THE ORIGINAL MEANING OF CONSTITUTIONAL INVENTORS: RESOLVING THE UNANSWERED QUESTION OF THE MADSTAD LITIGATION

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INTRODUCTION

In litigation that garnered national attention, a “garage inventor” of a new design for motorcycle windshields challenged the Leahy-Smith America Invents Act (AIA) as unconstitutional under the U.S. Constitution’s Patent Clause. The basis of the challenge in the case—MadStad Engineering, Inc. v. U.S. Patent & Trademark Office—uncoils as a pleasing syllogism: the AIA transitioned the American patent system from first-to-invent to first-inventor-to-file. The plaintiff argued that the Patent Clause, in enumerating to Congress authority to grant patents, limited the right to “inventors” who were the first, in time, to invent. To complete the circuit: a first-inventor-to-file system is unconstitutional insofar as it grants patent rights to inventors who were second to conceive but first to reach the patent office.

The suit was dismissed at the district court level on standing grounds, with the court relying almost entirely upon the newly minted precedent of Clapper v. Amnesty International, USA. The U.S. Court of Appeals for the Federal Circuit affirmed this dismissal last year. The central constitutional question of the suit, however, persists unresolved, as the appellate court took care “not [to]
reach MadStad’s constitutional arguments.6 Some critics have argued that the plaintiff’s interpretation is impractical;7 others have contended that potential plaintiffs cannot demonstrate a sufficient causal link to the alleged injury suffered.8 In what follows, I use the MadStad litigation to draw out a concentrated analysis of what modern courts might consider dispositive for purposes of discerning the metes and bounds of the Patent Clause: the text and the original understanding.9

In Part I, I begin with the words of the Constitution. Particularly, I work through some of the key terms in the Patent Clause, aided by Founding-era accounts and subsequent judicial interpretation. This inquiry, combined with an examination of the oft-ignored preamble to the Clause, concludes that a system predicated on the dissemination of an invention is not unconstitutional solely because the inventor may have been chronologically second to conceive of an idea. In Part II, I test this result against the broader historical context at the time of the drafting and respond to potential objections. I conclude that constitutionality of the AIA survives the stress test provided by originalist evidence.10

I. THE TEXT ITSELF

The text of the Patent Clause denotes that Congress shall have power “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”11 The difficulty of constitutional interpretation is quickly apparent: Is an inventor the first person to discover something, even if she locks her epiphany away in a file cabinet? Or might it be the second person who, after independently coming to the same invention, decides to release the idea to the public for the benefit of all society? We can call the first position the “Patent as Natural Right” view; the second the “Patent as Bargained Right” view.

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6. Id.
10. By “originalist” and “originalism,” I mean the broader definitions of the terms to encompass what is sometimes known as “original public meaning.” Accordingly, such evidence will include broadly debates and discussions over the Patent Clause from not just the Framers and ratifiers of the Constitution, but from leading contemporaneous commentators as well. For a further explanation of original public meaning, see RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 100-09 (2004). This original public meaning inquiry was at the center of the MadStad briefings. See Brief of Appellants, supra note 3, at 45-58.
This classification is more than window dressing. If the natural right view wins the day, then the merits of MadSta d’s challenge may be strong, as the Patent Clause would forbid the awarding of a monopoly right to all but the first chronological inventor. The AIA’s protection of inventors who bring their creations to the marketplace earlier in time would be abrogated.

A. Inventors and Discoveries

The plaintiff in the case argued that the plain text of the Patent Clause supported the natural rights interpretation, noting that language such as “inventor” and “discovery” invariably means the first chronological inventors.12 Parsed finely, however, the bargained view comports just as well with a textualist interpretation.

