent law in precedents and legal treatises remained sparse at the end of the 18th century.¹²⁵ The few cases in the late 1700s reflecting the changing conception of patent rights in England tended to be unreported and only later known through notes found in personal papers.¹²⁶ Published cases in the late 1700s continued to make explicit statements consistent with the traditional concept of patents as a discretionary, ad hoc, royal prerogative.¹²⁷ Only in the early 1800s did a shift in the concept of patents from a royal prerogative to a right based on social

¹¹⁷ OREN BRACHA, *OWNING IDEAS: THE INTELLECTUAL ORIGINS OF AMERICAN INTELLECTUAL PROPERTY, 1790-1909* 16-17 (Cambridge University Press 2016).

¹¹⁸ Bracha, *supra* note __, at 16-17.

¹¹⁹ *Id.* at 17.

¹²⁰ *Id.* at 18.

¹²¹ *Id.* at 20; Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550-1800*, 52 *Hastings L.J.* 1255, 1287-89 (2001).

¹²² BRACHA, *supra* note __, at 22; Walterscheid, *Antecedents* 4, *supra* note __, at 83-88.

¹²³ BRACHA, *supra* note __, at 22-23.

¹²⁴ *Id.* at 21-22 & n.39, 25.

¹²⁵ Mossoff, *Rethinking*, *supra* note __, at 1287-89.

¹²⁶ *See Id.* at 1293 & n.159, 1306 & n.219, 1311 & n.237.

¹²⁷ *Id.* at 1301 & n.201.

contract appear explicitly in English cases.¹²⁸ Thus, at the end of the 18th century, “[t]he traditional ad hoc privilege structure had eroded in practice for more than a century, but no firm and clear replacement took its place either in the bureaucratic processes or in formal legal thought.”¹²⁹

B. *The Nature of Patent Rights in America Before the Constitution*

In the colonies before the Revolution and in the states under the Articles of Confederation,¹³⁰ patent protection “received only minor attention and had little economic importance.”¹³¹ Patents were granted only sporadically in some colonies and not at all in others.¹³² States likewise did not issue many patents and some had issued none by the Constitutional Convention.¹³³ However, the years immediately preceding and during the Constitutional Convention of 1787 saw a “wave of petitions” to state legislatures seeking patent protection, fueled in part by a fierce competition for exclusivity in steamboat inventions.¹³⁴

The patents that did issue in America before the Constitution reflected broad governmental – specifically, legislative – power to define the terms, conditions, and rights of patent protection, including the power to “regulate” patent rights and patent owners. “[T]he various developments that gradually changed English patents in the seventeenth and eighteenth centuries were mostly absent or appeared only partially in the colonies and the states.”¹³⁵ Colonial invention patents “consisted almost entirely of private enactments of colonial legislatures in behalf of individual inventors, and included varying provisions and terms of effectiveness.”¹³⁶ State patents under the Articles of Confederation were “essentially a continuation of the colonial practice of enacting private laws of varying provisions in favor of individual inventors.”¹³⁷ The broad legislative power to specify the content of patent rights is evident both from the actual terms and conditions of patents and from

¹²⁸ *Id.* at 1300, 1313.

¹²⁹ BRACHA, *supra* note __, at 25.

¹³⁰ Patents were colony-specific before the Revolution and state-specific under the Articles of Confederation. WALTERSCHEID, *NATURE*, *supra* note __, at 37, 56.

¹³¹ Bruce W. Bugbee, *Genesis of American Patent and Copyright Law* 11 (Public Affairs Press 1967).

¹³² BRACHA, *supra* note __, at 25.

¹³³ 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, 1804 (2006).

¹³⁴ Bugbee, *supra* note __, at 98.

¹³⁵ BRACHA, *supra* note __, at 26.

¹³⁶ Bugbee, *supra* note __, at 57.

¹³⁷ Bugbee, *supra* note __, at 84.

the pre-Constitution American conception of patent rights more generally.

1. The Nature of Patent Protection in the Colonies and States

As Professor Hovenkamp recognized, “[t]he earliest American patents for inventions were a far cry from the private property rights model that predominates today,” as the colonies and states took a flexible approach to patent protection that “viewed the patent as an active policy tool for economic development.”¹³⁸ Patents were obtained by petitioning the colonial or state legislature for a “discretionary ad hoc grant[],”¹³⁹ rather than as a matter of right arising from the act of invention or as a matter of course through a bureaucratic process (as was beginning to occur in England in the late 1700s). “Each patent constituted a specific deal between the patentee and the colony” or state and therefore the rights granted were tailored to the specific situation, with “[t]he exact terms of the privileges and their duration var[ying] greatly from one grant to the other.”¹⁴⁰

A review of the colonial and state patents discussed in Bruce Bugbee’s extensive survey of patents from that era demonstrate the ways in which colonial and state legislatures regulated patent rights and the conduct of patent owners. Most frequently, colonial and state patents including working requirements that required the patent owner to introduce or practice the patented invention within the colony or state’s territory within a specified term or else the patent would be voided.¹⁴¹ They also frequently imposed price controls, specifying a cap on the price that the patent owner could charge for products embodying the patented invention.¹⁴² Commonly,

¹³⁸ Herbert Hovenkamp, *The Emergence of Classical American Patent Law*, 58 *Arizona L. Rev.* 263, 267 (2016).

¹³⁹ Bracha

¹⁴⁰ BRACHA, *supra* note __, at 26; *id.* at 28 (noting similarities of colonial and state patent practice); Bugbee, *supra* note __, at 57, 84 (describing patents in colonial America as private enactments with “varying provisions and terms of effectiveness” and state practice as “essentially a continuation of the colonial practice”).

¹⁴¹ See, e.g., Bugbee, *supra* note __, at 69-70 (1728 Connecticut patent to Higley and Dewey required working within two years and continued working to maintain patent protection); *id.* at 86 (1780 Pennsylvania patent to Guest with working requirement); *id.* at 97 (1785 Pennsylvania patent to Rumsey with requirement to work within one year); *id.* (1787 Virginia patent to Fitch providing the patent was void if a specific embodiment of the invention was not in operation within three years).

¹⁴² See, e.g., Bugbee, *supra* note __, at 63-64 (1646 Massachusetts Bay patent to Jenks reserving the right “to restrayne ye exportacon of such manufactures, & to moderate ye prizes thereof if occacon so require”); *id.* at 89-90 (1785 Pennsylvania patent to Donaldson allowing Philadelphia port wardens to fix his dredging rates for using invention if disputed); *id.* at 94 (1786 South Carolina patent to Belin requiring he provide he build his water works or allow others to do so at a reasonable price); *id.* at 101 (1787 New Hampshire patent to

colonial and state patents imposed compulsory licensing schemes, where the patent owner was required to allow others to use the invention upon payment of a specified fee.¹⁴³ They also sometimes required that the inventor teach the invention to others within the territory.¹⁴⁴

Beyond regulating the patent rights and patent owner, colonial and state patents limited the patent owner's ability to enforce its patent rights. Sometimes issued patents were subject to third-party use rights imposed by the legislature.¹⁴⁵ More typically, colonial and state patents specified a particular penalty for infringement, rather than allowing the patent owner to recover its damages.¹⁴⁶ Some of these penalty provisions certainly benefited patent owners,¹⁴⁷ but others restricted enforcement of their patent rights.¹⁴⁸ Perhaps most surprisingly to modern eyes,¹⁴⁹ some colonial and state patents required the patent owner to split the recovery of any penalty for infringement with the colonial or state government!¹⁵⁰ Finally, colonial and state patents

Dearborn requiring that one patented product be sold for no more than £8 and the other patented product for no more than £6);

¹⁴³ Bugbee at 75 (1691 South Carolina patent to Guerard setting 40 shillings as fee to use patented invention); *id.* at 94 (1786 South Carolina grant to Belin allowed compulsory licensing if invention not provided at reasonable price); *id.* at 94 (1788 South Carolina patent to Knight requiring him to allow duplication of his machine upon payment of £5 sterling); *id.* at 102 (1791 New Hampshire patent to Young allowing anyone use his patented design upon payment of no more than 3 shillings).

¹⁴⁴ Bugbee, *supra* note __, at 68 (1750 Massachusetts patent to Crab requiring teaching of new candle-making technique to five inhabitants of the colony); *id.* at 100 (1789 New Hampshire patent to Evans requiring him to provide within one year a trained builder of such machines within the state who would remain for the entire patent term); *id.* at 102 (1791 New Hampshire patent to Young requiring him to appoint an agent in each county within four months to teach his chimney-building method upon payment of a specified fee).

¹⁴⁵ Bugbee, *supra* note __ at 100 (1787 Delaware patent to Evans specifically exempted a Newcastle milling firm already using similar machines).

¹⁴⁶ See, e.g., Bugbee, *supra* note __, at 74 (1774 Connecticut patent to Shipman with £50 infringement penalty); *id.* at 79 (1743 South Carolina patent to Timmons with £10 infringement penalty); Bugbee at 91 (1789 Pennsylvania patent to Leslie with £20 infringement penalty); *id.* at 95 (1787 Maryland patent to Lemmon with £50 infringement penalty).

¹⁴⁷ See, e.g., Bugbee, *supra* note __, at 87 (1780 New York patent to Guest with penalty of three times the value of infringing sales); *id.* at 94 (1788 South Carolina patent to Briggs and Longstreet with penalty of double the value of infringing products).

¹⁴⁸ See, e.g., Bugbee, *supra* note __, at 86 (1780 Pennsylvania patent to Guest with penalty of one-half the value of infringing sales).

¹⁴⁹ But cf. Sichelman, *supra* note __, at 569-570 (arguing that on the appropriate public model for patent remedies, there is no necessary reason why the patent owner should be entitled to sue for compensatory damages).

¹⁵⁰ See, e.g., Bugbee, *supra* note __, at 71 (1714 New York patent to De Graeuw requiring splitting of £100 infringement penalty between De Graeuw and crown); *id.* at 93-94 (1786 South Carolina grant to Belin requiring splitting of £100 infringement penalty

often allowed the legislature to revoke the patent that it granted.¹⁵¹ Notably, however, in the 1780s, state legislatures increasingly specified a defined payment to the patent owner in the event the patent rights were revoked.¹⁵²

South Carolina was the only state to enact a general patent law before the Constitution, providing “[t]he Inventors of useful machines” the “exclusive privilege of making or vending their machines for the like term of 14 years.”¹⁵³ But even this early patent statute adopted a “regulatory” approach to patent rights, retaining individualized legislative grants; imposing compulsory licensing if patent owners did not provide the patented product in sufficient quantity and price to meet consumer demand; and mandating that recoveries for infringement be split with the state.¹⁵⁴

2. The Conception of Patent Rights in the Colonies and States

Moving beyond their actual terms and conditions, colonial and state patent grants were typically justified on grounds virtually identical to the dominant modern justification for patent rights – the utilitarian goal of incentivizing the creation of new inventions to promote the public good. Indeed, the dozens of colonial and state patents identified in Bruce Bugbee’s survey are near-unanimous in justifying their grant based on the social benefits the inventions conferred on the colony or state.¹⁵⁵

An early 1691 South Carolina patent to Guerard was explicit in its utilitarian rationale, explaining its goal that “all other ingenious and industrious persons may be encouraged to essay such other machines as may conduce to the better propagation of any commodities of the produce of this Colony.”¹⁵⁶ Similarly, 17th century statutes in the Massachusetts Bay and Connecticut colonies prohibited monopolies, but excluded short grants for “new Inventions” that were “p[ro]fitable” to the country and for “such new Inventions as shall be judged profitable for the Country,” respectively¹⁵⁷

between Belin and the State).

¹⁵¹ Bracha, *supra* note __, at 26.

¹⁵² Bugbee, *supra* note __, at 96 (1785 Virginia patent to Rumsey specifying £10,000 payment if revoked); *id.* at 97 (1785 Pennsylvania patent to Rumsey specifying £8000 payment if revoked); *id.* at 100 (1787 Pennsylvania patent to Evans specifying £5000 payment if revoked); *id.* (1787 Delaware patent to Evans specifying £1000 payment if revoked); *id.* (1789 New Hampshire patent to Evans specifying £2000 payment if revoked).

¹⁵³ *Id.* at 28.

¹⁵⁴ Bugbee, *supra* note __, at 93-94.

¹⁵⁵ See Bugbee, *supra* note __, at 84-103; see also n. __, *supra*.

¹⁵⁶ Bugbee, *supra* note __, at 75.

¹⁵⁷ Bugbee, *supra* note __, at 61, 68-69.

Colonial patents in the 18th century continued to explicitly emphasize the utilitarian rationale for their issuance. Massachusetts issued a patent to Houghton in 1736 because the invention was “tending to publick benefit and service; and this court [the legislature] being willing to encourage projections whereby the good of the publick may be served.”¹⁵⁸ South Carolina patents to Timmons in 1743 and Pedington in 1756 both stated that they were granted so “that all due encouragement be given to ingenuity and industry, when it tends to the public good.”¹⁵⁹

State patents under the Articles of Confederation likewise emphasized utilitarian purposes, both generally encouraging inventions and specifically encouraging particular industries or developments. As a general matter, the 1784 South Carolina patent (and copyright) statute was entitled “An Act for the Encouragement of Arts and Sciences.” The New Hampshire legislature justified its 1787 grant to Dearborn because it was “the interest of the state to encourage the inventing and constructing of new, more convenient, and less expensive instruments for the different purposes of life.”¹⁶⁰ Similarly, in a 1780 patent to Guest, the New York legislature noted that it was “willing to give all due encouragement to useful discoveries,”¹⁶¹ while a 1787 Maryland grant to Lemmon generally “wish[ed] to encourage useful inventions” before more specifically noting that it sought to “promote the manufacture of cotton and wool within the state.”¹⁶² South Carolina granted a patent to Belin in 1786 because “it may tend much to the improvement of agriculture, and otherwise advance the prosperity of the citizens of this State, if proper encouragement was given to the discoverers, improvers and constructors of such most advantageous principles and beneficial water works.”¹⁶³

Colonial and state patent grants sometimes framed their justifications in terms of a proper reward for the inventor for their ingenuity and discovery. In doing so, however, these grants generally explained that the reason rewarding the inventor was proper was because of the benefits they had conferred on the public through their invention. For example, in a 1728 grant to Higley and Dewey, the Connecticut legislature justified the grant because of the inventor’s “considerable cost and labor,” noting that it was “willing to give all due encouragement to works of this nature.”¹⁶⁴ Similarly, the

¹⁵⁸ Bugbee, *supra* note __, at 68.

