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**Reaffirming the Foundations of IP Rights:
Copyright and Patent in the Antebellum Era**

by

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In American constitutionalism the Antebellum era is important not for staking out new principles, but for developing and applying those principles already established in the written Constitution. Generally considered the period from before the Civil War back to the War of 1812, the Antebellum era saw the furtherance and consolidation of the Founding era's solicitude for protection of individual private property rights. Constitutionalism in the Antebellum era is particularly important for building upon the Constitution's foundational concepts of copyright and patent. In the time between the War of 1812 and the Civil War, the importance of protecting intellectual property (IP) rights was widely perceived and appreciated. As a result, the Antebellum era was a period of advancement for the protection of IP rights.

By the early 1800s, protection of copyright and patent rights had become established concepts within the American constitutional order. Article I, Section 8 of the U.S. Constitution included the IP Clause, empowering Congress to guarantee to authors and inventors the exclusive rights to the proceeds of their writings and inventions for limited periods. The First Congress enacted the Copyright and Patent Acts of 1790. Subsequent Congresses made minor amendments to the federal patent registration process and expanded copyright protection to historical prints,

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etchings, and engravings in 1793 and 1802, respectively. Authors and inventors began registering their writings and inventions under the new laws. And courts of law opened their doors to the first copyright and patent infringement lawsuits.

Over the next half-century, American constitutional concepts of copyright and patent protection were reinforced and expanded. Following in the thought paths of Founding era predecessors, prominent Antebellum era thinkers overwhelmingly regarded copyrights and patents in light of natural rights and property rights principles. According to this view, persons are by nature entitled to the fruits of their labor – that is, to their property. Government exists to safeguard individual rights to acquire, use, and transfer property according to just and equal laws.

This natural rights basis for copyright and patent is evidenced in the works of prominent law writers of the Antebellum era. In their highly influential legal treatises on American law and constitutionalism, Chancellor James Kent and Justice Joseph Story emphasized the protection of property rights as a core function of government. Both Kent and Story characterized copyrights and patents as private property acquired by an individual's intellectual labors. Story considered it "a poor reward, to secure to authors and inventors, for a limited period, only, an exclusive title to that, which is, in the noblest sense, their own property." Regarding the IP Clause's provision for securing copyrights and patent rights, Story contended "it is impossible to doubt its justice, or its policy, so far as it aims at their protection and encouragement." Kent similarly wrote in favor of the "justice and the policy of securing to ingenious and learned men the profit of their discoveries and intellectual labor."

A natural rights understanding of copyright and patent also figured prominently in U.S. Supreme Court and federal circuit court jurisprudence. Antebellum era decisions by the Supreme Court and lower courts developed legal doctrines for protecting IP rights and for ascertaining the limits of those rights. Court decisions by Chief Justice John Marshall and others applied to patents the vested rights doctrine – also rooted in natural rights principles. And the courts would apply legal doctrines related to real property to IP claims. Justice Story advocated a liberalized understanding of patent law that promoted IP protections for inventors. In this, Story was urged on by Kent and by Daniel Webster. As a statesman and as the most influential constitutional lawyer of the Antebellum era, Webster – often called the "defender of the Constitution" – was a defender of patents and for copyrights.

While the most notable Supreme Court decision of the era, *Wheaton v. Peters* (1834), rejected the idea of a perpetual common law copyright, it did so based principally on federalism considerations. Despite their differences, the Justices of the Supreme Court in *Wheaton v. Peters* agreed on the conceptual premise that an individual's rights to the fruit of his or her intellectual labors was the subject entrusted to Congress under the Constitution's Article I, Section 8 Intellectual Property Clause. Rather than rely on a substantive body of federal common law of copyright inherited from Britain, *Wheaton v. Peters* offered a more plausible and straightforward application of the IP Clause's provision that "The Congress shall have Power ... 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."

Legal doctrinal developments related to IP rights were paralleled by Congressional and Presidential actions reinforcing and expanding copyright and patent protections. The Antebellum era saw the first major revisions to federal copyright and patent laws since the 1790s. IP rights in copyrights and patents were enhanced in important respects. Legislative reforms expanded protection terms for both authors and inventors. And legislation improved administrative processes for copyright registrations and patent applications.

In 1831, Congress passed its first major revision to U.S. copyright laws since the First Congress. In conjunction with adoption of the Copyright Act of 1831, author and lexicographer Noah Webster vigorously urged a natural rights understanding of literary property. The 1831 Act expanded copyright terms, and permitted the heirs of authors to claim a right in the renewal of those terms. Additional legislation amending copyright laws passed in 1819, 1834, 1846, 1855, 1856, 1859, and 1861, supported by the likes of statesmen such as Henry Clay and Daniel Webster.

Likewise, in 1836, Congress passed its first major revision to U.S. patent laws since 1793, again at the urging of Clay and others. The Patent Act of 1836 officially established the United States Patent Office and provided for additional personnel to process patent applications. The 1836 Act also included expanded protection terms to inventors. Congress passed other patent law amendments in 1832, 1837, 1839, 1842, 1848, 1849, 1851, and 1861.

That Congress, in an era of property rights consciousness, would so frequently pass legislation congenial to copyright and patent protection, indicates the solicitude of lawmakers toward the IP rights of authors and inventors.

The fact that Jacksonian hostility to monopolies and perceived monopolies held currency at least among certain segments of the population in the decades leading up to the Civil War should not be overlooked. Yet, significantly, politicians who railed against monopolies endorsed IP rights at the same time. Avowed anti-monopolists such as Andrew Jackson, Martin Van Buren, and James K. Polk signed legislation expanding copyright as well as patent protections. They also signed individual patent approvals as part of their Presidential duties. That indicates a recognition of principled differences, rooted in the Constitution, between mere government favoritism in form of business or industry charters on the one hand and baseline protection of an individual's rights to the proceeds from his or her writings or inventions on the other.

All told, Antebellum era legal treatises, Supreme Court and federal circuit court jurisprudence, as well as adoption and implementation of Congressional legislation evidence a shared conceptual understanding about copyright and patent protection rooted in natural rights principles. In this respect, Antebellum era thinking marked the continuation of a consistent line of thought about the basic nature of intellectual property rights in the American constitutional order. Recognizing the principled commitment to copyright and patent protection that permeated this important period of history should lead to a renewed understanding and appreciation that those enduring intellectual property rights principles remain true today.

