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THE LESSON PATTERSON TAUGHT

*Lawrence Lessig**

I only met Lyman Ray Patterson once. I know his work in one area only, and I have only known that work well in the past five years. Yet of all the scholars I have ever known, there is no one who has had a more significant influence on my own view of the area of law to which my work is now devoted.

Patterson, I expect, would have called that area of law “copyright.” I would call it constitutional copyright. For Patterson’s work, more than any other scholar in the field of copyright, shows a certain practice of constitutional law. It is neither an uncontroversial practice among constitutional law scholars nor has it ever been uncontroversially advanced. But it is the practice of law that in my own view best exemplifies what a constitution can be, and Patterson’s own practice demonstrates best how a scholar can contribute to the best of what a constitution could be.

This practice is a kind of fidelity in interpretation.¹ Its aim is to preserve the meaning of a constitutional text across radically different interpretive context. And though constitutional scholarship rarely turns its attention upon the Progress Clause² of our Constitution, the meaning of that clause within our tradition will become increasingly important to those who believe fidelity should be our first constitutional practice. To do this work of fidelity well, a lawyer must understand the context from which a text is drawn. Yet as few lawyers ever do, and as even fewer do well, to understand an original context well, one must understand it as those who lived it would. Philosophers teach us that it is impossible to do that perfectly. But for reasons I can only sketch here, Patterson’s work shows it can still be done well.

The lesson that Patterson taught was that we had become far removed from the “copyright” that our framers had established. This drift has happened slowly, and it parallels a drift that Mark Rose describes among the British as well.³ Rose describes the slow forgetting over sixty years; Patterson’s story spans the life of our Republic. By the time he wrote his extraordinary book, *Copyright in Historical*

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¹ See Lawrence Lessig, *Understanding Changed Reading: Fidelity and Theory*, 47 STAN. L. REV. 395 (1995) (proposing a theory to explain how new readings of the Constitution may maintain fidelity with past understandings of the document’s meaning and purpose).

² U.S. CONST. art. I, § 8, cl. 8.

³ MARK ROSE, *AUTHORS AND OWNERS* 92-93 (1993).

Perspective,⁴ in 1968, the law of copyright had already forgotten its roots. Indeed, it had already become precisely what our framers had intended to avoid.

Our framers had inherited a tradition that resolved through law one of the most important struggles about how knowledge and culture would develop. Power over culture and over the flow of knowledge should be limited. This was consistent with constitutional law in the Anglo-American tradition generally. As Professor Marci Hamilton has written,⁵ our Republic would allow no centralized church to get its power through law; neither would it allow any centralized government to exert unlimited power through the law; and nor would it allow any centralized authority over culture and knowledge to gain its power through law. In each case, the framers' aim was not to destroy a power but to limit it. And in each case, the technique by which that power was limited was grounded in the Constitution. State religions were allowed, but the Establishment Clause⁶ forbid a federal religion; federal power was established, but it was limited by federalism; and a legal right to control the spread of knowledge and culture was granted, but that power was restricted by the very clause that established it.

We had inherited the technique of that limit from the British. After decades of suffering a censoring press, the British were the first to expressly limit the power the law might grant those who controlled the press—booksellers. This was the Statute of Anne of 1710,⁷ which secured the right of authors *and* booksellers to an exclusive property interest in a book once published, but limited that property interest to a fixed term. From our perspective, this looks like a simple recognition of an author's right. And against the background of a very vague understanding of Locke's labor theory of value, it seems right to us that our framers, and the British before them, would have recognized so fundamental a property interest as the right of an author over the product of his mind.

But Patterson's first lesson is that these laws granting authors power were not the expression of a natural right, but were instead industrial regulation. They responded to a particular danger of concentration within the industry that gave access to knowledge and culture—publishing. And both the British and American versions of this power were architected to avoid those dangers through structural limits on the ability of publishers' power to concentrate.

The British had one innovation in the design of that limit; the Americans had two. At the time of the Statute of Anne, the nature of literary property was

⁴ LYMAN RAY PATTERSON, *COPYRIGHT IN HISTORICAL PERSPECTIVE* (1968).

⁵ Marci Hamilton, *The Historical and Philosophical Underpinnings of the Copyright Clause*, 5 OCCASIONAL PAPERS INTELL. PROP. FROM BENJAMIN N. CARDOZO SCH. L., YESHIVA U. (1999).

⁶ U.S. CONST. amend. I.

