IP central Academic Advisory Council

THE PROGRESS & FREEDOM FOUNDATION'S Center for the Study of Digital Property

Who Cares What Thomas Jefferson Thought About Patents?

Reevaluating the Patent "Privilege"*

Academic Advisory Council
Bulletin 2.2, September 2007

by Adam Mossoff†

Introduction

In 1966 in *Graham v. John Deere Co.*,[1] the Supreme Court first invoked Thomas Jefferson's words that the "embarrassment of an exclusive patent" was a special legal privilege justified only because these "monopolies of invention" served the "benefit of society."[2] Following the *Graham* decision, scholars and jurists have increasingly relied on Jefferson as the defining source for the history of American patent law—creating what I call the "Jeffersonian story of patent law." For instance, the late Judge Giles S. Rich, one of the principal drafters of the 1952 Patent Act, believed that "patents for inventions were historically, and always will be, grants of privilege."[3] But such broad-brushed declarations that patents were merely special legal privileges are profoundly mistaken.

What is missing from the courts' and scholars' oft-repeated historical claims is an appreciation of the intellectual context of the eighteenth and nineteenth centuries. In ordinary usage, of course, a "privilege" is a specially conferred grant to which the recipient cannot claim any true entitlement. Parents admonish their children, saying "dessert after dinner is a privilege, not a right." But in early American history, "privilege" was often used as a legal term of art; it

---

* This is an abridged version of a recently published article, see Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent "Privilege" in Historical Context*, 92 CORNELL LAW REVIEW 953 (2007). For the complete historical analysis, including supporting citations to numerous primary sources and case law, one should look at this article. To obtain a copy by mail or email, please contact the author at amossoff@gmail.com.

† Adam Mossoff is Associate Professor of Law at Michigan State University College of Law, and Member of the Academic Advisory Council of the Progress and Freedom Foundation. The views expressed here are his own, and are not necessarily the views of the PFF board, fellows or staff.

1 383 U.S. 1 (1966).

2 *Id.* at 7-11.

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

was a synonym for what we would now call a "civil right." Many fundamental civil rights, such as due process rights, voting rights, property rights, and even patent rights, were defined in the early American Republic as "privileges." Recognizing this historical context is significant, because it explains how and why many early American jurists, politicians, and legal scholars classified the property rights in patents as "privileges." More importantly, it explains why antebellum courts and Congresses expanded and extended patent rights throughout the early nineteenth century. The Jeffersonian story of patent law—the historical claim that patents have always been specially conferred legal privileges—is at best a half-truth and at worst a myth.

The Jeffersonian Story of Patent Law

The Jeffersonian story of patent law is prevalent today because it contains a kernel of truth. There were antebellum politicians and jurists who viewed patents as "odious monopolies" that were granted to inventors given only the overall social utility of a patent system. Accordingly, in *Graham*, the Supreme Court quoted liberally from Jefferson's correspondence, including his now-famous 1813 letter to inventor, Isaac McPherson,[4] formally giving birth to what has grown into the Jeffersonian story of patent law. One cannot begrudge the Court for highlighting this important and compelling policy declaration by a Founder, but this is a far cry from the narrow historical focus adopted by the Court and intellectual property scholars in the years that followed—creating the Jeffersonian story of patent law.

The Jeffersonian story of patent law is not merely an academic or historical curiosity, as it has been actively employed in the modern debates over the recent expansions in patent doctrines (and in intellectual property rights generally). In particular, it is relied on as a central historical premise by critics, who maintain that this doctrinal expansion is a historical anomaly. They refer pejoratively to this expansive development as the "propertization" of intellectual property.[5] Professors Rebecca Eisenberg, Lawrence Lessig and others repeatedly cite and quote from Jefferson's letter to McPherson as historical

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

[5] *See, e.g.,* Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L. J. 1, 1 (2004) (declaring that "[o]ne of the most revolutionary legal changes in the past generation has been the 'propertization' of intellectual property," in which such rights are viewed as "absolute property" and the "duration and scope of rights expand without limit"); Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 902 (1997) (concluding after a survey of increasing intellectual property protections that "the 'propertization' of intellectual property is a very bad idea"); *see also* Pamela Samuelson, *Information as Property: Do* Ruckelshaus *and* Carpenter *Signal a Changing Direction in Intellectual Property Law?*, 38 CATH. U. L. REV. 365 (1989) (describing and critiquing the "more proprietarian and anti-dissemination attitude toward information than that which the law has previously displayed").

authority that early Americans were "against the idea that patent protection was in some sense a natural right."[6] They maintain that, as a historical matter, patents were viewed as special, limited grants of legislative privileges.