The Natural Rights Basis for Private Property in the Antebellum Era

In the early years of the 19th Century, the U.S. Constitution's provisions on the whole had received only modest interpretations and applications by the executive, legislative, and judicial branches of government. During the half-century to follow, all or nearly all of the Constitution's structural principles and terms found occasion for interpretation and application by the three branches. State government institutions as well as constitutional and legal thinkers in the public square also examined and debated constitutional meaning during the decades that bridged the War of 1812 and the Civil War.

In fleshing out the basic meaning of the Constitution's many clauses, Antebellum era thinking built upon Founding era understanding that it is a fundamental purpose of government in a free society to protect individual rights of private property. This is the subject of our *Perspectives from FSF Scholars* paper, "Constitutional Foundations of Intellectual Property." It is a principle of the Declaration of Independence, enshrined in the Constitution, that all persons possess a right to their own labor and to the fruits of their own labor. In turn, that right is safeguarded from unjust deprivation by rule of law principles embodied in the Constitution, including the 5th Amendment's provisions regarding due process of law and just compensation. Antebellum thinking reaffirmed this natural rights' basis for the institution of private property and its protection under law.

Professor James W. Ely, Jr., provided an overview of the development of property rights in the Antebellum era in his book *The Guardian of Every Other Right: A Constitutional History of Property Rights*. According to Ely, "[l]egal scholarship reinforced the importance of property rights in antebellum jurisprudence." Ely specifically identified the legal scholarship of New York Chancellor James Kent. Often known as "the American Blackstone" or the "father of American jurisprudence," Kent wrote "the popular and influential *Commentaries on American Law* (1826-1830), providing a definitive interpretation of American law" and resulting in "an enormous impact on subsequent legal developments." Kent's work was strongly supportive of the view that the acquisition and enjoyment of private property ranked among the "absolute rights of individuals" that government was obligated to protect. As Professor Ely has summed up, "Kent believed that the security of property ownership and corporate enterprise encouraged economic growth, and consequently he emphasized the constitutional restrictions on governmental authority over property."

A paradigmatic Antebellum era restatement of the natural rights basis for property is provided in Kent's *Commentaries*:

The sense of property is inherent in the human breast, and the gradual enlargement and cultivation of that sense, from its feeble force in the savage state, to its full vigor and maturity among polished nations, forms a very instructive portion of the history of civil society. Man was fitted and intended by the Author of his being for society and government, and for the acquisition and enjoyment of property. It is, to speak correctly, the law of his nature; and by obedience to this law, he brings all his faculties into exercise, and is enabled to display the various and exalted powers of the human mind.

The role of government in securing rights of property that individuals possess by nature is amplified by the equally esteemed Antebellum era academic and jurist, Justice Joseph Story. Writing for a unanimous Supreme Court *Terrett v. Taylor* (1815), Justice Story described “a great and fundamental principle of republican government, the right of the citizens to the free enjoyment of their property legally acquired.” Similarly, Story wrote in *Wilkinson v. Leland* (1829) that “[t]he fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred.” Judicial biographer Kent Newmyer described Story’s outlook regarding the governmental role in protecting property in no uncertain terms: “Security of property rights, including the right to deploy property freely and enjoy fully the fruits of one’s deployment, was the foundation of the whole dynamic moral structure of free enterprise and of free government itself.”

Supreme Court and federal circuit court jurisprudence solidified and extended those property rights principles in cases involving the Constitution and federal laws. The primacy of property rights in America’s constitutional order was an indispensable feature of the judicial opinions of Story’s senior colleague, Chief Justice John Marshall. Marshall’s tenure as Chief Justice lasted from 1801 to 1835. During most of that span, Marshall possessed an uncanny ability to obtain a consensus among his judicial colleagues. The length of his tenure as well as his congeniality heightened the prestige of the Supreme Court as a co-equal branch and similarly increased popular respect for the federal judiciary’s judgments – even when subject to public criticism. As a result, the emphasis on property rights in Marshall’s countless opinions for the High Court and as a federal circuit judge bolstered the institution of private property and indelibly shaped constitutional law for decades to come.

As Ely has explained, “To Marshall, property ownership both preserved individual liberty and encouraged the productive use of resources. Security of private property promoted the public interest by quickening commercial activity and thereby increasing national wealth.” But Marshall’s most basic assumptions about the primacy of property rights in American constitutionalism were widely shared by other jurists. In Ely’s words, “Antebellum legal culture placed a high value on the security of property. Despite their differences, the leading jurists of this period, Marshall, [Chief Justice Roger] Taney, Story, and Kent, envisioned respect for property rights as the basis for both ordered liberty and economic development.”

Indeed, respect for property rights was vigorously pressed at the bar of the Supreme Court. Perhaps no constitutional lawyer of the Antebellum era put greater stress upon the primacy of property rights than Daniel Webster – the “Defender of the Constitution.” According to Webster biographer Maurice Baxter: “Like most of his contemporaries, he believed there were universal laws of natural justice anterior to positive, man-made laws... Foremost among these first principles, he thought, was the right to hold property.” Webster fervently contented that the Constitution confirmed fundamental principles such as the right to own and use property. He urged constitutional protections for property in numerous appearances before the Supreme Court. As Baxter explained: “In the formative years from the end of the War of 1812 through the famous Compromise of 1850, no lawyer had more effect upon the United States Supreme Court...than Daniel Webster.”

Webster's profound impact on Antebellum constitutional jurisprudence regarding property rights protections is aptly summed up by Professor Baxter:

By mid century Webster could feel assured by the steadily expanding body of precedents available for the protection of property. In the cases he and his colleagues had argued they had asked the Court to go very far in that end. Often it had consented. Not only did the contract clause of the Constitution become a trustworthy shield for private rights of many kinds against state power, but the common law and principles of natural justice were valuable supplements. Inherent judicial power, exclusive of constitutional and statutory authority, was also a possible instrument for the purpose. But usually there were laws and public policy, state or national, upon which to rely.

During the Antebellum era, development of constitutional protections for private property rights was particularly evident in the Supreme Court's decisions interpreting the Constitution's Contracts Clause contained Article I, Section 10. In leading decisions such as *Fletcher v. Peck* (1810) and *Dartmouth College v. Woodward* (1819) – the latter argued by Webster – Chief Justice Marshall's opinions for the Supreme Court offered a broad construction of the Contracts Clause. Those decisions extended strong constitutional protections to contractual obligations – and the property transfers and interests comprising those obligations – from infringement by state legislation. Occasional Supreme Court and circuit court opinions by Justice Story and other Justices also emphasized a broad construction of the Contracts Clause to protect property interests.