¹⁵⁹ Bugbee, *supra* note __, at 79, 81.

¹⁶⁰ Bugbee, *supra* note __, at 101.

¹⁶¹ Bugbee, *supra* note __, at 87.

¹⁶² Bugbee, *supra* note __, at 95.

¹⁶³ Bugbee, *supra* note __, at 93.

¹⁶⁴ Bugbee, *supra* note __, at 69-70.

Pennsylvania legislature found it appropriate to grant a patent in 1787 “to make adequate compensation to the said Oliver Evans for his ingenuity, trouble and expense in the said discoveries,” but only after first noting that the invention “will greatly tend to simplify and render cheap the manufacture of flour which is one of the principal staples of this commonwealth.”¹⁶⁵ In these grants, the concept of reward seems to be playing the same role as incentive in modern patent theory. A 1789 Pennsylvania patent to Rumsey made this fairly explicit, noting that “it is highly proper that ingenious men who by their labors and study contrive and invent improvements in the arts and sciences should be rewarded by the community in proportion to the advantages resulting from the usefulness of their inventions.” It then explained why patent protection was the appropriate “reward”: “the exclusive right and privilege of making and using and vending to others . . . is not only the most cheap and frugal but the most certain way of rewarding inventors according to their merits.”¹⁶⁶

Though utilitarian-focused justifications predominated in colonial and state patent grants, there were a few suggestions that something more was behind the patent grant. A 1785 Pennsylvania patent to Donaldson stated that “it is consistent with the honor of this state to reward the inventors of useful machines and the most rational and just mode of such reward is and ought to be the exclusive advantage resulting from the invention for a term of years.”¹⁶⁷ A 1789 Pennsylvania patent to Leslie went further by stating that “it is just and right to reward the inventors of useful improvements.”¹⁶⁸ A 1788 South Carolina patent to Briggs and Longstreet was the most direct in suggesting a non-utilitarian justification, though also did so in conjunction with an explicitly utilitarian explanation. It said that “the principles of natural equity and justice require that authors and inventors should be secured in receiving the profits that may arise from the sale or disposal of their respective writings and discoveries, and such security may encourage men of learning and genius to publish and put in practice such writings and discoveries as may do honor to their country and service to mankind.”¹⁶⁹

These patents were the exception, not the rule – they are the only such examples in Bugbee’s extensive survey of colonial and state patents. In the same time period that these patents were issued, others were issued with only

¹⁶⁵ Bugbee, supra note __, at 99-100.

¹⁶⁶ Bugbee, supra note __, at 99.

¹⁶⁷ Bugbee, supra note __, at 89; see also id. at 91 (1787 Pennsylvania patent to Wall with similar language).

¹⁶⁸ Bugbee, supra note __, at 91.

¹⁶⁹ Bugbee, supra note __, at 95.

utilitarian justifications (including in Pennsylvania and South Carolina).¹⁷⁰ And even these patents did not see significant regulation of patent owners and patent rights as inconsistent with whatever non-utilitarian justifications they may have been suggesting. The Donaldson patent included a price control provision that allowed port wardens to fix the price Donaldson charged for using his patented dredging machine in the event of a dispute,¹⁷¹ while the Briggs and Longstreet patent was conditioned on reducing the invention to practice within a year.¹⁷²

3. Foreshadowing the Terms of the IP Clause

Beyond the terms and conditions they imposed and the justifications they provided, colonial and state patents are noteworthy because they often used language foreshadowing the language of the Constitution's IP Clause. Colonial and state patents used variable language in describing the legal interest they conveyed. Some referred to it as an "exclusive right," the same language that later would be used in the IP Clause, while others referred to it as an exclusive privilege,¹⁷³ an exclusive advantage,¹⁷⁴ or an exclusive benefit.¹⁷⁵

Moreover, colonial and state patents frequently used the terms "exclusive right" and "privilege" interchangeably within the same patent.¹⁷⁶ In a related context, Professor Mossoff has argued that equating patent rights with privileges in early America does not undermine the "property" conception of patent rights because "'privileges' referred to fundamental civil rights considered on par with natural rights."¹⁷⁷ Notably, however, state and colonial patents did not just equate the exclusive right they conveyed with a privilege but also sometimes used "exclusive right" interchangeably with "advantage" or "benefit."¹⁷⁸

¹⁷⁰ See *supra*.

¹⁷¹ Bugbee, *supra* note __, at 90.

¹⁷² Bugbee, *supra* note __, at 95.

¹⁷³ Bugbee, *supra* note __, at 73-74 (two 1770 Maryland patents granting "exclusive Privilege and Benefit of making and selling a [patented] Machine"); Bugbee at 93 (1784 South Carolina statute granting inventors the "exclusive privilege")

¹⁷⁴ Bugbee, *supra* note __, at 89 (1785 Pennsylvania grant to Donaldson referring to granting "the exclusive advantage resulting from the invention").

¹⁷⁵ Bugbee, *supra* note __, at 73-74 (two 1770 Maryland patents granting "exclusive Privilege and Benefit of making and selling a [patented] Machine").

¹⁷⁶ Bugbee, *supra* note __, at 88 (1783 Connecticut patent equating "exclusive Right" and "Privilege"); *id.* at 96 (1784 Virginia petition seeking "sole and exclusive right and privilege"); *id.* at 99 (1789 Pennsylvania grant of the "exclusive right and privilege")

¹⁷⁷ *Id.* at 967.

¹⁷⁸ See Bugbee, *supra* note __, at 89 (1785 Pennsylvania patent using "exclusive right")

Colonial and state patents using the term “exclusive right” were clear that the rights *created by the patent*, not some pre-existing right to exclusivity from the act of invention, referring to the legal interest they conveyed as an “exclusive right” even while describing it as a “reward” granted by the grace of the legislature for the advantages the invention offered the state.¹⁷⁹ Likewise, colonial and state patents viewed the grant of an expressly described “exclusive right” as entirely consistent with significant regulation of the patent owner, regulation of the patent rights, or limits and conditions.¹⁸⁰

C. *The Nature of Patent Rights at the Framing*

“We do not know with any certainty how the IP Clause came about or from what specifically it was derived.”¹⁸¹ This section first describes the utter lack of discussion of the nature of patent rights during the drafting and ratification of the Constitution before considering some potential influences on the Framers’ conception of patent rights that may not have been directly acknowledged during this process.

1. The Drafting and Ratification of the IP Clause

Intellectual property rights were not included in the first draft of the Constitution nor otherwise addressed in the first three months of the Constitutional Convention.¹⁸² On August 18, 1787, both James Madison of Virginia and Charles Pinckney of South Carolina proposed four economic development powers for Congress: (1) to create a university; (2) to grant financial and other inducements to encourage development; (3) to secure

and “exclusive advantage” interchangeably);

¹⁷⁹ See Bugbee, *supra* note __, at 86 (1780 Pennsylvania grant of “sole and exclusive right” “as a reward for his discovery and for the purpose of promoting useful manufactories in this state”); *id.* at 88 (1783 Connecticut grant of “exclusive Right . . . as a reward for his Study and Invention”); *id.* at 89 (1785 Pennsylvania grant of “exclusive right” to “reward the inventors of useful machines”); *id.* at 99 (1789 Pennsylvania grant of “exclusive right and privilege” to “reward[.]” inventors “in proportion to the advantages resulting from the usefulness of their inventions”).

¹⁸⁰ *Id.* at 86 (1780 Pennsylvania grant of “exclusive right” with working requirement and damage capped at half of infringing sales); *id.* at 89-90 (1785 Pennsylvania grant of “exclusive right” with price control condition); see also *id.* at 93, 118-119 (South Carolina statute granting inventors of useful machines “a like exclusive privilege” but with price control and compulsory licensing provisions); *id.* at 102 (1791 New Hampshire grant of “sole and exclusive previledge [sic]” with compulsory licensing provision requiring teaching of method to anyone wishing to use it for three shillings)

¹⁸¹ Edward C. Walterscheid, *Originalism and the IP Clause: A Commentary on Professor Oliar’s “New Reading,”* 58 UCLA L. REV. DISCOURSE 113, 115 (2010).

¹⁸² Dotan Oliar, *The (Constitutional) Convention on IP*, 57 UCLA L. Rev. 421, 426 (2009).

copyrights to authors; and, most relevant, (4) to grant rights to inventors.¹⁸³ Madison's proposed patent power allowed Congress "[t]o secure to the inventors of useful machines and implements the *benefits* thereof for a limited time,"¹⁸⁴ language that is more in line with the pre-Constitution discretionary patent practice than with the modern "property" conception of patent rights. Likewise, Pinckney's proposal gave Congress the power "[t]o grant *patents* for useful inventions," language that would seem to directly invoke the pre-Constitution patent practice.

On September 15, 1787, the Committee of Eleven (to whom all proposals had been referred) proposed the version of the IP Clause ultimately adopted.¹⁸⁵ No record exists of the deliberations leading to this final text or who ultimately drafted it.¹⁸⁶ The language does not track either Madison's or Pinckney's, though seems to combine elements from both.¹⁸⁷ Of course, the absence of a historical record makes this conjecture.¹⁸⁸ The IP Clause passed unanimously without recorded debate.¹⁸⁹

Rather than demonstrating a consensus of patents' importance, as some suggest,¹⁹⁰ the near-silence during the Framing suggests that the issue was seen as minor compared to other more pressing matters. Madison's summary of the problems with the Articles of Confederation a month before the Constitutional Convention noted the lack of copyright uniformity as an issue of "inferior moment" and made no mention of patent rights.¹⁹¹ And, again, the first draft of the Constitution made no provision for patent rights.

Moreover, the IP Clause raised no controversy among the states during ratification.¹⁹² The *Federalist Papers* mention the IP Clause briefly. In Federalist No. 43, Madison suggests, perhaps erroneously, that there was a common law right to copyright in England and then proceeds to note that "[t]he right to useful inventions seems with equal reason to belong to the inventors" because "[t]he public good fully coincides in both cases with the

¹⁸³ Oliar, *Making*, supra note __, at 1789.

¹⁸⁴ *Id.* (emphasis added); see also Oliar, (*Constitutional*), supra note __, at 435-445 (noting uncertainty over whether Madison included a patent proposal).

¹⁸⁵ Oliar, *Making*, supra note __, at 1790.

¹⁸⁶ Karl Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 11 J. PAT. OFF. SOC'Y 438 442 (1929); Oliar, (*Constitutional*), supra note __, at 446.

¹⁸⁷ Oliar, *Making*, at 1805-06.

¹⁸⁸ Walterscheid, *Originalism*, supra note __, at 115.

¹⁸⁹ Oliar, *Making*, supra note __, at 1790.

¹⁹⁰ See, e.g., Bugbee, supra note __, at 2.

¹⁹¹ Bugbee, supra note __, at 125.

¹⁹² Fenning, supra note __, at 442

claims of individuals.”¹⁹³ Madison further noted that the “states cannot separately make effectual provision for” copyrights and patents.¹⁹⁴ Patent rights were never mentioned in state ratifying conventions, and the two mentions of the IP Clause in the ratification debates emphasized the need for national, not state, copyright protection, with one also justifying copyright on utilitarian grounds of encouraging the production of great writings.¹⁹⁵

Beyond the general importance of patent rights, the indirect evidence indicates that the Framers did not view patent rights in line with the modern “property” conception. In Federalist No. 43, Madison justified his conclusion that “[t]he utility of this [Congressional IP] power will be scarcely questioned” on two grounds.¹⁹⁶ The second was that state governments were ineffectual for this purpose,¹⁹⁷ indicating a need for national patent rights but nothing about the content of those rights. Madison’s first basis was that the “[t]he right to useful inventions *seems with equal reason* to belong to the inventors” as copyrights to authors, which Madison suggested “to be a right of common law” in England.¹⁹⁸ Some contend that this shows that the Framers intended patent rights to be treated like common law rights in property.¹⁹⁹ However, as Professor Mossoff even recognizes, “Madison was suggesting a connection between copyrights and patents in their *policy* justification, not in their technical *legal* status.”²⁰⁰ Specifically, Madison equated the justifications for patent rights with those of copyright: “[t]he public good fully coincides in both cases with the claims of individuals.”²⁰¹ But Madison did not equate the content or nature of patent rights with the content or nature of common law copyrights, much less with common law property rights not even mentioned in Federalist No. 43.

The only other statement by a Framers about patent rights during the Constitutional Convention was a private exchange of letters between James Madison and Thomas Jefferson (who was not a Framers).²⁰² Jefferson suggested to Madison that the bill of rights ban monopolies, acknowledging that this would include patents for inventions but concluding that “the benefit

¹⁹³ Federalist No. 43 ¶ 1, available at http://avalon.law.yale.edu/18th_century/fed43.asp.

¹⁹⁴ *Id.*

¹⁹⁵ WALTERSCHEID, NATURE, *supra* note __, at 10-11.

¹⁹⁶ Federalist 43, *supra* note __, at ¶ 1.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* (emphasis added).

¹⁹⁹ See, e.g., *AbbVie Br.*, *supra* note __, at 15; *PhRMA Br.*, *supra* note __, at 20.

²⁰⁰ Mossoff, *Who Cares*, *supra* note __, at 981.

²⁰¹ Federalist 43, *supra* note __, at ¶ 1.

²⁰² See Mossoff, *Who Cares*, *supra* note __, at 962 n.43 (noting lack of commentary by Framers on patent rights).

even of [such] limited monopolies is too doubtful to be opposed to that of their general suppression.”²⁰³ Madison agreed with Jefferson’s anti-monopoly sentiment but suggested that “encouragements to literary works and ingenious discoveries” were “too valuable to be wholly renounced[.]”²⁰⁴ He thought it sufficient to “reserve in all cases a right to the Public to abolish the privilege at a price to be specified in the grant of it,”²⁰⁵ as often occurred under the “regulatory” approach of the colonies and states.²⁰⁶ The only other known public comment about patent rights during the Constitution’s drafting made the practical point that the government did not have the resources to provide direct rewards for meritorious inventions.²⁰⁷

Professor Nachbar rightly concludes:

The most obvious conclusion to be drawn from the mention made of the Intellectual Property Clause during the framing is that the Clause was either uncontroversial or simply unimportant. . . . Of what little there was said about the Intellectual Property Clause during the ratification debates, the most consistent points raised were not that intellectual property regulation should reflect any particular policy but rather that it should be uniform.²⁰⁸

2. Potential Influences on the Framers’ View of the Nature of Patent Rights

In the absence of direct discussion of the nature of patent rights during the Framing, there is a natural tendency to look for background influences that would have shaped the Framers’ views of the nature of patent rights, even if not directly acknowledged. Unfortunately, the influences on the Framers’ view of the nature of patent rights are ambiguous.

