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## **The "Reason and Nature" of Intellectual Property: Copyright and Patent in *The Federalist Papers***

by

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Congress's power to secure copyright and patent is expressly granted in the U.S. Constitution's Article I, Section 8 Intellectual Property Clause. It confers on Congress a power "to promote the progress of science and useful arts, by securing, for a limited time, to authors and inventors, the exclusive right to their respective writings and discoveries." In order to better grasp the meaning of this power and the rights it is designed to secure, attention undoubtedly should be paid to that repository of American constitutionalism widely regarded to be second only to the Constitution: namely, *The Federalist Papers*.

Such attention to *The Federalist Papers* is not merely a matter of historical interest, although the history is certainly interesting. Rather, it is a matter of enhancing our present day understanding of why our Founders thought copyrights and patents important and deserving of protection in our Constitution.

So, just what does *The Federalist* have to say about copyright and patent?

James Madison, writing in the guise of "Publius," provided that work's lone direct reference to Congress's power to protect intellectual property rights. In the Federalist No. 43, Madison wrote:

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The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provisions for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.

A proper reading of that brief passage requires examination of its context within *The Federalist* as well as Madison's other writings from that period. Such an examination reveals a rich understanding of the nature of IP and its place in the U.S. Constitutional order. In subtle and succinct fashion, Federalist No. 43 identifies the ultimate source for copyright and patent in an individual's natural right to the fruits of his or her own labor. Madison regarded copyright and patent as forms of property that government is established to protect. Additionally, as Federalist No. 43 and other numbers point out, securing an individual's IP rights, consistent with the rules of justice, also furthers the public good by incentivizing further investments and discoveries that promote the "progress of science and useful arts."

In reading Federalist No. 43's IP passage, one can see it is bookended by considerations about the locus of power for protecting copyright and patent under the proposed Constitution. The opening sentence describes the usefulness to the Union of a congressional power for protecting IP. And the closing sentence recounts both the recognition of IP rights by States as well as the inability of the States separately to provide the necessary safeguards for IP.

Given Madison's use of the terms "utility" and "public good," along with the IP Clause's language about promoting progress, modern minds may be prone to read into Federalist No. 43 a utilitarian understanding of copyright and patent. In general, however, the utility that *The Federalist* was concerned with is the "Utility to the Union" of lodging certain powers in the federal government. And Federalist No. 43's concern with conferring on Congress the power of protecting IP rights is no exception.

Furthermore, a constructive definition of the term emerges from *The Federalist Papers*. Particularly insightful are Federalist essays, such as 10, 37, and 51, that address the finiteness of human perception and communication, the fallibility of human reason, and the degree of depravity in human character. According to *The Federalist*, those aspects of human nature create a tendency toward the vice of self-interested factions. Constitutional structures such as the separation of powers and the extended sphere of representative government are required to act as counterweights and to channel self-interests in the service of the public good.

Throughout these essays, "public good" encompasses the interests of all people in the security and enjoyment of their rights to liberty and property, consistent with impartial rules of justice. Therefore, protecting the respective IP rights of authors and inventors

“for a limited time” in order “to promote the progress of science and useful arts” in society, fits firmly within Madison’s overall understanding of the purpose of a just government: to protect individual rights of liberty and property, in the furtherance of the common good rather than the self-interests of a faction of the people.

Nestled between Federalist No. 43’s bookends addressed to federal and state power is a brief and subtle allusion to the underlying nature of IP rights. Madison’s meaning is rather easy to misunderstand or to be confused because of the reference he makes to British common law copyright. But Madison was not making an appeal to binding historical precedent from the Old World. Rather, Madison invoked a historical point of reference in order to address what his co-author Alexander Hamilton, in Federalist No. 78, would call – “the reason and nature of the thing.” What Madison ultimately was concerned with was certain British common law jurists’ identification of an individual’s natural right as the *reason* for protecting an author’s copyright. Madison appealed to that same reason and advanced its application, in an American constitutional context, to support the protection of both copyright and patent rights.

Thus, in its essence, Federalist No. 43 traces the reason and nature of intellectual property to an individual’s right to the fruits of his or her labor. Madison’s short explanation for the IP Clause in Federalist No. 43 grounds copyright and patent in natural right, not merely utilitarian calculations about the greatest good for the greatest number.

Of course, a natural rights perspective does not eliminate matters of social utility from consideration in defining the dynamics of copyright and patent. Legal or administrative decisions about how best to secure individual IP rights are often complex and fact-intensive. Sound policy demands that both short-term and long-term costs and benefits to society be taken seriously in making such decisions. In the final analysis, however – and this is the important point – such decisions are about how best to protect the core of pre-existing rights of property that do not ultimately depend for their existence upon empirical or intuitive economic calculations. Thus, utility may be said to supply a boundary principle for IP rights, but natural right supplies IP’s foundational grounding principle.