It was significantly – but by no means exclusively – in the context of contracts that the Court under Marshall developed the vested rights doctrine in American constitutional law. According to Professor Ely, the vested rights doctrine is rooted in “the precepts of natural law.” As he has explained, the Supreme Court:

[A]dopted the doctrine of vested rights to protect established property rights from legislative interference. According to the doctrine of vested rights, property ownership was a fundamental right. Laws that disturbed such rights were void because they violated the general principles limiting all constitutional governments.

Regarding the Fifth Amendment's property protections, Ely has observed that “like the takings clause, the due process clause of the Fifth Amendment did not play a large role in the constitutional safeguarding of economic interests before the Civil War.” During this era, however, both constitutional clauses received interpretations friendly to property rights that laid the groundwork for future development of property protections in constitutional law.

The federal government seldom exercised eminent domain during this period, so there was little occasion for considering the Takings Clause. And in *Barron v. Baltimore* (1833), Chief Justice Marshall's opinion for the Supreme Court expressly concluded that the Fifth Amendment restricted only the federal government, not the states. The implication of Marshall's opinion was that the entire Bill of Rights limited only federal power. Thus, federalism considerations also

played into the modest role of the Takings Clause during this era. Nonetheless, Professor Ely has pointed out that Webster “attacked legislative discretion over eminent domain and urged judicial supervision by the federal courts” in *West River Bridge Company v. Dix* (1848). “Webster’s plea was unheeded before the Civil War, but later in the nineteenth century the Supreme Court began to fashion the takings clause of the Fifth Amendment into a more powerful shield for property owners.”

While the Fifth Amendment’s Due Process Clause was only modestly interpreted and applied during this time, Ely has observed that by the end of that era, “Federal courts also adopted the view that due process limited legislative discretion.” This is perhaps best reflected in *Murray’s Lessee v. Hoboken Land and Improvement Co.* (1856), wherein it was recognized that the Due Process Clause is “a restraint on the legislative as well as the executive and judicial powers of government, and cannot be so construed as to leave Congress free to make any process ‘due process of law,’ by its mere will.”

Not to be overlooked, Baxter has pointed out that “the rationale of vested rights became closely associated with separation of powers between legislative and judicial departments,” and therefore associated with due process of law. Particularly for Webster, in cases involving private rights of property, “‘due process of law’ demanded that the property holder have a fair trial in the circumstances and with legal protection that a politically minded legislature could never afford.”

Of course, basic considerations of the nature of property rights and the importance of safeguarding those rights under law were by no means confined to the Supreme Court. During this period, state courts also demonstrated a commitment to natural rights and property rights principles. That commitment was embodied in the development of state court jurisprudence protective of property rights.

On this score, Professor Ely has recounted:

Following *Barron*, the states took the lead in fashioning the contours of eminent domain... Reflecting the influence of the Fifth Amendment, the constitutions of the newer states, such as Ohio and Tennessee, usually included a just compensation provision. Moreover, even when the state constitution did not expressly provide for payment, state courts reasoned that just compensation must be made under the principles of common law or natural justice. Thus, the prominent New York jurist James Kent, in *Gardner v. Village of Newburgh* (1816) equated due process with natural equity and barred an uncompensated taking of property.

And further to the point:

Because property ownership had long been closely associated with individual liberty, by mid-nineteenth century judges increasingly invoked substantive due process to defend property rights against economic regulations. Courts broadly reviewed and struck down laws deemed unreasonable as deprivations of property without due process of law.

Importantly, regard for property rights rooted in natural rights provided the crucial context in which Antebellum legal jurists developed constitutional legal doctrines for the protection of copyright and patent.

Antebellum Legal Treatises Reflect Property Rights Understanding of IP

The natural rights understanding of the basis for copyright and patent is evidenced in the works of highly influential legal treatises of the Antebellum era. One of the most enduring of such treatises is Justice Joseph Story's *Commentaries on the Constitution* (1830). Story's *Commentaries* has been described by judicial biographer Kent Newmyer as "the logical successor to the *Federalist Papers*." According to Newmyer, the response to Story's *Commentaries* – even from critics – "marked them at once as the leading nationalist work on the Constitution, a position of authority that remained unchallenged throughout the nineteenth century." In 1840, Story published an abridgement of his *Commentaries* for popular consumption for non-lawyers and for use in schools, titled *A Familiar Exposition of the Constitution of the United States*.

In the *Exposition's* section on copyrights and patents, Story quotes the IP Clause and paraphrases Federalist No. 43 regarding the utility of granting Congress the power to secure IP rights and the ineffectualness of leaving that power to the states. What then follows is one of Story's most succinct statements about justification for recognizing and protecting copyrights and patents:

No class of men are more meritorious, or are better entitled to public patronage, than authors and inventors. They have rarely obtained, as the histories of their lives sufficiently establish, any due encouragement and reward for their ingenuity and public spirit. They have often languished in poverty, and died in neglect, while the world has derived immense wealth from their labors, and science and the arts have reaped unbounded advantages from their discoveries. They have but too often possessed a barren fame, and seen the fruits of their genre gathered by those, who have not blushed to purloin, what they have been unable to create. It is, indeed, but a poor reward, to secure to authors and inventors, for a limited period, only, an exclusive title to that, which is, in the noblest sense, their own property; and to require it ever afterwards to be dedicated to the public. But, such as the provision is, it is impossible to doubt its justice, or its policy, so far as it aims at their protection and encouragement.

As indicated earlier, Chancellor James Kent authored his own multi-volume treatise that was widely read and held sway for decades to follow. Historian Daniel Walker Howe has written that Kent "spread the influence of Story's judgments through his famous *Commentaries on American Law*." Lecture 36 of Kent's *Commentaries* is devoted to the subject of title to personal property by original acquisition. In Kent's words, "[t]he right of original acquisition, may be comprehended under the heads of occupancy, accession, and intellectual labor." Kent succinctly described the acquisition of property by intellectual labor as follows:

Another instance of property acquired by one's own act and power, is that of literary property, consisting of maps, charts, writings, and books; and of mechanical inventions, consisting of useful machines or discoveries, produced by the joint result of intellectual and manual labor. As long as these are kept within the possession of the author, he has the same right to the exclusive enjoyment of them, as of any other species of personal property; for they have proprietary marks, and are a distinguishable subject of property. But when they are circulated abroad, and published with the author's consent, they become common property, and subject to the free use of the community. It has been found necessary, however, for the promotion of the useful arts, and the encouragement of learning, that ingenious men should be stimulated to the most active exertion of the power of genius, in the promotion of works useful to the country, and instructive to mankind, by the hope of profit, as well as by the love of fame, or a sense of duty. It is just that they should enjoy the pecuniary profits resulting from mental as well as bodily labor. We have, accordingly, in imitation of the English jurisprudence, secured by law to the authors and inventors, for a limited time, the right to the exclusive use and profit of their productions and discoveries. The jurisdiction of this subject is vested in the government of the United States, by that part of the constitution, which declares, that Congress shall have the power '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.' This power was very properly confided to Congress, for the states could not separately make effectual provision for the case.