It would be unsurprising if the Framers’ view of the nature of patent rights, was influenced, at least to some extent, by the English patent practice.²⁰⁹ However, those trying to limit Congress’s power to define patent rights are split as to whether the IP Clause reflects a continuation of the prior

²⁰³ Letter From Thomas Jefferson to James Madison, 31 July 1788, available at <https://founders.archives.gov/documents/Jefferson/01-13-02-0335> (“Jefferson LTR”)

²⁰⁴ Letter From James Madison to Thomas Jefferson, 17 October 1788, available at <https://founders.archives.gov/documents/Madison/01-11-02-0218> (“Madison LTR”).

²⁰⁵ *Id.*

²⁰⁶ See Part II.A, *supra*.

²⁰⁷ Heald & Sherry, *supra* note __, at 1149 & n.244; *see also* Mossoff, *Who Cares*, *supra* note __, at 962 & n.43.

²⁰⁸ Nachbar, *supra* note __, at 338.

²⁰⁹ Bugbee, *supra* note __, at 2.

English practice or a sharp break with the prior English practice.²¹⁰ In truth, the extent of the Framers' familiarity with the details of English practice or the nature of English patent rights is unclear. By contrast, the Framers almost certainly were familiar with state patent practice under the Articles of Confederation, since many of the Framers were members of state legislatures in the 1780s.²¹¹ Notably, the American states saw a flurry of patent activity in the mid to late 1780s, including the fierce competition for patent rights in the steamboat, that would have highlighted the state patent practice to those Framers serving in state legislatures.²¹²

Beyond prior English and American practice, some contend that the Framers' view of the nature of patent rights was influenced by conceptions of Lockean social contract, *i.e.*, securing to the inventor a natural right to the product of his or her labor in creating the invention.²¹³ A natural rights conception of patent rights would become prominent in the 19th century,²¹⁴ but it is doubtful that it was shared by the Framers.²¹⁵

Even its proponents recognize that the Framers' supposed Lockean view of patent rights would have been a completely new conception of patent rights because exclusivity in inventions was not a recognized natural right at English common law.²¹⁶ Likewise, patent grants in the colonies and states were normally justified by the legislatures on utilitarian grounds of encouraging useful inventions and promoting manufacturing and agriculture.²¹⁷ Although the English conception of patents as discretionary royal prerogatives was eroding and would eventually be replaced by a

²¹⁰ Compare add cites

²¹¹ Bugbee, *supra* note __, at 2.

²¹² Bugbee, *supra* note __, at 98.

²¹³ Mossoff, *Who Cares* *supra* note __, at 981-985 (2007); BIO Br., *supra* note __, at 10 (arguing that "the moral claim of the inventor to the fruits of his or her labor was a uniquely American justification for patents under the Constitution").

²¹⁴ See Part I.D, *supra*; Mossoff, *Who Cares*, *supra* note __, at 998-1008 (describing natural rights' influence on patent law in the 19th century). Some even in the 19th century doubted the applicability of natural rights to patent law. See, e.g., C. C. Langdell, Patent Rights and Copy Rights, 12 Harv. L. Rev. 553 (1898-1899) (rejecting natural right in exclusivity of invention). This is not surprising, given that neither Locke nor any prior natural rights thinker addressed invention patents. Mossoff, *Rethinking*, *supra* note __, at 1284.

²¹⁵ See Wurman, *supra* note __, at 66-83 (describing debate over influences on Constitution, rejecting natural rights as primary influence, and identifying mixed influences).

²¹⁶ Bio Br., *supra* note __, at 10 ("The emphasis on the moral claim of the inventor to the fruits of his or her labor was a uniquely American justification for patents under the Constitution.") Mossoff, *Who Cares*, *supra* note __, at 981 (recognizing that patents were not rights at common law and equating common law rights with natural rights).

²¹⁷ See Part II.B.2, *supra*.

conception of patents as a right, perhaps even natural law right, this view had not yet emerged in the precedent and formal legal sources to which the Framers would most likely have access.²¹⁸ In fact, we know that at least one leading founding-era American interested in patent law (albeit not a Framers) was completely unaware of the changing conception of English patents.²¹⁹

One would expect that such a major shift in the conception of patent rights would have been acknowledged or debated during the Convention or the ratification process. But Pinkney's and Madison's original proposals for patent protection were each part of a series of proposals focused on the utilitarian goal of promoting development.²²⁰ And the IP Clause itself is written in utilitarian, not labor-desert, terms, allowing patent protection "[t]o promote the progress . . . of the useful arts."²²¹ Moreover, the only comments on the IP Clause at state ratification conventions focused on utilitarian justifications for the copyright power.²²²

Professor Mossoff points to Federalist No. 43 as evidence of a Lockean view of patent rights, arguing that copyright was justified by natural rights theory at the time and Madison stated that "[t]he right to useful inventions seems *with equal reason* to belong to the inventors."²²³ Yet, the very next sentences suggests utilitarian considerations as the primary justification for patent rights, with inventors' interests secondary, noting that "[t]he public good fully coincides in both cases with the claims of individuals" and emphasizing the need for protection of national scope.²²⁴ Mossoff also acknowledges that Madison privately viewed patent rights as grounded in utilitarian concerns – the social value of encouraging innovation.²²⁵

In sum, the contention that the Framers were viewed patent rights in Lockean natural contract terms is based on pure conjecture. Such a view requires assuming that this major change in the conception of patent rights from pre-Constitution practice was allowed to go without comment during the Framing process.

²¹⁸ Mossoff, Rethinking, supra note __, at 1301.

²¹⁹ See Murray, supra note __, at 855 (describing English patents as "derived from the grace of the Monarch" and "not so much a right inherent as it is a privilege bestowed and an emanation of prerogative").

²²⁰ Olliar, Making, supra note __, at 1789.

²²¹ Heald & Sherry, supra note __, at 1153-54.

²²² Part III.A.1, supra.

²²³ Mossoff, *Who Cares*, supra note __, at 979-983 (emphasis added).

²²⁴ Federalist 43, supra note __, at ¶ 1.

²²⁵ Mossoff, *Who Cares*, supra note __, at 983-984.

III. THE CHANGING CONCEPTION OF PATENT RIGHTS IN THE UNITED STATES PATENT SYSTEM

A. “Regulatory” Patent Rights in the Early United States Patent System

Those seeking to limit Congress’s power to define patent rights sometimes portray the Constitution as marking a clear shift from a “regulatory” conception of patent rights to a “property” conception.²²⁶ To the contrary, as Professor Hovenkamp notes, into the 1820s, “American legislatures and courts conceived of the patent as an active tool of economic development” with “considerable state involvement in ensuring that granted patents were actually used in socially beneficial ways.”²²⁷ Hovenkamp focuses primarily on state patent rights²²⁸ but federal patent rights issued under the IP Clause showed similar characteristics in the first few decades of the United States patent system.

1. The Nature of Patent Rights Before the First Patent Act

The earliest patent practice under the Constitution, beginning with Congress’s first session on March 4, 1789, was virtually identical to that before the Constitution. Inventors submitted individualized petitions directly to Congress justifying the social importance of their inventions and seeking patent protection with varying scope and terms.²²⁹ They did not assert a right arising from invention but rather sought Congress’s favor, justifying their requests by the benefits they offered to society.²³⁰

Congress referred these petitions to committees to engage in an ad hoc evaluation of the technical merits and public benefits of the inventions,²³¹ demonstrating a clear conception of patent rights in utilitarian terms. In a few

²²⁶ See, e.g., BIO Br., supra note __, at 10 (arguing that the Constitution adopted the “property” framework which previously “was alien to foreign patent systems,” which treated patents “as special privileges . . . in pursuit of their regulatory policies.”).

²²⁷ Hovenkamp, supra note __, at 267.

²²⁸ Hovenkamp, supra note __, at 267.

²²⁹ Bugbree, supra note __, at 131-142.

²³⁰ To James Madison from John Fitch, 2 April 1789, <https://founders.archives.gov/documents/Madison/01-12-02-0035> (asking Congress to “grant me that Encouragement to which they shall think me entitled” because of “the Advantage I shall render my Country by extending the plan to general use”); To George Washington from Francis Bailey, 2 February 1790, <https://founders.archives.gov/documents/Washington/05-05-02-0048> (asking Congress “to encourage your petitioner, in such manner, as his discovery shall appear to merit”).

²³¹ *Id.*

instances, the committees completed their evaluations and reported back to Congress. One recommended that the inventor of new methods of navigation be provided the “exclusive pecuniary emolument” because it was “ingenious” and “of very high importance.”²³² Another petition was sent to Secretary of the Treasury Alexander Hamilton to evaluate its worth, who opined that it was likely to prevent counterfeiting of currency “in a sufficient degree, to merit the countenance of Government, by securing to the Petitioner an exclusive right to the use of his Invention.”²³³ The House passed an individual bill for patent protection for this invention, which, like pre-Constitution patents, specified the amount of damages for infringement and forfeiture of infringing products.²³⁴ However, Congress never granted any individual petition, finding it more convenient to focus on general patent legislation.²³⁵

These early days of the United States’ patent system also provide important insights into the contemporaneous understanding of the language of the IP Clause. Notably, prominent early Americans, including Jefferson and Madison, equated the IP Clause’s reference to an “exclusive right” as conferring a “benefit” on the inventor, rather than any suggestion of a “property” right. For example, in a March 1790 letter, James Madison stated that “Congress seem[s] to be tied down to the single mode of encouraging inventions by *granting the exclusive benefit* of them for a limited time . . .”²³⁶ A month later, Thomas Jefferson wrote a letter describing the potential passage of legislation to exercise the patent power granted under the IP Clause as “a law for *securing to inventors the benefits* of their own ingenuity.”²³⁷ Earlier, in January 1790, the President of Harvard University wrote to Jefferson about one of the university’s graduates describing “applying to the Congress for a Patent, to *secure to him the benefits* arising from” the invention.²³⁸ And, even earlier, in May 1789, an inventor wrote to George Washington using the term “exclusive right” interchangeably with the term “exclusive pecuniary emolument” in describing patent protection

²³² EDWARD C. WALTERSCHEID, *TO PROMOTE THE PROGRESS OF USEFUL ARTS: AMERICAN PATENT LAW AND ADMINISTRATION 1798-1836*, 83 (Fred B. Rothman & Co. 1998).

²³³ Report on the Petition of Francis Bailey, 23 February 1790, Founders Online, National Archives, <https://founders.archives.gov/documents/Hamilton/01-06-02-0167>.

²³⁴ Bugbee, *supra* note __, at 142.

²³⁵ *Id.* at 84, 120.

²³⁶ From James Madison to Tench Coxe, 28 March 1790, <https://founders.archives.gov/documents/Madison/01-13-02-0089>

²³⁷ From Thomas Jefferson to Joseph Willard, 1 April 1790, <https://founders.archives.gov/documents/Jefferson/01-16-02-0159>.

²³⁸ To Thomas Jefferson from Joseph Willard, 16 January 1790, <https://founders.archives.gov/documents/Jefferson/01-16-02-0065>

under the IP Clause.²³⁹

2. The Nature of Patent Rights and the Early Patent Acts

The First Congress passed patent legislation, which some suggest indicates the importance of the topic to the Framers,²⁴⁰ but did so only after more pressing business prevented it from doing so in its first session.²⁴¹ And its motivation may have been the legislative inconvenience of the steady stream of petitions from inventors, not the importance of patent rights.²⁴² President Washington seemed to have some doubt as to whether the First Congress recognized the importance of patent rights. His first Congressional address in 1790 noted that “[t]he advancement of Agriculture, commerce and Manufactures, by all proper means, will not, I trust, need recommendation” but said that he could not “forebear intimating to you the expediency of giving effectual encouragement as well to the introduction of new and useful inventions from abroad, as to the exertions of skill and genius in producing them at home.”²⁴³

A “regulatory” conception of patent rights remained prominent as Congress debated and adopted general patent legislation in 1790. The Senate amended the pending bill to echo the earlier South Carolina statute by providing for compulsory licensing if the inventor did not offer for sale the invention in the United States in sufficient quantity to meet demand or sold it at a price higher than adequate compensation.²⁴⁴ The House rejected this amendment, and the Senate acquiesced, because of pragmatic concerns about Supreme Court justices determining adequate compensation, not constitutional concerns about Congress’s power.²⁴⁵ Ultimately, the Patent Act of 1790 provided that “it shall and may be lawful” for a board composed of the Secretary of State, Secretary of War, and Attorney General to issue a

²³⁹ To George Washington from John Churchman, 7 May 1789, <https://founders.archives.gov/documents/Washington/05-02-02-0165> (describing petition to Congress “1st For the exclusive pecuniary emolument to be derived from the publication of his inventions” and stating that “only the first part relating to the exclusive right has been as yet adopted”).

²⁴⁰ See Blackwell, *supra* note __, at 4.

²⁴¹ WALTERSCHEID, *PROMOTE*, *supra* note __, at 105.

²⁴² *Id.* at 82-84, 107, 115-120.

²⁴³ From George Washington to the United States Senate and House of Representatives, 8 January 1790, available at <https://founders.archives.gov/documents/Washington/05-04-02-0361>; see also THOMAS G. FESSENDEN, *AN ESSAY ON THE LAW OF PATENTS FOR NEW INVENTIONS* 37 (D. Mallory & Co. Boston, 1810) (describing “dispositions hostile to patentees” by “legal men of great and deserved eminence”).

²⁴⁴ *Id.* at 139.

²⁴⁵ *Id.* at 141 n.107.

patent if they determined the invention was “sufficiently useful and important,” retaining in significant part previous discretionary, policy-based systems but shifting power from the legislature to the executive.²⁴⁶

The Patent Act of 1793 began in earnest the move to the “property” framework for patent rights,²⁴⁷ eliminating the discretionary, policy-based examination by cabinet officials and replacing it with a registration system where patents issued as a matter of course upon compliance with procedural formalities.²⁴⁸ Yet, the patent system retained significant “regulatory” features. The 1793 Act indirectly regulated the conduct of patent owners by limiting damages to “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*,”²⁴⁹ practically requiring the patent owner to use or license the invention. Injunctive relief to enforce the patent owner’s right to exclude remained unavailable until 1819.²⁵⁰ Moreover, courts in the early 1800s used patent law’s utility requirement to perform the board’s prior role of determining whether the invention was socially valuable enough to warrant patent protection.²⁵¹ Additionally, until 1861, Congress and the Patent Office made policy determination of inventions’ value when granting patent term extensions.²⁵²

The continued viability of a “regulatory” conception of patent rights in the early American patent system is most evident from Congress’s treatment of foreign inventors, in furtherance of the protectionist policy objective of promoting domestic industry.²⁵³ Unlike the 1790 Act, the 1793 Act limited patent protection to “citizens of the United States,”²⁵⁴ while the Patent Act of 1800 extended it to non-citizens who had lived in the United States for two years with the “same conditions, limitations, and restrictions” as citizens.²⁵⁵ The Patent Act of July 13, 1832 extended patent protection to

²⁴⁶ Id. at 136.