When law professors and historians look beyond Jefferson's letter to McPherson, they usually rely on select sources from the nineteenth century that further support the Jeffersonian story of patent law, such as patent law decisions by Chief Justice Taney, the famously anti-monopolist Jacksonian Democrat.[7] Professor Lessig thus faults the Supreme Court today for failing to heed its own "long history [in] . . . imposing limits on Congress's power in the name of the Copyright and Patent Clause."[8] Ultimately, when judges, scholars and public policy activists read historical legal documents, they see terms like "privilege," and they find validation in the Jeffersonian story of patent law.

The Patent "Privilege" in Historical Context

The conclusion today that the Jeffersonian story of patent law is vindicated by the omnipresent historical references to patents as "privileges" represents an unfortunate anachronism. In the eighteenth and nineteenth centuries, a "privilege" referred to several distinct types of legal rights secured to individuals in civil society. Therefore, one must examine the context of each usage to determine how the term was employed. This is not a game of linguistics or pettifoggery; this is an essential requirement in studying and using historical sources in legal and political disputes today.

A close look at the historical legal sources reveals that "privilege" is a legal term of art whose meaning diverges from the layperson's understanding of a special benefit doled out to a recipient who lacks any rightful claim to it. Eighteenth-century legal documents are replete with examples of "privilege" being used as a legal term of art, and early American constitutions are exemplars of this fact. The title of the constitution drafted by William Penn in founding

---

[6] Rebecca S. Eisenberg, *Patents and the Progress of Science: Exclusive Rights and Experimental Use*, 56 U. CHI. L. REV. 1024 n. 7 (1989); see also LAWRENCE LESSIG, FREE CULTURE 84, 88 (2004) (noting that patent and copyright were merely "exceptions to free use [of] ideas and expressions,"which grew out of England's "long and ugly experience with 'exclusive rights,' especially 'exclusive rights' granted by the Crown.").

[7] Taney is best known for his anti-monopoly decision in *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837), in which the Court strictly construed a monopoly franchise granted by Massachusetts.

[8] LESSIG, *Free Culture,* at 240. *Cf. United States v. Eldred*, 537 U.S. 186, 246 (2003) (Breyer, J. dissenting) (castigating *Eldred* majority for ignoring views of Madison, Jefferson, "and others in the founding generation, [who] warned against the dangers of monopolies").

Pennsylvania in 1701 reads: Charter of Privileges for Pennsylvania.[9] State constitutions adopted during the American Revolution often guaranteed to the newly minted state citizens that they would retain "the privileges, immunities and estates"[10] that they enjoyed under their colonial charters, including the "inherent privilege of every freeman the liberty to plead his own cause [in court]"[11] or the right to confront witnesses in criminal cases.[12] It is such fundamental civil rights, among others, that the 1787 Federal Constitution secured equally for all U.S. citizens in its own Privileges & Immunities Clause.[13] Revolutionary Americans, influenced by Lockean ideals concerning the social contract and natural rights, certainly did not think that the rights of confrontation and self-representation in court were merely special benefits doled out by their governments!

What was the connection between Lockean natural rights philosophy and this specialized meaning of "privilege"? The modern understanding of social contract doctrine presents a somewhat simplistic picture of this theory: one enters into civil society and thereby delegates some natural rights to the government while retaining the rest. But Locke and his contemporaries recognized that entering into civil society meant that one would "enjoy many Conveniences, from the labour, assistance, and society of others in the same Community."[14] Accordingly, a person had an expanded range of powers and responsibilities vis-à-vis other people and the state—specifically with respect to the legislative, executive, and judicial institutions that were absent in the state of nature.[15] In other words, in creating civil society, individuals secured the protection of their natural rights, and they also gained a litany of new rights that defined their freedoms relative to their new fellow citizens and public institutions.

Working under the social contract doctrine in the eighteenth and nineteenth century, scholars and jurists, such as William Blackstone, came to refer to those rights that arose as a consequence of the social contract as "privileges."[16] Thus, for example, Alexander Hamilton wrote in *The Federalist* of

---

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

[10] PA. CONST. of 1776, § 45.

[11] GA. CONST. of 1777, art. LVIII.

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

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

[14] JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 128, at 353 (Peter Laslett ed., 1988) (1690) [hereinafter Locke, Second Treatise.

