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## To Promote the Progress of Science and Useful Arts: the Background and Origin of the Intellectual Property Clause of the United States Constitution

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ARTICLES

**TO PROMOTE THE PROGRESS OF SCIENCE  
AND USEFUL ARTS: THE BACKGROUND  
AND ORIGIN OF THE INTELLECTUAL  
PROPERTY CLAUSE OF THE UNITED  
STATES CONSTITUTION**

*Edward C. Walterscheid\**

I. INTRODUCTION

The U.S. patent and copyright law derives from a constitutional grant of authority to the Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."<sup>1</sup> Prior to the ratification of the Constitution by the

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\* Deputy Laboratory Counsel, University of California Los Alamos National Laboratory, Los Alamos, NM 87545. Although the work which resulted in this Article was performed under a contract between the Department of Energy and the University of California, the views expressed herein are uniquely those of the author and do not necessarily represent those of either the Department or the University.

<sup>1</sup> U.S. CONST., Art. 1, § 8, cl. 8. This clause is frequently referred to as either the Patent Clause, the Copyright Clause, or the Intellectual Property Clause, depending on the context in which it is being discussed. Any of these descriptors is in a sense misleading in that, as Bugbee notes, the clause contains "no reference to 'property' itself (or to patents or copyrights as such)." See BRUCE W. BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 129 (1967) (discussing significance of clause as basis for patent and copyright systems). A more appropriate name for the Clause, at least in the context of the times, would be the "Science

requisite nine states on June 21, 1788, no federal patent or copyright law existed because under the Articles of Confederation each state retained "every power, jurisdiction and right, which is not expressly delegated to the United States, in Congress assembled."<sup>2</sup> Among the powers that the states failed to delegate expressly was the right to issue patents or otherwise grant rights with respect to inventions and discoveries, as well as the right to provide for copyright of writings.

To understand the origins of the United States patent and copyright law it is necessary to inquire into the foundations of the constitutional language. Why did the Framers believe it necessary to even mention inventors and authors in the Constitution, much less expressly empower Congress to grant them exclusive rights, albeit for limited times in their respective discoveries and writings? The answer, of course, is that the constitutional language was not framed out of whole cloth. At the time the United States transitioned to the federal form of government, the patenting of inventions and copyrighting of literary works had been practiced for several centuries. Indeed, the legal forms of letters patent, at least in the English context, were not only time-honored but timeworn.<sup>3</sup> So too was it with copyright.

More than anything else, the severe limitation on the power of the national government under the Articles of Confederation, including its absolute lack of power to protect intellectual property, had to do with the United States' original form as a federation of thirteen existing states.<sup>4</sup> By and large, national governments today, as indeed was the case toward the close of the eighteenth century, are recognized as being vested with any and all powers necessary to govern, except as such power might be limited by a

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and Useful Arts" Clause, because the term "intellectual property" was unknown in the eighteenth century. Nonetheless, because intellectual property law is to a substantial extent derived from the grant of authority set forth in this clause, I will follow what is increasingly becoming standard usage and refer to it as the Intellectual Property Clause.

<sup>2</sup> ARTICLES OF CONFEDERATION, art. II, reprinted in 9 JOURNALS OF THE CONTINENTAL CONGRESS 908 (Worthington C. Ford ed. 1906).

<sup>3</sup> Frank D. Prager, *Historic Background and Foundation of American Patent Law*, 5 AM. J. LEGAL. HIST. 309, 309 (1961).

<sup>4</sup> For further discussion of the acknowledgment of limitations on a national government's power, see CHRISTOPHER COLLIER & JAMES L. COLLIER, *DECISION IN PHILADELPHIA* 184-85 (1986).

national constitution. It is assumed, in the natural course of things, that all political power resides in the national government and that political subdivisions are administrative units granted only such power as the national government is willing to delegate. With the notable exception of Great Britain, few nations in the eighteenth century recognized constitutional limitations on the power of the government. It was precisely because of this British history of unwritten constitutional law and practice that the principle was known and understood in the infant United States.

Indeed, one argument used to support the right of the American colonies to revolt was that the government of Great Britain had violated the unwritten English constitution in the manner in which it had sought to govern the colonies. The need for constitutional limits on the governing authority plainly was recognized as the various states quickly adopted constitutions during and immediately after the American Revolution. It was one thing to limit the rights of state government by a state constitution; it was quite another to limit those rights by what was, in essence, a delegation by the people of a major portion of those rights to a national government.

This then is a part of the unique nature of the U.S. Constitution. It was drafted and ratified not so much for the purpose of limiting the power of the national government, but rather to enhance that power, albeit in a carefully controlled and balanced way. The Articles of Confederation had addressed the issue by a limited and restrictive grant of powers from the states to the Congress. As noted previously, the authority to issue patents or copyright was not a part of that limited grant. Only with the ratification of the Constitution did Congress come to have the necessary authority for making statutory enactments pertaining to patents and copyright.

The Framers drafted the Intellectual Property Clause against the immediate backdrop of the Articles of Confederation but within the overall framework of the English, colonial, and state practices regarding patents and copyright. To understand the Intellectual Property Clause in the context of its time, it is first necessary to look at how that immediate backdrop came to be, then to briefly explore the overall framework of existing patent and copyright practice. Only then is it possible to obtain some insight into what the Framers did and why they did it.

## II. THE ARTICLES OF CONFEDERATION

In 1776, Americans gave precious little thought to any form of national government that might ensue if their revolt against Great Britain was successful. Indeed, at that time it is likely that the majority of American colonists would have been content to remain under the British crown, if only some workable form of self-determination within a colonial framework could be found. Even after the Declaration of Independence, the fight was not thought by most Americans to be for some ill-defined and amorphous national entity, but rather for their newly independent states.<sup>5</sup> To the extent that Americans thought about it, they were generally convinced that the one thing they did not want was to substitute a strong new central government, assumed to be tyrannical, for the despotic British rule they were fighting to overcome.<sup>6</sup>

Nonetheless, they were pragmatic souls and recognized that the individual states could not go it alone, for to do so would simply invite piecemeal defeat by the British. They accepted, although not always gracefully, the need for the Continental Congress to take unto itself those powers necessary to achieve the ultimate goal of

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<sup>5</sup> Jensen notes that "[t]he people, so far as they had fought for independence, had not fought for the independence of a vague entity known as the United States, but for the independence of their own particular states." MERRILL JENSEN, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION, 1781-1789* 83 (1962). Or, as phrased by Schuyler, "the patriotism of many a sturdy Revolutionist was bounded by the limits of his own state." ROBERT L. SCHUYLER, *THE CONSTITUTION OF THE UNITED STATES: AN HISTORICAL SURVEY OF ITS FORMATION* 27 (1923).

<sup>6</sup> To be sure, some delegates, from the inception of the Revolution, believed that a strong central government would be necessary, but they were in the minority. Nonetheless the words attributed to Rufus King, a delegate to the Constitutional Convention, should be remembered:

You young men who have been born since the Revolution, look with horror upon the name of a King, and upon all propositions for a strong government. It was not so with us. We were born the subjects of a King, and were accustomed to subscribe ourselves 'His Majesty's most faithful subjects'; and we began the quarrel which ended in the Revolution, not against the King, but against his parliament; and in making the new government many propositions were submitted which would not bear discussion; and ought not to be quoted against their authors, being offered for consideration, and to bring out opinions, and which, though behind the opinions of this day, were in advance of those of that day.

1 T. H. BENTON, *THIRTY YEAR'S VIEW* 58, *reprinted in* 3 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 466 (Max Farrand ed., 3d ed. 1966).

independence. The remarkable thing is that while the second Continental Congress early on called upon the states to set up their own governments and write their own constitutions,<sup>7</sup> the Continental Congress itself operated without any constitutional charter of its own for some seven years. When such a charter, the Articles of Confederation, was finally ratified by all the states in 1781,<sup>8</sup> "Congress suffered a serious diminution of its authority and effectiveness as well as its prestige both at home and abroad."<sup>9</sup> The reason for this was that the Articles "were a constitution [only] in the most tenuous sense—they provided fundamental law, but they did not establish a government."<sup>10</sup>

While the Congress managed to guide the fledgling United States through much of the Revolutionary War without a constitutional charter, it did not in fact intend to do so. Rather, the circumstance that no such charter existed was not the fault of the Congress, but rather of the recalcitrance of a single state, Maryland, which refused to ratify the Articles of Confederation until 1781. Within a few months of its inception on May 10, 1775, the second Continental Congress began to receive proposals for some form of confederation for the colonies, soon to be declared states. Indeed, some six different drafts of confederation proposals are now known to have been prepared in 1775 and 1776.<sup>11</sup>

These early proposals were in many respects quite nationalistic in tone and content and would have conferred upon Congress

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<sup>7</sup> The first Continental Congress met from September 5 to October 26, 1774, and the second met from May 10, 1775 to March 2, 1789. Exactly one year after the second Continental Congress came into being, it issued a resolution calling on the various colonies to form state governments. See RICHARD B. MORRIS, *THE FORGING OF THE UNION, 1781-1789*, at 55-59 (1987) (discussing existence of national sovereignty prior to Constitutional Convention).

<sup>8</sup> Although all the states except Maryland signed the Articles of Confederation in 1778, ratification could not occur until all the states had signed, and Maryland did not actually sign until 1781. Maryland refused to sign until the states agreed in principle to disposition of the western lands by ceding state claims thereto to the United States. According to Morris, "the West would prove the most divisive issue delaying adoption of the Articles of Confederation." MORRIS, *supra* note 7, at 87.

<sup>9</sup> *Id.* at 80.

<sup>10</sup> ROBERT MIDDLEKAUFF, *THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763-1789*, at 621 (1982).

<sup>11</sup> See generally MORRIS, *supra* note 7, at 80-91 (providing detailed discussion of events leading to drafting of Articles of Confederation).

significant powers, some of which it never in reality would possess. The Congress did not act directly on any of the proposals, but instead, some thirteen months after its inception, finally appointed a committee of thirteen to draft what ultimately became the Articles of Confederation. This appointment occurred only a month after the Congress had asked the various colonies to form state governments and create their own constitutional charters, but even then it was recognized that a fundamental issue in the formation of any central or national government would be the relative authority of the states and the Congress. At this early stage in the development of the United States it was largely assumed that the Congress would have the primary, if indeed not the exclusive, role in the formation of any central government.<sup>12</sup>

If the states were to have governments of their own, then clearly power had to be divided between those state governments and the Congress as the embodiment of the national government.<sup>13</sup> But where was the dividing line to lie? One approach was to give the Congress a grant of authority to do all things necessary for the general good of the country. Any such grant of general authority would give Congress power to override the states on most issues. An alternative approach was to place strict limits on Congress' authority through specifically enumerated powers. In the absence of a specific grant of power to the Congress, such power would be reserved to the states. An approach of this kind would have severely restricted Congress' authority because it would not have been able to act in the absence of an express grant of power. At heart, the issue was one of sovereignty. Was sovereignty to remain with the newly established states, or was it to be transferred to a national government?

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<sup>12</sup> Some delegates favored the formation of a strong executive authority, but they were in a distinct minority. It was precisely the claimed tyranny of a strong executive authority embodied in the English crown that the colonists were rebelling against. They were not predisposed to replace one strong executive authority with another. *But see supra* note 6 (quoting speech in favor of strong central government).

<sup>13</sup> *Cf. COLLIER & COLLIER, supra* note 4, at 185 (writing in context of 1787 Constitutional Convention). The issue of the relative roles of the states and the national government—of whatever sort—clearly was understood by the Congress a decade earlier during the debates on the drafting of the Articles of Confederation.

For the most part, the members of the committee tasked with drafting a proposed charter for the national government were moderates and conservatives. As such, they were predisposed toward the first approach noted above.<sup>14</sup> The committee reported the draft of proposed articles of confederation to the Congress on July 12, 1776, but it would not be accepted by the Congress—and then only in substantially modified form—until November 15, 1777. Nonetheless, as initially presented, “[i]t was a constitution with great possibilities for centralization, for it contained few limitations on the power of Congress and no guarantees of power to the states.”<sup>15</sup>

It made no mention of patents, copyrights, or the rights of inventors and authors.<sup>16</sup> Nonetheless, had the Congress accepted the draft as presented, it clearly would have possessed the power to protect intellectual property and the subsequent constitutional provision might well have never been included—if indeed the need for a U.S. Constitution was perceived at all. The key clause was Article III which stated:

Each colony shall retain and enjoy as much of its present Laws, Rights and Customs as it may think fit, and reserve to itself the sole and exclusive regulation and Government of its internal Police, in all Matters that shall not interfere with the Articles [agreed upon by] at this Confederation.<sup>17</sup>

This provision, in effect, would have given Congress supreme authority over the states. Such authority would have included the power to issue patents or grant other rights to inventors as well as to provide for the copyright of literary works.

But it was not to be. During the early debates on the draft, there seems to have been no recognition whatever that this third article, in which the reserved power of the states was so vaguely defined,

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<sup>14</sup> Jensen argues that “they believed in the need for a coercive, centralized government.” JENSEN, *supra* note 5, at 23.

<sup>15</sup> *Id.* at 24.

<sup>16</sup> In the midst of the American Revolution concerns about such rights could not have been high on the list of congressional priorities.

<sup>17</sup> MORRIS, *supra* note 7, at 84.



would in essence transfer sovereignty in all significant matters to the national government, *i.e.*, the Congress. It was not until the early spring 1777 that the issue was raised by a newly arrived delegate from North Carolina named Thomas Burke. Burke is not well-known as having any significant role in the development of constitutional government in the United States, yet he played a pivotal role in causing the Congress to replace the third article of the draft Articles with what became the second article in the ratified Articles of Confederation. It would be the limitations imposed on national government by the second article that, more than anything else, would ultimately result in the Constitutional Convention and change forever the form of government in the United States.

Initially at least, Burke seems to have been driven by concern that the third article as drafted would provide the Congress with authority to control the western lands.<sup>18</sup> He also seems to have sincerely believed "that unlimited power was not to be safely entrusted to any man or set of men on earth."<sup>19</sup> In his view, the third article granted virtually unlimited power to the Congress because it "expressed only a reservation of the power of regulating the internal police, and consequently resigned every other power."<sup>20</sup> He argued that unless the third article was drastically changed, Congress "could explain away every right belonging to the States and to make their own power as unlimited as they please."<sup>21</sup>

Accordingly, Burke proposed the language of what became the second article, *i.e.*, "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." The profound significance inherent in this

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<sup>18</sup> JENSEN, *supra* note 5, at 25 (suggesting that attempts by landless states to seize land claimed by other states constituted threat to independence); *see also* MORRIS, *supra* note 7, at 87 (noting that North Carolina, represented by Burke in Congress, was one of southern states having "sea-to-sea" charters). Southern states with such charters opposed attempts to place control of their rights to western land in a national government. MORRIS, *supra* note 7, at 87 (explaining that bias of delegates, many of whom were land speculators, motivated opposition).