Of course, the above-quoted passages served as introductions to the particulars of copyright or patent, primarily under British common law or under Congressional statutes. During the Antebellum era, the Supreme Court and federal circuit courts would address constitutional issues related to the scope of copyright and patent protection pursuant to the IP Clause. At its early stages of development, American constitutional jurisprudence regarded both copyright and patent as property rights protected by law.

Antebellum Copyright Jurisprudence Reinforces Property Rights Understanding of IP

The Supreme Court addressed the nature and scope of copyright protection accorded to authors under the IP Clause in *Wheaton v. Peters* (1834). Oddly enough, the case involved a dispute between two different Supreme Court reporters regarding copyrights in published Supreme Court opinions and accompanying publisher notes. Then-Supreme Court reporter Richard Peters published a multi-volume edition report of Supreme Court cases that included cases reported by its former reporter, Henry Wheaton. A lawsuit was filed by Wheaton, who sought a permanent injunction against publication of the previously published materials. Co-Counsel Daniel Webster and Elijah Paine, Jr., a future New York judge, represented Wheaton before the Supreme Court.

Paine's argument in the case traced the natural rights' logic for literary property:

It would seem needless to discuss those general principles on which an author's property is based. They are the same as give man a title to any species of property.

An author acquires a property in his works, because they are the product of his own labour, bestowed with the declared and known intention of appropriating such product exclusively to himself. They are his, because the natural law makes it necessary for man to labor for his subsistence, and therefore secures to him what he thus acquires in obedience to its commands. They are his, because the law forbids a dependance upon casual acquisitions, but enjoins the duty of providence, and of course protects those stores which by labour he seeks to lay by for the future. They are his, because the object of all labor is acquisition; because man must depend upon his labor alone for subsistence, and the products of his labour, are therefore, absolutely necessary to his being. They are his, because unless he acquires the right to publish them, he acquires nothing, but his labour is wholly unproductive. They are his, because civil society grows out of the natural wants of men, and its object is by every possible means, to enforce, aid, and extend those natural laws which the wants of man have ordained. They are his, because they may by law be secured to him, and be protected without difficulty, and because he may possess and enjoy them, without mischief to society, and without any possible injury to another. But above all, they are his, because the labour which produces them is meritorious, and while it secures a subsistence for himself, promotes directly and inconceivably the happiness and good of mankind.

Although Daniel Webster previously expressed skepticism of the idea of a perpetual common law copyright in his capacity as a Congressmen, his role as a legal advocate and duty to his client in *Wheaton v. Peters* best accounts for his subsequent alignment with the perpetual copyright claims advanced by Paine. Regardless of his mixed views on the matter of a perpetual federal common law copyright, throughout his careers as both a statesman and as a lawyer, Webster consistently traced copyright back to its source in a person's natural right to the proceeds of their intellectual labor. And Webster consistently linked Congress's constitutional power to secure copyright to natural right. As he argued to the Court in *Wheaton v. Peters*, "[t]he right of an author to the production of his mind is acknowledged every where. It is a prevailing feeling, and none can doubt that a man's book is his book – is his property. It may be true that it is property which requires extraordinary legislative protection, and also limitation. Be it so."

The Justices were unanimous in concluding that Supreme Court opinions were not private property and therefore not copyrightable – although the reporter's case notes could be copyrighted. But *Wheaton v. Peters* was significantly complicated by the fact that Wheaton did not follow the strictures of the statute regarding copyright registration. Instead, Wheaton asserted a perpetual *federal* common law copyright. As a result, *Wheaton v. Peters* raised issues involving ambiguities about British common law copyright, the reception of British common law in the law of American colonies-turned-states, and federalism principles. In addressing those issues, the Court split 4-2 in reaching its decision. And precise holding and meaning of the decision has been debated by scholars.

The complicating issues present in *Wheaton v. Peters* make it easy to overlook the Justices shared recognition of a fundamental premise: that copyright is a property right rooted in a person's right to the fruits of his or her labor and protected by the constitutionally-sanctioned laws.

Writing for the majority, Justice John McLean readily acknowledged that “[t]he argument that a literary man is as much entitled to the product of his labor as any other member of society cannot be controverted.” Of course, recognition of that premise did not provide an automatic result in the case, but would depend upon laws that exist regarding property. As McLean explained: “That every man is entitled to the fruits of his own labor must be admitted, but he can enjoy them only, except by statutory provision, under the rules of property, which regulate society and which define the rights of things in general.”

Based on his review of British common law precedents, McLean wrote: “[t]hat an author at common law has a property in his manuscript, and may obtain redress against anyone who deprives him of it or by improperly obtaining a copy endeavors to realize a profit by its publication cannot be doubted.” McLean thus rejected the idea that an author enjoyed any *perpetual* common law copyright in published materials. However, the scope of any common law right was ultimately beside the point for Justice McLean because:

It is clear there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states, each of which may have its local usages, customs, and common law. There is no principle which pervades the union and has the authority of law that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our federal system only by legislative adoption.

When, therefore, a common law right is asserted, we must look to the state in which the controversy originated...

Accordingly, Justice McLean left the door open to *state* common law copyright claims. But no reported cases involving common law copyright claims existed in Pennsylvania. McLean thus concluded that Pennsylvania never adopted British common law copyright. For the Court’s majority, McLean ruled that it was the laws passed by Congress pursuant to the IP Clause that created a federally-protected copyright.

The Court in *Wheaton v. Peters* rejected Justice Smith Thompson’s contentions that authors possessed a perpetual federal common law copyright in their publications, and that a remedy for injunction based on that same perpetual right was not superseded by Congressional legislation. But the Court’s majority shared the dissent’s basic recognition of the natural rights’ basis of copyright. Wrote Thompson:

The great principle on which the author's right rests is that it is the fruit or production of his own labor, and which may, by the labor of the faculties of the mind, establish a right of property as well as by the faculties of the body, and it is difficult to perceive any well founded objection to such a claim of right. It is founded upon the soundest principles of justice, equity, and public policy.