### ***The Federalist* and its Constitutional Legacy**

Describing *The Federalist* to his audience during the ratification debates over the proposed 1787 U.S. Constitution, James Madison wrote in Federalist No. 37 that “the ultimate object of these papers is to determine clearly and fully the merits of this Constitution, and the expediency of adopting it.”

A collaborative effort of Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* did much more than explain the form and substance of the proposed Constitution. In addition to defending the proposed Constitution from misleading or exaggerated charges made against it by anti-Federalist critics, the co-authors of *The Federalist* assessed the inadequacies of the Articles of Confederation and described the abuses and conflicts stemming from State legislatures.

Moreover, *The Federalists*' co-authors contended for the “*utility of the UNION*” to further America’s “*political prosperity*.” Indeed, they maintained that the preservation of that Union depended on the ratification of the proposed Constitution. Adoption of the proposed Constitution, they insisted, would help secure republican government, liberty, and property. As Alexander Hamilton wrote to the American public at the beginning of Federalist No. 1, the stakes could not be any higher:

You are called upon to deliberate on a new Constitution for the United States of America. The subject speaks its own importance; comprehending in its consequences nothing less than the existence of the UNION, the safety and welfare of the parts of which it is composed, the fate of an empire in many respects the most interesting in the world. It has been frequently remarked that it seems to have been reserved to the people of this country, by their conduct and example, to decide the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force. If there be any truth in the remark, the crisis at which we are arrived may with propriety be regarded as the era in which that decision is to be made; and a wrong election of the part we shall act may, in this view, deserve to be considered as the general misfortune of mankind.

Written under the pen name of “Publius,” “The Federalist papers” first appeared as a series of separate newspaper articles. They subsequently saw wider circulation in book form, totaling 85 entries in all. *The Federalist* was admired by contemporaries for its insights into human nature and the character of republican government. It was likewise praised for its lucid review of the proposed Constitution’s provisions and its persuasive arguments for their efficacy.

George Washington, for example, secretly transmitted the first seven Federalist essays for wider publication in Virginia after being sent draft versions by Madison on November 18, 1787. In a letter to Hamilton dated August 28, 1788, Washington wrote:

As the perusal of the political papers under the signature of Publius has afforded me great satisfaction, I shall certainly consider them as claiming a most distinguished place in my Library. I have read every performance which has been printed on one side and the other of the great question lately agitated (so far as I have been able to obtain them) and, without an unmeaning compliment, I will say, that I have seen no other so well calculated (in my judgment) to produce conviction on an unbiased Mind, as the *Production* of your *triumvirate*. When the transient circumstances and fugitive performances which attended this Crisis shall have disappeared, That Work will merit the Notice of Posterity; because in it are candidly and ably discussed the principles of freedom and the topics of government, which will be always interesting to mankind so long as they shall be connected in Civil Society.

Washington's prediction regarding *The Federalist's* legacy has proven correct. Its enduring importance depends in no small part on historian John C. Miller's observation that: "Generations of commentators upon the Constitution – John Marshall, Daniel Webster, Joseph Story among them – ranked *The Federalist* second only to the Constitution itself; and in determining the jurisdiction of the national government and the powers of the various departments of that government, they followed Hamilton, Madison and Jay with implicit confidence." Thus, *The Federalist* would quickly assume authoritative status – and to continue to grow in stature over time – for its examination of the basic principles of the American constitutional order and for its interpretive insights into the meaning of the Constitution's provisions and terms. Where it speaks to a matter of American constitutionalism, therefore, *The Federalist* merits careful attention.

### **Federalist No. 43 on Congressional Power, Copyright, and Patent**

The U.S. Constitution's Article I, Section 8 IP Clause delegates to Congress a power "to promote the progress of science and useful arts, by securing, for a limited time, to authors and inventors, the exclusive right to their respective writings and discoveries." Federalist No. 43, written by James Madison, marks *The Federalist's* only direct reference to the IP Clause and to the underlying nature of IP rights that Congress is charged with securing.

Here is what Madison said regarding the IP clause:

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provisions for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.

The foregoing paragraph consists of few words. But a close reading of the passage and an appreciation of its context, including the whole of *The Federalist*, reveal a rich understanding of the nature of IP and its place in the U.S. Constitutional order.

### **Federalist No. 43: Natural Right as the Reasoned Basis for IP Rights**

In subtle and succinct fashion, Federalist No. 43 identifies the ultimate source for copyright and patent in an individual's natural right to the fruits of his or her own labor. This Madison does in a pair of sentences that are easy to misunderstand or misconstrue because of Madison's reference to British common law. However, a careful reading of both sentences suggests that Madison was ultimately concerned with certain British common law jurists' identification of an individual's natural right as the *reason* for copyright. And in an American constitutional context, Madison applied that reason to both copyright and patent.