<sup>19</sup> JENSEN, *supra* note 5, at 25.

<sup>20</sup> *Id.*

<sup>21</sup> MORRIS, *supra* note 7, at 88.

language seems to have caught the other delegates by surprise, and, as Burke noted in a letter to the governor of North Carolina, "[t]his was at first so little understood that it was sometime before it was seconded, and South Carolina first took it up."<sup>22</sup> Once understood, however, the concept of leaving the locus of sovereignty firmly with the states exercised a powerful attraction, with eleven states voting yes, Virginia no, and New Hampshire divided.<sup>23</sup>

Article II's use of the term "expressly" severely restricted the national government's authority, i.e., "the United States, in Congress assembled." For by the literal language of Article II, if the Articles did not expressly delegate a power, jurisdiction, or right, the Congress could not exercise that authority. It was for this reason that the Continental Congress never attempted to issue patents or grant any form of exclusive rights to inventors in their inventions.<sup>24</sup> Nor did the Congress attempt to provide copyrights, although it did encourage the states to enact their own copyright laws.<sup>25</sup> The power to do so was simply not delegated to the Congress by the Articles.<sup>26</sup>

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<sup>22</sup> Letter from Thomas Burke to Richard Caswell (Apr. 29, 1777), in *LETTERS OF DELEGATES TO CONGRESS, 1774-1789*, at 671-73 (P.H. Smith ed., 1980). Ironically, Burke began his letter by stating that he was not "able to communicate anything interesting." *Id.* at 671.

<sup>23</sup> That Virginia should vote no was intriguing to say the least because she was among the most powerful of the states and had the greatest claim to the western lands. JENSEN, *supra* note 5, at 24.

<sup>24</sup> This absence of delegated authority, however, did not prevent inventors from on occasion seeking patent rights from the Congress. See, e.g., Frank D. Prager, *The Steamboat Pioneers Before the Founding Fathers*, 37 J. PAT. OFF. SOC'Y 486, 493-95, 509 (1955) (discussing petitions for "stream boat" and steamboat in late eighteenth century) [hereinafter Prager, *Steamboat Pioneers*]; Frank D. Prager, *The Steamboat Interference 1787-1793*, 40 J. PAT. OFF. SOC'Y 611, 615 (1958) (discussing efforts to gain congressional protection of "steamboat idea").

<sup>25</sup> See *infra* notes 63-65 and accompanying text (discussing resolution of Continental Congress encouraging state enactment of copyright law). Strangely, the Continental Congress never suggested that the states take any legislative action concerning patents.

<sup>26</sup> Arguably, the Articles did not expressly bind the Congress until they were formally ratified by all the states. Prior to 1781 the Congress might have conceivably issued patents or something akin thereto. But as a practical matter, no one seems to have petitioned the Congress for patent rights or for copyright during this pre-ratification period so the issue seems not to have been addressed.

## III. PATENTS AND COPYRIGHT PRIOR TO 1787

Three sources of precedent existed in 1787 that the Framers would have looked to in deciding whether to provide constitutional authority for the granting of some form of limited exclusive or monopoly right by the national government to authors and inventors for their writings and discoveries. These precedents were: (a) the extant practice in Great Britain regarding the issuance of both patents and copyright; (b) the colonial practice regarding what would now be termed “patents;” and (c) the practice of the various states during the Confederacy regarding what would not be termed patents and copyright.

Only near the end of the eighteenth century—indeed at the very time that the Framers were considering the question—did the term “patent” (short for letters patent) begin to have a precise and technical meaning, *i.e.*, a grant of monopoly power by the state over the commercial exploitation of an invention for a limited time.<sup>27</sup> Previously, the meaning attached to letters patent was much broader.

The kings of England conducted much of their state business by means of charters, letters patent, and letters close. At least initially, the monarchs used charters for more solemn acts. Letters patent set forth their public directives, of whatever sort, whereas letters close provided private instructions to individuals. Royal charters and letters patent often were similar in content and differed only in their form.<sup>28</sup>

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<sup>27</sup> CHRISTINE MACLEOD, *INVENTING THE INDUSTRIAL REVOLUTION: THE ENGLISH PATENT SYSTEM, 1660-1800*, at 40 (1988).

<sup>28</sup> 2 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 182 (4th ed. 1936). Holdsworth states that the royal charters were addressed to the archbishops, bishops, earls, barons, etc. and were executed in the presence of witnesses, whereas letters patent were addressed “to all to whom these presents come” and were generally witnessed by the king himself. *Id.* at 182 n.1.

Separate records called "rolls"<sup>29</sup> were kept for these three types of state papers. Unlike the Close Rolls, the Patent Rolls contained a wide variety of documents intended to be open to public inspection. Initially, these documents related primarily to the royal prerogative, the revenue of the realm, and the various branches of judicature. Over time, the Rolls included documents relating to foreign affairs as well as grants and confirmations of office and privileges, pardons, charters, proclamations, and commissions.<sup>30</sup> As stated by Blackstone:

The king's grants are also matter[s] of public record.  
 \* \* \* These grants, whether of land, honors, liberties, franchises, or aught besides, are contained in charters, or letters *patent*, that is, open letters, *literae patentes*: so called, because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom; and are usually directed or addressed by the king to all his subjects at large.<sup>31</sup>

The royal grants and confirmation of privilege by letters patent are of particular interest here, for these were used as the crown's vehicle for granting privileges to inventors concerning their inventions.

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<sup>29</sup> This name derives from the practice of recording information on long strips of vellum or parchment initially and stored in rolls. "The patents, written and drawn on vellum, were sewn end to end to form rolls, each containing several dozen patents, the number depending on their length. Long patents before 1829 ran to twenty or thirty skins of descriptive matter, with perhaps fifteen to twenty skins of drawings." DAVID J. JEREMY, *TRANSATLANTIC INDUSTRIAL REVOLUTION: THE DIFFUSION OF TEXTILE TECHNOLOGIES BETWEEN BRITAIN AND AMERICA, 1790-1830s* 45, 47 (1981). In Great Britain to this day, when a patent is officially made of record, it is said to be "enrolled."

<sup>30</sup> 2 HOLDSWORTH, *supra* note 28, at 182 n.2.

<sup>31</sup> 2 WILLIAM BLACKSTONE, *COMMENTARIES* \*346.

The Statute of Monopolies,<sup>32</sup> enacted in 1623, is frequently described as the legal foundation for the English patent system. Constitutional historians view the Statute as the culmination of a long struggle between Parliament and the crown to place curbs on the royal prerogative.<sup>33</sup> For the purposes of this Article, it is primarily of interest because in the eighteenth century it was the only statutory basis for the English patent practice.

In most respects, the Statute was simply a recapitulation in statutory form of the existing common law. The first section declares as contrary to the law of the realm and utterly void, all monopolies, grants, licenses, and letters patent theretofore made or granted, or thereafter to be made or granted, to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using of anything within the realm.<sup>34</sup> Section 2 provides that the force and validity of all monopolies, and all commissions, grants, licenses, charters, letters patent, proclamations, etc. tending toward monopoly, shall be determined in accordance with common law.<sup>35</sup> Section 3 provides that no person, body politic, or corporation may use or exercise any monopoly right granted by any commission, grant, license, charter, letters patent, proclamation, etc.<sup>36</sup> Section 4 grants any party aggrieved by a monopoly the right to recover treble damages and double costs in the common-law courts.<sup>37</sup>

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<sup>32</sup> 21 Jam. 1, ch. 3 (1623). The term "monopoly" first came into use in England during the sixteenth century. See HAROLD G. FOX, *MONOPOLIES AND PATENTS: A STUDY OF THE HISTORY AND FUTURE OF THE PATENT MONOPOLY* 24-26 (1947) (discussing origins of word "monopoly"). Cornering the market in a particular commodity so as to control its price, which was considered a monopoly practice, was variously known as "engrossing," "regrating," or "forestalling," and was generally an offense at common law. *Id.* at 21 n.6; see RICHARD GODSON, *A PRACTICAL TREATISE ON THE LAW OF PATENTS FOR INVENTION* 17-41 (1823) (discussing nuances of terms and applicable law).

<sup>33</sup> Cf. E. Wyndham Hulme, *The History of the Patent System Under the Prerogative and at Common Law*, 12 L.Q.R. 141, 151-52 (1896) (stating "that [t]he choice of language employed by the framers of this statute appears to have been dictated not so much by a desire to restrain unduly the exercise of the prerogative as to avoid lending a semblance of legality to grants which in future might be exercised to the public detriment").

<sup>34</sup> 21 Jam. 1, ch. 3, § 1 (1623).

<sup>35</sup> *Id.* § 2.

<sup>36</sup> *Id.* § 3.

<sup>37</sup> *Id.* § 4.

Sections 5 through 14 set forth a variety of exceptions to the mandate of the first section.<sup>38</sup> Of specific interest here is Section 6, which provides that:

... any declaration before mentioned shall not extend to any letters patent and grants of privilege for the term of fourteen years or under, hereafter to be made, of the sole working or making in any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others at the time of making such letters patent and grants shall not use, so as also they be not contrary to the law, nor mischievous to the state; ... [t]he said fourteen years to be accounted from the date of the first letters patents, or grant of such privilege hereafter to be made, but that the same shall be of such force as they should be, if this act had never been made, and of none other.<sup>39</sup>

This language sanctioned the extant English patent practice in 1787.

The Framers would have considered several aspects of this patent practice noteworthy. First, it was an exception to the general ban on monopolies, but one considered to be in the interest of the public at large. Second, the practice existed entirely at the discretion of the crown, *i.e.*, a patent was the creature of the royal prerogative.<sup>40</sup> The rights secured by the patent could be protected at common law, but no common-law right to a patent existed. Nonetheless, by the second half of the eighteenth century the crown was routinely granting patents if the invention met certain formalities, including the payment of the requisite fees.

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<sup>38</sup> 21 Jam. 1, ch. 3, §§ 5-14 (1623).

<sup>39</sup> *Id.* § 6.

<sup>40</sup> As stated by Hindmarch in 1846, "inventors are *never entitled as of right* to letters patent, granting them the sole use of their inventions, but they must obtain them from the Crown by petition, and *as a matter of grace and favour* . . ." W. M. HINDMARCH, A TREATISE ON THE LAW RELATIVE TO PATENT PRIVILEGES FOR THE SOLE USE OF INVENTIONS 3 (Harrisburg, Pa., I.G. McKinley & J.M.G. Lescure 1847) (1846).

Third, and perhaps most important, patents were beginning to be perceived as playing an increasingly important role in the industrial development of Great Britain. Patents of monopoly for inventions had issued in England for more than 200 years. The official series began in the year 1617, although patents had issued for at least 50 years earlier.<sup>41</sup> From 1617 to the Restoration in 1660 some 130 patents are in the official series. The number of patents listed in each decade from 1660 to 1800 are as follows:<sup>42</sup>

1660-1669	36	1710-1719	38	1760-1769	205
1670-1679	50	1720-1729	89	1770-1779	294
1680-1689	53	1730-1739	56	1780-1789	477
1690-1699	105	1740-1749	82	1790-1799	647
1700-1709	22	1750-1759	92		

The most obvious aspect of these data is the tremendous upsurge in the number of patents issued from 1760 onwards.<sup>43</sup>

A patent custom involving exclusive grants of privilege for limited terms with respect to invention and importation existed in a number of the American colonies and states prior to the drafting of the Constitution. That custom developed in parallel with that in England, albeit on a much more sporadic and less uniform scale. In principle, two sources of authority existed for the grant of monopoly patents of invention in the colonies: the royal prerogative

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<sup>41</sup> See, e.g., ALLAN GOMME, *PATENTS OF INVENTION: ORIGIN AND GROWTH OF THE PATENT SYSTEM IN BRITAIN* 25 (1946) (discussing use of patent specification in patent practice); D. Seaborne Davies, *The Early History of the Patent Specification*, 50 L.Q.R. 86, 86 n.2 (1934) (discussing lack of record of pre-1617 patents). Both Davies and Gomme note that compilation of the official series did not actually commence until 1853. Gomme suggests that the official series may not be absolutely complete for the period that it covers and acknowledges that it lacks the hundred or so patents granted before 1617 and the eighteen patents known to have been granted during the Commonwealth and Protectorate, i.e., during 1649-1660. GOMME, *supra*, at 37-38. Hulme notes that the official series is far from complete for the early years of the Restoration period. See E. Wyndham Hulme, *Privy Council Law and Practice of Letters Patent for Invention from the Restoration to 1794*, 33 L.Q.R. 63, 63 (1917) (discussing shortcomings in early recording of patents).

<sup>42</sup> MACLEOD, *supra* note 27, at 150 (setting forth table of patents awarded, by decade, in period 1660-1799).

<sup>43</sup> Holdsworth notes that "[t]he number of patents taken out between 1617 and 1760 was smaller than the number of patents taken out in the course of the following twenty-five years." 11 WILLIAM HOLDSWORTH *A HISTORY OF ENGLISH LAW*, 426 n.1. (1938).

as in England and the powers invested in the royal governors. Letters patent covering the American colonies in whole or in part were issued in England from time to time, but they were not commonplace. There is little or no evidence that royal governors issued patents of monopoly. Instead, the patent custom in the colonies—such as it was—came to be predicated largely on the activities of local assemblies and legislatures which, “while not formally invested with such sovereign power, readily assumed the authority in practice.”<sup>44</sup> After the Revolution, the state assemblies and legislatures—taking up where their colonial predecessors had left off—continued to exercise this self-assumed authority.<sup>45</sup>

These grants of exclusivity were private legislative acts of the assemblies or legislatures. It is something of a misnomer to call them patents as such, precisely because they were private acts and not grants under the royal prerogative. Although the purported grant of exclusivity within the geographic area encompassed by this grant was similar to English letters patent, they were literally not letters patent.

For a variety of reasons inventors in the colonies never sought these exclusive grants on anything resembling the scale that occurred in England.<sup>46</sup> The major reason was that the colonies were predominantly agrarian societies with never more than ten percent of the population engaged in manufacturing of any kind.<sup>47</sup> Such manufacturing as existed was mostly for local consumption,

<sup>44</sup> E. BURKE INLOW, *THE PATENT GRANT* 36 (photo. reprint 1968) (1950).

<sup>45</sup> During the period between the Declaration of Independence and the ratification of the U.S. Constitution, each state had ratified its own constitution, and in some instances more than one constitution. Unlike the later federal Constitution, these state constitutions were silent regarding a delegation of authority to the legislative assembly to grant any form of limited-term exclusive rights in their writings and discoveries to authors and inventors.

<sup>46</sup> At the time of the American Revolution almost a thousand English patents had issued. Because of the lack of adequate records, it is difficult to know with any degree of precision the number of monopoly grants actually issued in the various colonies which came to be included in the United States, but it is unlikely that it was much in excess of fifty. See generally, P.J. Federico, *State Patents*, 13 J. PAT. OFF. SOC'Y, 166 (1931) (discussing colonial patents).