⁷ 8 Ann., c. 19, § 1 (1710) (Eng.).

uncertain.⁸ Some believed that it was protected by the common law; some believed it had no natural protection at all. But whatever its status, everyone recognized the power of publishers. After almost two centuries of intimate conspiracy with the Crown, publishers had become a powerful and protected force over the spread of knowledge and culture. A small group of London Publishers—the Conger—exercised vast control over the progress of English culture.⁹ Their claimed monopolies over the right to publish books meant that the spread of books would forever be restricted by the peculiar economics of a monopolist.

The ideals of the Enlightenment chafed at this result. Concentrated power over the spread of knowledge was not how society would progress. Yet a practical recognition of the political power of the publishers led reformers to find an indirect way to limit the booksellers' power. In Britain, that was the limit on terms. A copyright would be secured under British law to “authors and booksellers” but only for a fixed term, after which the exclusive right to publish a particular work would expire, and once that protection expired, the spread of knowledge within Britain would be determined by the dynamics of a competitive market.

It is from such particular examples that the Madisons of our tradition learned best how to limit government generally. For the technique of the Statute of Anne was to avoid a conflict with a dangerous power by building a structure that would check the emergence of that power. By assuring that any monopoly right over the spread of knowledge would be limited, the British guaranteed that eventually, competition would govern the progress of knowledge. Successful and important works would be produced within a competitive market, after the term of exclusive protection expired. That competition would check any trend to concentration.

Yet such a purpose could not have been achieved if it had been pursued directly. The booksellers were too powerful, and their claim to a natural right was too strong. Thus, the framers of this structure of Madisonian balance put off the liberation of British culture for a generation as a way to buy the promise that eventually that limit would be effected. A compromise within Parliament limiting the term of a copyright was possible because the limits were deferred for twenty-one years. The booksellers were not happy with the limit. But neither were they happy with the absence of any express legal authority for their exclusive rights—which had expired with the Licensing Act in 1695.¹⁰ Thus, they accepted

⁸ 1 WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 477 (1953) (“[T]he Common Law of the United States . . . was in a highly uncertain state on the subject of copyrights.”).

⁹ PATTERSON, *supra* note 4, at 151-52.

¹⁰ Brief *Amici Curiae* of Tyler T. Ochoa et al. at 6, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No.

a compromise that secured their rights immediately and left to another day the question of whether their secured rights would ever expire.

When their rights did begin to expire, the booksellers returned to Parliament to ask for extensions. Indeed, three times did the booksellers make the plea that their exclusive rights over their books should be continued,¹¹ but Parliament three times rejected their claim. In 1774, after a generation of uncertainty, the House of Lords finally recognized that whatever rights the common law granted the bookseller or author over works published to the world, those rights were now defined by the Statute of Anne.¹² Hence, those rights would expire. After the decision in *Donaldson v. Beckett*,¹³ and for the first time in British history, the works of Shakespeare and Milton were free of the booksellers' control. A free market would thereafter fuel the spread of culture. It is was this "free culture" that we Americans inherited.

The Americans added one idea to the innovation of the Statute of Anne—"Authors." Not only would the monopolies granted under the law be limited in term, but they would also be granted to authors alone. "Booksellers" would have no direct right under American law to control the exclusive right to publish that copyright law would grant.¹⁴ Any right they did have would be granted indirectly from authors alone. As the source of this monopoly protection was therefore the many who would be authors, the concentration of this monopoly right would again be checked.

To see constitutional purpose in the framers' design required the work of a historian. This was Patterson's genius. Indeed, after two hundred years of regular copyright law, our tradition had lost touch with the ideals that animated its founding. We had forgotten that the law was first a regulation of publishers.¹⁵ More importantly, we had lost any sense of limit to the rights that the law did grant. What was born as a tiny and particular right—the exclusive right in authors to control the "publishing" of a "map, chart, or book" for a term of fourteen years, renewable once¹⁶—had become a massive and general right to control not just the publishing, but increasingly, the uses of creative property. America was founded during the first struggle over the nature of creative property; we aligned ourselves through our Constitution with the side in that struggle that viewed copyright as regulation; yet two hundred years after that founding, the rights granted under that regulation had grown so extensively that most view the

01-618).

¹¹ *Id.* at 7-8.

¹² *Donaldson v. Beckett*, 4 Burr. 2408, 98 Eng. Rep. 257 (H.L. 1774).

¹³ *Id.*

¹⁴ L. Ray Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1, 32-33 (1987).

¹⁵ *Id.* at 16.

¹⁶ Act of May 31, 1790, 1 Stat. 124.

regulation as the recognition of a natural right. When Patterson published his extraordinary book, copyright had already become precisely what the framers had sought to avoid—an essentially perpetual power exercised by increasingly concentrated few to control the access to, and the spread of, knowledge and culture.