In his dissent, Thompson elaborated on how copyright is to be understood as a right a person possesses by nature. Thompson proceeded to cite notes made by Edward Christian in his edition of Blackstone's *Commentaries on the Laws of England*:

Nothing, says he, is more erroneous than the practice of referring the origin of moral rights and the system of natural equity to the savage state which is supposed to have preceded civilized establishments, in which literary composition, and, of consequence, the right to it, could have no existence. But the true mode of ascertaining a moral right is to inquire whether it is such as the reason, the cultivated reason, of mankind must necessarily assent to. No proposition seems more conformable to that criterion than that everyone should enjoy the reward of his labor, the harvest where he has sown, or the fruit of the tree which he has planted. Whether literary property is *sui generis* or under whatever denomination of rights it may be classed, it seems founded upon the same principle of general utility to society, which is the basis of all other moral rights and obligations. Thus considered, an author's copyright ought to be esteemed an invaluable right, established in sound reason and abstract morality.

It is unnecessary, for the purpose of showing my views upon this branch of the case, to add anything more. In my judgment, every principle of justice, equity, morality, fitness, and sound policy concurs in protecting the literary labors of men to the same extent that property acquired by manual labor is protected.

In sum, while *Wheaton v. Peters* rejected the idea of a perpetual federal common law copyright, it did so principally on the basis of an anti-federal common law rationale rather than any anti-copyright rationale.

Indeed, the majority's conclusion in *Wheaton v. Peters* appears to be the most straightforward way of understanding the operation of the IP Clause's grant to Congress of power to secure to authors the exclusive rights to their proceeds "for limited times." While rejecting a perpetual federal common law copyright, the majority nonetheless regarded a natural rights understanding as the point of reference for the Constitutional Convention and First Congress in establishing federal copyright protection. The majority agreed with the dissent in reaffirming a natural rights basis for federal copyright protection under law as directed by the terms of the IP Clause.

For his part, Justice Story made an enduring contribution to American copyright law in this same era. Story's circuit court opinion in *Burton v. Folsom* (1841) set the groundwork for what is today known as the "fair use" doctrine. At issue in *Burton* was Charles W. Upham's publication of papers of George Washington. Harvard historian Jared Sparks had been given exclusive authorization to access and publish George Washington's papers by Justice Bushrod Washington – nephew of the First President – and by Chief Justice John Marshall – author of the first major biography of the President. Sparks subsequently published his own biography of Washington and likewise edited and published *The Writings of George Washington*, consisting of twelve volumes of Washington's papers. But Upham relied on Sparks' organization and publication of Washington's previously unpublished papers and essentially repackaged and republished 319 of Washington's letters in his own book, *Life of Washington*.

In addressing the question of whether that republication constituted copyright infringement, Story described a basic analytical framework for ascertaining whether an abridgement or citation of an original work was legitimately designed for purposes of fair and reasonable criticism on a matter of public importance. As Story stated in *Burton*, a court must “look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work.”

As Story judicial biographer Kent Newmyer summed up the competing interests confronting Story in *Burton*:

In copyright law Story ... confronted the tension among private property, public interest, and republican values. No one seriously doubted that literary production was property worthy of protection and encouragement of the law. But republican society, with its goal of an active and informed citizenry, put a premium on the dissemination of ideas. Story fully agreed but as an author also knew firsthand the beneficial effect of private property in literary production.

Story’s framework would endure in copyright jurisprudence until Congress codified it in the Copyright Act of 1976.

Antebellum Patent Jurisprudence Reinforces the Property Rights Understanding of IP

The nature and scope of patent protection accorded to inventors pursuant to the IP Clause was also the subject of many Supreme Court and lower federal court decisions in the Antebellum Era. Based on his scholarly review of the era’s jurisprudence, Professor Adam Mossoff has concluded that “nineteenth-century case law dating back to the antebellum period unequivocally classified patents as property rights.” In particular, early Congresses and courts “invoked natural-rights justifications for property in defining and adjudicating patent rights.” They also “explicitly relied on *real property* case law, and often invoked property concepts, such as trespass and the inchoate-choate right distinction, in adjudicating patent cases.”

Early circuit court opinions by Chief Justice Marshall and Justice Washington identify patents as vested property rights. Further, as Professor Mossoff has explained:

In 1843 in *McClurg v. Kingsland*, the Supreme Court began laying the groundwork for applying the Takings Clause to the property rights secured in patents, as distinguished from monopoly franchises and other similarly limited property rights. Although not a takings case, the *McClurg* Court held that Congress could not *retroactively* limit property rights that had been secured in now-repealed patent statutes. Justice Baldwin’s opinion for the unanimous Court acknowledged that “the powers of Congress to legislate upon the subject of patents is plenary by the terms of the Constitution.” Nonetheless, he concluded that a “repeal [of a patent statute] can have no effect to impair the *right of property* then existing in a patentee, or his assignee, according to the well-

established principles of this court.” In sum, a patent issued under now repealed statutes vested property rights in an inventor, so that “the patent must therefore stand as if the [now-repealed] acts . . . remained in force.”

Patent jurisprudence was to a significant degree shaped by Justice Story. This was a result of the depth of legal insight that Story brought to bear in cases heard before him amidst a career on the Supreme Court and riding circuit judge that spanned from 1811 to 1845. As Newmyer has written:

Story grappled with patent law in some forty opinions rendered throughout his long tenure on the Court. Neither in these opinions nor in his anonymous note on patents, which appeared in Wheaton’s reports in 1818, nor in his *Commentaries on the Constitution* did he deal theoretically or comprehensively with the subject. He had no doubt, however, that the law should serve the public by encouraging invention. He also accepted without question the notion that invention and writing were species of property. The need was clear. The problem was, given the sporadic and fragmentary format of case law, to fashion a body of rules that was clear enough for judges to follow and that also recognized both property rights (themselves conflicting) and community interest—all without the guidance of settled precedent.

According to Newmyer, in *Ames v. Howard* (1833), *Blanchard v. Sprague* (1839), *Wyeth v. Stone* (1840), and other cases, “Story did what Webster suggested in 1829” and “Story moved away from undue reliance on English law in the direction of an American patent law that would favor inventors and, following the spirit of the Constitution, serve the national interest by promoting technical progress.” In the end, “Story’s authority (along with his copious exposition of doctrine) was of immense importance in giving legitimacy to the new position. Fairly or not, he was identified by contemporaries as the pioneer in the liberalization of American patent law.”