Samuel Johnson’s dictionary, often used by originalists to ascertain definitions of constitutional terms,13 occupied a conspicuously outsized role in the plaintiff’s briefing.14 There, “discovery” is defined as “[t]he act of finding anything hidden,” and “inventor” is “[o]ne who produces something new; a deviser of something not known before.”15 Contrary to the plaintiff’s contention, nothing in these definitions precludes a second person from conceiving of an idea from being considered an inventor, as two individuals could certainly both stumble independently upon hidden knowledge.

Moreover, the idea of invention was generally understood in the colonial period quite differently than it is today. In the common law, “invention” typically meant the physical act of introducing a product or process to society instead of the mental process of creation.16 Accordingly, an inventor was one who introduced useful knowledge unknown to the public at large. Mere discovery without filing or other public availability would have stretched the notion of invention.

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15. JOHNSON, supra note 14.
It is therefore no surprise that judicial interpretations have taken a similar stance in interpreting analogous patent law statutes. 17 “[K]nowledge and use . . . mean[s] knowledge and use existing in a manner accessible to the public,” noted the Court in 1851. 18 Accordingly, the uncovering of something unknown is not like stumbling across an artifact never before seen in human history, but rather coming across a piece of information unknown to the public at large. The Court explained that even though a “party who invents is not strictly speaking the first and original inventor,” he may still have “invented a new and useful improvement, ‘not known or used by others before his discovery or invention.’” 19 The first-inventor-to-file system fits cleanly with this interpretation.

Of course, there is room for ambiguity in this type of unyielding textualist inquiry, and the MadStad plaintiff summoned a litany of academic articles arguing that the definitions of inventor and discovery undoubtedly rendered the first-inventor-to-file system unconstitutional. 20 Their certainty, no matter in which direction, is worrying. More disconcerting, however, is that these works seem to utterly disregard half of the Patent Clause’s very text. I turn there now.

B. Promoting Progress: The Preamble

Though the practice of using preambular language in constitutional interpretation has its share of critics, 21 it has generally been praised as a helpful tool for “expound[ing] the nature, and extent, and application of the powers actually conferred by the [C]onstitution.” 22 Here, the Patent Clause’s preamble—designating patent protection to “promote the progress of science”—is particu-

20. Brief of Appellants, supra note 3, at 57-61 (citing ten articles and working papers).
22. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 462 (Boston, Hilliard, Gray, & Co. 1833); cf. Milton Handler et al., A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation, 12 CARDozo L. REV. 117, 118 (1990) (explaining how the “well-established rules of construction involving preambles and analogous provisions in contracts, statutes, and treaties” contrast with preambular interpretation in the constitutional context).
larly salient. Though the preamble often evades any type of study, it provides a clear statement of purpose and useful lens through which to unpack the historical literature.

Historical studies of the preamble’s language have helped to shed some light on its meaning. One commentator notes that the “progress” being invoked was primarily one of spread and scope of knowledge. The drafters of the Constitution would likely have been deeply influenced by the Enlightenment idea that “progress” meant the wide dissemination of information.

State laws at the time of the framing, when they did discuss patentability and progress, couched them in the language of bargained rights. “[T]he improvement of knowledge, [and] the progress of civilization” were the ends being sought in promoting the work of scientists and inventors, as enumerated in the New Hampshire and Rhode Island statutes. The Massachusetts Constitution contained a similar preamble-operation construction in its respective patent clause, and unpacked the progress component to mean “[w]isdom and knowledge . . . diffused generally among the body of the people, being necessary for the preservation of their rights and liberties.”

The Court has interpreted the “constitutional command” of the Patent Clause preamble quite powerfully. “Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites” of a patent system built upon the preambular statement of purpose. If the watchword of the Patent Clause is discovery as well as dissemination, then the first-inventor-to-file regime is as valid, if not more so, a manifestation of constitutional intent as the first-to-invent system.

II. ORIGINALIST THEORIES OF THE PATENT CLAUSE

Although the plain text analysis of the Patent Clause, and especially a close focus on its preamble, helps to settle our interpretive questions, sincere difference of opinion is still possible. In pursuit of further clarity, I turn to the historical record surrounding the debate over the Clause’s most essential themes and concepts.