²⁴⁷ See *infra*, Part II.C.

²⁴⁸ Bracha, *supra* note __, at 202-203.

²⁴⁹ Patent Act of 1793 § 5 (emphasis added).

²⁵⁰ Patent Act of 1819.

²⁵¹ BRACHA, *supra* note __, at 203-206.

²⁵² Richard M. Cooper, *Legislative Patent Extensions*, 48 FOOD & DRUG L.J. 59, 60 (1993) (describing Congressional ad hoc extensions via private bills); Patent Act of 1836 § 18 (creating Patent Office term extension power if inventor provided evidence of costs and profits showing failure to obtain “a reasonable remuneration for the time, ingenuity, and expense” of the invention); 12 Stat. 246, 249 (Mar. 2, 1861) (abolishing term extensions).

²⁵³ See R. Carl Moy, *Patent Harmonization, Protectionism and Legislation*, 74 J. PAT. OFF. SOC’Y 777, 788-789 (1992).

²⁵⁴ Patent Act of 1790 § 1.

²⁵⁵ Patent Act of 1800 § 1. Congress sometimes used its discretion to grant patents to

any non-citizen residing in the United States who declared an intention to become a citizen but subject to significant (and unique) “regulatory” conditions – the inventor was required to become a United States citizen and to publicly use the invention in the United States.²⁵⁶ If the inventor violated either of these conditions, the patent rights “bec[a]me absolutely void without resort to any legal process to annul or cancel the same.”²⁵⁷ The Patent Act of 1836 eliminated this cancellation provision but imposed a working requirement on *all non-citizen patent owners*, providing a complete defense to infringement if a non-citizen patentee “failed and neglected for the space of eighteen months from the date of the patent, to put and continue on sale to the public, on reasonable terms” the patented invention.²⁵⁸ This provision remained until the Patent Act of 1870.²⁵⁹

In sum, a historical precedent or analog from the first few decades of the United States patent system can be found for virtually every modern reform or proposed reform that would move patent rights away from the “property” conception and in a more “regulatory” direction, as the following chart shows:

<u>Proposed Reform</u>	<u>Departure from Property Conception</u>	<u>Post-Ratification Historical Analog</u>
Greater executive discretion in patent issuance, such as weighing social value and costs	Patent issuance as of right upon compliance with technological criteria	Congress’s consideration of applications before 1790 Act; Practice under Patent Board of 1790 Act ²⁶⁰
More technology and industry-specific patent law	Generalized and standardized patent law with uniform criteria and conditions for all inventors and	Pre-1790 Act ad hoc consideration of patent applications; differential treatment of foreign inventors;

foreign citizens via private bills. Merges & Reynolds, *supra* note __, at 61 & n.67.

²⁵⁶ Patent Act of July 13, 1832.

²⁵⁷ Patent Act of July 13, 1832.

²⁵⁸ Patent Act of 1836 § 15.

²⁵⁹ Patent Act of 1870 § 61.

²⁶⁰ See Reilly, *Our 19th*, *supra* note __, at 4, 9-10.

<u>Proposed Reform</u>	<u>Departure from Property Conception</u>	<u>Post-Ratification Historical Analog</u>
	inventions	discretionary term extensions via private bill ²⁶¹
Compulsory licensing and/or policy driven third-party use rights	Strong property interest with near absolute right to exclude	Senate proposed amendment to 1790 Act for compulsory licensing ²⁶²
Working requirements	Near complete patent owner discretion as to whether, and how, to use patent rights	Working requirement for foreign patentees in 1832 Act; non-use defense against foreign patentees in 1836 Act ²⁶³
Greater regulation of patentees and issued patents, such as price controls	Strong property interest; near complete patent owner discretion as to whether, and how, to use patent rights	1832 Act requirement that foreign patentees become citizens to retain patent; Senate proposed amendment to 1790 Act for compulsory licensing if product not sold in sufficient quantity or at reasonable price ²⁶⁴
More restrictive granting of injunctive relief	Strong property interest with near absolute right to exclude	Injunctive relief not available before 1819 Act ²⁶⁵
Administrative	Limited post-issuance	1832 Act provision

²⁶¹ Id. at 4-5.

²⁶² Id. at 6.

²⁶³ Id. at 7.

²⁶⁴ Id. at 6-7.

²⁶⁵ Id. at 15.

<u>Proposed Reform</u>	<u>Departure from Property Conception</u>	<u>Post-Ratification Historical Analog</u>
cancellation of issued patents without judicial involvement	government role	that patents issued to foreigners became “absolutely void without resort to any legal process to annul or cancel the same” if the patentee failed to introduce the invention in US or become a citizen ²⁶⁶

B. The Emergence of the “Property” Conception of Patent Rights in the 19th Century

The “regulatory” aspects of early American patent law faded in the first half of the 19th century. The now-familiar characteristics of the “property” conception that dominated the patent system into the 21st century emerged and took hold in the middle of the 1800s (1820-1870).²⁶⁷

The early years after the Constitution saw growing recognition of the importance of moving from a primarily agrarian economy to one with an active manufacturing sector.²⁶⁸ Some began to emphasize, for the first time, the importance of patent rights to the development of the young nation.²⁶⁹

In this context, the “property” conception of patent rights emerged among those advocating for strong patent protection. In 1792, Joseph Barnes

²⁶⁶ Patent Act of July 13, 1832.

²⁶⁷ Reilly, 19th Century, supra note ____.

²⁶⁸ Alexander Hamilton, Report on the Subject of Manufactures (Dec. 5, 1791), <https://founders.archives.gov/documents/Hamilton/01-10-02-0001-0007> (“The expediency of encouraging manufactures in the United States, which was not long since deemed very questionable, appears at this time to be pretty generally admitted.”).

²⁶⁹ See, e.g., Annals of Congress (2d Cong., 2d Sess.) at 856 (Jan. 1793) (statement of Rep. Murray), available at <https://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=003/llac003.db&recNum=424> (“Murray”) (describing patent legislation as “extremely important” because it “embraced national views and national citizenship” and would insure that the “genius of the Americans could . . . reap its fruits”).

– essentially a lobbyist for a claimant to steamboat patents – published the strongest defense of patent rights to that point in America, and perhaps England.²⁷⁰ Among other arguments, Barnes contended that inventors have “the natural and equal right . . . to have property secured in the products of their genius” as did owners of land or personal property, and further that “each American citizen has a constitutional right to claim that his property in the products of his genius, should be secured by the National Legislature.”²⁷¹ Similarly, in supporting the 1793 Patent Act, Congressman Murray of Ohio contrasted patent protection in England – where a patent was “not so much a right inherent as it is a privilege bestowed” – with what he described as the American approach – “a citizen has a *right* in the inventions he may make, and he considers the law but as the mode by which he is to enjoy their fruits.”²⁷²

Some seeking to limit Congress’s power to define patent rights point to these early statements as evidence that the Constitution mandates the “property” conception.²⁷³ However, these early proponents of a “property” conception of patent rights based on Lockean labor-desert justifications – Barnes, Congressman Murray, and, later, Thomas Fessenden writing the first treatise on American patent law in 1810²⁷⁴ – intermixed these arguments with more familiar utilitarian arguments about incentivizing innovation.²⁷⁵ And, importantly, they all emphasized that their conception was a minority view of which they were trying to convince others. Barnes addressed “several objections raised against” providing strong property rights in inventions that reflected “popular prejudice” and “popular objection.”²⁷⁶ From Barnes’ perspective, the First Congress shared these prejudices and objections, as he

²⁷⁰ WALTERSCHEID, PROMOTE, supra note __, at 209 & n.41.

²⁷¹ Joseph Barnes, Treatise on the Justice, Policy, and Utility of Establishing An Effectual System for Promoting the Progress of Useful Arts, By Assuring Property in the Products of Genius 16 (Francis Bailey 1792).

²⁷² Murray, supra note __, at 855.

²⁷³ See Abbvie Br., supra note __, at 17; BIO Br., supra note __, at 9.

²⁷⁴ Fessenden, supra note __, at xxxvii (contending that an inventor “has the best of all possible titles to a monopoly of the first fruits of his ingenuity” because “[t]he invention is the work of his hands, and the offspring of his intellect . . .”).

²⁷⁵ Barnes, supra note __, at 30 (describing “[t]he essential purpose of a patent system” as “the convenience, and, consequently, the happiness of society” resulting from “an effectual system for securing mental property” that will lead to “all the improvements in science and the arts”); Fessenden, supra note __, at iv-vi (describing the incentives patent protection gives inventors to innovate new technologies that increase convenience and prosperity of society); Murray, supra note __, at 855 (supporting making patents easier to obtain because “[t]he facility of enjoyment would prove an incentive to invention” and it would “tend[] to foster the genius of men”).

²⁷⁶ Id. at 4-5; see also Walterscheid, Constitutional Limitations, supra note __, at 298 (describing Barnes as introducing a new view of patents).

described the “effect of the existing patent system” under the 1790 Patent Act as “infinitely worse than none” and complained that the United States “should be last, or at least should so long protract, or hesitate to establish an effectual [patent] system.”²⁷⁷ Murray likewise noted that “he saw the idea of a patent law ridiculed by some, and unattended to by others.”²⁷⁸ And Fessenden explained “that the lower orders in society” had “absurd and unreasonable prejudices” against inventors and “legal men, of great and deserved eminence, have shown dispositions hostile to patentees.”²⁷⁹

The emerging “property” conception of patent rights was slowly incorporated into the formal patent system. The Patent Act of 1793, influenced by Barnes,²⁸⁰ described the patent as providing “an exclusive property”; offered the alienability of traditional property rights; eliminated government discretion in patent issuance; and provided liberal infringement damages to the patent owner.²⁸¹ The changing conception of patent rights began to appear in the case law, with an 1813 circuit decision by Chief Justice Marshall often identified as the earliest judicial endorsement of the “property” conception.²⁸² And the Patent Act of 1819 provided the injunctive relief necessary to enforce a strong property right in a patent.²⁸³

Professor Hovenkamp associates the changing conception of patent rights to the economic classicism that dominated American public policy under Jacksonian influences in the 1820s and 1830s under which “[t]he government’s job was increasingly seen as limited to defining patent property rights, with questions about development and use left entirely to their private owners.”²⁸⁴ Likewise, “[d]uring the Jackson era, the patent gradually became rebranded as a set of ‘property’ rights” that were issued as of right without government discretion and had “the same protections that apply to rights in

²⁷⁷ Barnes, *supra* note __, at 9.

²⁷⁸ Murray, *supra* note __, at 855

²⁷⁹ Barnes, *supra* note __, at 5 (describing “popular prejudice” and “popular objection” against patent rights); Fessenden, *supra* note __, at ix

²⁸⁰ WALTERSCHEID, PROMOTE, *supra* note __, at 225.

²⁸¹ Reilly, 19th Century, *supra* note __, at 6, 10,

²⁸² *Evans v. Jordan*, 8 F. Cas. 872, 873 (C.C.D.Va. 1813) (Marshall, Circuit Justice) (“The constitution and law . . . give to the inventor, from the moment of invention, an inchoate property therein, which is completed by suing out a patent.”); see also *Cato Oil States Br.* at 4 (identifying *Evans* as the genesis of “property” framework). Contemporaneously, New York’s highest court invoked the “property” framework, stating that “[t]he [patent] power of congress is only to ascertain and define the right of property; it does not extend to regulating the use of it.” *Livingston v. Van Ingen*, 9 Johns. 507, 582 (N.Y. 1812) (Kent, Ch. J.)

²⁸³ Patent Act of 1819.

²⁸⁴ Hovenkamp, *supra* note __, at 269, 271.

land or other traditional property.”²⁸⁵ As a result, “once they were issued, patents were subject to the management of their owners but relatively free from other government control.”²⁸⁶

Reflecting the “property” conception of patent rights and Lockean labor-desert justifications, the precedent in the middle of the 19th century increasingly emphasized that:²⁸⁷ (1) patents were the formal recognition of the inventors’ rights derived from discovery;²⁸⁸ (2) patent were the just reward for the inventor’s labor;²⁸⁹ (3) an issued patent conferred a strong private property right on the patent owner;²⁹⁰ (4) the private property right of a patent was equal to traditional property rights in land;²⁹¹ (5) the protection of patent rights was a particularly important national objective;²⁹² and (6) patents should receive broad and favorable treatment.²⁹³ To be clear, support

²⁸⁵ *Id.* at 271.

²⁸⁶ *Id.*

²⁸⁷ See Adam Mossoff, *Who Cares What Thomas Jefferson Thought about Patents - Reevaluating the Patent Privilege in Historical Context*, 92 *Cornell L. Rev.* 953, 990-1001 (2007) (providing citations and reaching a similar conclusion).

²⁸⁸ See, e.g., *Evans*, 8 F. Cas. at 873-874; *Gayler v. Wilder*, 51 U.S. 477, 493 (1850) (An inventor “is vested by law with an inchoate right to its exclusive use, which he may perfect and make absolute by proceeding in the manner which the law requires.”).

²⁸⁹ See, e.g., *Brown v. Duchesne*, 60 U.S. 183, 195 (1856) (“[Patents] secure to the inventor a just remuneration . . . from his genius and mental labors.”); *Lowell v. Lewis*, 15 F. Cas. 1018, 1020 (C.C.D. Mass. 1817) (describing patents “as an encouragement and reward for [the inventor’s] ingenuity, and for the expense and labor attending the invention.”); *Blanchard v. Sprague*, 3 F. Cas. 648, 650 (C.C.D. Mass. 1839) (Story, Circuit Justice) (“Patents for inventions are now treated as a just reward to ingenious men . . .”).

²⁹⁰ See, e.g., *Ex Parte Wood & Brundage*, 22 U.S. 603, 608 (1824) (describing a patentee’s “property in his inventions . . . of which the law intended to give him the absolute enjoyment and possession”); *Whitney v. Emmett*, 29 F. Cas. 1074, 1080 (C.C.E.D. Pa. 1831) (Baldwin, Circuit Justice) (describing patent validity as “a question of property, of private right, unconnected with the public interest”).