In *Ames v. Howard*, Story explained his liberalized outlook toward patents as a protected form of constitutional property:

Patents for inventions are not to be treated as mere monopolies, odious to the eyes of the law, and therefore not to be favored, but on the contrary to be construed with the utmost rigor as *strictissimi juris*. The Constitution of the United States, in giving authority to Congress to grant such patents for a limited period, declares the object to be to promote the progress of science and the useful arts, an object as truly national and meritorious, and well founded in public policy, as any that can possibly be the object of national protection. Hence it has always been the course of the American courts (as it has latterly been that of the English courts also) to construe these patents fairly and liberally, and not to subject them to any over-nice and critical refinements. The object is to ascertain what, from the fair scope of the words, is the nature and extent of the invention claimed by the party, and when the nature and extent of the claim is apparent, not to fritter away his rights upon formal and subtle objections of a purely technical character.

Story's zeal for the rights of inventors was perhaps matched by Daniel Webster. Contrasting English decisions with American law, Webster argued before the Supreme Court in *Pennock v. Dialogue* (1829) that:

In the courts of the United States, a more just view has been taken of the rights of inventors. The laws of the United States were intended to protect those rights, and to confer benefits; while the provisions in the statute of England, under which patents are issued, are exceptions to the law prohibiting monopolies. Hence, the construction of the British statute has been exceedingly straight and narrow, and different from the more liberal interpretation of our laws.

Webster made his final oral argument before a court of law in a patent case presided over by Justice Robert Grier. In *Goodyear v. Day* (1852), also known as the "India Rubber Case," Webster declared:

Invention, as a right of property, stands higher than inheritance or devise, because it is a personal earning. It is more like acquisitions by the original right of nature. In all these there is an effort of mind as well as muscular strength. Upon acknowledged principles, rights acquired by invention stand on plainer principles of natural law than most other rights of property. Blackstone, and every other able writer on public law, thus regards this natural right and asserts man's title to his own invention or earnings. The right of an inventor to his invention is no monopoly. It is no monopoly in any other sense than as a man's own house is a monopoly. A monopoly, as it was understood in the ancient law, was a grant of the right to buy, sell, or carry on some particular trade, conferred on one of the king's subjects, to the exclusion of all the rest. Such a monopoly is unjust. But a man's right to his own invention is a very different matter. It is no more a monopoly for him to possess that, than to possess his own homestead.

In addition to Webster, James Kent also offered Story reinforcement on the matter of patents. Scholarship by Camilla A. Hrdy has shown that Kent recognized the power of states to grant patent rights to importers of foreign inventions. Hrdy has outlined Kent's concurrent state powers rationale regarding patents, based on a reading of Federalist No. 32. And Hrdy has likewise observed that Story favorably cited Kent's views in his *Commentaries on the Constitution* and in his judicial opinions.

On the other hand, some evidence exists that Chief Justice Roger Taney did not share Story, Webster, and Kent's enthusiasm for patents as constitutionally-protected property rights. In *Gaylor v. Wilder* (1850), Taney reaffirmed that "the discovery of a new and useful improvement is vested by law with an inchoate right to its exclusive use, which he may perfect and make absolute by proceeding in the manner which the law requires." Yet in some later opinions Taney strayed from the prevalent property rights understanding of patents. According to Professor Mossoff, on occasion Taney ignored express patent statutes and sought to limit patent protections according to Jacksonian political concerns about monopoly franchises. For instance, in *Bloomer v. McQuewan* (1852), Taney regarded patents as government-granted franchises that secure only "a right to exclude." And in *O'Reilly v. Morse* (1854), Taney's opinion for a divided court

invalidated part of Samuel Morse's patent for the electro-magnetic telegraph. As Professor Mossoff reminds us, Taney achieved infamy for his willingness to bring his political preferences to bear in deciding legal claims in *Dred Scott v. Sanford* (1857).

Taney's occasional aberrations aside, Antebellum era jurisprudence overwhelmingly retained and reinforced the understanding that patents are constitutional property rooted in an inventor's natural right to the fruits of his or her mental labors.

Antebellum Legislation Bolsters Copyright Protections

Regard for property rights rooted in natural rights also supplied the crucial context in which Antebellum statesmen passed legislation that extended protections for IP and improved administrative processes for securing IP rights. That intellectual context was also prevalent when Congress passed the Copyright and Patent Acts of 1790 – subjects addressed in our prior *Perspectives from FSF Scholars* essay, “Constitutional Foundations of Copyright and Patent in the First Congress.” The Antebellum era saw the first major revisions to those early federal copyright and patent laws. In 1831, Congress made its first major revision to U.S. copyright laws since the First Congress. Passage of the Copyright Act of 1831 was a result of the persistence of author and lexicographer Noah Webster, often regarded as “the Father of Copyright” in America.

The efforts of Noah Webster to advance copyright protection in state legislatures, in the Confederation Congress, and in the Philadelphia Convention of 1787 were recounted in our *Perspectives* paper “Literary Property: Copyright's Constitutional History and its Meaning for Today.” In particular, Webster lobbied George Washington, James Madison, and others to include a provision for securing copyright in the proposed U.S. Constitution.

Webster made use of the provisions of the copyright protections enacted by Congress, registering his own works. This includes Webster's cultural achievement and greatest life's work, *The American Dictionary of the English Language* (1828). Yet Webster pursued his literary efforts with trepidation. He feared competitors would republish or otherwise plagiarize his efforts and thereby reap the proceeds of his labors. He regarded the existing law's fourteen year copyright protection term insufficient for recouping the costs of his intensive labors. As Webster explained in an 1829 letter to James Madison, his dictionary was:

[A] work which has cost me twenty years of labor, & from twenty five to thirty thousand dollars. Whether my fellow citizens are to be benefited to that amount or to any amount, I cannot determine; but certain I am, that I can never be reimbursed by the sales during my life; though possibly a more liberal copy-right law might bring to my heirs something like an equivalent.

By the time of his letter to Madison, Webster had already urged legislative revision to American copyright law. In an 1826 letter to his cousin, Daniel Webster, Noah wrote: “I sincerely desire that, while you are a member of the House of Representatives in Congress, your talents may be exercised in placing this species of property on the same footing as all other property as to exclusive right and permanence of possession.” In his letter, Noah deemed “contrary to all our best established principles of right and property,” the British House of Lords' closely divided

decision in 1774 that authors possessed a common law right only in their unpublished manuscripts or first print. Yet Noah also called attention to the fact that the British Parliament had since extended copyright to authors for twenty-eight years. Noah went so far as to insist that authors enjoyed a perpetual copyright in their works. Accordingly, Noah closed his letter by expressing his wish that Congress would “pass a new act, the preamble to which shall admit the principle that an author has, by common law or natural justice, the sole and *permanent* right to make profits by his own labor, and that his heirs and assigns shall enjoy the right, unclogged with conditions.”