<sup>47</sup> INLOW, *supra* note 44, at 37 (noting that one important reason for American colonists' failure to seek historic pattern of exclusive privilege was that colonies were predominantly agricultural); P. J. Federico, *Colonial Monopolies and Patents*, 11 J. PAT. OFF. SOC'Y 358, 358 (1929) (stating that although some industry existed, American colonies were mainly agricultural).



and directed to supplying the essentials required for the maintenance of the community. Neither a wide industrial base nor any extended markets existed over which the patent monopoly could be effectively enforced. Another major disincentive was that there was very little evidence that it was worth the time, effort, and cost involved.<sup>48</sup> Competition among tradesmen and artisans in the individual colonies was never on the scale that existed in England, and few examples illustrated the worth of a patent. One indication of the relatively low value attached to patents is the fact that no record has been found of any litigation involving colonial patents of monopoly for invention in any colonial or English court.<sup>49</sup>

No state ever enacted a general patent statute assuring the right of inventors to obtain exclusive rights in their inventions for some limited period of time. One state, however, did address the issue but did so in the context of its copyright statute. In 1784, South Carolina enacted a copyright law which contained the following clause: "The Inventors of useful machines shall have a like exclusive privilege of making or vending their machines for the like term of 14 years, under the same privileges and restrictions hereby granted to, and imposed on, the authors of books."<sup>50</sup> The statute did not include a provision for administrative procedures to implement this clause. Consequently, the granting of each patent

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<sup>48</sup> See INLOW, *supra* note 44, at 38 (discussing difficulty of obtaining patent in seventeenth and eighteenth centuries). Little is known about the actual costs and administrative complexities involved in obtaining patents in the various colonies. Clearly, these varied from colony to colony, but it is reasonable to assume that these costs and complexities never approached those in England. Nonetheless both cost and administrative requirements must have been adverse factors, because there was always less available specie in the colonies than in England and the legislatures only met at certain times of the year. Inlow also suggests that considerable graft was involved, which likely served to convince more than one would-be patentee that the game was not worth the candle. *Id.*

<sup>49</sup> Inlow seems to have been the first to note this absence of litigation. He argues that "[t]o a people more than usually quick to seek recourse in the courts for evils done, this could only indicate a lack of sustained interest anywhere." *Id.* at 39. The remarkably litigious nature of the Americans has been noted by more than one historian. See, e.g., COLLIER & COLLIER, *supra* note 4, at 212 ("Americans were constantly racing into court over their claims and counterclaims: it is safe to say that nowhere in the world were ordinary people so at home before judge and jury.").

<sup>50</sup> BUGBEE, *supra* note 1, at 93 (citing 4 STATUTES AT LARGE OF SOUTH CAROLINA 618-20 (Thomas Cooper ed., Columbia, SC 1837-68); PUBLIC LAWS OF THE STATE OF SOUTH-CAROLINA 333-34 (John F. Grimke ed., Philadelphia 1790)).

required a special act of the legislature.<sup>51</sup>

Following the cessation of hostilities with Great Britain, a significant renewal of patenting activity occurred. In particular, states that had little or no experience with the patent custom as colonies found themselves actively granting patents, although they were still not usually called such. As with colonial patents, it is difficult to know precisely how many state patents were actually granted prior to 1787, but it is unlikely that the total exceeded twenty.<sup>52</sup>

Unlike the term "patent," copyright had a literal connotation through the eighteenth century, namely, the right to copy. The rise of copyright is inextricably intertwined with the development of printing. In England it began in the same way as patents of monopoly for invention did, as an adjunct to the royal prerogative. Unlike the patent privilege that prior to 1852 was never treated as a right under the common law, copyright—as the very name implies—developed into something more than a mere privilege. It became an inherent right.

During the seventeenth century, a variety of ordinances and parliamentary acts were passed for the purpose of regulating printed works. These regulatory mechanisms tacitly, if not specifically, acknowledged a common-law right of property in copyright.<sup>53</sup> It was not until 1710, however, that what has been denominated as the first true English copyright act became law. This was the famous Statute of Anne.<sup>54</sup> It had two major purpos-

<sup>51</sup> BUGBEE, *supra* note 1, at 93 (noting renewability of general statute's copyright term inapplicable to patents); P. J. Federico, *State Patents*, 13 J. PAT. OFF. SOC'Y 166, 167 (1931) (noting that inventors had to obtain special act for each patent grant); *see also* Leo Smilow, *Operation of Rules 17 and 22 in Cases Involving Foreign Applicants*, 18 J. PAT. OFF. SOC'Y 43, 44 (1936) (describing process for foreign application examinations).

<sup>52</sup> Bugbee is the best extant source, and he lists some twenty-three state patents as having been granted between 1779 and 1791. BUGBEE, *supra* note 1, at 85-103. He limits his coverage, however, to so-called patents of invention and excludes patents for importation even though during this period novelty was not precluded merely because the subject matter of the grant had previously been known or practiced elsewhere.

<sup>53</sup> *See, e.g.*, BUGBEE, *supra* note 1, at 53 (discussing assumption of common-law ownership in book and its copies); 6 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 367-77 (2d ed. 1937) (discussing origins of copyright law).

<sup>54</sup> 8 Anne, ch. 19 (1709). The date of this statute frequently creates confusion. It was enacted in the calendar year 1709 and became effective April 10, 1710. But at this time the beginning of the year in England was March 25. It was not until 1752 that the first of

es: (a) to prevent the piracy of printed works; and (b) to encourage the writing of useful books. To accomplish these ends, it provided that authors, or their assigns, had the exclusive right for a limited period—twenty-one years for existing books, and fourteen years, with one fourteen-year right of renewal, for new books—to print their works. The statute required registration with the Stationers' Company, along with any record of assignment or consent to copy.<sup>55</sup>

In 1769 the King's Bench determined, in *Millar v. Taylor*,<sup>56</sup> that despite the existence of the Statute of Anne, authors held a perpetual common-law property right in their works. Five years later in *Donaldson v. Beckett*<sup>57</sup>, the House of Lords decided that whatever may have been the case at common law, the Statute of Anne effectively limited the term for which copyright could be enforced at common law to a maximum of 28 years. The result was that while under English law an author retained a perpetual copyright, it could only be enforced in accordance with the terms of

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January was designated as the beginning of the year in England. See Calendar Act of 1750, 24 Geo. II, ch. 23 § 1 (1751). By modern usage, the statute was both enacted and became effective in 1710. See L. RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 3 n.3 (1968) (discussing start of English year prior to 1752).

<sup>55</sup> In 1556 the crown chartered the Stationers' Company and granted it general supervision of the trades of printing, binding, publishing, and dealing in books. In return for this right of supervision, the Stationers agreed to royal censorship, supervision, regulation, and licensing of books to be printed. The Stationers' Company quickly established a register in which were recorded the works for which copying rights or privileges had been obtained. Unless a printer or publisher had obtained a printing patent from the crown, authorizing the printing of a particular book or class of books, the work to be printed had to be registered with the Stationers' Company. See generally PATTERSON, *supra* note 54, at 28-41 (discussing Stationers' Company and its operation); see also BUGBEE, *supra* note 1, at 51-55 (discussing historical context that gave rise to Stationers' Company); 6 HOLDSWORTH, *supra* note 53, at 363-65 (examining origin of Stationers' Company).

<sup>56</sup> 98 Eng. Rep. 201 (K.B. 1769).

<sup>57</sup> 98 Eng. Rep. 257 (1774); see also 17 WILLIAM COBBET, PARL. HIST. ENG. 954-1003 (London, Longman & Hurst 1813) (discussing parliamentary handling of *Donaldson v. Beckett*). This case was for all intents and purposes effectively an appeal of *Millar v. Taylor*. Millar had sold his copyright at issue in *Millar v. Taylor* to Beckett who had had it pirated by Donaldson. Beckett immediately obtained an injunction against Donaldson and the latter appealed to the House of Lords. See RICHARD C. DE WOLF, AN OUTLINE OF COPYRIGHT LAW 10 (1925) (discussing background of *Donaldson v. Beckett*).

the Statute.<sup>58</sup>

It was not until the last quarter of the eighteenth century, therefore, that a common-law property right in England finally was established. An author, however, could only enforce this right in accordance with the Statute of Anne. The argument that no logical distinction exists between a literary work and an invention and should result in similar property rights stems from this history of copyright as a common-law property right. But the life of the law is not always logic.<sup>59</sup> Thus, in *Donaldson v. Beckett*, the lack of a common-law property right in invention provided a fixed point in the debate about common-law property in copyright.<sup>60</sup> Those Lords who argued for such property in perpetuity deemed themselves obligated to distinguish between literary work and invention, whereas those Lords who denied it found themselves arguing that the two were analogous. While two of the Lords were prepared to admit the possibility that "previous to the monopoly statute, there existed a common law right, equally to an inventor of a machine and an author of a book," the only property right that existed after the Statute of Monopolies, and subsequent disclosure of the invention to the public was that right granted by the crown in the

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<sup>58</sup> See, e.g., BUGBEE, *supra* note 1, at 55 (discussing perpetual copyright under *Miller v. Taylor* and how *Donaldson* court, while agreeing with existence of perpetual common-law copyright, found Statute of Anne terminated common-law right to enforce it); DE WOLF, *supra* note 57, at 11-12 (discussing court's conclusion that publication of work terminates common-law protection and commences statutory protection, which endures "only for a limited time"); cf. INLOW, *supra* note 44, at 66 (stating that "[o]n the question of the common-law right, the Lords were quite certain that no such right ever existed"). While the Lords may have believed that no such right existed, they were constrained to rule on the basis of the answers to certain specific questions they submitted to the judges of the Courts of King's Bench and Exchequer. One of those questions was whether the author of any literary composition and his assigns had the sole right of printing and publishing the same in perpetuity by the common law. Of the eleven judges who responded, seven answered yes. See DE WOLF, *supra* note 57, at 10-11 (listing "ayes" and "noes" to five questions submitted to court).

<sup>59</sup> See OLIVER W. HOLMES, *THE COMMON LAW* 5 (M. Howe ed., 1963) ("The life of the law has not been logic: it has been experience."). On occasion logic and experience have been known to produce the same result.

<sup>60</sup> Justice Yates noted the same point in his *Millar* dissent, arguing that it was well known that no common-law property right existed in mechanical inventions once they were published. *Millar*, 98 Eng. Rep. at 246 (Yates, J., dissenting).

form of a patent.<sup>61</sup>

For all intents and purposes, no colonial copyright practice existed.<sup>62</sup> Nor is there much evidence of any early state copyright practice. However, on May 2, 1783, the Continental Congress issued a resolution recommending that the various states enact copyright laws.<sup>63</sup> This resolution has been characterized as "the earliest known venture of the United States Government into the realm of intellectual property."<sup>64</sup> The committee which recommended this resolution reported that it was "persuaded that nothing is more properly a man's own than the fruit of his study, and that the protection and security of literary property would greatly tend to encourage genius, to promote useful discoveries and to the general extension of arts and commerce."<sup>65</sup>

The May 2, 1783 resolution of the Continental Congress is limited to copyright and says nothing about letters patent for invention. Yet the rather remarkable thinking about the committee

<sup>61</sup> MACLEOD, *supra* note 27, at 198-99. A point made by Holdsworth, but one which seems never to have been addressed in any clear-cut way in the eighteenth century, is that there were two distinct ways of obtaining copyright, i.e., either by registration or by patent, whereas the option of registration did not exist with inventions. 6 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 378-79 (2d ed. 1937). Thus, the arguments in favor of common law property in copyright derive almost entirely from the registration practices of the Stationers' Company engaged in over a period of well over a century that provided the necessary evidence of long custom or usage that is indicative of a common law right. There is little to indicate that in the seventeenth century, for example, there was a belief that printing patents should be issued as a matter of right.

<sup>62</sup> BUGBEE, *supra* note 1, at 106 (noting absence of coherent system of copyright protection prior to 1780).

<sup>63</sup> The resolution stated:

That it be recommended to the several states, to secure to the authors or publishers of any new books not hitherto printed, being citizens of the United States, and to their . . . executors, administrators and assigns, the copyright of such books for a certain time, not less than fourteen years from the first publication; and to secure to the said authors, if they shall survive the term first mentioned, and to their . . . executors, administrators and assigns, the copyright of such books for another term of time not less than fourteen years, such copy or exclusive right of printing, publishing and vending the same, to be secured to the original authors, or publishers, or . . . their executors, administrators and assigns, by such laws and under restrictions as to the several states may seem proper.

*Id.* at 113 (quoting 24 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 2, at 326-27).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

language is that if one replaces the phrase "literary property" is replaced with "property in invention," it would have provided an equally admirable justification for a congressional recommendation that the states protect the rights of inventors "by such laws and under restrictions as to the several states may seem proper."<sup>66</sup> Obviously, this recommendation did not occur, and one may reasonably ask why.

A straight-forward answer to this deceptively simple question is that authors seeking copyright protection lobbied for such a recommendation from the Congress whereas, inventors did not. The Journals of the Continental Congress state that "sundry papers and memorials from different persons on the subject of literary property" had been submitted to the Congress by early in 1783.<sup>67</sup> One of those lobbying the Congress to recommend that the states adopt laws protecting literary property was the young Noah Webster, soon to be famed for his speller, grammar book, and dictionary. He would later write that "as Congress, under the confederation, had no power to protect literary property, certain gentlemen . . . presented a memorial to that body, petitioning them to recommend to the several states, the enactment of such a law."<sup>68</sup>

Between the beginning of 1783 and the close of 1786, twelve states enacted general copyright statutes,<sup>69</sup> although the suggestion has been made that these state statutes apparently never became operative in any real sense.<sup>70</sup> The Massachusetts statute has an eloquent preamble which could fully as well have served as a justification for a patent statute. It read:

<sup>66</sup> *Id.*

<sup>67</sup> BUGBEE, *supra* note 1, at 112 (quoting 24 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 2, at 326).

<sup>68</sup> *Id.* (citing NOAH WEBSTER, A COLLECTION OF PAPERS ON POLITICAL, LITERARY AND MORAL SUBJECTS 174 (New York 1843)).

<sup>69</sup> See *id.* at 110-22 (tracing adoption of copyright statutes during period 1783-86); PATTERSON, *supra* note 54, at 183-84 (explaining basis for, and form of, state copyright statutes). Six of these enactments occurred in 1783, with three, those of Connecticut, Massachusetts, and Maryland, actually preceding the congressional resolution. Only Delaware failed to comply with the congressional recommendation.

<sup>70</sup> PATTERSON, *supra* note 54, at 181 (noting that state statutes widely ignored in development of copyright).