## *Confusion Surrounding British Common Law Copyright*

Describing the IP rights that Congress is empowered to secure under the proposed Constitution, Madison referenced copyright in British common law. In a handful of cases, British common law jurists deemed copyright a common law right. For instance, in *Millar v. Taylor* (1769), common law luminary Lord Mansfield ruled that authors enjoyed a perpetual common law copyright in their written publications. Another British common law luminary, Sir William Blackstone similarly contended that authors enjoyed a common law right to their manuscripts and to the proceeds resulting from publications.

Incidentally, the section devoted to the IP Clause in Joseph Story's *Commentaries on the Constitution of the United States* (1833) is in many respects a gloss on Federalist No. 43. Story, an eminent legal scholar and a Madison appointee to the U.S. Supreme Court, cites Federalist No. 43 in summing up the historical antecedents for the IP Clause: "It was doubtless to this knowledge of the common law and statuteable rights of authors and inventors, that we are to attribute this constitutional provision."

Mindful of historical developments, some scholars have fixated on the precise status of copyright under British law and suggest that Madison misstated that law in Federalist No. 43. Madison made no reference, it is observed, to the House of Lords ruling in *Donaldson v. Beckett* (1774) that denied a perpetual copyright under the common law. Rather, *Donaldson* held that copyright existed solely because of Parliament's say-so in the Statute of Anne (1717). The implication arising from such observation seems to be that Federalist No. 43 offers little useful information about IP and perhaps points to the shaky foundations of copyright and patents.

Of course, the Lords' decision in *Donaldson* was not without controversy. The Lords' ruling was split, decided by a one-vote margin on account of Lord Mansfield's abstention. Mansfield issued a ruling in a prior state of the same case to the effect that there was a perpetual common law copyright. *Donaldson* would remain the subject of continuing confusion and legal debate for decades in America. It was unclear to many, for instance, whether *Donaldson* meant that authors still possessed a common law copyright to unpublished manuscripts or whether the Statute of Anne eliminated all common-law copyright claims. The matter becomes a bit more confusing given that neither the Statute of Anne or the Statute of Monopolies – which recognized limited patent rights for inventors – expressly applied to America; and the basic presumption was that those statutes only applied in Britain prior to the Revolution.

This kind of confusion regarding IP vis-à-vis British common law and American law would come as no surprise to Madison. In his discussion of the limitations on human perception and communication in Federalist No. 37, Madison explained:

The experience of ages, with the continued and combined labors of the most enlightened legislatures and jurists, has been equally unsuccessful in delineating the several objects and limits of different codes of laws and different tribunals of justice. The precise extent of the common law, and

the statute law, the maritime law, the ecclesiastical law, the law of corporations, and other local laws and customs, remains still to be clearly and finally established in Great Britain, where accuracy in such subjects has been more industriously pursued than in any other part of the world. The jurisdiction of her several courts, general and local, of law, of equity, of admiralty, etc., is not less a source of frequent and intricate discussions, sufficiently denoting the indeterminate limits by which they are respectively circumscribed. All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications. Besides the obscurity arising from the complexity of objects, and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment.

#### *Explaining Madison's Reference to Common Law Rights of Authors*

Unsurprisingly, therefore, Federalist No. 43 has led to confusion about what Madison meant by his reference to British common law copyright. Scholars have offered a variety of suggestions as to Madison's meaning. According to one account, Madison relied on the first American edition of Blackstone's *Commentaries*, which reported on *Millar's* ruling that recognized the common law right of copyright but not that decision's subsequent overruling in *Donaldson*. By another account, Madison relied on *Burrow's* 1776 published report of *Donaldson*, which described the Statute of Anne as divesting common law copyright entirely. It has also been suggested Madison referred to *Donaldson's* ruling that no perpetual copyright existed under common law because it would apparently be more consistent with the IP Clause's conferring congressional power to secure copyrights and patents "for limited Times." Or perhaps Madison was entirely unaware of the Lords' ruling or had simply forgotten it when writing his hasty defense of the proposed U.S. Constitution in late 1787 and early 1788.

It is also entirely plausible that Madison simply rejected the ruling in *Donaldson* – or that he would have rejected *Donaldson* had he known of it when writing Federalist No. 43. After all, the overarching logic of Madison's views concerning constitutionalism and common law cuts against *Donaldson's* ruling in certain respects.

Madison was in many respects a critic of British common law. In his 1787 letter to George Washington – written just three months before Federalist No. 43 – Madison explained his basic objections to British common law and described how States had limited and modified British common law to suit American constitutional sensibilities:

The common law is nothing more than the unwritten law, and is left by all the constitutions equally liable to legislative alterations. I am not sure that any notice is particularly taken of it in the Constitutions of the States. If there is, nothing more is provided than a general declaration that it shall

continue along with other branches of law to be in force till legally changed... Since the Revolution every State has made great inroads & with great propriety in many instances on this *monarchical* code... The abolition of the *right of primogeniture*, which I am sure Col. Mason does not disapprove, falls under this head.