²⁹¹ See, e.g., *U.S. v. Am. Bell Telephone Co.*, 128 U.S. 315, 358-359 (1888) (stating that invention and land patents “emanate from the same source, and . . . are of the same nature, character and validity . . .”); *Consol. Fruit-Jar Co. v. Wright*, 94 U.S. 92, 96 (1876) (“A patent for an invention is as much property as a patent for land. The right rests on the same foundation, and is surrounded and protected by the same sanctions.”); *Hayden v. Suffolk Mfg. Co.*, 11 F. Cas. 900, 901 (C.C.D. Mass. 1862) (“A patent right . . . is just as sacred as any right of property, and no more so . . .”).

²⁹² See, e.g., *Wood & Brundage*, 22 U.S. at 608; *Ames v. Howard*, 1 F. Cas. 755, 756 (C.C.D. Mass. 1833) (Story, Circuit Justice) (describing patent protection as “an object as truly national, and meritorious, and well founded in public policy, as any which can possibly be within the scope of national protection”).

²⁹³ See, e.g., *Lowell*, 15 F. Cas. at 1019 (stating that damages should be “estimated as high, as they can be . . . that wrong-doers may not reap the fruits of the labor and genius of other men.”); *Blanchard*, 3 F. Cas. at 650 (“Patents, then, are clearly entitled to a liberal construction . . .”); *Ames*, 1 F. Cas. at 756 (“[I]t has always been the course of the American

for the “property” framework was not unanimous in the precedent, even at its peak in the mid-19th century.²⁹⁴ Some decisions still described patent rights as public franchises or privileges on par with those to build railroads, telegraph lines, or bridges.²⁹⁵ Some decisions justified patent protection exclusively or partially on utilitarian considerations of promoting the public good by incentivizing innovation.²⁹⁶ And some decisions emphasized Congress’s broad power to define the content of patent rights and impose terms and conditions on the patent grant.²⁹⁷

However, by the middle of the 19th century, the combined effect of legislative and judicial actions was to enshrine the “property” conception of patent rights in American patent law, with core characteristics that remained largely constant into the 21st century: patents as of right upon compliance with only technological criteria without government discretion or evaluation of social benefits; a strong exclusionary right without policy-based third party use rights; and limited government regulation and involvement with issued patents.²⁹⁸ The “property” conception so pervaded the patent system by the late 19th century that the Supreme Court had “no doubt” that a patent “conferred upon the patentee an exclusive property in the patented invention” upon which the government could not condition its own “superior dominion and use” because when the government “grants a patent the grantee is entitled to it as a matter of right, and does not receive it, as was originally supposed to be the case in England, as a matter of grace and favor.”²⁹⁹

courts . . . to construe these patents fairly and liberally . . .”)

²⁹⁴ Mossoff, *Who Cares*, supra note ___, at 1008.

²⁹⁵ See, e.g., *Seymour v. Osborne*, 78 U.S. 516, 533 (1870) (stating that “[l]etters patent are . . . to be regarded . . . as public franchises” and are “entitled to protection as any other property, consisting of a franchise”); see also *Oil States*, 138 S. Ct. at 1373-75 (citing cases); Mossoff, *Who Cares*, supra note ___, at 975 n.106 (citing cases).

²⁹⁶ See, e.g., *Grant v. Raymond*, 31 U.S. 218, (1832) (“The great object and intention of the act is to secure to the public the advantages to be derived from the discoveries of individuals”); Mossoff, *Who Cares*, supra note ___, at 1008 & n.278 (citing cases); see also *Seymour*, 78 U.S. at 533 (describing patents both “as tending to promote the progress of science and the useful arts, and as matter of compensation to the inventors for their labor, toil, and expense”).

²⁹⁷ See, e.g., *McClurg*, 42 U.S. at 206 (describing Congress as having “plenary” power over patents as long as it “do[es] not take away the rights of property in existing patents.”); *Gayler*, 51 U.S. at 493 (concluding that patent rights could not be “regulated by the rules of the common law” because they “did not exist at common law” but rather were “created by the act of Congress; and no rights can be acquired in it unless authorized by statute, and in the manner the statute prescribes”).

²⁹⁸ Reilly, *19th Century*, supra note ___.

²⁹⁹ *James*, 104 U.S. 356, 358 (1881).

C. The Continued Dominance of the “Property” Conception of Patent Rights in the 20th Century

Through the 20th century, patent rights remained largely defined by the “property” conception of patent rights. Patent rights were available as of right upon compliance with uniform technological criteria defined by general legislation, without government discretion or policy weighing in issuance. Patent rights conferred near-absolute exclusionary rights with no policy-based third-party use rights or compulsory licensing. Issued patents were generally free from government control and regulation. And patent owners were entitled to recover full compensatory damages and an injunction upon proof of infringement.³⁰⁰ It is these long-standing features of the patent system that makes the “property” conception of patent rights so familiar that is often mistaken for being an inherent, necessary, or mandatory feature of the patent system.

The stability in the actual characteristics of 20th century patents was juxtaposed with significant changes in the theoretical conception of patent protection. According to Professor Mossoff, “the analytical and normative framework employed by the courts in [19th century patent cases] are no longer cognizable to a modern jurist or scholar.”³⁰¹ Professors Meurer and Nard explain that as early as the end of the 19th century, “the favorable attitude toward patents and the heroic inventor receded and courts voiced greater skepticism of patents as rewarding not the hard labor of the inventor, but rather, the scheming of would-be monopolists.”³⁰² With the rise of Progressivism and Legal Realism in the early 20th century, natural rights theories emphasizing patents as the inventors’ just desert gave way to utilitarian conceptions of patent rights as incentivizing innovation to promote social welfare.³⁰³ “During the twentieth century, courts shifted largely to an economic understanding of the patent system”³⁰⁴ whereby “[w]e grant patents in order to promote innovation, and so we should grant patents only to the extent necessary to encourage such innovation.”³⁰⁵ To 20th century courts,

³⁰⁰ See Reilly, *Our 19th*, supra note __.

³⁰¹ Adam Mossoff, *Patents As Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. Rev. 689, 724 (2007).

³⁰² Michael J. Meurer & Craig Allen Nard, *Invention, Refinement and Patent Claim Scope: A New Perspective on the Doctrine of Equivalents*, 93 Geo. L.J. 1947, 1959 (2005); see also Hovenkamp, supra note __, at 267.

³⁰³ Mossoff, *Patents*, supra note __, at 715-716; see also Hovenkamp, supra note __, at 267 (describing move away from classical liberalism in patent law beginning in 1890s).

³⁰⁴ Meurer & Nard, supra note __, at 1960.

³⁰⁵ Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 Va. L. Rev. 1575, 1597-99 (2003).

“the grant of monopoly power to a patent owner constitute[s] a limited exception to the general federal policy favoring free competition.”³⁰⁶ In turn, “the primary purpose of our patent laws is not the creation of private fortunes for the owners of patents” but instead advancement of the public interest.³⁰⁷

While continuing to describe patents as conferring a property interest, 20th century courts emphasized that this property interest derived exclusively from statute, conferred only the rights granted by Congress, and was subject to the terms and conditions imposed by Congress.³⁰⁸ In modern conception, the IP Clause was “permissive” with regards to patent rights,³⁰⁹ imposing only a ceiling on the extent to which Congress can grant patent protection.³¹⁰ Congress was left with otherwise broad discretion “to implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim” and “set out conditions and tests for patentability.”³¹¹ Despite occasional statements that “inventors shall be fairly, even liberally, treated,” 20th century courts often emphasized strict adherence to the patent statutes and strictly limited the scope of the patent to that expressly described in the claims.³¹²

IV. EVALUATING REASONS TO LIMIT CONGRESS TO THE “PROPERTY” CONCEPTION OF PATENT RIGHTS

Having reviewed the historically variable nature of patent rights in Parts II and III, this Part turns to the question of whether there is any cognizable theory that would limit Congress’s power to define patent rights today. Specifically, this Part evaluates possible reasons why Congress today would be limited to defining patent rights to reflect the “property” conception

³⁰⁶ *Lear v. Adkins*, 395 US 653, 663 (1969); *Precision Co. v. Automotive Co.*, 324 US 806, 816 (1945).

³⁰⁷ *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 511 (1917)

³⁰⁸ *Bonito*, 489 U.S. at 149 (noting that the “limited opportunity to obtain a property right in an idea” is due to the “federal patent scheme”); *Deepsouth*, 406 U.S. at 525-526 (holding that any right to exclude “must be derived from [the] patent grant, and thus from the patent statute” because “[u]nder the common law the inventor had no right to exclude others from making and using his invention”).

³⁰⁹ *Deepsouth*, 406 U.S. at 530.

³¹⁰ *Graham*, 383 U.S. at 5-6.

³¹¹ *Id.* at 6; see also *Deepsouth*, 406 U.S. at 530 (“[T]he sign of how far Congress has chosen to go can come only from Congress.”).

³¹² *Motion Picture*, 243 U.S. at 511-513; see also *Precision*, 324 U.S. at 816 (noting that “the public [has] a paramount interest in seeing that patent monopolies . . . are kept within their legitimate scope”); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 US 225, 230 (1964) (noting that “the prerequisites to obtaining a patent are strictly observed, and when the patent has issued the limitations on its exercise are equally strictly enforced” and “it is strictly construed”).

that has dominated the American patent system for most of its history.

Parts II and III should be sufficient to show the error of equating the familiarity of the “property” conception with its necessity, as those seeking to limit Congress’s power to define patent rights sometimes do. This Part evaluates two other categories of arguments for limiting Congress to the “property” conception – those sounding in originalist constitutional theory and those based on 19th century case law.

A. Theories of Constitutional Originalism

Those seeking to limit Congress to the “property” conception of patent rights sometimes use the language, and occasionally the tools, of originalist theories of constitutional interpretation. This is perhaps a natural place to look for support in limiting the power of today’s Congress to define patent rights. Originalist theories view the meaning of each Constitutional provision as fixed at the time of its enactment, with that fixed meaning constraining constitutional decision-makers today.³¹³

The primary divide in originalist theories is whether the original intent of the Framers or the original public meaning of the provision fixes Constitutional meaning.³¹⁴ Original intent, popular in the 1980s and early 1990s, “maintain[s] that the meaning of the Constitution was fixed by the intentions of the Constitution’s framers, drafters, or ratifiers.”³¹⁵ Legitimate criticism of original intent theories caused “the mainstream of originalist constitutional theory” to “turn[] away from intentionalism and toward textualism” decades ago.³¹⁶ Original public meaning, which now dominates among leading originalists, contends “that the meaning of constitutional text was fixed by the communicative content that the wording of a constitutional text conveyed to the general public at the time of ratification.”³¹⁷ Original intent may be on the verge of a renaissance, however. Two scholars have recently suggested a unified theory of originalism by which original public meaning guides constitutional interpretation – determining the communicative content of the Constitution – and original intent (“the general

³¹³ Randy E. Barnett & Evan Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 *Geo. L.J.* 1 (2018)

³¹⁴ Barnett & Bernick, *supra* note __, at 2-3.

³¹⁵ *Id.* at 2.

³¹⁶ Solum, *Surprising*, *supra* note __, at 237-241. These objections included the difficulty of identifying the collective intent of a multi-member institution and the speculative nature of determining how the framers would resolve contemporary legal problems. *Id.*; Barnett & Bernick, *supra* note __, at 8-11.

³¹⁷ Barnett & Bernick, *supra* note __, at 2.

functions, purposes or objectives of particular constitutional provisions”) guides constitutional construction – determining the legal effect of the Constitution through implementing rules for particular contexts.³¹⁸

This Part evaluates whether originalist theories, if accepted and faithfully applied, would support limiting Congress’s power to define patent rights to the “property” conception. This Part is neither intended to weigh into the extensive debates over the propriety of originalism as a means of constitutional interpretation,³¹⁹ nor to provide a comprehensive originalist evaluation of the IP Clause and Congress’s patent power.³²⁰

1. Does the Framers’ Intent Limit Congress to the “Property” Conception?

Aside from its questionable theoretical justifications in modern originalist thought, an original intent theory offers little support for limiting Congress’s power to define patent rights to a “property” conception. At the time of the Constitution, the “property” conception for patent rights would have been a sharp break from past practice and understandings of patent protection.³²¹ The contention that the Framers intended such a fundamental change in the nature of patent rights³²² without direct acknowledgment is highly doubtful. Yet, there is virtually no direct evidence of the Framers’ intent with regards to patent rights, other than the desire to make them national in scope.³²³

Without direct evidence, proponents of limited Congressional power to define patent rights rely on indirect evidence in contending that “the Framers . . . viewed patents as important private property rights . . . not as a special grant issued by the prerogative of the Executive.”³²⁴ The indirect evidence, however, suggests that the Framers gave limited thought to patent rights and, consistent with pre-Constitution practice, left it to Congress to determine the content and nature of patent rights.³²⁵ Notably, the Framers

³¹⁸ *Id.*

³¹⁹ See Solum, *Surprising*, *supra* note __, at 236 (recognizing debate).

³²⁰ Cf. *id.* at 237 (“Reaching firm conclusions requires meticulous research and analysis that I have not undertaken and that could only be presented in an extensive treatment—a long article on each topic.”).

³²¹ See Part II, *supra*.

³²² Cf. *BIO Br.*, *supra* note __, at 10 (arguing that the IP Clause’s purpose was to adopt a “property” framework “alien to foreign patent systems,” which treated patents “as special privileges . . . in pursuit of their regulatory policies.”).

³²³ See *Bonito Boats*, 489 U.S. at 162 (describing “national uniformity” as “[o]ne of the fundamental purposes” of the IP Clause).

³²⁴ *Mossoff Br.*, *supra* note __, at 15.

³²⁵ See Part II.C, *supra*; *Nachbar*, *supra* note __, at 338 (suggesting that the only

themselves did seem to view the IP Clause as limiting Congress to the “property” conception. The First Congress, which included many Framers, took a “regulatory” approach to the individual petitions it received from inventors, seeking to determine not just technological merit but also whether the social benefit warranted patent protection.³²⁶ Moreover, the first Senate proposed a working requirement, price controls, and compulsory licensing in the process of enacting the country’s first patent act.³²⁷ And the 1790 Patent Act ultimately adopted some “regulatory” features inconsistent with the “property” conception.³²⁸

Some proponents of limiting Congress to the “property” conception of patent rights rely on precedent starting in the 1810s as evidence of the Framers’ intent.³²⁹ In doing so, they mistakenly “collapse different groups of people and different generations together.”³³⁰ To be fair, sometimes these 19th century cases attributed their own views of patent rights to the Framers.³³¹ However, the conclusions of subsequent generations writing in the 1820s and after are “far less probative than” than the Framers’ generation for originalist purposes.³³²

2. Does the Original Public Meaning of the IP Clause Limit Congress to the “Property” Framework?

Invocations of the original public meaning to limit Congress to the “property” conception of patent rights are rarer, perhaps reflecting the difficulty of identifying a textual hook in the sparse language of the IP Clause. To determine the original public meaning of the IP Clause, consideration must be given to both the (1) literal meaning derived from the “semantic meanings of the words and phrases as combined by syntax and grammar”;

identifiable intent from the framing was uniformity, not a particular policy for IP rights).