24. See id. at 773.
25. An Act for the Encouragement of Literature and Genius, and for Securing to Authors the Exclusive Right and Benefit of Publishing Their Literary Productions, for Twenty Years (1783), reprinted in COPYRIGHT ENACTMENTS OF THE UNITED STATES, 1783-1906, at 18 (Thorvald Solberg ed., rev. 2d ed. 1906); An Act for the Purpose of Securing to Authors the Exclusive Right and Benefit of Publishing Their Literary Productions, for Twenty-One Years (1783), reprinted in COPYRIGHT ENACTMENTS OF THE UNITED STATES, 1783-1906, supra, at 19.
A. Historical Support of Bargained Rights

The Framers understood patent protection to uphold the bargained right rationale expressed in the preambular language. James Madison, for instance, considered the “public good” as coterminous with the claims of inventors to their patents. Thomas Jefferson took a similar line, writing passionately about using patents primarily to promote social welfare. He “[c]onsider[ed] the exclusive right to invention as given not of natural right, but for the benefit of society.” Particularly, patents were meant as “encouragement to men to pursue ideas, which may produce utility.”

Granting patents to the first inventor to file promotes this social utility with even greater strength than does a strict first-to-invent system. As Justice Story noted in 1829, the latter system would allow an inventor “to hold back from the knowledge of the public the secrets of his invention.” This would serve only to “materially retard the progress of science” in contravention of the Constitution’s requirements.

Fellow nineteenth-century jurists came down in line with Justice Story. Chief Justice Marshall even went so far as to call the patent system “the reward” to an inventor in exchange “for the advantages derived by the public in the form of the new knowledge.” A little over a decade later, the Gayler Court opined that a primary inquiry was whether the community would “derive [an] advantage from the invention here.” If the invention “confer[s] no benefit upon the community . . . the inventor . . . is not considered to be entitled to the reward.”

Perhaps the clearest wisdom on the matter came from William Rawle, a Founding-era lawyer and commentator. Rawle explained that under the Constitution, “there was no doubt that if another person had fallen on the same invention, without a knowledge of the first, he would be entitled to the benefit of his

31. Id.
34. Id.
own talents.”36 This was made clear in part because other countries did indeed “secure to the first inventor a reward for the time and study employed in such pursuits” at the time of the Founding.37 This practice was abused by the monarchy in England, however, with the King doling out privileges to his favorite subjects regardless of true merit.38 The American patent system was therefore intended to push back against an English system rife with potential for abuse.

B. Responding to Countervailing History

To be sure, there is good evidence that supports the natural rights reading and therefore might support the strict first-to-invent approach. Much of this work bubbled to the surface in the plaintiff’s brief before the Federal Circuit.

The primary historical counterargument is that the Framers were seeking to encode in the Patent Clause a Lockean notion of property rights that emanated from natural law.39 Accordingly, the argument follows, the benefit to society of an invention is subservient to the protection of an inventor’s genius, as the property right “is created by the invention, and not by the patent.”40 The property right of a man in his discovery predates any formalization of that right in a patent and dissemination.41