In his reply, Daniel Webster pointed out the House Judiciary Committee was considering important changes to the copyright law. Regarding Noah’s expressed views about the grounds for copyright in the right that a person by nature possesses to their own act intellect and creating, Daniel responded, “Your opinion, in the abstract, is certainly right and incontrovertible. Authorship is, in its nature, ground of property.” Still, Daniel acknowledged that British common law precedent suggesting copyright is not perpetual was persuasive to many. To this, Daniel added:

But after all, property, in the social state, must be the creature of law; and it is a question of expediency, high and general, not particular expediency, how and how far, the rights of authorship should be protected. I confess frankly [sic], that I see, or think I see, objections to make it perpetual. At the same time I am willing to extend it further than at present, and am fully persuaded that it ought to be relieved from all charges, such as depositing copies, &c.

For the most obvious objections to perpetual copyright that Daniel referred, one need look no further than the text of the Constitution’s IP Clause, which only guarantees to authors and inventors exclusive rights to proceeds “for limited times.” Ultimately, no copyright revision would pass Congress that term. But according to David Micklethwait in *Noah Webster and the American Dictionary*, “for more than four years, following his exchange of letters with Daniel Webster, he was an active and persistent lobbyist for improved statutory protection.”

In 1829, Noah Webster’s son-in-law William Ellsworth was elected to Congress and appointed to the House Judiciary Committee. The son of Oliver Ellsworth – Senator in the First Congress and former Chief Justice – Congressman Ellsworth referred to the Committee a petition by Webster seeking an extension of the terms of copyrights for Webster’s *American Spelling Book*.

Webster travelled to Washington, D.C. in December 1830. On December 17, Ellsworth’s bill to extend copyright protection to twenty-eight years with an extension available for living authors or their heirs for fourteen more years, was sent to the full House. The bill’s report tracked with Webster’s own thinking about the principled basis for “literary property”:

Upon the first principles of proprietorship in property, an author has an exclusive and perpetual right, in preference to any other, to the fruits of his labor. Though the nature of literary property is peculiar, it is not the less real and valuable. If labor and effort in producing what before was not possessed or known, will give title, then the literary man has title, perfect and absolute, and should have his

reward: he writes and he labors as assiduously as does the mechanic or husbandman. The scholar, who secludes himself, and wastes his life, and often his property, to enlighten the world, has the best right to the profits of those labors.

By this time, Webster's spelling books were well known to many and his dictionary had been published. During his stay in Washington, Webster was celebrated at the White House where he dined at the right hand of President Andrew Jackson. On January 3, 1831, Webster delivered a lecture in the Hall of the Representatives promoting copyright. And on January 7, the House passed Congressman Ellsworth's copyright bill without a division. By month's end, Ellsworth's bill passed the Senate, whose membership then included Daniel Webster. And in February President Jackson signed the Copyright Act of 1831 into law.

Noah Webster later penned an essay "Origin of Copy-Right Laws in the United States," published in 1843. There Webster recounted both his Confederation-era efforts on behalf of securing copyrights, as well as his lobbying of Congress in 1830-31. Webster's short account acknowledged the roles that Ellsworth played in the House and Daniel Webster played in the Senate in securing the Act's passage.

For his part, Ellsworth would later be elected governor of Connecticut and serve as a judge. In 1843, he would become executor of Webster's estate, which included a vested right in Webster's surviving children for the renewal term of Webster's *American Dictionary*. Ellsworth would also write a short work, *Copy-Right Manual: Designed for Men of Business, Authors, and Members of the Legal Profession* (1862). In that brief writing, Ellsworth described copyright as a form of literary property as "the result of labor, invention and study." Ellsworth defended "exclusive right to publish for sale his thoughts and sentiments, peculiarly arranged and clothed in his own language."

In his *Copy-Right Manual*, Ellsworth credited the persistence of Noah Webster, more than anyone in or out of Congress, for securing passage of the Copyright Act of 1831. He also referenced subsequent copyright legislation passed by Congress in 1834 and 1846, which involved minor amendments regarding processes for recordation of copyright assignments and for copyright registration and deposit requirements, respectively.

Several minor amendments were made to American copyright law by Congress in the Antebellum era. Those revisions spanned nearly the entire period between the War of 1812's conclusion and the Civil War's onset:

- 1819 – provided federal circuit courts with original jurisdiction in copyright cases;
- 1834 – required recordation of assignments of copyrights;
- 1846 – required authors and proprietors of copyrighted works to deposit copies with the Smithsonian Institution and the Library of Congress in addition to the Secretary of State;

- 1855 – provided free mailing privileges for all copyright deposits;
- 1856 – granted to copyright holders of dramatic compositions the sole right of public performance;
- 1859 – provided for removal of copyright deposits from the State Department to the Department of the Interior;
- 1861 – provided for appeals to the Supreme Court in copyright cases regardless of the amount in controversy.

Taken together, these legislative enactments surely evidence Congress's regard for protecting inventors' property rights and for promoting the nation's technological progress and economic welfare.

Antebellum Legislation Bolsters Patent Rights Protections

The first half-of the 19th Century likewise saw the first major revisions to federal patent law since the First Congress. IP rights in patents were granted expanded protection terms. Administrative requirements and processing for patent applications were also improved.

The Patent Act of 1836 erected the basic apparatus upon which today's patent system operates. Under the Act, the U.S. Patent Office was officially established within the State Department. The office of the Commissioner was established to head the Patent Office and to hire and train examiners for patent application examination and processing. Thus, the Act revived the concept of a reviewing process for patent applications that first appeared in the Patent Act of 1790 but was removed in 1793. But the 1836 law would establish a more administratively manageable process. Among other provisions, the Patent Act of 1836 provided that the existing fourteen year patent term could be extended for seven years upon application to the Commissioner of the Patent Office.

Henry Ellsworth, son of Oliver Ellsworth and twin brother of William, is generally credited for helping to draft the Patent Act of 1836. Ellsworth previously served in administrative posts in the Jackson administration. The legislation was passed by the 24th Congress, which included Senators Daniel Webster and Henry Clay. Upon President Jackson's signing the Patent Act into law on July 4, 1836, Ellsworth was appointed as first Commissioner of the Patent Office.

Historian Daniel Walker Howe offers a succinct summary of the Act in operation:

Starting in 1836, a reorganized federal Patent Office carefully vetted every application before granting a patent. Despite its increasing strictness, the office got busier and busier. Where the government had granted 23 patents a year per million residents during the decade after the War of 1812, the number rose to 42 a year in the 1830s. The statistic at that time for southern New England stood at 106. All across the country, patenting activity flowed along the waterways that sustained commerce and provided power for industry.