Whereas the Improvement of Knowledge, the Progress of Civilization, the public Weal of the Community, and the Advancement of Human Happiness, greatly depend on the Efforts of learned and ingenious Persons in the various Arts and Sciences: As the principal Encouragement such Persons can have to make great and beneficial Exertions of this Nature must exist in the legal Security of the Fruits of their Study and Industry to themselves; and as such Security is one of the natural Rights of all Men, there being no Property more peculiarly a Man's own than that which is produced by the Labour of his Mind.<sup>71</sup>

As has been noted, however, no state ever thought to apply such language to a general patent statute.<sup>72</sup>

Although the states in their individual capacities had sought to provide some form of limited-term exclusive rights to inventors and authors, by early 1787 the defects in the state copyright and patent customs were obvious.<sup>73</sup> The most singular defect was that states only could legislate with respect to their own territory. Thus, state patents and copyrights could be infringed with impunity in adjoining states. Obtaining multiple state patents or copyrights was time consuming, expensive, and frequently frustrating. Moreover, consistency in terms and conditions varied from state to state. With regard to patents, no guarantee of consistency from patent to patent existed even within a particular state because each patent required a private legislative act. Furthermore, what a state could grant, it could also take away, and on occasion did

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<sup>71</sup> BUGBEE, *supra* note 1, at 114 (citing ACTS AND LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 236 (Boston 1781-83)).

<sup>72</sup> See *supra* notes 65-66 and accompanying text (examining events culminating in passage of early state copyright statutes).

<sup>73</sup> As one observer at the time concluded, "a patent can be of no use unless it is from Congress, and not from them till they are vested with much more authority than they possess at this time." BUGBEE, *supra* note 1, at 90 (quoting Letter from F. W. Geyer to Silas Deane (May 1, 1787)). This conclusion was equally applicable to copyright.

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The reasonable solution was to amend the Articles of Confederation to grant power expressly to the Congress to provide for patents and copyrights having national scope and coverage. Indeed, if the Framers assembled at the Philadelphia convention in the summer of 1787 had followed their express instructions from Congress, this is quite possibly what would have happened. But they did not, and thus, the basis for the American patent and copyright law came to be the Constitution rather than the Articles of Confederation.

#### IV. THE CONSTITUTIONAL CONVENTION

On February 21, 1787, the Congress, with considerable reluctance and after being importuned by several states, issued a formal resolution expressing "the opinion of Congress" that:

it is expedient that on the second Monday in May next a Convention of delegates who shall have been appointed by the several states be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of Government and the preservation of the Union.<sup>75</sup>

The events leading up to the calling of the Constitutional Convention have been chronicled in detail and will not be repeated or even summarized here. Suffice it to say that nothing in those events suggested that a lack of congressional power to issue patents or

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<sup>74</sup> See *Livingston v. Van Ingen*, 9 Johns. Cas. 507, 507-09 (N.Y. 1812) (discussing New York's March 19, 1787 grant of fourteen-year patent for exclusive use of steamboats on all waterways in jurisdiction to steamboat inventor John Fitch, March 27, 1798 revocation of Fitch's patent, and subsequent grant of twenty-year patent to Robert R. Livingstone).

<sup>75</sup> 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 14 (Max Farrand ed., 1966) [hereinafter RECORDS OF THE FEDERAL CONVENTION].



copyrights played any significant role in that decision.<sup>76</sup> Only one document written by a delegate prior to the convention mentioned the concerns which ultimately resulted in the Intellectual Property Clause of the Constitution.

In preparing in his methodical way to take part in that convention, James Madison, delegate from Virginia, set down in April 1787 "Observations by J. M." on the weaknesses of the existing Confederation.<sup>77</sup> Among those weaknesses was a "want of concert in matters where common interest requires it" between state governments. In Madison's view, the resulting loss of "national dignity, interest, and revenue" was deplorable. Almost as an afterthought, he added "[i]nstances of inferior moment are the want of uniformity in the laws concerning naturalization & literary property."<sup>78</sup> The want of uniformity in the laws concerning patents, or indeed the very absence of such laws, seems not to have overly troubled him or any other delegate prior to the convention.

It has recently been contended that at the time of the Constitutional Convention "the states felt a strong need for national copyright laws to secure for authors their property rights in their works" and that as a consequence there was a "strong desire of the framers to include a copyright clause in the Federal Constitution."<sup>79</sup> This considerably overstates the reality. As noted above, Madison's concern about the lack of uniformity in state laws concerning literary property was by his own admission "of inferior moment." Moreover, there is no evidence whatsoever that any state instructed its delegates to seek a copyright clause in the Constitution. As would be demonstrated by their actions, the Framers certainly were amenable to granting power to the Congress to enact both copyright and patent legislation. Such a grant of congressional power was not high on their list of priorities as evidenced by:

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<sup>76</sup> See JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 4-19 (1966) (setting forth variety of reasons why new constitutional scheme of government was required but not including reason for protection of intellectual property).

<sup>77</sup> See BUGBEE, *supra* note 1, at 125 (citing 4 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786-1870, at 128 (Washington, DEPT ST. 1894-1905)) (noting that James Madison "unburdened himself on paper" regarding weaknesses of Confederation by cataloging list of its defects).

<sup>78</sup> *Id.*

<sup>79</sup> Irah Donner, *The Copyright Clause of the U.S. Constitution: Why Did the Framers Include It With Unanimous Approval?*, 36 AM. J. LEGAL. HIST. 361, 362, 365 (1992).

(a) the fact that none of the general systems of governance they debated included any such proposed delegation of authority;<sup>80</sup> and (b) when the enumerated powers of Congress actually were proposed and initially debated, these enumerations did not include the powers set forth in the Intellectual Property Clause.<sup>81</sup>

The assembly that would be known as the Constitutional Convention was originally scheduled to convene on May 14, 1787, but did not actually have a quorum of seven states represented until May 25th. Early on, the Convention would be presented with several proposals for schemes of national governance. These came to be called the Virginia Plan, the South Carolina Plan, the New Jersey Plan, and the New York Plan, depending on the delegation from which they arose. The contention has been made, almost in passing, that "both the Virginia and the New York plans originally included provisions stipulating the use of the letters patent for industrial inventions."<sup>82</sup> No evidence has been found which in any way supports this view, and it is almost certainly incorrect.<sup>83</sup>

In the early years after the Constitution was ratified, one delegate, Charles Pinckney, caused some confusion as to whether the South Carolina Plan had in fact contained a proposal to give Congress authority "to secure to [a]uthors the exclusive right to their [p]erformances and [d]iscoveries." Pinckney, who authored the South Carolina Plan, wrote a pamphlet shortly after the Convention describing that Plan as containing such a proposal.<sup>84</sup> As will be shown, Pinckney deserves substantial credit for what ultimately became the Intellectual Property Clause, but again there

<sup>80</sup> See *infra* notes 82-86 and accompanying text.

<sup>81</sup> See *infra* notes 144-147 and accompanying text (examining proposals for congressional power).

<sup>82</sup> INLOW, *supra* note 44, at 46.

<sup>83</sup> See Karl Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 17 GEO. L.J. 109, 110-11 (1929) (stating "[i]n none of these is there any foundation for the portion in the Constitution in which we are interested [i.e., the Intellectual Property Clause]" in reference to texts of Virginia and New York Plans).

<sup>84</sup> CHARLES PINCKNEY, OBSERVATIONS ON THE PLAN OF THE GOVERNMENT SUBMITTED TO THE FEDERAL CONVENTION ON THE 28TH OF MAY, 1787 26 (New York, Francis Childs 1787) ("There is also an authority to the National Legislature, permanently to fix the act of the general Government, to secure to Authors the exclusive right to their Performances and Discoveries."); see 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 75, at 106, 122 (reprinting Pinckney's proposal); see also *id.* at 106 n.1 (suggesting that pamphlet was published before October 14, 1787).

is no evidence—other than his own self-serving claim<sup>85</sup>—that he proposed the quoted language as part of the South Carolina Plan.<sup>86</sup>

Since none of the delegate-proposed plans contained any reference to congressional power over copyright and patent, the question naturally arises as to how the Intellectual Property Clause came to be included in the Constitution. Little has been written on the point. The reason for the dearth of commentary undoubtedly is that so little is actually known about how its inclusion came about. Contemporaneous records such as Madison's notes indicate that it was adopted *nemine contradicente*<sup>87</sup> and without debate.<sup>88</sup> Although most commentators on the origin of U.S. patent law take this absence to mean that it met universal approbation, another interpretation is quite possible. The delegates agreed upon the clause on September 5, 1787, after several months of intense and sometimes acrimonious debate on other more momentous issues. It may well have been that the delegates were tired, wanted to go home, and simply did not perceive this particular grant of power to the Congress to warrant any further debate, regardless of whether

<sup>85</sup> He was famous for his self-aggrandizement. He deliberately attempted to shave five years off his age so that he could claim to be the youngest member of the Convention. As pointed out by Rossiter, he was known as "Constitution Charlie" for his self-inflated opinion of his role in 1787, and scorned by Madison for continuing to falsify his age and for grossly exaggerating this role." CLINTON ROSSITER, 1787: THE GRAND CONVENTION 327 (1966). More recently, other scholars have viewed Pinckney much more sympathetically. See COLLIER & COLLIER, *supra* note 4, at 64-74 (discussing Pinckney's role and characterizing him as "smart and thorough" and "an intelligent, experienced, clear-sighted, and convincing man whose ideas and opinions had considerable weight"); *but see* MORRIS, *supra* note 7, at 273 (suggesting that Colliers gave to South Carolina Plan "a serious weight that tested scholarship rejects").

<sup>86</sup> One scholar contends that the Journal of the Constitutional Convention demonstrates that the South Carolina Plan, as originally submitted, included no such language. Fenning, *supra* note 83, at 110. Furthermore, various authoritative compilations which state that the quotation does not appear in the Plan as presented to the Convention substantiate Fenning's contention. *Id.* (citations omitted); *see* BUGBEE, *supra* note 1, at 193 n.8 (noting that "no provision for the safeguarding of intellectual property can be found in a detailed draft which Pinckney supplied in 1818 to replace his earlier version, which was missing when the Convention papers were opened after a thirty-year interval"); *see also infra* notes 165-167 and accompanying text (discussing replacement draft supplied by Pinckney).

<sup>87</sup> BLACK'S LAW DICTIONARY 1036 (6th ed. 1990) (no one dissenting).

<sup>88</sup> 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 75, at 509-10 (noting absence of debate on portion of Committee of Eleven's report regarding "exclusive right[s]" to authors and inventors).

they considered it to have any particular significance.<sup>89</sup>

This interpretation raises the rather intriguing question as to why the delegates considered it to be of sufficient import to be included in the Constitution at all. Indeed, a plausible argument can be made that the power to protect intellectual property rights is inherent in other powers granted to the Congress by the Constitution so that there is in reality no need for a separate Intellectual Property Clause. To understand the nature of this argument it is first necessary to note briefly two other grants of authority the delegates found appropriate to include in the Constitution.

The constitutional grants of authority to the Congress are set forth in eighteen clauses found in Section 8 of Article I. The content of half of those clauses can be traced back to the Articles of Confederation.<sup>90</sup> Of interest here are two clauses found nowhere in the Articles. Under these two clauses:

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . [and] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.<sup>91</sup>

Since intellectual property in its various forms may be considered

<sup>89</sup> One scholar noted that:

The absence of debate over the patent provision by the Founding Fathers has been taken as proof of their firm belief in patents as the best way to encourage socially beneficial innovation. However, it is more likely that the authors of the Constitution simply followed the English precedent and chose the patent without paying much attention to the subject, since they were also faced with the larger problems of how to structure the government, solve its fiscal difficulties, and defend the new nation.

Morgan Sherwood, *The Origins and Development of the American Patent System*, 71 AM. SCI. 500, 500 (1983).

<sup>90</sup> Needless to say, the Intellectual Property Clause was not among them, although an occasional commentator so implies. See, e.g., CHARLES L. MEE, *THE GENIUS OF THE PEOPLE* 256-57 (1987) (listing copyright as ordinary affair that merited little or no debate).

<sup>91</sup> U.S. CONST. art. I, §8, cl. 3, 18.

as articles of commerce both with foreign nations and among the several states, it would follow logically from these two clauses that patent and copyright laws constitute "laws necessary and proper for carrying into execution" the congressional power to regulate commerce. One may only speculate whether this approach would have been taken had no Intellectual Property Clause been included in the Constitution.

Many years after the Constitutional Convention in which he played a primary role, Madison set forth language indicative that these two clauses might indeed be interpreted in accord with such an approach. Writing with respect to the Commerce Clause in 1829, he stated:

That the encouragement of Manufactures, was an object of the power to regulate trade, is proved by the use made of the power for that object, in the first session of the first Congress under the Constitution; when among the members present were so many who had been members of the federal Convention which framed the Constitution, and of the State Conventions which ratified it; each of these classes consisting also of members who had opposed & who had espoused, the Constitution in its actual form. It does not appear from the printed proceedings of Congress on that occasion that the power was denied by any of them.<sup>92</sup>

The "promotion of . . . useful arts" as set forth in the Intellectual Property Clause and "the encouragement of Manufactures" under the Commerce Clause may be closely equated.

Madison wrote in the context of an argument about whether the Commerce Clause granted Congress the right to impose import duties. Several years later in 1832, he broadened his argument to suggest that even though the Constitutional Convention had rejected certain specific proposals with respect to congressional power, this rejection did not mean that the delegates did not intend

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<sup>92</sup> Letter from James Madison to J. C. Cabell (Sept. 18, 1828), in 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 75, at 477.

for the Congress to have equivalently broad powers under the Commerce Clause to protect and encourage domestic manufactures. As Madison explained:

The intention is inferred from the rejection or not adopting of particular propositions which embraced a power to encourage them [i.e., domestic manufactures]. But, without knowing the reasons for the votes in those cases, no such inference can be sustained. The propositions might be disapproved because they were in a bad form or not in order; because they blended other powers with the particular power in question; or because the object had been, or would be, elsewhere provided for. No one acquainted with the proceedings of deliberative bodies can have failed to notice the frequent uncertainty of inferences from a record of naked votes.<sup>93</sup>

Thus, in Madison's view, the Convention's failure to include in the Constitution a congressional power "to establish public institutions, rewards, and immunities for the promotion of agriculture, commerce, and manufactures"<sup>94</sup> did not imply or suggest that the Congress did not have broad powers to encourage manufactures, including the use of import duties on foreign manufactures. Arguably, insofar as Madison was concerned, the absence of an Intellectual Property Clause, or even the outright rejection of such a clause by the Convention, would not per se have served as a constitutional ground for precluding the Congress from granting patents under the Commerce Clause.

But the Constitution includes an Intellectual Property Clause, and the question is why. In the absence of any recorded debate on the point, any answer must to some degree be based on speculation. But, there are intriguing clues which can be drawn from the backgrounds of the delegates themselves and the experiences on

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<sup>93</sup> Letter from James Madison to Professor Davis (1832), in 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 75, at 520.