³²⁶ Part III.A.1, *supra*.

³²⁷ Part III.A.2, *supra*.

³²⁸ Part III.A.2, *supra*.

³²⁹ See, e.g., 3M Br., *supra* note __, at 6 (using evidence from “early nineteenth-century America” for the “understanding . . . of the founding generation”); Abbvie Br., *supra* note __, at 9-21 (relying on cases starting in 1812 as evidence “that the Founders conceived of patent rights as a species of private property”).

³³⁰ See Balkin, *supra* note __, at 38-39.

³³¹ See *Ex Parte Wood & Brundage*, 22 U.S. 603, 608 (1824) (“The securing to inventors of an exclusive right to their inventions, was deemed of so much importance . . . that the constitution has expressly delegated to Congress the power to secure such rights to them for a limited period.”).

³³² See Blackman, *supra* note __, at 158, 165 (describing views of presidents starting in the 1820s regarding constitutionality of foreign emoluments as less probative than presidents who were Framers and Founders).

and (2) the context of constitutional communication.³³³

Sometimes those seeking to limit Congress to the “property” conception of patent rights point to the term “secure” in the IP Clause as “impl[y]ing the recognition of . . . pre-existing rights,” with Congress having the “relatively limited role” of protecting these existing rights, rather than creating, defining, or regulating patent rights.³³⁴ Other arguments seem to rely on the supposed meaning of the IP Clause as a whole, contending that “[a]t the time of the founding, patents were recognized as civil rights in property afforded expansive and liberal protections under the law.”³³⁵

These arguments are deeply flawed. It is plausible that the public in 1789 would have understood the IP Clause to refer to patent rights, as that is how it was treated from the outset,³³⁶ but there is no reason to think they would have understood the Clause as mandating a “property” conception of patent rights, which would have been totally foreign in 1789.³³⁷ Likewise, the Supreme Court in 1834 concluded that “the word secure, as used in the constitution, could not mean the protection of an acknowledged legal right” because “it has never been pretended, by any one, either in this country or in England, that an inventor has a perpetual right, at common law, to sell the thing invented.”³³⁸ There is no reason to think that the Court’s conclusion in this regard was wrong.

In terms of literal meaning, Edward Walterscheid, the leading historian of the patent system, identifies two distinct literal meanings of the term “secure” for a legal right in 1789: (1) “‘to obtain’ or ‘to provide,’” which suggests the creation of a new right; and (2) “‘to insure’ or ‘to affirm and protect,’” which suggests the recognition of an existing right.³³⁹ Others suggest that the first is more appropriate. Writing in the 1950s, Karl Lutz, a defender of the “property” conception of patent rights, recognized that “contemporary usage” of the word “secure” in state patent petitions and the

³³³ Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *Fordham L. Rev.* 453, 464-465 (2013).

³³⁴ *BIO Br.*, *supra* note __, at 8; *Abbvie Br.*, *supra* note __, at 13-15; see also *Lauder Br.*, *supra* note __, at 13 (“The Founders . . . empowered Congress only to ‘secur[e] for limited times’ the ownership rights that inventors *already had* in their inventions, rather than *grant* them new rights that did not exist.”).

³³⁵ *PLF Br.*, *supra* note __, at 32 (quotation omitted); see also *Mossoff Br.*, *supra* note __, at 3 (identifying “evidence for the public meaning in early American courts that patents are private property rights” but relying on “nineteenth-century cases”).

³³⁶ Walterscheid, *Promote*, *supra* note __, at 255.

³³⁷ *Part II*, *supra*.

³³⁸ 33 U.S. 591, 661 (1834).

³³⁹ Walterscheid, *Nature*, *supra* note __, at 213.

like was “to get hold or possession of.”³⁴⁰ Writing fifty years later, Professor Lawrence Solum, a leading original public meaning theorist, identified the literal meaning of “secure” in the IP Clause as “to establish (a person) securely in some position, privilege, etc.,” or even more so, “to make the tenure of (a property, office, privilege, etc.) secure to a person.”³⁴¹ Solum’s literal meaning is consistent with the creation of a new right, not the recognition of an existing right, but it does provide some support for limited governmental regulation of issued patents, unlike Walterscheid and Lutz. Solum suggests that a person is secure “in his [or her] exclusive right if the right were sufficient so as to minimize any doubts about the efficacy of the right or to guard against any threat to the right.”³⁴²

Yet, originalist theory recognizes that the original public meaning includes “the context that was shared by the drafters, ratifiers, and citizens” because “[m]uch of the work of communication is done by context,” which can resolve ambiguities in literal meaning.³⁴³ The larger context in which the IP Clause was adopted, which Solum explicitly did not consider,³⁴⁴ confirms that neither the term “secure” nor patents generally would have been understood by the public in 1789 to mandate the “property” framework.³⁴⁵ Neither a pre-existing right to exclusivity in inventions nor the “property” framework for patent rights existed before the Constitution, meaning both would be unfamiliar to the public in 1789.³⁴⁶ An original public meaning argument based on “secure” or the IP Clause as a whole thus depends on the public recognizing that the IP Clause marked a fundamental shift in the nature of patent rights. Yet, nothing in the text of the IP Clause itself (save potentially for the term “exclusive right” discussed below), the Constitutional Convention, the ratification debates, or early practice under the IP Clause signaled this change to the public or indicated that the public understood the change to have occurred.³⁴⁷

Proponents of limiting Congress to the “property” conception of patent rights put a lot of weight on the term “exclusive right” in the IP Clause, suggesting that it demonstrates that patents must be granted as of right to

³⁴⁰ Lutz, *supra* note __, at 772.

³⁴¹ Lawrence B. Solum, *Congress’s Power to Promote the Progress of Science: Eldred v. Ashcroft*, 36 *Loy. L.A. L. Rev.* 1, 26-27 (2002).

³⁴² *Id.* at 27.

³⁴³ Solum, *Originalism*, *supra* note __, at 459, 465, 469.

³⁴⁴ Solum, *Congress’s Power*, *supra* note __, at 25 n.90.

³⁴⁵ Walterscheid, *Promote*, *supra* note __, at 61-69 (noting that only his first possible literal meaning is plausible in historical context).

³⁴⁶ See Part III.A.2, *supra*.

³⁴⁷ See Part III.A.1, *supra*.

inventors, rather than at the grace or discretion of Congress³⁴⁸ and that its use, rather than “benefit” or “privilege,” requires that patent rights “must be a fee simple beyond the power of Congress to qualify or regulate.”³⁴⁹

There is some support for the argument as a matter of original literal meaning. According to Professor Caleb Nelson, early Americans “distinguished . . . ‘core’ private rights (which Lockean tradition associated with the natural rights that individuals would enjoy even in the absence of political society) from mere ‘privileges’ or ‘franchises’ (which public authorities had created purely for reasons of public policy and which had no counterpart in the Lockean state of nature).”³⁵⁰ Although not absolutely unqualified or free from any form of regulation, protecting and promoting core private rights was seen as a fundamental end of government.³⁵¹ By contrast, privileges or franchises were “entitlements . . . to carry out public ends” and could be structured as the legislature saw fit.³⁵²

The evidence suggests, however, that merely using the term “right” (or “exclusive right”) at the time of the Founding did not denote what Nelson calls a “core” private right but rather was an umbrella term covering various legal interests, including both “core” private rights and privileges and franchises.³⁵³ Professor Solum identifies the literal meaning of “right” at the Founding as “[a] legal, equitable, or moral title or claim to the possession of property *or authority*, the enjoyment of privileges or immunities, etc,” with “exclusive” further meaning “[o]f a monopoly or grant: Excluding all other persons from the rights conferred. Hence of a right, privilege, possession, quality, etc.”³⁵⁴ Thus, the literal meaning of “exclusive right” was not limited to “core” private rights in property but also included the “authority” granted by public franchises, though Solum suggests that it might preclude forced third-party access via conditions like compulsory licensing or policy-based use rights.³⁵⁵

³⁴⁸ See, e.g., *McKeever v. United States*, 14 Ct. Cl. 396, 421 (1878) (“Congress are not empowered to grant to inventors a favor, but to secure to them a right.”); see also *BIO Br.*, supra note __, at 8.

³⁴⁹ *Lutz*, supra note __, at 772 (noting argument); *Abbvie Br.*, supra note __, at 3, 13 n.2; *BIO Br.*, supra note __, at 8.

³⁵⁰ Caleb Nelson, *Adjudication in the Political Branches*, 107 *Colum. L. Rev.* 559, 567 (2007).

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ Cf. *id.* at 566-567 (“[T]he terminology of ‘rights’ is confusing, because Anglo-American lawyers did not treat all legal interests capable of being held by individuals as an undifferentiated mass.”).

³⁵⁴ Solum, *Congress’s Power*, supra note __, at 41.

³⁵⁵ *Id.* at 42 (describing “an exclusive right” as “to exclusion of all others”).

Contextual usage confirms that the IP Clause's use of "exclusive right" does not mandate the "property" conception of patent rights. At the time of the founding, contemporary usage equated an "exclusive right," including as specifically used in the IP Clause, with the "advantage," "benefit," or "pecuniary emolument" of the invention.³⁵⁶ Likewise, colonial and state patents referred to the legal interest they conveyed as an "exclusive right" even as they described this "exclusive right" as a "reward" granted by the grace of the legislature for the advantages the invention offered the state, not the inventor's right arising from the act of invention, and imposed significant regulatory conditions – e.g., working requirements, price controls, compulsory licensing, and capped, non-compensatory damage – on this "exclusive right."³⁵⁷

The history and social context confirms that the term "exclusive right" in the IP Clause would not have been understood as mandating the "property" conception.³⁵⁸ Patent protection as a right arising from the act of the invention, rather than as an act of sovereign grace and policy discretion, was unknown at the Founding.³⁵⁹ Nor were patent rights free from the sovereign's power to control, regulate, and limit known at the time of the Founding.³⁶⁰ And, again, nothing would have suggested to the public that IP Clause's use of the term "exclusive right" was meant to introduce such a fundamental shift in the nature of patent rights.³⁶¹

Likewise, early practice under the IP Clause reflected a very different view of the patent's "exclusive right" than the "property" conception that would later come to dominate. Those petitioning Congress for patents before the 1790 Act did not assert a right arising from invention but rather sought Congress's favor, justifying their requests by the benefits they offered to society, and Congress before the 1790 Act and the Patent Board under it evaluated these petitions to determine whether their social benefits warranted patent protection.³⁶² Finally, the first Senate proposed significant regulatory and third-party use conditions for the "exclusive right" – a working requirement, price and quantity controls, and compulsory licensing – that

³⁵⁶ Part II.B.3, *supra*; Part III.A.1, *supra*.

³⁵⁷ Part II.B.3, *supra*.

³⁵⁸ Cf. Wurman, *supra* note __, at 130 (explaining that, due to history and social context, the 1st Amendment cannot be read literally as allowing "no law . . . abridging the freedom of speech" because the founding generation had various laws infringing free speech that would not have been understood to be part of "freedom of speech" or "abridging").

³⁵⁹ See Part II, *supra*.

³⁶⁰ See Part II, *supra*.

³⁶¹ See Part II.C, *supra*.

³⁶² See Part III.A, *supra*.

were rejected for practical, not constitutional, reasons.³⁶³

B. 19th Century Practice and Precedent

Reliance on post-founding practice and precedent is common in Supreme Court precedent.³⁶⁴ In slightly different forms, it also is accepted by most leading constitutional theories – originalism, living constitutionalism, constitutional pluralism, and legal pragmatism.³⁶⁵ For present purposes, theories relying on post-founding practice and precedent can be divided into two main group: (1) those relying on early post-ratification precedent and practice to establish a “fixed” meaning for the constitution; and (2) those relying on long-standing precedent and practice, whenever it occurred, to change constitutional meaning over time.³⁶⁶ Section 1 concludes that early historical practice and precedent did not “fix” the meaning of the IP Clause to require the “property” conception, given the significant regulatory components in early patent practice. Section 2 concludes that long-standing practice and precedent dating from the 19th century may have changed the meaning of the IP Clause to require the “property” framework, but it is doubtful that that changed meaning continues to limit Congress today.

1. Did 19th Century Precedent and Practice Fix the IP Clause’s Meaning to Require a “Property” Conception of Patent Rights?

Early historical practice and precedent is sometimes used to establish a fixed meaning of a Constitutional provision. In one form, these theories rely on post-ratification practice and precedent as evidence of original meaning.³⁶⁷ In another form, these theories contend that the Founders “recognized that [the Constitution] contained ambiguities and that subsequent interpreters would help ‘fix’ [or liquidate] its meaning on disputed points.”³⁶⁸ In both cases, these theories emphasize *early* post-ratification practice and conclude that it renders Constitutional meaning free from future changes.³⁶⁹ The Supreme Court has specifically relied on historical practice going back to the First Congress and “early Congresses”

³⁶³ Part III.A.2, *supra*.

³⁶⁴ Bradley & Siegel, *supra* note __, at 2-3.

³⁶⁵ *Id.* at 7,

³⁶⁶ *Id.* at 27 (recognizing similar distinctions).

³⁶⁷ Bradley & Siegel, *supra* note __, at 28.

³⁶⁸ Caleb Nelson, Originalism and Interpretive Conventions, 70 U. Chi. L. Rev. 519, 521 (2003).

³⁶⁹ Nelson, Originalism, *supra* note __, at 521; Bradley & Siegel, *supra* note __, at 28-30.

to “comprehend the scope of Congress’ power under the [IP] Clause.”³⁷⁰ However, for two reasons, theories of early practice and precedent as “fixing” or “liquidating” constitutional meaning do not limit Congress to the “property” conception of patent rights.