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

[16] 1 BLACKSTONE, COMMENTARIES 125 (U. Chi. Press ed. 1979).

securing "equal privileges" for all citizens.[17] In 1783, George Washington welcomed immigrants to New York City, inviting them to participate in all "our rights and privileges."[18] Antebellum courts also repeatedly identified contracts, the elective franchise, *habeas corpus*, and the right to travel from state to state as "privileges deemed to be fundamental."[19] In referring to such fundamental civil rights as "privileges," early Americans believed these legal rights were a necessary corollary of the social contract that they believed justified civil society (as set forth in the Declaration of Independence). Although not using the "privilege" terminology, James Madison evidenced this important theoretical connection between these non-natural civil rights and natural rights when he introduced the Bill of Rights to Congress. There, he argued that the various proposed amendments secured both natural and civil rights, and that these civil rights, such as the right to a jury trial, were deserving of the same protection as the natural right to liberty.[20]

There were, of course, court opinions and antiquarian legal dictionaries in which the modern, standard meaning of "privilege" is used.[21] The conventional meaning ascribed to privilege today—a special grant contrary to or without right—is rooted in well-established historical practices. But this explication of the multiple senses of privilege in the eighteenth and nineteenth centuries establishes that references to patent privileges in the historical record must be read carefully in their context to ensure which sense was meant by the speaker.[22]

This important connection between natural rights philosophy and patent privileges is revealed in the Supreme Court's 1834 copyright decision in *Wheaton v. Peters.*[23] In this case, the litigants and Justices all agreed that copyright and patents were *not* natural rights that existed before the creation of civil society; these were rights secured under express statutes enacted by a government. Yet, the *Wheaton* Court embraced the labor theory of property of natural rights

[17] THE FEDERALIST No. 7, at 63 (Alexander Hamilton).
[18] Letter of Dec. 2, 1783, *in* 27 THE WRITINGS OF GEORGE WASHINGTON 254 (John C. Fitzpatrick ed., 1938).
[19] *See, e.g.,* Corfield v. Coryell, 6 F. Cas 546, 551-52 (C. C. E. D. Pa 1823) (No. 3,230) (Washington, Circuit Justice).
[20] 1 ANNALS OF CONG. 454 (Joseph Gales ed., 1789).
[21] *See, e.g.*, THOMAS BLOUNT, A LAW-DICTIONARY (2d ed. 1691) ("A *Personal Priviledge* is that which is granted or allowed to any person, either against or besides the course of the Common-Law.") (this text is unpaginated).
[22] Madison's discussions of copyright and patent are particularly difficult in this regard, as his public and private communications on the subject are not consistent. *See* detailed discussion in Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent "Privilege" in Historical Context*, 92 CORNELL LAW REVIEW at 973-982.
[23] 33 U.S. (8 Pet.) 591 (1834).

philosophy as the principal justification for protecting patents under the law: "That every man is entitled to the fruits of his own labour must be admitted; but he can enjoy them only, except by statutory provision, under the rules of property, which regulate society, and which define the rights of things in general."[24] The *Wheaton* decision is but one of many examples of how jurists, lawyers and scholars in the early American Republic defined patents as civil rights that were derived from the social compact and justified by natural rights philosophy.

The Early Treatment of Patent Privileges in Courts and Congress

As a result of the natural rights justification for patents, antebellum Congresses and courts distinguished between the fundamental property rights secured in patent "privileges" and mere grants of monopoly franchises, such as in bridges. Nineteenth-century courts viewed monopoly franchises with disfavor; for instance, in the famous 1837 anti-monopoly case, *Charles River Bridge v. Warren Bridge,* the Supreme Court followed long-established legal precedent in narrowly construing a state franchise in a bridge monopoly.[25] Thus, while nineteenth-century courts viewed monopoly franchises with disfavor, and therefore they *narrowly* construed them against the grantor, these same courts concomitantly embraced *expansive* protections of patent rights.

In accord with their definition of patents as privileges—civil rights securing fundamental property rights—courts often relied on tangible property case law and rhetoric in patent cases. References to patents as "property" are omnipresent in nineteenth-century patent law decisions.[26] Accordingly, courts formally defined a patent as a "title" that was possessed and owned by a patentee,[27] and they even went so far as to refer to multiple owners of a patent as "tenants in common."[28] The courts even adopted the property terminology of "inchoate" and "choate" rights: a pre-patented invention was said to be "inchoate" property, which was "vested" by the discovery and then perfected by the