<sup>94</sup> JAMES MADISON, NOTES ON DEBATES IN THE FEDERAL CONVENTION OF 1787, at 478 (1966).

which they drew.<sup>95</sup> More than half of the fifty-five delegates had training in the law.<sup>96</sup> Eight of them had signed the Declaration of Independence and two the Articles of Confederation.<sup>97</sup> Some forty had served in the Congress under the Confederation<sup>98</sup> and seven in the First Continental Congress. A number had been involved in the formation of their state constitutions,<sup>99</sup> and seven had served as the chief executives of their states. Indeed, at the time of the convention, more than forty delegates were involved with their state government either as chief executive, judge, or legislator. Needless to say, they were well aware of the political climate that caused the Convention to be called.

The observation has been made that "so very much of the Constitution was crafted on lessons drawn from the operations of the states as colonies, on the precedents provided by the state constitutions, and on the obvious examples of the inadequacies of the Articles of Confederation."<sup>100</sup> While undoubtedly true in the larger context, this point of view only has limited applicability to the Intellectual Property Clause. Thus, nothing suggests that the

<sup>95</sup> See, e.g., ROSSITER, *supra* note 85, at 79-156 (providing both thumb-nail sketches of individual delegates and composite picture of delegates as group).

<sup>96</sup> Exactly how many were lawyers or had legal training is a point of some difference of opinion among various commentators. Compare MORRIS, *supra* note 7, at 269 ("Although only about a dozen were practicing lawyers, three times that number had studied law.") and COLLIER & COLLIER, *supra* note 4, at 212-13 ("Thirty-one of the fifty-five men at the Convention had been trained in the law.") with CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 55 (1928) ("At least thirty-three had been lawyers, of whom ten had served as State Judges.").

<sup>97</sup> See MORRIS, *supra* note 7, at 269 (portraying delegates as most impressive assembly of minds and abilities in history of politics); ROSSITER, *supra* note 85, at 144-46 (detailing extensive political experience of delegates); accord WARREN, *supra* note 96, at 55 (same).

<sup>98</sup> See MORRIS *supra* note 7, at 269 (forty-two); ROSSITER, *supra* note 85, at 145 (same); see also WARREN, *supra* note 96, at 55 (thirty-nine).

<sup>99</sup> Different scholars have posited varying numbers. Compare WARREN, *supra* note 96, at 55 (eight) with ROSSITER, *supra* note 85, at 146 ("perhaps twenty"). The numbers, however, continue to increase over time. See Donald W. Banner, *An Unanticipated, Nonobvious, Enabling Portion of the Constitution: The Patent Provision—The Best Mode*, 69 J. PAT. OFF. SOC'Y 631, 632 (1987) (stating at least thirty had participated in drafting various state constitutions).

<sup>100</sup> MORRIS, *supra* note 7, at 267.

colonial patent custom played any significant role,<sup>101</sup> and it is certain that the state constitutions provided essentially no precedent of any sort for a clause of this type.<sup>102</sup> Indeed, the constitutions of two states, Maryland and North Carolina, actively discouraged any sort of monopoly, including limited-term exclusive rights to authors and inventors.<sup>103</sup>

While the delegates would in all likelihood have been aware that Article II of the Articles of Confederation precluded Congress from issuing patents or copyrights, this in and of itself would not have been sufficient for them to incorporate the Intellectual Property Clause into the Constitution. Rather, something must have warranted the conclusion that Congress should, as a matter of course, have the power granted by the Intellectual Property Clause,

<sup>101</sup> Bugbee argues to the contrary, using the following logic:

(a) "[a] majority of the fifty-five delegates to the Federal Convention were lawyers, members of a profession dedicated to a continuing search for precedent"; (b) "[m]ost of the men who framed the Constitution had acquired their political preparation in the colonial legislatures"; (c) "colonial and state development of legal protection for intellectual property was of fundamental importance as precedent upon which the founders of 1787 . . . could draw"; and (d) "the unanimously approved 'intellectual property' clause . . . was in large part the product of colonial and early state experience."

BUGBEE, *supra* note 1, at 2-3. While state experience may indeed have played a role in the Intellectual Property Clause's incorporation into the Constitution, no contemporaneous record supports Bugbee's premises that colonial political preparation had any significance or that the colonial patent custom was of fundamental importance as precedent. At best, it was a part of the evolutionary background against which the precedent actually considered by the delegates could be viewed.

<sup>102</sup> See *supra* note 45 (noting absence of delegation of authority concerning copyrights and patents in state constitutions). If the clause had merely authorized the Congress to promote the progress of science and useful arts without expressly stating how this was to be done, it would have found support in the constitutions of both Massachusetts and New Hampshire. See MASS. CONST. of 1780, ch. 5, § 2, reprinted in 3 THE FEDERAL AND STATE CONSTITUTIONS 1907 (Francis N. Thorpe ed., 1909) (stating "it shall be the duty of legislatures . . . to cherish the interests of literature and the sciences"); N.H. CONST. of 1784, part 2, The Form of Government, Encouragement of Literature, reprinted in 4 THE FEDERAL AND STATE CONSTITUTIONS, *supra*, at 2467-68 (stating that knowledge is "essential to the preservation of free government").

<sup>103</sup> See MD. CONST. of 1776, § 39 (1867), reprinted in 3 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 102, at 1690 (declaring "[t]hat monopolies are odious, contrary to the spirit of a free government, and the principles of commerce; and ought not to be suffered"); N.C. CONST. of 1776, A Declaration of Rights, art. 23 (1868), reprinted in 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 102, at 2788 (declaring "[t]hat perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed").



and that such power should be set forth expressly rather than merely being implied in the power to regulate commerce.<sup>104</sup>

In the eighteenth century those who thought about such matters—and the delegates in general were certainly among those—took for granted that it was the duty of enlightened government “to promote the progress of science and [the] useful arts.”<sup>105</sup> But there is a tendency to forget that the constitutional power granted to the Congress “to promote the progress of science and [the] useful arts” is unique among the congressional powers in that it alone specifies a mode for exercising the particular power, *i.e.*, “by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” No other constitutional grant of authority to the Congress sets forth a specific means for exercising that authority. Indeed, the Committee of Detail, which was responsible for preparing a working draft from which the delegates ultimately crafted the Constitution, deliberately avoided placing such details in the proposed clauses. As Edmund Randolph explained:

In the draught of a fundamental constitution, two things deserve attention:

1. To insert essential principles only, lest the operations of government should be clogged by rendering those provisions permanent and unalterable, which ought to be accommodated to times and events.
2. To use simple and precise language, and general propositions, according to the example of the . . . constitutions of the several states.<sup>106</sup>

It is precisely because the delegates hewed to these first principles that the Constitution has been such an enduring framework of government for the United States.

Thus, the unusual fact that this particular detail exists in the Intellectual Property Clause in and of itself suggests a key to why

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<sup>104</sup> Nothing suggests that the delegates engaged in or contemplated any analysis regarding the Commerce Clause similar to that suggested in notes 90-91, *supra*, and accompanying text.

<sup>105</sup> U.S. CONST. art. 1, § 8, cl. 8.

<sup>106</sup> 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 75, at 137.

such a clause was included. The clause was intended not so much as an express authority to promote the progress of science and the useful arts, but rather as a means of ensuring authority to do so in a particular way, namely, by securing exclusive rights for limited times to authors and inventors in their respective writings and discoveries. It is unique in being the only instance wherein the delegates prescribed a specific mode of accomplishing the particular authority granted.<sup>107</sup>

That the delegates should include the particular method is interesting because there are a variety of ways of promoting the progress of science and the useful arts which have nothing whatever to do with the granting of exclusive rights for limited times in writings and inventions or discoveries.<sup>108</sup> Indeed, a strong movement would arise in Europe in the nineteenth century that would argue that this was precisely the wrong way to encourage industrial innovation.<sup>109</sup> Why then should the Constitution make specific reference to promoting the progress of science and the useful arts by securing exclusive rights in their inventions

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<sup>107</sup> Not only was this grant of power deliberate but the delegates also rejected other attempts to grant special powers to Congress. Jefferson's dinner conversation of March 11, 1798 supports this observation:

Baldwin mentions at table the following fact. When the bank bill was under discussion in the House of Representatives, Judge Wilson came in, and was standing by Baldwin. Baldwin reminded him of the following fact which passed in the grand convention. Among the enumerated powers given to Congress, was one to erect corporations. It was, on debate, struck out. Several particular powers were then proposed. Among others, Robert Morris proposed to give Congress a power to establish a national bank. . . . [This] was rejected, as was every other special power, except that of giving copyrights to authors, and patents to inventors; the general power of incorporating being whittled down to this shred. Wilson agreed to the fact.

Baldwin: Incident in House of Representatives, in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 75, at 375-76.

<sup>108</sup> Among those that had already been attempted by the time of the Constitutional Convention were medals, honorary titles, premiums, bounties, and other rewards of various types.

<sup>109</sup> See, e.g., MOUREEN COULTER, *PROPERTY IN IDEAS: THE PATENT CONTROVERSY IN MID-VICTORIAN BRITAIN* (1991) (discussing history of English patent, including relevant participants, development, and parliamentary struggle); Fritz Machlup & Edith Penrose, *The Patent Controversy in the Nineteenth Century*, 10 J. ECON. HIST. 1 (1950) (stating that "the chief opponents of the [patent] system have been among the chief proponents of free enterprise").

to inventors for limited times? The answer in no small measure seems to have been predicated on their desire to follow the English practice of granting exclusive rights through the issuance of patents or a similar device. Moreover, the delegates were not at all certain that the Congress would have the power to do so without an explicit grant of authority.

But aside from familiarity, why would they desire to perpetuate an English institution of this type? More than anything else the delegates' reason was purely a pragmatic one; namely, that this approach—of the various schemes then being contemplated for encouraging the rise of manufacturing while providing the desired pecuniary incentive to inventors and authors—would cost the federal government the least to implement.<sup>110</sup> This cost consideration was critical for a new federal government that was taking over the state debts inherited from the Revolutionary War. Accordingly, from the perspective of the delegates seeking to devise a form of governance for a fledgling and impecunious national government, granting limited-term exclusive rights in the works of authors and inventors seemed the perfect solution to encouraging the progress of science and useful arts with the least expense.<sup>111</sup> Although no contemporaneous American exposition of this pragmatic economic reality has been found, it recently had been set forth in

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<sup>110</sup> In the republican frame of mind that existed in the United States at this time, honorary titles were the last thing contemplated to encourage the promotion of science and the useful arts. Medals or plaques failed to excite the pecuniary interests of writers and inventors. For the views of a famous contemporary English inventor, James Watt, on this point, see H.I. DUTTON, *THE PATENT SYSTEM AND INVENTIVE ACTIVITY DURING THE INDUSTRIAL REVOLUTION, 1750-1852*, at 109 (1984). Simply put, in Watt's view, fame and honor were nice, but they were secondary considerations to the primary focus on profit. Other schemes under consideration, such as bounties and monetary rewards, would all be expensive. The delegates perceived the grant of limited term exclusive rights as almost entirely without cost to the new federal government. This observation, however, did not prevent the proposal of both "premiums" and "rewards" as means for promoting the advancement of useful knowledge and discoveries as well as agriculture, trade, commerce, and manufactures. See *infra* notes 7-148 and accompanying text (quoting language of proposals). Neither proposal, however, saw the light of day in the Constitution as ratified.

<sup>111</sup> As noted about the modern British patent system, but fully applicable to the circumstances of the newly independent United States, such an approach "makes no attempt to reward an inventor directly: the reward is of [the inventor's] own making." KLAUS BOEHM & AUBREY SILBERSTON, *THE BRITISH PATENT SYSTEM* 1 (1967).

England.<sup>112</sup>

The practical monetary consequences of granting exclusive rights in lieu of other "rewards" is evidenced by the debate which took place in the first Federal Congress with respect to the first inventor's petition presented to it. That petition sought not only an exclusive right but also "the patronage of Congress" to finance a voyage to Baffin's Bay for the inventor to conduct further experiments concerning his invention. The congressional committee which looked into the matter reported that it was reluctant to recommend "in the present deranged state of our finances, a precipitate adoption of a measure which would be attended with considerable expense."<sup>113</sup>

Several sources of precedent for this pragmatic approach suggest themselves, of which many, if indeed not most, of the delegates would have been aware. The first was the English precedent embodied in the Statute of Monopolies and the English practice thereunder.<sup>114</sup>

Because of their legal training, a majority of the delegates would have recognized that the Statute exempted patents for invention from its prohibition against monopolies. These same delegates generally would have been aware that such patents had been issued in England for more than a century and a half, although it would have been surprising if more than a very few were aware of the administrative details involved in obtaining an English patent.<sup>115</sup> Nonetheless, based on the English precedent, the

<sup>112</sup> In 1785 Jeremy Bentham, comparing rewards by bonus payments with rewards by "exclusive privilege[s]," took the view that the latter approach was "the best proportioned, the most natural, and the least burdensome" in that it "produces an infinite effect and costs nothing." See Machlup & Penrose, *supra* note 109, at 20, 23 (citation omitted). While it is doubtful that more than a few of the Framers were aware of what Bentham had recently written, as a group they would have wholeheartedly endorsed his views.

<sup>113</sup> *Journal of the First Session of the House of Representatives: April 1789*, reprinted in 3 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 20, 29 (Linda G. De Pauw ed., 1977) (debate of April 20, 1789). See also *Proceedings in Congress During the Years 1789 and 1790, Relating to the First Patent and Copyright Laws*, 22 J. PAT. OFF. SOC'Y 243-45 (1940) (discussing petition requesting funding for Baffin's Bay voyage).

<sup>114</sup> See Sherwood, *supra* note 89, at 500 (claiming Framers adopted patent simply because of familiarity with English precedent).

<sup>115</sup> Most delegates would likely have received their knowledge of the English common law from BLACKSTONE'S COMMENTARIES ON THE LAW OF ENGLAND. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 88-89 (1973) (stating American edition printed in 1771-72 on

concept of an exclusive patent for invention for a limited period of time was known and understood by them. The extent to which they understood that, under the English practice, a patent was a privilege rather than a right<sup>116</sup> is much less clear.

There is a natural tendency to suggest that the dramatic increase in patenting activity in England from 1760 onward<sup>117</sup> correlates well with the increase in economic and industrial activity resulting from the industrial revolution.<sup>118</sup> While no hard evidence has been developed that the Framers were in fact cognizant of such a correlation, nonetheless, they undoubtedly were aware of the significant increase in industrial and economic activity in Great Britain and sought to provide a framework of governance that would permit the national government to provide incentives similar to those perceived to be associated with Great Britain's patent system.