First, proponents rely on long-standing practice and precedent to contend that the “property” conception is *constitutionally required* and therefore reforms moving in a more “regulatory” direction are *unconstitutional*. Normally, “the existence of early—or longstanding—congressional action [is used] as evidence that such action is *constitutional*,” i.e., is *constitutionally permissible*.³⁷¹ Professor Leah Litman has distinguished the type of antinovelty argument – that the lack of a historical precedent for a practice is evidence of its unconstitutionality – made by those seeking to limit Congress’s power to define patent rights from the “more familiar issue in constitutional law: how congressional practice factors into constitutional interpretation and, specifically, whether a statute is more likely to be constitutional because it is part of a longstanding history of similar congressional enactments.”³⁷² The use of practice and precedent dating to the early dates post-ratification to *uphold* a current practice against constitutional challenge has a long-standing pedigree in Supreme Court jurisprudence, dating back to Chief Justice Marshall), significant support in the scholarship, and plausible theoretical justifications.³⁷³

By contrast, the inverse proposition relied on by those trying to limit Congress to the “property” conception of patent rights – “the idea that legislative novelty signals that a statute is unconstitutional” – dates only to the 1990s, is based on far sparser precedent, lacks significant scholarly evaluation (save for Litman’s critical evaluation), and rests on a highly questionable theoretical basis.³⁷⁴ Notably, this antinovelty theory of constitutional interpretation may not even apply to evaluating the scope of Congress’s power under the IP Clause. The antinovelty principle has generally arisen in cases implicating federalism or separation of powers concerns.³⁷⁵ Questions of Congress’s power under the IP Clause are unlikely to raise federalism concerns because of the exclusivity of federal patent protection. They can implicate separation of powers concerns, as *Oil States* itself demonstrates, but many issues related to Congress’s power to regulate patent owners and patent rights would not have a separation of powers

³⁷⁰ Eldred, 537 U.S. at 200-201.

³⁷¹ Heald & Sherry, *supra* note __, at 1136-37

³⁷² Leah M. Litman, *Debunking Antinovelty*, 66 *Duke L.J.* 1407, 1411 (2017).

³⁷³ Litman, *supra* note __, at 1411, 1466-1475.

³⁷⁴ Litman, *supra* note __, at 1410, 1415-1421, 1455-65, 1476-79.

³⁷⁵ Litman, *supra* note __, at 1410-1414.

component to them. Overall, “there is a fair amount of uncertainty about how significant legislative novelty is to a court’s ultimate conclusion that a statute is unconstitutional.”³⁷⁶ Antinovelty-based arguments therefore could provide, at most, a weak basis for limiting Congress’s power to define patent rights.

Second, even accepting the validity and broad applicability of antinovelty constitutional arguments, such arguments offer little support for concluding that early practice and precedent “fixed” the meaning of the IP Clause to mandate the “property” conception of patent rights. Arguments that it did rely on practice and precedent dating from the 1810s and after, whereas constitutional theories that meaning can become “fixed” or “liquidated” “look[] only (or primarily) to initial practice and decisions and disallow[] a subsequent interpretation that contradicts the one reflected in initial practice.”³⁷⁷

The initial practice in the American patent system adopted a much more “regulatory” approach to patent rights than the “property” conception would permit. Specifically, historical precedent or analogs for virtually every recent reform or proposed reform that would depart from the “property” conception of patent rights can be found in the first few decades of the American patent system.³⁷⁸ More generally, this variability in the nature of patent rights in the early United States patent system, along with evidence that the early view was that the IP Clause continued the flexible, ad hoc, case-by-case practices of the colonies and states,³⁷⁹ suggests broad Congressional power to define, and change, the nature, terms, conditions, and rights conferred by a United States patent. Subsequently, Congress used that broad power to define patent rights consistent with the “property” framework and continued to do so for most of the history of the United States patent system. However, just because Congress has “latterly exercised in a particular way a power which they might have exercised in some other way” does not undermine the import of “previous practice when and as different views of expediency prevailed.”³⁸⁰

³⁷⁶ Litman, *supra* note __, at 1412.

³⁷⁷ Bradley & Siegel, *supra* note __, at 30.

³⁷⁸ See Part III.A, *supra*.

³⁷⁹ See Part III.A, *supra*.

³⁸⁰ McPherson, 146 U.S. at 36; see also Myers, 272 U.S. at 174-175 (relying on understanding of first and other early Congresses despite later Congress’s changed understanding).

2. Did 19th Century Precedent and Practice Change the IP Clause to Require a “Property” Conception of Patent Rights?

Efforts to limit Congress to the “property” conception of patent rights find their greatest (though still doubtful) support from theories of constitutional change based on historical practice and precedent. Most prominently, a group of living constitutional theories share the common assumption that Constitutional provisions do and should change to account for changing circumstances and values.³⁸¹ Particularly relevant, common law constitutionalism, most clearly articulated by Professor David Strauss, contends that constitutional law is built as much on the precedents and traditions that have developed over time as on the actual text of the Constitution.³⁸² “[L]ike precedents, [Constitutional] provisions are expanded, limited, qualified, reconceived, relegated to the background, or all-but-ignored, depending on what comes afterward — on subsequent decisions and on judgments about the direction in which the law should develop.”³⁸³ The effect is that “glosses on the Constitution (by judicial decision and otherwise), when validated by tradition, operate in public discourse on a par with the specific provisions of the Constitution.”³⁸⁴

Closely related, living constitutionalists, pragmatists, and constitutional pluralists endorse a theory of “historical gloss” that looks to historical practice for constitutional meaning when the Constitutional text and other sources are “unclear with respect to the constitutional question under consideration,” though only to “longstanding governmental practices that have proven to be stable—that is, practices that have operated for a significant amount of time without generating continued inter-branch contestation.”³⁸⁵ Unlike theories of fixed meaning discussed above, historical gloss “does not insist on permanent fixation through practice,” but rather allows gloss to appear, disappear, and change over time, and “does not privilege early practice when it conflicts with longstanding subsequent practice.”³⁸⁶

Finally, some originalists, most notably Professor Will Baude, rely

³⁸¹ Lawrence Solum, *Legal Theory Lexicon: Living Constitutionalism*, Legal Theory Blog (May 14, 2017).

³⁸² David A. Strauss, *The Living Constitution* 3.

³⁸³ David A. Strauss, *Forward: Does the Constitution Mean What It Says?*, 129 *Harv. L. Rev.* 1, 5 (2015).

³⁸⁴ David A. Strauss, *Common Law Constitutional Interpretation*, 63 *U. Chi. L. Rev.* 877, 925 (1996)

³⁸⁵ Bradley & Siegel, *supra* note ___, at 12.

³⁸⁶ *Id.* at 12.

heavily on analogy to the common law development of precedent in describing a form of changing constitutional liquidation, where “one liquidated understanding can be replaced with another” and early practice is not privileged over subsequent settled practice.³⁸⁷ The difference from historical gloss,³⁸⁸ or even common law constitutionalism (given the analogy to precedent), is not entirely clear, but may be a stronger requirement of textual uncertainty before consulting historical practice.³⁸⁹ Eliding the distinctions between these theories, this Section first evaluates whether 19th century practice and precedent changed the meaning of the IP Clause to mandate the “property” conception of patent rights and then considers subsequent evolution of the IP Clause’s meaning to no longer require the “property” framework.

a. Constitutional Change & the “Property” Conception of Patent Rights

Beginning in the 1810s, the “property” conception came to dominate Congressional patent practice, Supreme Court patent precedent, and patent theory.³⁹⁰ Arguably, this 19th century practice and precedent has two key hallmarks necessary to have glossed, liquidated, or changed the initial understanding of the IP Clause so as to have limited Congress to the “property” conception. First, there was prolonged, repeated, and consistent legislative and judicial actions and statements, lasting most of the 19th century and with significant aspects lasting through most of the 20th century.³⁹¹ Second, there may have been acquiescence, settlement, or agreement along various dimensions – bipartisan, branches of government, government versus public, etc. – as the “property” conception was reflected in Congressional practice, judicial precedent, and popular thought.³⁹² Although not all courts

³⁸⁷ Baude, *supra* note __, at 53-63.

³⁸⁸ Bradley & Siegel, *supra* note __, at 35-40.

³⁸⁹ Baude, *supra* note __, at 63-66.

³⁹⁰ See Part III.B, *supra*; see also Hovenkamp, *supra* note __, at 267 (describing shift in early 19th century in conception of patent rights from government regulatory tools for economic development to private property rights subject to limited government involvement).

³⁹¹ See Part III.B-C, *supra*; Reilly, *Our 19th*, *supra* note __; see also Bradley & Siegel, *supra* note __, at 12-13 (requiring government action of long-standing duration for historical gloss); Baude, *supra* note __, at 16-17 (requiring a deliberate course of practice over a period of years); Andrew C. Spiropoulos, *Just Not Who We Are: A Critique of Common Law Constitutionalism*, 54 *Vill. L. Rev.* 181, 189 (2009) (“Common law constitutionalism is more than adherence to precedent; it is more accurately described as traditionalism, a presumption in favor of society’s long-established practices.”).

³⁹² See Part III.B, *supra*; see also Bradley & Siegel, *supra* note __, at 13 (describing need for acquiescence in the form of stability); Baude, *supra* note __, at 18-21 (describing need for settlement along various dimensions); Strauss, *Common*, *supra* note __, at 925 (requiring that practice be “validated by tradition”).

or commentators accepted the “property” conception in the 19th century,³⁹³ acquiescence and settlement do not necessarily require unanimity if there is sufficient stability in the practice.³⁹⁴

However, three considerations cast doubt on the strength of the argument that 19th century practice changed the understanding of the IP Clause to mandate the “property” framework. First, some, but not all, of the theories of constitutional change through historical practice impose a threshold requirement of textual indeterminacy.³⁹⁵ The IP Clause might not meet this indeterminacy requirement, as its text broadly conveys power to Congress and originalist methodologies virtually preclude a conclusion it mandates the “property” conception.³⁹⁶ Second, like their counterparts that rely on historical practice to fix constitutional meaning, theories that rely on historical practice to change constitutional meaning generally focus on how long-standing practice demonstrates that the practice is constitutionally *permissible*.³⁹⁷ By contrast, those seeking to limit Congress’s power to define patent rights argue that the long-standing “property” framework demonstrates that it is constitutionally *required* and the alternative “regulatory” framework is *unconstitutional*.³⁹⁸

Third, some, but not all, of these theories require that the practice and precedent reflect constitutional interpretation, not just normal political or policy choices.³⁹⁹ It is questionable whether the 19th century practice and precedent reflects development of the *IP Clause*, rather than just *policy* choices or common law development of the *patent statutes*. The Supreme Court has only decided a handful of cases interpreting terms in the IP Clause, and even less interpreting the terms relevant to patent protection, and has never decided the constitutionality of a patent statute under the IP Clause.⁴⁰⁰

³⁹³ See Part III.B, *supra*.

³⁹⁴ Bradley & Siegel, *supra* note __, at 13-14; Baude, *supra* note __, at 18 (allowing “sufficient uniformity” to overcome “individual judgments”).

³⁹⁵ See Baude, *supra* note __, at 13 (requiring “indeterminacy in the meaning of the Constitution”); Bradley & Siegel, *supra* note __, at 12 (describing “historical gloss” as applying when other sources are “unclear with respect to the constitutional question under consideration”); but see Strauss, Common, *supra* note __, at 925 (describing gloss from constitutional tradition as on par with constitutional text).

³⁹⁶ See Part IV.A, *supra*.

³⁹⁷ See, e.g., Bradley & Siegel, *supra* note __, at 15 (declining to address whether Congressional inaction demonstrates a lack of constitutional power to take that action).

³⁹⁸ See Part IV.A, *supra*.

³⁹⁹ See Baude, *supra* note __, at 17; Strauss, Common, *supra* note __, at 33-35; but see Bradley & Siegel, *supra* note __, at 13 (not requiring “an agreement about the meaning of the Constitution” to rely on historical gloss).

⁴⁰⁰ Walterscheid, *Divergent*, *supra* note __, at 308 & n.6.

Some of the 19th century precedent did invoke the Constitution in generic terms, in dicta, or combined with statutory rationales.⁴⁰¹ But much of the precedent did not refer to the Constitution and probably merely reflected the statutory scheme and judicial exposition of the statute.⁴⁰²

b. Subsequent Departure from the “Property” Conception of Patent Rights

In contrast to theories that historical practice “fixes” constitutional meaning, a base assumption of common law constitutionalism, historical gloss, and Baude’s liquidation theory is that constitutional meaning can continue to change over time if subsequent practice and precedent also meets the prerequisites for glossing, liquidating, or changing constitutional meaning. In two distinct ways, Congress today may not be limited to the “property” framework under these theories, even if practice and precedent in the 19th century at one point altered the IP Clause’s original meaning so as to require the “property” framework.

First, the understanding of the IP Clause may have already evolved in a way that no longer limits Congress to the “property” conception. The actual practice in the patent system in the 20th century continued to largely reflect the “property” conception of patent rights, but the theoretical understanding of patent rights underpinning the “property” conception eroded.⁴⁰³ In this way, the “acquiescence” to the “property” conception of patent rights, which is a hallmark of theories of constitutional change based on historical practice and precedent, may have disappeared in the 20th century.

Under common law constitutional, historical gloss, and liquidation theories, constitutional meaning can continue to evolve based on subsequent acquiescence to new practices that themselves are prolonged, repeated, and consistent. However, these theories are inconsistent about situations where a practice remains but without continued acquiescence to that practice. Baude suggests that changed theoretical conceptions are sufficient to change constitutional meaning even if the actual practice remains the same, concluding that a new liquidation can be initiated if there is widespread agreement among interpreters that “the previous liquidation was just sufficiently bad on normative grounds.”⁴⁰⁴ But Professors Bradley and Siegel

⁴⁰¹ Evans, 8 F. Cas. at 873 (“The constitution and law . . . give to the inventor, from the moment of invention, an inchoate property therein, which is completed by suing out a patent.”); James, 104 U.S. at 358 (invoking Constitution).

⁴⁰² See cases cited in Part III.B, *supra*.

⁴⁰³ See Part III.C, *supra*.