37. Id. at 105.
38. Id.
39. See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 27 (Richard Cox ed., Harlan Davidson, Inc. 1982) (1690) (“Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with and joined to it something that is his own, and thereby makes it his property... For this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to . . . .”). As one commentator explains, Locke occupies an “uncommon place in American intellectual property theory,” because “Lockean natural rights informed the Framers’ understanding of intellectual property law.” Benjamin G. Damstedt, Note, Limiting Locke: A Natural Law Justification for the Fair Use Doctrine, 112 YALE L.J. 1179, 1179 (2003) (citing THE FEDERALIST NO. 43, at 239-40 (James Madison) (Clinton Rossiter ed., 1999); Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in BASIC WRITINGS OF THOMAS JEFFERSON 708 (Phillip S. Foner ed., 1944)). The natural law justification, at bottom, posits that “[w]hen the individual combines her labor with materials from the common, this property right extends to the items she has removed from the common due to the mixing of her property-laden labor with the items.” Id. at 1184. In the intellectual property context, this intuition is arguably strong because the creation is “more plainly and completely the product of the author’s labor.” Id. at 1184 n.21 (quoting Lloyd L. Weinreb, Copyright for Functional Expression, 111 HARV. L. REV. 1150, 1222 (1998)) (internal quotation marks omitted). As explained further, the analogy to our present inquiry is that an intellectual property right in an invention exists from the moment an inventor mixes genius to product to form creation, regardless of the mechanics of a subsequent patent system and its focus upon public dissemination and benefit.
40. Brief of Appellants, supra note 3, at 54 (quoting Pennock v. Dialogue, 27 U.S. (2 Pet.) 1, 12 (1829)).
41. Id. (noting that the Patent Clause “secure[s],” rather than creates, a property right).
“The right of the inventor,” opined Daniel Webster before the House of Representatives in 1824, “is the fruit of his mind—it belongs to him more than any other property . . . —it peculiarly belongs to him, and he ought to be protected in the enjoyment of it.”42 Early American inventor John Fitch considered the awarding of patents as a “matter of property and as a matter of right.”43 Similarly, a preeminent patent lawyer wrote in 1792, “[E]ach American citizen has a constitutional right to claim . . . his property in the products of his genius.”44

But three responses are worth mentioning to fully unpack these statements. First, the natural rights evidence discussed above came in the context of a prior monarchal system in which patents were dispensed corruptly to non-inventors.45 The reliance on natural rights rhetoric was likely more a response to that abuse than to possible indignation with a first-inventor-to-file system. Second, even if we accept the natural rights reading of the Patent Clause, it does not foreclose the first-inventor-to-file system. Two independent creators could come to the same conclusion using only the fruits of their respective minds. To value only the first chronologically even when that time difference is negligible is to prioritize the natural right of one over another without compelling reason. Third, if the underlying concern of the natural right theory is with the potential for subsequent inventors to prey or thief upon the first inventor, then foreclosing the first-inventor-to-file system is far from the least restrictive means of achieving that end. After all, the AIA still maintains strong protections against thievery by establishing derivation proceedings46 “to ensure that the first person to file the application is actually a true inventor.”47 At bottom, the evidence affirms what the plain text already instructs.

CONCLUSION

Sooner or later, a litigant is likely to make it past the standing barrier imposed by the Federal Circuit, and a court will need to reach the merits on the constitutionality of the AIA. In doing so, the court charged with resolving the

42. Id. at 55-56 (citing 41 ANNALS OF CONG. 934 (1824)).
44. Id. at 405 & n.14 (quoting 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 (Philadelphia, Francis Bailey 1792)).
45. See supra text accompanying note 38.
debate must sift through what will surely be a voluminous set of arguments on text, history, and pragmatism. When that task arises, it is first important to remember that courts generally grant the legislature great deference on their enactment of patent legislation. The question therefore is whether Congress, in attempting to bring the American patent system in line with various international systems, could rationally be said to fall within the constitutional bounds of the Patent Clause. The text and history encoded in the constitutional language demonstrate that Congress and the AIA meet this test.

48. See, e.g., Eldred v. Ashcroft, 537 U.S. 186, 202-04, 218 (2003); McClurg v. Kingsland, 42 U.S. (1 How.) 202, 206 (1843) (“[T]he powers of Congress to legislate upon the subject of patents is plenary by the terms of the Constitution, and . . . there are no restraints on its exercise . . . .”); Figueroa v. United States, 466 F.3d 1023, 1031-32 (Fed. Cir. 2006) (citing Graham v. John Deere Co., 383 U.S. 1, 6 (1966)).