The Framers also almost certainly were aware of the Statute of Anne and the recent English cases<sup>119</sup> defining the common-law right to copyright. Indeed, their knowledge of this common-law right may well have influenced the language actually used in the Intellectual Property Clause.<sup>120</sup>

A second source of precedent, albeit in a very real sense a frustrating one, would have been the recognition by most of the delegates of the Continental Congress' inability to act in both the patent and copyright arenas. A substantial majority of the

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subscription basis for sixteen dollars per set received incredible response of 840 American subscribers for 1,557 sets); see BLACKSTONE, *supra* note 31, at \*405-07 (providing summary of common-law copyright but making little mention of patents).

<sup>116</sup> See *supra* note 40 and accompanying text (explaining that inventors have no *right* to letters patent but may obtain them from Crown "as a matter of grace and favour").

<sup>117</sup> See *supra* notes 42-43 and accompanying text (providing historic data on number of patents issued).

<sup>118</sup> See DUTTON, *supra* note 110, at 176 (1984) (noting that "the trend of patenting grew almost exponentially throughout the industrial revolution").

<sup>119</sup> *Millar v. Taylor*, 98 Eng. Rep. 201 (K.B. 1769); *Donaldson v. Beckett*, 98 Eng. Rep. 257 (1774). See also *supra* notes 56-58 and accompanying text (examining import of *Millar* and *Donaldson*).

<sup>120</sup> Professor Patterson makes a similar argument. See PATTERSON, *supra* note 54, at 194 (proposing that use of word "securing" indicates purpose of statutory copyright was not to create right but to affirm and protect existing right).

delegates had served in the Continental Congress<sup>121</sup> and would have been aware of the various petitions for both patent and copyright that the Congress had received and had been unable to act upon. They would also have been aware of the Congress' May 2, 1783 resolution recommending that the individual states enact copyright laws giving authors an exclusive copyright in their books not previously printed "for a certain time, not less than fourteen years from the first publication."<sup>122</sup> The close analogy between an exclusive right for a limited time granted to authors for their writings and a similar exclusive right granted to inventors for their discoveries would not have escaped notice.

Finally, a third source of precedent would have been the actual experience of the states in issuing patents and enacting copyright legislation. The extent to which the various delegates would have been aware of this practice is uncertain, but there is every reason to believe that at least some of them were cognizant of what their own and neighboring states were doing in this regard. One should note that a majority of the delegates at the time of the convention were active in some capacity in their state governments.<sup>123</sup>

However, it is precisely because the delegates were familiar with the Statute of Monopolies either on legal or political terms that they were not about to give the Congress any general power to create monopolies.<sup>124</sup> A broad power to create monopolies was too

<sup>121</sup> For further discussion of the number of delegates with such service, see *supra* note 98 and accompanying text.

<sup>122</sup> For further discussion of the May 2, 1783 resolution, see *supra* note 63 and accompanying text.

<sup>123</sup> For further discussion of the delegates' governmental experience, see *supra* note 99 and accompanying text; see also BUGBEE, *supra* note 1, at 128 ("The major contributions of the state patent and copyright policies lay in the precedents which they had accumulated by that year [1787] and the 'education' which they had provided for men who had soon left the states to play a national role.").

<sup>124</sup> Indeed, the failure of the draft Constitution to contain an express prohibition on monopoly would be raised as an objection to it. Among a variety of reasons why Madison's fellow Virginian and delegate to the Constitutional Convention, George Mason, refused to sign the proposed Constitution was that "[u]nder their own construction of the general clause at the end of the enumerated powers, the congress may grant monopolies in trade and commerce." *The Objections of the Hon. George Mason, One of the Delegates from Virginia, in the Late Continental Convention, to the Proposed Federal Constitution, Assigned as His Reasons for Not Signing the Same*, 2 AMERICAN MUSEUM OR REPOSITORY OF ANCIENT AND MODERN FUGITIVE PIECES, ETC. 534, 536 (AMS Press, Inc. 1965) (1787) [hereinafter AMERICAN MUSEUM]. In addition, the New York convention that ratified the Constitution

reminiscent of the power of the royal prerogative which was the last thing that anyone (with the possible exception of Alexander Hamilton) wanted to grant to either the executive or the legislative branches contemplated by the proposed Constitution. While the Framers were cognizant that the patent grant constituted an express exception to the general ban on monopolies that had existed in England for more than one hundred and fifty years,<sup>125</sup> they also perceived patents to be monopolies, albeit of a limited and acceptable type. Therefore, if the Framers were to give power to Congress to secure exclusive rights for limited times to inventors in their discoveries, it was necessary to do so expressly. The explicit grant of power would have seemed so obvious as to merit almost no discussion.

Aside from the precedents known to the delegates, a point of interest is the extent to which authors, inventors, and others sought to influence the delegates to make some provision in the Constitution for granting limited-term exclusive rights to authors and inventors for their writings and inventions. One noted commentator on the history of the patent law states unequivocally that this occurred: "It was also recognized that federal rather than statewide legislation was needed in this field. Therefore, when the federal convention of 1787 came to consider questions of such legislation, a provision for patents and copyrights was urged by a number of interested persons."<sup>126</sup> This position is misleading in several respects. First, the members of the convention were not

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recommended certain amendments be sought to it, among which were "[t]hat the congress does not grant monopolies, or erect any company with exclusive advantages of commerce." *Ratification of the New Constitution by the Convention of the State of New York*, 4 AMERICAN MUSEUM 153, 156 (Philadelphia, Matthew Carey 1789). Similarly, the ratifying conventions of Massachusetts, New Hampshire, and North Carolina all requested an amendment "that congress erect no company of merchants, with exclusive advantages of commerce." *Remarks on the Amendments to the Federal Constitution Proposed by the Conventions of Massachusetts, New Hampshire, New York, Virginia, South and North Carolina, with the Minorities of Pennsylvania and Maryland by the Rev. Nicholas Collin, D.D.*, 6 AMERICAN MUSEUM 303, 303 (Philadelphia, Carey, Stewart & Co. 1789); see also *Proceedings of the Late Meeting of Harrisburg, in Pennsylvania*, 4 AMERICAN MUSEUM 268, 268 (Philadelphia, Matthew Carey 1789) (articulating various considerations of Constitution by Pennsylvanian delegation).

<sup>125</sup> The ban in the Statute was not nearly as general as they—or for that matter most knowledgeable Englishmen—supposed, but they most certainly understood the intent of the Statute to curb the royal prerogative.

<sup>126</sup> Prager, *supra* note 3, at 317.

considering such legislation per se, but rather Congress' power to enact such legislation.<sup>127</sup> Second, there is nothing in the writings of the delegates or of those with whom the delegates corresponded which expressly indicates that a constitutional provision for patents and copyrights was urged on the delegates by anybody outside the convention itself.<sup>128</sup> Although the assertion continues to be made,<sup>129</sup> no contemporaneous documentation has been found which provides any specific evidence that such a provision was in fact directly pressed on the delegates by anyone else.

Nonetheless, there was what was quite likely an attempt, although in an indirect sense, to recommend to their deliberations the idea that knowledge and invention be encouraged and rewarded by the state. In an address to the Pennsylvania Society for the Encouragement of Manufactures and the Useful Arts on August 9, 1787 in Philadelphia, Tench Coxe not only made express reference to the fact that the Constitutional Convention was in session in that city, but also stated:

We must carefully examine the conduct of other countries in order to possess ourselves of their methods of encouraging manufactories, and pursue such of them, as apply to our own situation, so far as it may be in our power. Exempting raw materials, dye-stuffs, and certain implements for manufacturing, from duty on importation, is a very proper measure. Premiums for useful inventions and improvements, whether foreign or American, for the

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<sup>127</sup> Commentators tend to confuse authority granted to Congress by the constitutional provision with some form of inherent constitutional authority. See e.g., James B. Gambrell, *The Constitution and the In Personam Defense of First Invention*, 39 J. PAT. OFF. SOC'Y 791, 799 (1957) ("The Constitutional provision, it is clear, established in the owner of a valid patent grant the right to exclude others from its use."). The constitutional provision did nothing of the sort, but instead merely gave Congress the power to statutorily establish such a right in a patentee.

<sup>128</sup> But even if such outside urgings had actually occurred, the secrecy rule adopted on May 29, 1787 prevented the delegates from commenting on their deliberations outside the convention itself. See WARREN, *supra* note 96, at 134-39 (discussing various contemporaneous views on secrecy rule).

<sup>129</sup> See, e.g., Arthur H. Seidel, *The Constitution and a Standard of Patentability*, 48 J. PAT. OFF. SOC'Y 5 n.23 (1966) ("Also, it is believed that the various developers of steam boats and their supporters pressed members of the convention for a constitutional provision.").



best experiments in any unknown matter, and for the largest quantity of any valuable raw material, must have an excellent effect. They would assist the efforts of industry, and hold out the noble incentive of honourable distinction to merit and genius. The state might with great convenience enable an enlightened society, established for the purpose, to offer liberal rewards in land for a number of objects of this nature. Our funds of that kind are considerable, and almost dormant. An unsettled tract of a thousand acres, as it may be paid for at this time, yields very little money to the state. By offering these premiums for useful invention, to any citizen of the union, or to any foreigner, who would become a citizen, we might often acquire in the man a compensation for the land, independent of the merit which gave it to him. If he should be induced to settle among us with a family and property, it would be of more consequence to the state than all the purchase money.<sup>130</sup>

While purporting to address these remarks in the context of the concerns of the state of Pennsylvania, Coxe was also in a very real sense directing them toward the delegates working to draft the new form of government for the United States. There is good reason to believe that Madison was apprised of these remarks by Coxe, for less than a fortnight later he would propose that the Congress be given authority "to encourage by premiums & provisions, the advancement of useful knowledge and discoveries."<sup>131</sup>

An argument has been made that Noah Webster's "close proximity to the Constitutional Convention coupled with his familiarity with the delegates makes it likely that he played some indirect role in the development of the copyright clause."<sup>132</sup> While the

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<sup>130</sup> *An Address to an Assembly of the Friends of American Manufactures, Convened for the Purpose of Establishing a Society for the Encouragement of Manufactures and the Useful Arts, Read in the University of Pennsylvania, on Thursday the 9th of August, 1787—by Tench Coxe, Esq. and Published at Their Request*, 2 AMERICAN MUSEUM 248, 253 (AMS Press, Inc. 1965) (1787).

<sup>131</sup> See *infra* note 149 and accompanying text.

<sup>132</sup> Donner, *supra* note 79, at 372.

contemporaneous record makes clear that Webster had vigorously sought state copyright laws and was in favor of some form of national copyright law, no direct evidence supports the view that Webster either sought to influence, or in fact influenced, the delegates, with regard to the drafting of the Intellectual Property Clause. In this regard, it should be noted that Webster in later life was not reticent in setting forth his role in the development of copyright law in this country, and he never made any allegation that he had influenced, either directly or indirectly, the Intellectual Property Clause's content.

The contention that a provision for copyrights and patents was "urged by no one less than Washington"<sup>133</sup> in the context of the Constitutional Convention is simply wrong. What Washington actually did was provide a certificate to the Congress in 1784 on behalf of James Rumsey, one of the early contestants for priority as the inventor of the steamboat, that stated that he believed that Rumsey had made a discovery of vast importance.<sup>134</sup> Washington made no request whatsoever that Rumsey be granted a patent or any other form of exclusive right in this discovery. Insofar as is known, Washington never mentioned the intellectual property provision of the proposed Constitution during the delegates' deliberations.

Nor is there any clear record indicating that "[s]uch provision was urged for instance by a man who operated a steamboat on the river a few blocks from Convention hall."<sup>135</sup> John Fitch, the man in question, was Rumsey's chief protagonist in the quest for priority of invention with respect to steamboats. This is not to say that Fitch may not well have done so, but only that there is no specific evidence to show that he actually did so.<sup>136</sup> What is known is that he certainly had the chance to lobby the delegates for such a provision at a most opportune time.

Contemporaneous documents indicate that during the week of August 20, 1787 Fitch *did* demonstrate his steamboat to at least

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<sup>133</sup> Prager, *supra* note 3, at 317.

<sup>134</sup> For a reproduction of this certificate, see BUGBEE, *supra* note 1, at 95-96.

<sup>135</sup> Prager, *supra* note 3, at 317.

<sup>136</sup> *But see* Seidel, *supra* note 129, at 23 n.38 ("[t]he Fitch developments are said to have furthered the adoption of the Constitutional provision").

certain of the delegates.<sup>137</sup> This steamboat was not the later successful paddlewheel version of the steamboat,<sup>138</sup> but rather a most ungainly contraption involving the use of twelve oars. Its method of operation had been described earlier in the December 1786 edition of *Columbia Magazine*: "Each revolution of the axletree moves twelve oars five and a half feet. As six oars come out of the water, six more enter the water, which makes a stroke similar to the paddle of a canoe."<sup>139</sup> As ungainly and exceedingly prone to mechanical failure as it was, it nonetheless successfully demonstrated that steam could be used to propel a boat against the current of a river.

Although the number of delegates actually present for the demonstration is uncertain, three are known by name.<sup>140</sup> Fitch recorded in his journal that nearly all the members of the convention were present.<sup>141</sup> Whether any of the delegates actually rode on the boat is a matter of some dispute.<sup>142</sup> The discussion between Fitch and the delegates is not known, but it can reasonably be supposed that he pressed his claims of priority with respect to the steamboat and further sought some form of exclusive recognition as the inventor of the steamboat. At this time he was

<sup>137</sup> For an in-depth examination of the events surrounding this demonstration, see Prager, *Steamboat Pioneers*, *supra* note 24, at 517-18; accord WARREN, *supra* note 96, at 510-12. Some confusion exists as to the actual date. Warren advocates August 22, 1787 whereas Prager maintains August 20, 1787. See Prager, *supra*, at n.518 (discussing confusion as to dates, and making persuasive argument that it was in fact August 20th).

<sup>138</sup> See Prager, *Steamboat Pioneers*, *supra* note 24, at 505-08 (describing Ben Franklin's doubt concerning viability of paddle wheels and Fitch's subsequent adoption of oar mechanism). In 1787 neither Fitch nor Rumsey was attempting to build a paddlewheel version because of Benjamin Franklin's recent disparagement of the use of steam-actuated paddlewheels as a means of propulsion.

<sup>139</sup> WARREN, *supra* note 96, at 511 (citation omitted).

<sup>140</sup> *Id.*; see WARREN, *supra* note 96, at 510-11 (indicating Dr. William Samuel Johnson, Governor Randolph of Virginia, and Judge Ellsworth attended demonstration).

<sup>141</sup> *Id.* (describing Fitch's steamboat and its trial trip on Wednesday, August 22, 1787); but see Prager, *Steamboat Pioneers*, *supra* note 24, at 517 (stating that "it is not reported how big the group was").