⁴⁰⁴ Baude, *supra* note __, at 56.

suggest that continued practice would trump changed theoretical and popular conceptions, as their theory of historical gloss emphasizes the stability of the actual practice and deemphasizes agreement as to constitutional meaning.⁴⁰⁵

Second, even if the potential 19th century gloss or liquidation of the IP Clause requiring the “property” conception of patent rights remained unaltered in the 20th century, Congress would not be forever limited to defining patent rights in accordance with the “property” conception. The IP Clause would be susceptible to future change, though common law constitutionalism, gloss, and liquidation theories suggest that change would have to occur in a particular way – slow and evolutionary over time, rather than a sudden break with past practice.⁴⁰⁶ For example, under these theories, it might be unconstitutional for Congress tomorrow to impose a requirement that future patent owners must commercialize their inventions to retain patent protection. But a more incremental step, such as treating non-use as a factor weighing against granting an injunction for infringement, may be permissible. Once this step is taken, a further incremental step – say a rebuttable presumption against injunctive relief for non-use – may be legitimate and then another incremental step – say prohibiting injunctive relief where patent owners do not commercialize their inventions. Ultimately, a series of incremental steps may lead to the type of prolonged, repeated, and consistent practice that would alter the IP Clause away from the “property” conception and allow Congress to impose a full working requirement.

V. THE IMPLICATIONS OF BROAD CONGRESSIONAL POWER TO DEFINE PATENT RIGHTS

Parts II-IV suggest that Congress is not bound by the “property” conception of patent rights, contrary to the arguments of opponents of recent patent reforms. This Part turns to the implications of this analysis. It first suggests that patent law’s “regulatory”-“property” debate often conflates descriptive accounts of how patent rights have been structured, normative accounts of how patent rights should be structured, and essentialist accounts of how patent rights must be structured. It then suggests that the non-essentialist nature of patent rights is normatively desirable both because patent law is inherently about innovation and because patent policy is empirically uncertain and fraught with difficult political choices properly

⁴⁰⁵ See Bradley & Siegel, *supra* note __, at 15-20.

⁴⁰⁶ See *id.* at 34 (allowing “longstanding subsequent practice” to trump earlier practice); Strauss, *Common*, *supra* note __, at 905-906 (describing permissibility of evolutionary change, not watershed changes, based on a previously laid groundwork).

entrusted to the elected branches.

A. Congressional Power and the Property-Regulatory Debate

The debate over whether patent rights should be structured according to the “property” conception or the “regulatory” conception often assumes that there is a single “right” answer – patent rights necessarily must be either a “property” right or a “regulatory” tool.⁴⁰⁷ In doing so, commentators mix together questions of historical practice, policy, and power, without clearly identifying between them. Congress’s broad power to define the nature of patent rights demonstrates the need to separate questions of historical practice, policy, and power in the “property”-“regulatory” debate.

The first question in the “property”-“regulatory” debate is who has the *power* to resolve the debate. Participants often assume that their normatively preferred approach is the only legitimate approach. This assumption is most evident from those who increasingly contend that Congress cannot depart from the “property” conception of patent rights.⁴⁰⁸ It is not particularly surprising, as constitutional arguments are often used as a trump card in policy debates and patent debates tend to be overly influenced by the normative priors of their participants.⁴⁰⁹

Recognizing Congress’s broad power to define patent rights provides an important reminder that “the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence,”⁴¹⁰ including the patent system. Thus, it is Congress that has the *power* to resolve the “property”-“regulatory” debate, not scholars, stakeholders, the Framers, or 19th century jurists and legislators. Those debating the normative wisdom of these approaches would be wise to remember that they are just making policy arguments whose success depends on their strength in convincing the political branches. To be sure, Congress’s exercise of its power to decide the proper nature for patent rights, like the exercise of any of its powers, must be rational.⁴¹¹ On this question, Congress is entitled to substantial deference “however debatable or arguably unwise [the policy choice] may be”⁴¹² and even if it reflects “economic

⁴⁰⁷ See Part I.C, *supra*.

⁴⁰⁸ See *supra*, Part I.B-C.

⁴⁰⁹ See Lisa Larrimore Ouellette, *Cultural Cognition of Patents*, 4 IP THEORY 28, 28-30 (2014); Ted Sichelman, *Markets for Patent Scope*, 1 IP THEORY 42, 47-48 (2010)

⁴¹⁰ *Alden v. Maine*, 527 US 706, 713 (1999).

⁴¹¹ *Eldred*, 537 U.S. at 204

⁴¹² *Id.* at 204-208 & n.10.

misjudgment.”⁴¹³ Given the uncertainty and active debate over whether patent rights, or any particular level of patent rights, promotes social welfare,⁴¹⁴ Congress is likely to have a rational basis for adopting a “property” framework, a “regulatory” framework, or something in between.

This is not to say that the second question in the “regulatory”-“policy” debate – how patent rights have been historically structured – is irrelevant. Congress largely structured patent rights pursuant to the “property” framework from at least the middle of the 19th century into the early 21st century.⁴¹⁵ That Congress consistently “continued [a] policy through many years,” may allow us to “assume that experience has demonstrated its wisdom and beneficial effect upon the arts and sciences.”⁴¹⁶ Moreover, significant and/or sudden changes could “disrupt the settled expectations of the inventing community”⁴¹⁷ and undermine long-term investments made in reliance on a general expectation of a particular approach to patent rights.⁴¹⁸

That a practice is long-standing, however, does not mean it necessarily must be retained, as what lessons to draw from long-standing practice are a “choice of what patent policy should be [that] lies first and foremost with Congress.”⁴¹⁹ Congress has “the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by” patent issues and “engage in an *ad hoc* innovation-based analysis” to determine the appropriate policy.⁴²⁰ In particular, “[t]he responsibility for changing [settled law] rests with Congress,” which has the authority to “adopt[] changes that disrupt the settled expectations of the inventing community.”⁴²¹

Thus, it is the third question in the “property”-“regulatory” debate –

⁴¹³ *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2413 (2015).

⁴¹⁴ See Part V.B.2, *supra*.

⁴¹⁵ See Reilly, Our 19th, *supra*.

⁴¹⁶ *Cont’l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405, 429-430 (1908).

⁴¹⁷ *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 739 (2002).

⁴¹⁸ *Ass’n for Molecular Pathology v. U.S.P.T.O.*, 689 F. 3d 1303, 1344 (Fed. Cir. 2012) (Moore, J., concurring in part), *rev’d sub nom Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 (2013).

⁴¹⁹ See *Kimble*, 135 S. Ct. at 2414.

⁴²⁰ *Molecular Pathology*, 689 F. 3d at 1344 (Moore, J., concurring in part); *Bonito*, 489 U.S. at 168 (describing Congressional discretion “to determine if the present system of . . . patents is ineffectual in promoting the useful arts”); *Kimble*, 135 S. Ct. at 2414 (describing Congressional power to determine if current IP protection “has serious and harmful consequences for innovation”).

⁴²¹ *Festo*, 535 U.S. at 739; *see also Myriad Genetics*, 133 S. Ct. at 2119 n.7 (“Concerns about reliance interests arising from PTO determinations, insofar as they are relevant, are better directed to Congress.”).

which approach is normatively desirable as a matter of social and innovation policy – that is crucial. Scholars and stakeholders should be debating that question and marshalling arguments and evidence to convince Congress of why their normative policy preference are correct. Many scholars and stakeholders do exactly that.⁴²² But too many intermix questions of power and historical practice, obscuring the fact that the “property” or “regulatory” debate is at its core a policy question for Congress. To be clear, this Article takes no position on whether a “property” framework or “regulatory” framework is best for patent policy. The conclusion that the “property” framework is not an essential feature of patent rights should not be mistaken as suggesting that Congress should depart from the “property” framework, should adopt a more “regulatory” approach to patent rights, or should adopt any specific patent reform. Those are questions are for others to debate and Congress to resolve.

B. The Legitimacy of Change in the Nature of Patent Rights

Congress’s power to define the scope, content, conditions, etc. of patent rights is normatively desirable for at least two distinct reasons: (1) it allows patent law to innovate to reflect the innovation it is supposed to promote; and (2) it insures that the democratically-responsive branches are making the inherently political choices of patent policy.

1. Technological Change & Legal Change

Some defend limiting Congress’s power to define patent rights as necessary to insure that patent rights are “not subject to the ordinary shifts in regulatory policies common with changes in administrations,” thereby promoting stability and strength of patent rights.⁴²³ They may be right that, as a matter of policy, Congress should craft patent rights to encourage the type of stability necessary for business planning and investment.⁴²⁴ But that does not warrant denying Congress the power to change the nature of patent rights all together.

The consensus justifications for the American patent system are economic and utilitarian, rather than moral rights, distributive considerations,

⁴²² See, e.g., Lemley, *Free Riding*, supra note __ (making only policy arguments).

⁴²³ 3M Br., supra note __, at 1.

⁴²⁴ See Masur & Mortara, supra note __, at 9 (“Each time a court or Congress changes patent law, it damages these existing reliance interests. This, in turn, can be expected to lead to less R&D investment, measured against the baseline of how firms would behave if the law were fixed.”).

or the desire to reward inventors.⁴²⁵ Specifically, “[w]e grant patents in order to promote innovation, and so we should grant patents only to the extent necessary to encourage such innovation.”⁴²⁶ The ultimate goal of incentivizing innovation is to enhance social welfare through development and progress of technology that raises standards of living.⁴²⁷ But the trade-off of patent rights is that they can stifle follow-on innovation and competition, potentially preventing advancements in technology by others, reducing supply, and raising costs of patented inventions.⁴²⁸ “In crafting the patent laws, Congress struck a balance between fostering innovation and ensuring public access to discoveries.”⁴²⁹

As an area of economic policy that that seeks to incentivize technological advancement, disclosure, and commercialization but also prevent stifling competition and follow-on innovation, patent law itself may need to be changed to reflect changing technological, economic, and social conditions that affect this trade-off.⁴³⁰ In economic policy, Congress normally has authority to adjust economic regulations and interventions to the changing needs of society. This power is particularly important in the patent context because the danger of “legal stultification” is especially “salient in the context of patent law, where changes in technology and markets can render legal rules outdated at a faster rate than in other legal contexts.”⁴³¹ The doctrines of patent law do, to some extent, expand, contract, and change shape based on changing conditions through the common law process.⁴³² But larger technological, economic, or social changes could require proportionally larger changes to patent law, including with regards to the very nature of patent rights.⁴³³

As a normative matter, why should patent rights today be bound by the supposedly obsessive fear of monopolies of the Framers or the antiquated notions of natural rights of mid-19th century jurists and legislators? Their choices may still reflect optimal patent policy. But today’s Congress should be able to make that decision in light current technological, economic, and

⁴²⁵ See Burk & Lemley, *supra* note __, at 1596-99.

⁴²⁶ See *id.* at 1596-99 (2003).

⁴²⁷ See Heidi L. Williams, *How Do Patents Affect Research Investments?*, NBER Working Paper 23088 at 1 (Jan. 2017), <http://www.nber.org/papers/w23088> (“Technological change is widely perceived to be a key driver of improved standards of living.”).

⁴²⁸ *Bonito*, 489 U.S. at 146

⁴²⁹ *Kimble*, 135 S. Ct. at 2406-07.

⁴³⁰ Masur & Mortara, *supra* note __, at 17.

⁴³¹ Masur & Mortara, *supra* note __, at 17.

⁴³² Craig Allen Nard, *Legal Forms and the Common Law of Patents*, 90 B.U. L. Rev. 51, 54-57 (2010).

⁴³³ Reilly, *Our 19th*, *supra* note __, at 16.

social needs, rather than forced adherence to the policy choices made by past generations in light of their own needs.

2. Empirical Uncertainty & Political Choice

Congress's broad power to define patent rights naturally may raise concerns about Congress's institutional shortcomings. Specifically, IP scholars object to greater Congressional action by raising concerns sounding in public choice theory – special interest lobbying, rent-seeking, and industry capture.⁴³⁴ That these concerns have been particularly prominent in the copyright context⁴³⁵ may explain the extensive scholarship arguing for various constitutional limits on Congress's IP power,⁴³⁶ which has spillover effects for patent law. Yet, public choice concerns also have been raised against Congressional dominance of patent law specifically.⁴³⁷

As Professors Schwartz and Treanor recognized of efforts to use the Constitution to limit Congress's copyright power based on public choice concerns, these type of arguments echo those of opponents of progressive economic legislation in the *Lochner* era.⁴³⁸ Whatever the shortcomings in the Congressional legislative process, the country experimented with, and rejected, using the Constitution to overrule Congress's economic policy choices, concluding that courts are poorly suited to making economic choices and lack the legitimacy of majoritarian decision making.⁴³⁹ The same competency and anti-majoritarian concerns arise when the economic legislation is in the form of patent laws as when it is other types of market interventions or regulatory policies.

In fact, efforts to use the Constitution and courts to overrule Congress's policy choices in the patent context may be particularly problematic. There is “a tremendous amount of controversy over whether the patent system” actually improves social welfare.⁴⁴⁰ As a survey of the empirical and economic literature recently concluded:

A half-century ago, [leading economists Edith] Penrose (1951) and [Fritz] Machlup (1958) argued that insufficient empirical evidence existed to make a conclusive case either

⁴³⁴ Burk & Lemley, supra note __, at 1637-38.

⁴³⁵ Id.

⁴³⁶ Schwartz & Treanor, supra note __, at 2342

⁴³⁷ See, e.g., Burk & Lemley, supra note __, at 1637.

⁴³⁸ Schwartz & Treanor, supra note __, at 2365-66.

⁴³⁹ Schwartz & Treanor, supra note __, at 2396, 2400-01.

⁴⁴⁰ Williams, supra note __, at 1, 26.

for or against patents. Today, I would argue that given the limitations of the existing literature we still have essentially no credible empirical evidence on the seemingly simple question of whether stronger patent rights – either longer patent terms or broader patent rights – encourage research investments into developing new technologies.⁴⁴¹

In sum, the patent system is an economic intervention that offers social benefits and imposes social costs, creating economic winners and losers. But the evidence is lacking to determine as whether the social benefits outweigh the social costs generally or at any particular level of patent protection specifically. The design of patent rights thus requires a trade-off between competing interests based on limited evidence. It is thus an inherently political question that should be entrusted to Congress, as the politically-responsive representatives of the people. Broad Congressional power to define patent rights insures that is the case.

CONCLUSION

Congress has broad power to decide how to structure patent rights and what scope, content, conditions, and limitations to impose, even if Congress has long exercised this power in a way consistent with the “property” conception of patent rights. The familiar should not be confused with the necessary. This Congressional flexibility allows Congress to adjust patent law to reflect changing technological, economic, and social conditions. It also insures that the deeply political and empirically uncertain decisions underlying patent policy are within the power of the democratically responsive branches of government. Whether Congress should change the nature of patent rights to reflect more “regulatory” characteristics or whether it should retain the familiar “property” framework is a *policy* question open for debate. However, that question ultimately is within Congress’s *power* to resolve.

⁴⁴¹ Williams, *supra* note __, at 26-27.