Minor amendments were also made to American patent law by Congress in the Antebellum era. The many revisions made during this period included the following:

- 1837 – provided for re-collection of patent records after the Patent Office Building burned down; issuance of a patent to the assignee of the inventor; and for validity of patent to the extent of actual invention where patentee innocently overstated extent of invention;
- 1839 – provided patents would not be debarred because invention had been patented in foreign countries where certain circumstances existed; two years public use of invention prior to application was allowable without invalidating patent, provision for bills of equity in all cases where patents were administratively denied;
- 1842 – expressly provided for design patents; required patented articles be marked with the date of the patent;
- 1848 – reassigned patent extension power from a board that included the Secretary of State, Solicitor of the Treasury, and the Commissioner of Patents to the Commissioner alone; reset patent recording fees;
- 1849 – transferred the Patent Office from under the Secretary of State to under the Secretary of the Interior;
- 1851 – revised provisions regarding appeals from decisions of the Commissioner of Patents to judicial officers.
- February 1861 – permitted appeals of all federal circuit court judgments under copyright and patent laws to the U.S. Supreme Court, regardless of the amount in controversy;
- March 1861 – granted patent terms of seventeen years with no extensions; reset fees; required independent patents for specifications of improvements to existing patents; established Board of Examiners-in-Chief to hear appeals from primary examiners and for appeals from the Board to the Commissioner; prevented recovering of damages for infringement where patentee failed to mark patented articles; and repealed penalties for failure to mark patented articles.

Thus, from the passage of the Patent Act of 1836 to the dawn of the Civil War, Congress took care to extend patent protection and sought to improve patent application processing. The final two Patent Acts listed above were signed just days prior to the inauguration of President Abraham Lincoln on March 4, 1861.

The Constitution's Distinction Between Monopolies and IP Rights Was Recognized by Jacksonians

In understanding the thinking of the Antebellum era, it is also critical to consider the era's solicitude for property rights in light of its frequent aversion to monopolies. Sharp differences of opinion existed during the period regarding precisely what types of monopolies were harmful and should be prohibited. Nonetheless, the era reflects a shared commitment to private property rights undeterred by varying opposition to government grants of special privileges. More particularly, Antebellum era thinking embodied a shared understanding that copyrights and patents were constitutionally legitimate and economically beneficial types of limited monopolies that deserved the basic legal protections accorded to private property.

Opposition to government-conferred monopolies and special privileges was a hallmark of Jacksonian ideology that influenced politics and law during the Antebellum era. But it would be decidedly wrong-headed to read into Jacksonian anti-monopolistic sentiment any broad-based attack on copyrights or patents that dominated public thinking.

According to historian Howe, “[t]he ‘age of Jackson’ was not a time of consensus.” In his writings on the period, Howe has avoided the term “Jacksonian America,” because “it suggests that Jacksonianism describes Americans as a whole, whereas in fact Andrew Jackson was a controversial figure and his political movement bitterly divided the American people.” It would therefore be a mistake to simply claim that Jacksonian aversion to monopolies and special privileges were, in principle or in practice, contrary to IP rights. It would likewise be a mistake to simply take a single speech or letter by any one figure of the period about monopolies and to either treat it as an embodiment of the thinking about monopolies or of the age or read it into the Constitution.

Corporations chartered by special legislation drew Jacksonian ire. As Howe recounted, “the corporate form of organization remained a privilege conferred by the state in return for what were considered services to the public interest.” Discontent with such special treatment by government eventually led to legislative reform efforts in the states. Thus, “[i]n an effort to avoid favoritism while also allowing the multitude of small investors their chance, various states enacted general laws of incorporation that conferred corporate status upon any business applicant(s) who complied with certain rules.”

“Mixed corporations,” consisting of both public and private ownership interests pursuant to government charter, were the paradigmatic monopoly opposed by Jacksonians. And opposition to the Second Bank of the United States was a defining aspect of Andrew Jackson's presidency. Howe has explained that:

The Bank of the United States was the largest example in the country of a mixed public-private corporation, and Jackson criticized both its public and private aspects. Sometimes he waged his war on the Bank as an agency of overcentralized government, but more often he attacked it as a private enterprise that had received

unjust privileges, an artificial monopoly unresponsive to government or public... Jackson himself habitually referred to the Bank as 'the Monster,' a word that implied unnatural and enormous power.

Jackson's "war" against the Bank and his favoring of state banks and hard money policies embroiled him in controversy over the meaning of the Constitution and over matters of fiscal and economic policy. Written with the assistance of cabinet members that included future Chief Justice Roger Taney, Jackson's "Veto Message Regarding the Bank of the United States" (1832), is replete with references to the Bank as a monopoly and exclusive privilege. However controversial Jackson's characterization of the Bank or his proffered interpretation of the Constitution, his veto statement made clear the Constitution's distinction between illegitimate monopolies and legitimate IP rights:

On two subjects only does the Constitution recognize in Congress the power to grant exclusive privileges or monopolies. It declares that "Congress shall have power 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." Out of this express delegation of power have grown our laws of patents and copyrights. As the Constitution expressly delegates to Congress the power to grant exclusive privileges in these cases as the means of executing the substantive power "to promote the progress of science and useful arts," it is consistent with the fair rules of construction to conclude that such a power was not intended to be granted as a means of accomplishing any other end. On every other subject which comes within the scope of Congressional power there is an ever-living discretion in the use of proper means, which can not be restricted or abolished without an amendment of the Constitution. Every act of Congress, therefore, which attempts by grants of monopolies or sale of exclusive privileges for a limited time, or a time without limit, to restrict or extinguish its own discretion in the choice of means to execute its delegated powers is equivalent to a legislative amendment of the Constitution, and palpably unconstitutional.

For all the divisiveness that characterized so-called Jacksonian America and the surrounded monopolies and special privileges, the distinction between illegitimate monopolies and IP rights was widely understood and accepted by ideological rivals. In short, they perceived the principled difference between the two concepts and recognized the Constitution's protection of copyrights and patents in the IP Clause.

Conclusion

Antebellum era legal treatises, Supreme Court and federal circuit court jurisprudence, and adoption and implementation of Congressional legislation evidence a shared conceptual understanding about copyright and patent rooted in natural rights. In this respect, Antebellum era thinking marked the continuation of a consistent line of thought about the basic nature of IP in the American constitutional order. Recognizing the principled understanding about copyright and patent that permeated this important period of history should lead us to consider anew how those enduring principles remain true today.

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