<sup>142</sup> See, e.g., Prager, *Steamboat Pioneers*, *supra* note 24, at 517 (stating that some delegates "[took] a sail" on Fitch's steamboat); see also THOMPSON WESCOTT, *LIFE OF JOHN FITCH* 192-93 (Philadelphia, J.B. Lippincott & Co. 1878) (quoting August 27, 1787 diary entry of Rev. Ezra Stiles that states Judge Ellsworth, delegate from Connecticut, "was on board the boat, and saw the experiment succeed") (citation omitted); but see ELLA M. TURNER, *JAMES RUMSEY: PIONEER IN STEAM NAVIGATION* 114-15 (1930) (disputing vigorously contention that delegates rode Fitch's boat).

vigorously seeking state patents for his steamboat, and had become more than slightly aware of the vagaries of obtaining such patents.<sup>143</sup> Thus, it is likely that he sought some means of obtaining exclusive rights through the federal government—which he would have perceived as the Congress.

Fitch's timing was highly appropriate, for on August 18, 1787 the Convention received its first proposals for what would ultimately become the Intellectual Property Clause. Before discussing those proposals, it is useful, however, to establish the background against which they were submitted. On July 24th, a five-member Committee of Detail had been appointed for the purpose of preparing a draft of a Constitution based on various resolutions which had been adopted by the convention to that point. On July 26th several additional resolutions were given to the Committee. None of these made any reference to inventors or authors or any rights or privileges respecting inventions or written works. The resolution given to the Committee regarding legislative powers stated only:

That the [National] Legislature of the United States ought to possess the legislative Rights vested in Congress by the Confederation; and moreover to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation.<sup>144</sup>

Although the details are vague (with the exception of the rights granted to Congress by the Articles of Confederation), this resolution certainly is sufficiently broad as to permit specific legislative authority to be set forth with respect to inventors and authors if that should be the course chosen. Alternatively, incorporation of its general language into the Constitution would also have given Congress authority to legislate with respect to the rights of

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<sup>143</sup> See Prager, *Steamboat Pioneers*, *supra* note 24, at 517-21 (discussing Fitch's attempt to gain credibility for his idea, his apprehension concerning the patent system, and questions about his involvement in Patent Clause).

<sup>144</sup> Committee of Detail Res. 8, *reprinted in* 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 75, at 131-32.

inventors and authors.

Neither approach was taken in the draft Constitution reported by the Committee on August 6th. While the Committee adopted the approach of enumerating specific powers to be granted to Congress, it did not set forth any specific powers relating to Congressional authority to legislate regarding rights or privileges of inventors and authors. It did contain a grant of power “[t]o regulate commerce with foreign nations, and among the several states”; and “to make all laws that shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested, by this Constitution, in the government of the United States, or in any department or officer thereof.”<sup>145</sup> Similar language appears in the Constitution as ratified, and, as has been suggested, an argument can be made that language of this type implicitly grants to the Congress the power to legislate with respect to patents.<sup>146</sup> But the subsequent course of events would lead the delegates down a different path.

Article VII of the draft Constitution enumerated the powers to be granted to Congress.<sup>147</sup> Discussion of these powers did not occur until August 16. As has been noted, the draft Constitution was silent regarding both inventors and patents and authors and copyrights. On August 18, however, the delegates proposed a number of additional congressional powers. From these proposals came the Intellectual Property Clause.

At this point, historical exposition becomes both interesting and complicated. The Journal of the Convention for August 18, 1787 lists twenty additional powers “proposed to be vested in the Legislature of the United States,” including the following:

To secure to literary authors their copy rights for a limited time; To encourage, by proper premiums and provisions, the advancement of useful knowledge and

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<sup>145</sup> *Id.* at 181-82 (quoting Article VII, Section 1 of Committee of Detail draft Constitution as reflected in Madison's journal entry of August 6, 1787).

<sup>146</sup> See *supra* notes 90-101 and accompanying text (setting forth arguments giving congressional power over patents).

<sup>147</sup> The printed copies given to the delegates inadvertently repeated Article VI as the heading, causing all later Articles to be misnumbered. See 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 75, at 181 n.5 (noting error in numbering of Articles).

discoveries; To grant patents for useful inventions; To secure to authors exclusive rights for a certain time; [and] To establish public institutions, rewards and immunities for the promotion of agriculture, commerce, trades, and manufactures.<sup>148</sup>

These proposals served as the genesis for the intellectual property clause, but unfortunately the Journal fails to mention who offered them or why.

Madison's Notes are both more revealing and, in some respects, more enigmatic. Because he edited them after they were written, what was ultimately published in 1840 does not, in some instances, reflect what he initially wrote at the time of the events described. His edited notes include those for August 18, 1787. Fortunately, one may access his original notes at the Library of Congress and determine the nature of his editing. But that is precisely what produces the enigma.

As published, Madison's Notes for Saturday, August 18 state:

Mr. Madison submitted in order to be referred to the Committee of detail the following powers as proper to be added to those of the General Legislature . . . To secure to literary authors their copy rights for a limited time . . . To encourage by premiums & provisions, the advancement of useful knowledge and discoveries . . .

These propositions were referred to the Committee of detail which had prepared the Report and at the same time the following which was moved by Mr. Pinkney [sic]: in both cases unanimously. . . . To grant patents for useful inventions[;] To secure to Authors exclusive rights for a certain time[; and] To establish public institutions, rewards and immunities for the promotion of agriculture, commerce, trades

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<sup>148</sup> 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 75, at 321-22.

and manufactures . . .<sup>149</sup>

Thus, these notes clearly establish that Madison and Pinckney made the proposals that ultimately led to the Intellectual Property Clause. They also suggest that Pinckney first proposed that Congress have the explicit power to grant patents for useful inventions, although not in the context of the South Carolina Plan, despite Pinckney's later assertions.<sup>150</sup>

Madison's unedited Notes reveal a different story.<sup>151</sup> His original entry began: "Mr. Pinkney proposed for consideration several additional powers which had occurred to him."<sup>152</sup> This entry was followed immediately by: "Mr. M. proposed the following, . . . to be referred to a Committee." A list of ten numbered congressional powers that Madison had suggested followed, including: "6 to secure to literary authors their copy rights for a limited time. 7 [t]o secure to the inventors of useful machines and implements the benefits thereof for a limited time . . . 9 to encourage by [proper]<sup>153</sup> praemiums and provisions, the advancement of useful knowledge and discoveries. . . ." At the end of this list, Madison wrote: "These motions were referred to the Committee of detail who had prepared the Reports nem con."<sup>154</sup> Madison subsequently crossed out this material and pasted a paper, containing the material found in the printed version, over the original.<sup>155</sup>

It is interesting to note that neither the printed version of Madison's Notes nor the Journal of the Convention includes the

<sup>149</sup> JAMES MADISON, NOTES ON DEBATES IN THE FEDERAL CONVENTION OF 1787, at 477-78 (1966).

<sup>150</sup> See *supra* notes 84-86 and accompanying text (discussing lack of evidence to substantiate Pinckney's claim that he proposed patent clause in South Carolina Plan).

<sup>151</sup> See 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 75, at 324 n.3 (indicating that Pinckney made proposal); BUGBEE, *supra* note 1, at 192-93 n.7 (contending that Madison's editing indicated his belief "that Pinckney alone had made the suggestion that the future Congress be empowered to grant patents").

<sup>152</sup> Farrand, who was normally quite meticulous in citing to Madison's Notes, makes no reference to and does not disclose the bracketed sentence. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 75, at 324 n.3.

<sup>153</sup> Farrand notes several changes in this list from the edited version but fails to note that the edited version does not contain the word "proper" in item 9. *Id.* at 325.

<sup>154</sup> BUGBEE, *supra* note 1, at 192-93 n.7 (emphasis added).

<sup>155</sup> *Id.*

seventh item.<sup>156</sup> Moreover, the seventh item does not appear in at least seven other sets of notes from the convention that have been printed. Why then did Madison include it in his original Notes and later delete it?

The suggestion has been made that Madison later believed "that Pinckney alone had made the suggestion that the future Congress be empowered to grant patents."<sup>157</sup> Yet Madison was meticulous about transcribing the notes he took during the discussions into a more detailed product shortly after the discussion occurred. Moreover, he must have been fully aware of what he actually had proposed as additional powers for the Congress. Consequently, it is difficult to understand why he would insert a proposal into his original Notes that the Journal of the Convention does not indicate was ever presented. The situation would make more sense if he had deleted or misrepresented a proposal made by Pinckney, but this does not seem to have been the case.<sup>158</sup>

Thus, for whatever reason, Madison himself provides the best evidence that Pinckney first proposed a constitutional grant of congressional power to issue patents for useful inventions. Nonetheless, the claim continues to be made that Madison was partially responsible for suggesting that Congress have power to issue patents.<sup>159</sup> Although Madison obviously played a significant role in the origination of the Intellectual Property Clause, he did so in the context of protecting authors' rights, not inventor's rights.

One must remember that Madison was a scholar. Accordingly,

<sup>156</sup> See Fenning, *supra* note 83, at 112-13 (1928-29) (suggesting or at least inferring that Madison submitted two separate minutes to Committee of Detail, only one containing item 7). Nothing in Madison's Notes supports Fenning's contention.

<sup>157</sup> BUGBEE, *supra* note 1, at 192-93 n.7.

<sup>158</sup> *Contra* COLLIER & COLLIER, *supra* note 4, at 69-70 (suggesting that James Madison "suppressed" parts of Pinckney's Plan out of dislike or jealousy and later claimed they were forgery). Madison intensely disliked Pinckney, and the contention has been made that his failure to record anything about details of the South Carolina Plan into his Notes and to claim that a later Pinckney version of it was incorrect or at worst a forgery resulted from this dislike. If this was indeed the case, it renders it even more difficult to understand why Madison would later in effect make an "admission against interest" that Pinckney had been the one to suggest that Congress have the power to grant patents. BUGBEE, *supra* note 1, at 127.

<sup>159</sup> See, e.g., Prager, *supra* note 3, at 317-19 (stating that Madison submitted drafts of copyright and patent clauses); Fenning, *supra* note 83, at 113 (arguing that Madison was involved in suggesting federal power to issue patents).



he was highly interested in protecting the interests of authors and scholarship in general. He had served on the committee that had drafted the 1783 congressional resolution recommending to the states that they adopt copyright laws.<sup>160</sup> In preparing for the Convention he had expressed concern about the lack of uniformity in state laws concerning literary property.<sup>161</sup> Consequently, it is not at all surprising that he should propose that Congress have power to grant copyrights for a limited time and to encourage the advancement of useful knowledge and discovery by "premiums and provisions." The latter proposal, although including invention within its ambit, is clearly not limited to invention. Rather, it has a Baconian sweep and is meant to encompass scholarship and discovery in their broadest sense.

Pinckney's motivations are less apparent. He, too, had served in the Continental Congress and was a strong nationalist. In almost every other way, however, he differed markedly from Madison. Unlike Madison, he was not a scholar and did not pretend to be. Why then would he propose that the Congress have power to grant patents for useful inventions, to secure to authors exclusive rights for a certain time, and to establish rewards and immunities for the promotion of agriculture, commerce, trades and manufactures?

The most likely answer stems from his status as a politician at a time when most office holders considered such a label abhorrent. As a politician, he had learned to be aware of his constituents' concerns, and he thought in the practical terms of agriculture, commerce, trades, manufactures, and useful invention, whereas Madison did not. Pinckney's interests focused on the pragmatic level of the practicing politician, whereas Madison's were—at least during this period—on a higher intellectual level. Moreover, Pinckney hailed from South Carolina; the only state to enact a general statute authorizing the grant of both copyrights and patents.<sup>162</sup> Indeed, he had been a member of the state legislature in 1784 when this statute was enacted. One might reasonably infer that his knowledge of this South Carolina statute played a role in

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<sup>160</sup> See *supra* note 63 and accompanying text (quoting resolution's language).

<sup>161</sup> See *supra* notes 77-78 and accompanying text (demonstrating weakness in Confederation).

<sup>162</sup> See *supra* notes 50-51 and accompanying text (discussing provision in South Carolina statute that authorized issuance of patents).

his proposals of August 18, 1787.<sup>163</sup>

Unfortunately, Pinckney has confused the issue almost as much as Madison, for like Madison he has left a conflicting record. In a pamphlet published shortly after the Constitutional Convention ended, Pinckney alleged that in the South Carolina Plan he had proposed that the Congress have authority "to secure to authors the exclusive rights to their performances and discoveries."<sup>164</sup> Thirty odd years later, however, when John Quincy Adams was preparing the Journal of the Convention for publication, he could not find a copy of the South Carolina Plan and accordingly asked Pinckney to supply him with one. Pinckney responded by stating:

I have already informed you I have several rough draughts of the Constitution I proposed & that they are all substantially the same differing only in words & the arrangement of the Articles—at the distance of nearly thirty two Years it is impossible for me now to say which of the 4 or 5 draughts I have was the one but enclosed I send you the one I believe was it—I repeat however that they are substantially the same differing only in form & unessentials.<sup>165</sup>

The version Pinckney supplied shows twenty powers to be granted to the Congress<sup>166</sup> but does not include either a power "to secure to authors the exclusive rights to their performances and discoveries" or any other power relating to the protection of intellectual property.<sup>167</sup>

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<sup>163</sup> But see BUGBEE, *supra* note 1, at 127 (noting that "[t]he wording of Pinckney's patent and copyright suggestions of August 18 nevertheless bears little resemblance to any portion of this South Carolina law, which may have provided only inspiration"). Pinckney may have deliberately simplified his proposals in accordance with the prevailing views of the delegates that a constitution should contain only "essential principles" and "general propositions." See *supra* note 106 and accompanying text (setting forth principles guiding delegates).

<sup>164</sup> PINCKNEY, *supra* note 84, at 26.

<sup>165</sup> Letter from Charles Pinckney to John Quincy Adams (Dec. 30, 1818), in 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 75, at 427-28 (emphasis added).

<sup>166</sup> *Id.* at 598.

<sup>167</sup> See Letter from James Madison to W.A. Duer (June 5, 1835), in *id.* at 534-35 (noting that "[t]he pamphlet refers to the following provisions which are not found in the plan furnished to Mr. Adams as forming a part of the plan presented at the Convention: . . . 6. For securing exclusive rights of authors and discoverers"). Madison erred somewhat here

Even if one assumes that Pinckney had, in fact, sought in the original South Carolina Plan to give the Congress power to protect the exclusive rights of authors, then, like Madison, he subsequently edited out this grant as being “unessential.” But taking Pinckney at face value—inconsistency and all—it is clear that the South Carolina Plan never contained any reference to a congressional power to grant patents or otherwise protect inventors with respect to their inventions.