[24] *Wheaton*, 33 U.S. at 657.
[25] 36 U.S. (11 Pet.) 420 (1837).
[26] *See, e.g.,* Allen v. New York, 1 F. Cas. 506, 508 (C.C.S.D. N.Y. 1879) (No. 232) ("the [patent] right is a species of property"); Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent "Privilege" in Historical Context*, 92 CORNELL LAW REVIEW at 993-997 (listing numerous nineteenth-century cases referring to patents as “property”).
[27] *See e.g.*, Franz & Pope Knitting-Mach. Co. v. Lamb Knitting-Mach. Mfg. Co., 9 F. Cas. 721, 722 (C.C.E.D. Pa. 1881) (No. 5,061a) (recognizing that "the title to said letters patent . . . is duly vested" in the plaintiffs).
[28] *See e.g.*, Dunham v. Indianapolis & St. L. H. Co., 8 F. Cas. 44, 45 (C.C.N.D. Ill. 1876) (No. 4,151) ("The patentees are tenants in common of the right.").

issuance of the patent (resulting in choate property).[29] Even more significantly, early courts often accused patent infringers of committing "trespass"[30] and "piracy."[31]

Circuit Justice Swayne's jury instructions in an 1869 patent infringement trial succinctly summarizes the property status of patents in the nineteenth century:

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

In an earlier patent infringement trial in 1846, the court instructed the jury that "[a]n inventor holds a property in his invention by as good a title as the farmer holds his farm and flock."[32] The theoretical and legal connections between patent "privileges" and traditional property rights in land and chattels were beyond peradventure to early American courts.

Another key set of developments in antebellum patent law were legal presumptions favoring liberal interpretation of both patent statutes and patents. Between 1793 and 1836, even before the modern patent examination system was created by the 1836 Patent Act, courts adopted a presumption favoring liberal treatment of patents.[33] Judges even recognized additional rights beyond

---

[29] *See, e.g.*, Gayler v. Wilder, 51 U.S. (10 How.) 477, 493 (1850); Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent "Privilege" in Historical Context*, 92 CORNELL LAW REVIEW at 997.

[30] *See, e.g.* Goodyear Dental Vulcanite Co. v. Van Antwerp, 10 F. Cas. 749, 750 (C.C.D.N.J. 1876) (No. 5,600) (analogizing to "trespass" of horse stables and unauthorized use of horses for determining rule of damages in patent infringement action); *See also* Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent "Privilege" in Historical Context*, 92 CORNELL LAW REVIEW 953, 993 n.192 (2007) (listing numerous cases referring to patent infringement as "trespass").

[31] *See, e.g.,* Pennock v. Dialogue, 27 U.S. (2 Pet.) 1, 12 (1829) (Story, J.) (recognizing that "if the invention should be pirated, use or knowledge, obtained by piracy" would not prevent the inventor from obtaining a patent). *See also* Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent "Privilege" in Historical Context*, 92 CORNELL LAW REVIEW 953, 993 n.193 (2007) (listing numerous nineteenth-century patent decisions using the "piracy" rhetoric).

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

[33] Davis, 7 F. Cas. At 158; Ames v. Howard, 1 F. Cas. 755, 756 (C.C.D. Mass. 1833) (No. 326) (Story, Circuit Justice) (stating rule that "[p]atents for invention are not to be treated as mere monopolies odious in the eyes of the law, and therefore not to be favored…").

those expressly provided in the patent statutes, affirming the Superintendent of Patent's practice in permitting patentees to surrender mistakenly defective patents and obtain corrected "reissued" patents, despite the absence of any authorization to do so in the patent statutes.[34] Lastly, Congress repeatedly granted patent term extensions to individual inventors, and a provision providing for patent term extensions was formally included in the 1836 Patent Act.

The Historical Patent Privilege Rediscovered: Implications for Today

The Jeffersonian story of patent law masks the development of early American patent law under the meaningful guidance of the social contract doctrine and labor theory of property of natural rights philosophy. A proper intellectual history of American patent law is important if for no reason other than that the Supreme Court draws heavily on the history of patent rights in analyzing current patent doctrines. This history shows that Lessig's critique that the modern Court contradicts its own "long history" in limiting patent and copyright is profoundly mistaken, as is the claim that patents (and other intellectual property rights) are being "propertized" in their expansive treatment today. The expansion in patent rights today is in accord with similarly expansive developments in the early history of American patent law. Modern developments in patent and copyright law may be criticized on the basis of policy concerns, such as emphasizing monopoly costs or championing the value of the public domain, but invocations of an incorrect historical claim cannot serve as a proxy for such arguments.

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

1444 Eye Street NW, Suite 500, Washington, DC 20005 | phone: 202-289-8928
website: http://ipcentral.info | email: advisory@ipcentral.info