Yet when Patterson demonstrated this truth, there was little reason to listen. However powerful publishers had become, there was a regular practice of the culture they affected that was still balanced and free. In 1968, the economics of publishing kept prices generally low. The spread of the market assured wide access to any culture and knowledge that was produced, and a strong system of public libraries tempered the limits that remained. Once published, however long the term of control had become, creative work passed quite quickly into the competitive market of used bookstores and the subsidized market of libraries.

The fiscal costs of this control were therefore tempered. So too were the opportunity costs. While the expanse of rights protected by copyright had grown dramatically in 180 years since our founding, the economics of publishing assured that any burden created by these rights would fall on those best able to bear that burden. Thus, derivative rights were unknown to our framers; yet the industries that would be necessary to exercise those derivative rights were quite capable of negotiating any burden that those rights imposed.

Thus as the time Patterson gave legal culture the gift of his work, the significance of his insight was not immediately apparent. An industry had grown up around a different conception of copyright, and it was not obvious what would be gained by returning to the framers' very different vision. Patterson was therefore promoting a truth without a constituency. He had identified a fundamental and unnoticed change, but it was not at all clear that anything had been lost in this compromise of principle.

In the thirty-five years since Patterson first remarked this change, the change has only grown more significant. In the last decade especially, the opportunity costs of this change have finally been realized. Copyright law has only become more extreme in its protections. Technology has finally made the costs of this extremism significant. For just at the time when the ideals that the framers imagined could be realized—when a technology for spreading culture cheaply and broadly has developed, and an opportunity for an astonishingly wide range of creativity has been produced—the burdens of this unchecked expanse of regulation called copyright now choke the very values that it was set to protect. The burdens of this law—in its scope and complexity—limit the opportunity for follow-on creators freely to cultivate our culture; those burdens in turn drive industries to concentration. Both trends have resulted in a culture that is more heavily regulated and controlled through law than at any time in our past.

Patterson's truth thus now has a constituency. There is now a movement that would translate his insights about the values of our framers into law once again. Yet so far have we strayed from the values they thought important such that it is practically impossible to even excite recognition.

In my own work, I have felt this gap most directly. It was upon the basis of Patterson's understanding of our framers' values that some of us launched a constitutional challenge on the latest example of Congress's forgetting.¹⁷ The Sonny Bono Copyright Term Extension Act¹⁸ was perhaps the most extreme instance of copyright forgotten. For the eleventh time in forty years, Congress, through CTEA, had extended the terms of existing copyrights. This time the extension was for twenty years. The quid pro quo that our framers had envisioned between the grant of a monopoly and the creation of something new was forgotten.¹⁹ The value of a competitive market to spread culture was delayed, and the dangers of increasing concentration in the right to cultivate our past were totally ignored. Indeed, precisely the opposite idea guided many in granting this latest extension—that it was a value to assure that our culture remain within the control of those who could be counted upon to develop it “best.”²⁰

Thus, in our appeal to the Supreme Court to strike this latest extension, our focus was upon the framers' values. We asked the Court to interpret the Constitution's grant of powers against the background that scholars such as Patterson had painted. We asked the Court to make sense of the peculiar and limited grant of authority in light of those values. We asked, in a word, for restoration of those values by limiting at least this most extreme example of copyright unmoored from its founding ideals.

Yet even among the Justices for whom fidelity to our framers' values is the first virtue of constitutional law, the lesson was lost. In its decision upholding the CTEA, the Court did not even try to explain the odd structure of Congress's grant of power. Its history is limited to the post-ratification history of periodic deference to Congress. The Court was asked to reaffirm the values of the framers, but its opinion shows no recognition of those values at all.

Were Patterson's a story written in Hollywood, ironically, it would have had a different ending. The man whose work gave birth to a movement would have had the chance, in his last days, to see that movement bear fruit. Yet the tempo

¹⁷ *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

¹⁸ Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

¹⁹ Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119 (2000).

²⁰ Brief of Amici Curiae Dr. Seuss Enters. et al. at 19, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618).

of constitutional law knows no metronome of dramatic climax. It works its pace on its own.

There will be a time soon when our tradition will confront again the conflict between the value of free culture that our framers gave us, and the very different values that now guild the regulation of speech we call copyright. That confrontation was avoided in *Eldred v. Ashcroft*. It cannot be avoided forever. When our tradition resolves this question again, the lessons of this teacher from the University of Georgia School of Law will finally have their proper effect. We have lost touch with ideals that were central to our founding. The work of this extraordinary scholar will guide their rediscovery.