In any case, the proposals submitted by both Madison and Pinckney on August 18th were referred to the Committee of Detail which made a partial report on August 22 but said nothing about those proposals from either gentleman relating to intellectual property. On August 31, the delegates agreed to “refer such parts of the Constitution as have been postponed, and such parts of reports as have not been acted upon to a Committee of a Member from each state.”<sup>168</sup> Since Rhode Island had never sent delegates, and New York could not vote because its delegation was not present, this Committee became the Committee of Eleven. Madison was on it; Pinckney was not.<sup>169</sup>

On September 1 and 4, this Committee of Eleven reported partially on the unfinished business presented to it. Again there was no reference to intellectual property matters. On September 5 the Committee reported five unresolved matters pertaining to the powers to be granted to Congress. The fifth of these powers became the Intellectual Property Clause of the Constitution, to wit: “To promote the progress of Science and useful arts by securing for limited times to authors and inventors, the exclusive right to their respective writings and discoveries.”<sup>170</sup> As Madison reported, the

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because the pamphlet published on behalf of Pinckney immediately after the Convention did not speak in terms of granting power to Congress “for securing exclusive rights of authors and discoverers” but rather provided for a power in Congress “to secure to authors the exclusive rights to their performances and discoveries.” See *supra* note 84 and accompanying text (discussing Pinckney’s proposal).

<sup>168</sup> 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 75, at 473 (quoting Madison’s journal entry of August 31, 1787).

<sup>169</sup> The other ten members were Gilman, King, Sherman, Brearley, Gouverneur Morris, Dickinson, Carrol, Williamson, Butler, and Baldwin.

<sup>170</sup> U.S. CONST., art 1, § 8, cl. 8.

Convention unanimously approved the clause.<sup>171</sup> There is no record to indicate how the intellectual property proposals submitted by Madison and Pinckney were transformed into this clause. Madison, as a member of the responsible committee, must have known but never explained it. Nor did any other member of the Committee. It is quite conceivable, however, that Madison authored the clause.<sup>172</sup>

What is clever about the intellectual property clause as it came forth from the Committee of Eleven is that it harmoniously combines the several proposals for congressional authority relating to exclusive rights in both invention and written works. Yet the terms "science" and "useful arts" do not appear in any of those proposals. How did these terms find their way into the final product? One can explain the use of the word "science" is explained by noting that in the latter part of the eighteenth century "science" was synonymous with "knowledge" and "learning."<sup>173</sup> Madison had, however, included the promotion of "knowledge" in his original proposals. Thus, if Madison *was* the author, it would have readily occurred to him to use the shorter and more succinct "science" in place of the term "knowledge." Moreover, in the context of the clause's balanced style of composition, "science" would have

<sup>171</sup> 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 75, at 508-10. The only mentionable difference in the Journal report of this clause was the deletion of the comma between "inventors" and "the." *Id.* at 505.

<sup>172</sup> This is particularly true since he had clearly proposed that the Congress have power to secure copyrights for authors and because he was highly interested in protecting scholarly works. See *supra* notes 160-161 and accompanying text. Moreover, Madison's subsequent defense of the Intellectual Property Clause, while not conclusive on the point, suggests that he had more than a passing interest in this particular clause. See THE FEDERALIST No. 43, at 309 (James Madison) (Benjamin F. Wright ed., 1961) ("The utility of this power will scarcely be questioned.").

<sup>173</sup> See Arthur H. Seidel, *The Constitution and a Standard of Patentability*, 48 J. PAT. OFF. SOC'Y 11 n.13 (1966) (observing that most authoritative dictionary at time provides "knowledge" as first definition of "science") (citing 2 SAMUEL A. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 4F (Philadelphia, James Maxwell 1819)); see also *id.* at 11-13 (pointing out that in 1787 "science" meant learning or knowledge generally and in fact had had such meaning since times of Lord Coke); see Giles S. Rich, *The Principles of Patentability*, 42 J. PAT. OFF. SOC'Y 75, 78-80 (1960) (emphasizing that "science" meant knowledge by noting that title of first federal copyright statute in 1790 was "[a]n act for the encouragement of learning" and that "the only word in the constitutional language corresponding to learning is science").

appeared more aesthetically pleasing.<sup>174</sup>

One may also plausibly determine the origin of the phrase "useful arts." In 1787 "useful arts" meant helpful or valuable trades. Therefore, to promote the progress of useful arts presupposed an intent to advance or forward the course or procession of such trades.<sup>175</sup> Less than a month before the Committee of Eleven first set forth the Intellectual Property Clause, Philadelphia was the birthplace of a new group entitled the "Pennsylvania Society for the Encouragement of Manufactures and the Useful Arts." Its name was quite descriptive of its purpose.<sup>176</sup> The inaugural meeting of the Society occurred on August 9 and was well attended.<sup>177</sup> Consequently, good reason exists to believe that Madison and the other members of the Committee of Eleven were not only

<sup>174</sup> For various discussions on this balanced style of composition in the context of the Intellectual Property Clause, see, e.g., DE WOLF, *supra* note 57, at 15; Robert I. Coulter, *The Field of the Statutory Useful Arts*, 34 J. PAT. OFF. SOC'Y 487, 491 (1952); Karl B. Lutz, *Patents and Science: A Clarification of the Patent Clause of the U.S. Constitution*, 32 J. PAT. OFF. SOC'Y 83, 84 (1950); Rich, *supra* note 173, at 75, 77-78; Seidel, *supra* note 129, at 5, 9. An interpretation of this "aesthetic" substitution by two Supreme Court Justices some 160 years later probably would have confounded the Framers. See *Great Atl. & Pac. Tea Co. v. Supermarket Equip. Co.*, 340 U.S. 147, 154 (1950) (Douglas, J. & Black, J., concurring) (stating that, in Framers' view, "[t]he invention, to justify a patent, had to serve the ends of science—to push back the frontiers of chemistry, physics, and the like; to make a distinctive contribution to scientific knowledge").

<sup>175</sup> Seidel, *supra* note 129, at 10 (interpreting phrase "To promote the Progress of . . . useful Arts . . .").

<sup>176</sup> The justification for forming the Society was set forth in the following terms:

In the various stages of her political existence, America has derived great advantages from the establishment of manufactures and the useful arts. Her present situation in the world calls her by new and weighty considerations, to promote and extend them. The [U]nited [S]tates, having assumed the station of an independent government, require new resources to support their rank and influence, both abroad and at home. Our distance from the nations of Europe—our possessing within ourselves the materials of the useful arts, and articles of consumption and commerce—the profusion of wood and water, (those powerful and necessary agents in all arts and manufactures)—the variety of natural productions with which this extensive country abounds, and the number of people in our towns, and most ancient settlements, whose education has qualified them for employments of this nature—all concur to point out the necessity of promoting and establishing manufactures among ourselves.

*Plan of the Pennsylvania Society for the Encouragement of Manufactures and the Useful Arts*, 2 AMERICAN MUSEUM 167, 167 (AMS Press, Inc. 1965) (1787).

<sup>177</sup> *An Address to an Assembly*, 2 AMERICAN MUSEUM, *supra* note 130, at 248.

aware of its existence but were conversant with its aims as well.<sup>178</sup> For much the same reason that "knowledge" was replaced with "science," "manufactures" as first proposed was replaced with "useful arts." The new term was more aesthetically pleasing and encompassed the same meaning.<sup>179</sup>

On September 8, the delegates appointed a Committee on "Stile and Arrangement" to revise the style of, and arrange the articles of, the Constitution that the delegates had agreed upon. Although Madison was a member of this Committee, Pinckney was not. On September 12, the Committee reported a draft of the Constitution which left the Intellectual Property Clause unchanged. The Intellectual Property Clause remained intact in the final draft of the Constitution that was approved on September 17.

The final draft, however, on its face appears to contain a last minute correction to the Intellectual Property Clause. As originally written in the September 17 draft, the clause contains the phrase "for a limited time." This phrase was corrected by drawing a line through the "a" and adding an "s" to "time" by a caret with the "s" above it. The document itself leaves the impression that this last minute change was intended to permit the extension of the right.<sup>180</sup> The language of the clause proposed on September 5 and incorporated in the September 12 draft reveals, however, that the change corrected a typographical error in the final draft and rendered the language consistent with that which had been approved earlier. Even though the final draft may create such an

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<sup>178</sup> Madison may well have crafted one of his proposals for congressional authority based on his knowledge of the lecture presented at the inaugural meeting of the Society. See *supra* notes 130-131 and accompanying text (quoting language of both lecture and Madison's proposal).

<sup>179</sup> In this view, it may well have only been the adoption of the balanced structure discussed in the references set forth in note 173, *supra*, that precluded the Intellectual Property Clause from commencing, e.g., "to promote the progress of knowledge, learning, manufactures, and the useful arts." Cf. Lutz, *supra* note 174, at 83, 86 (suggesting that "useful arts" was deliberately used to broaden the field from "new manufactures" because "by the year 1787 it was being recognized even in Great Britain that the phrase 'new manufactures' was an unduly limited object for a patent system, since it seemed to exclude new processes"). No contemporaneous record indicates that the Framers either understood or intended a distinction of the type suggested by Lutz.

<sup>180</sup> See, e.g., George Ramsey, *The Historical Background of Patents*, 18 J. PAT. OFF. SOC'Y 6, 14 (1936) (stating that although no record of specific change exists, probable purpose was to permit patent extensions).

impression, the delegates did not attempt to change this clause at the close of the proceedings.

## V. A PERSPECTIVE

Granting authority to a national government for issuing patents and copyrights was not a compelling matter for the Framers in 1787. Indeed, in the words of Madison, this grant of authority was "an instance of inferior moment." Nonetheless, the Framers saw fit to grant such authority to the Congress. As a result, enduring and powerful systems of patent and copyright protection exist today.

The Intellectual Property Clause appears to be an exception to the first principles adopted by the Framers, namely, to insert only essential principles and to use only general propositions. In reality, however, it is not, because the Intellectual Property Clause did involve an essential principle, namely, the express authority granted to the Congress to issue limited-term exclusive rights, more commonly known as monopolies, to authors and inventors for their writings and inventions. Nonetheless, the uniqueness of the Intellectual Property Clause flows from its status as the only enumerated power granted to Congress that explicitly defines the mechanism for exercising this power. It is the particular mechanism set forth for promoting the progress of science and the useful arts that constitutes the essential principle of importance to the Framers.

Although the Framers approved the Intellectual Property Clause unanimously and the ratification convention raised no objections to it, one should not conclude that it was viewed with universal approbation. Thomas Jefferson was distinctly cool toward it and quite likely would have opposed it had he been a delegate to the Constitutional Convention. On August 7, 1787, he wrote to a French citizen that "[t]hough the interposition of government, in matters of invention, has its use, yet it is in practice so inseparable from abuse, that they [i.e., the United States] think it better not to meddle with it. . . ."<sup>181</sup> Simultaneously Framers were crafting express congressional authority to "meddle with it."

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<sup>181</sup> Letter from Thomas Jefferson to Monsieur L'Hommande (Aug. 9, 1787), in Paul E. Holbrook, *Science vs. Gadgets*, 33 J. PAT. OFF. SOC'Y 87, 91-92 (1951).

Upon receiving a draft of the Constitution from Madison, Jefferson wrote back in December expressing his general satisfaction, but also noting his concern that it did not have a bill of rights. In setting forth his views on what the bill of rights should include, he indicated that it should provide "clearly and without the aid of sophism . . . for the restriction against monopolies."<sup>182</sup>

When he found that the Constitution had been ratified, he expressed his pleasure to Madison in July 1788 and went on to amplify his views, saying:

It is a good canvas, on which some strokes only want retouching. What these are, I think are sufficiently manifested by the general voice from North to South, which calls for a bill of rights. It seems pretty generally understood that this should go to . . . Monopolies. . . . [I]t is better . . . to abolish . . . Monopolies, in all cases, than not to do it in any. . . . The saying there shall be no monopolies lessens the incitements to ingenuity, which is spurred on by the hope of a monopoly for a limited time, as of 14 years; but the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression.<sup>183</sup>

Jefferson's aversion to monopolies was not unique. For example, his fellow Virginian and delegate to the Constitutional Convention, George Mason, refused to sign the proposed Constitution partially for the reason that "[u]nder their own construction of the general clause at the end of the enumerated powers, the Congress may grant monopolies in trade and commerce."<sup>184</sup> In addition, the New York Convention that ratified the Constitution recommended that certain amendments be added, including one "[t]hat the congress do[es] not grant monopolies, or erect any company with

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<sup>182</sup> P.J. Federico, *Operation of the Patent Act of 1790*, 18 J. PAT. OFF. SOC'Y 237, 240 (1936) (quoting Letter from Thomas Jefferson to James Madison (Dec. 20, 1787)).

<sup>183</sup> Letter from Thomas Jefferson to James Madison (July 31, 1788), in 13 THE PAPERS OF THOMAS JEFFERSON 440, 442-43 (Julian P. Boyd ed., 1956).

<sup>184</sup> *Objections of the Hon. George Mason*, 2 AMERICAN MUSEUM, *supra* note 124, at 536.



exclusive advantages of commerce."<sup>185</sup> Likewise, the ratifying conventions of Massachusetts, New Hampshire, and North Carolina requested an amendment "that congress erect no company of merchants, with exclusive advantages of commerce."<sup>186</sup> Although these amendments did not address patent or copyright monopolies per se, these views demonstrate why the delegates to the Constitutional Convention saw the need to delineate expressly the congressional authority to secure "for limited times to authors and inventors, the exclusive right to their respective writings and discoveries."<sup>187</sup>

It is in the context of a discussion of these monopoly concerns by the ratifying conventions that the only contemporaneous comment by a member of the public with respect to the Intellectual Property Clause has been found: "As to those monopolies, which, by way of premiums, are granted for certain years to ingenious discoveries in medicine, machines, and useful arts; they are common in all countries, and more necessary in this, as the government has no resources to reward extraordinary merit."<sup>188</sup>

The clause was briefly and favorably mentioned during two of the state ratification contests, but only in the context of its grant of authority to the Congress to establish copyright.<sup>189</sup> Just as in the Constitutional Convention itself, the issue of the limited monopolies authorized by the Intellectual Property Clause seems never to have been a point of contention in the state ratifying conventions. Although it was generally received with favor by those who thought about it, with Jefferson being the notable exception, the reality is that among the much more momentous issues addressed with respect to the new Constitution, very few actually gave much thought to it.

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<sup>185</sup> *Ratification of the New Constitution*, 4 AMERICAN MUSEUM, *supra* note 124, at 156.

<sup>186</sup> *See Remarks on the Amendments to the Federal Constitution*, 6 AMERICAN MUSEUM, *supra* note 124, at 303.

<sup>187</sup> U.S. CONST., Art. I, § 8, cl. 8.

<sup>188</sup> *Remarks on the Amendments*, 6 AMERICAN MUSEUM, *supra* note 124, at 303.

<sup>189</sup> *Thomas McKean Speaking at the Pennsylvania Convention on the Ratification of the Federal Constitution*, 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 415 (J. Kaminski et al. ed. 1984); *Marcus IV, Norfolk and Portsmouth Journal*, 16 *id.* at 382.