Madison's letter to Washington was occasioned by anti-Federalist George Mason's criticisms that "the Common law is not secured by the new constitution." Writing to Washington, Madison explained the reasoning behind the 1787 Philadelphia Convention's approach to British common law:

What could the Convention have done? If they had in general terms declared the Common law to be in force, they would have broken in upon the legal Code of every State in the most material points: they wd. have done more, they would have brought over from G.B. a thousand heterogeneous & antirepublican doctrines, and even the *ecclesiastical Hierarchy itself*, for that is a part of the Common law. If they had undertaken a discrimination, they must have formed a digest of laws, instead of a Constitution. This objection surely was not brought forward in the Convention, or it wd. have been placed in such a light that a repetition of it out of doors would scarcely have been hazarded.

Consistent with Madison's concerns about the monarchical, anti-republican aspects of British common law, a case can be made that a decision by the aristocratic House of Lords dismissing common law rights was illegitimate. Such a view carries added plausibility considering *Donaldson* was handed down in 1774, the same year Britain retaliated for the Boston Tea Party with the "Intolerable Acts" and in which Americans would respond by convening the First Continental Congress.

Thus the logic of Madison and like-minded Americans regarding American constitutionalism and British common law also weighs against any easy acceptance of British parliamentary acts eliminating or limiting common law rights. As contemporary common law scholar James Stoner has explained:

To assume that the Americans of the Revolutionary era simply accepted the dominant understanding of common law in contemporary Britain would be a serious error. Although Blackstone would, within a generation, replace Coke as the favorite authority on common law among Americans, it was understood that his account of parliamentary sovereignty was inapplicable here—it might even be said that the American Revolution was fought against the assertion of that principle in the colonies.

To the extent, therefore, that *Donaldson* claimed to replace the common law's grounding of copyright in natural right for the whim of parliamentary supremacy, there is ample reason to believe that Madison would not find it applicable on American shores. On the other hand, Madisonian logic could accept constitutional limitations on copyright and



patent provided for in the IP Clause. The difference being that the source of the limiting power was part of the Constitution to be ratified by the American people and because those limits would be set by members of Congress who are held accountable by the republican principle of representative elections.

*Madison's Appeal to the Reason and Nature of IP Rights*

In any event, even if observations about Madison being mistaken about British law are correct, they are still beside the primary point that Madison was making about IP rights in Federalist No. 43. Madison did not invoke British common law as a matter of binding historical precedent. Rather, he made it a historical point of reference in addressing – what his co-author Alexander Hamilton in Federalist No. 78 would call – “the reason and nature of the thing.” In Federalist No. 43, Madison made an implicit appeal to natural right as the underlying reason behind British common law’s recognition of copyright. And extended that same reason to patent.

Despite Madison’s misgivings of feudal and monarchical aspects of British common law, he was in accord with classical liberal theory and its emphasis on natural rights. And natural right was infused in the common law. As Stoner explained:

By the eighteenth century...several great attempts at synthesis [between liberal political theory and the common law] were made, first by John Locke, who aimed to reconcile liberal philosophy and the English Constitution, and then by William Blackstone, whose *Commentaries on the Laws of England*, appearing in the 1760s, reworked the common law from a liberal perspective and presented its chief rules and maxims in accessible, literary form.

In describing the nature of IP rights, Blackstone wrote in his *Commentaries*:

There is still another species of property, which (if it subsists by the common law) being grounded on labour and invention is more properly reducible to the head of occupancy than any other; since the right of occupancy itself is supposed by Mr. Locke, and many others, to be founded on the personal labour of the occupant. And this is the right, which an author may be supposed to have in his own original literary compositions; so that no other person without his leave may publish or make profit of the copies. When a man by the exertion of his rational powers has produced an original work, he seems to have clearly a right to dispose of that identical work as he pleases, and any attempt to vary the disposition he has made of it, appears to be an invasion of that right.

Like Blackstone, Madison also accepted Lockean principles regarding rights of private property. Also, like Blackstone, Madison regarded copyrights and patents as forms of individual private property. Madison accepted the natural rights of authors to the fruits of their labors, which – at least formerly – served as the basis for copyright under British

common law. And despite patent's lack of recognition under British common law, Madison concluded in Federalist No. 43, "with equal reason," that because an individual is entitled to the fruits of his or her own labor that "[t]he right to useful inventions" is a kind of property that should "belong to the inventors."

### **"Utility to the Union" in *The Federalist***

Federalist No. 43's IP passage is bookended by considerations about the locus of power for protecting copyright and patent under the proposed Constitution. The opening sentence described the usefulness to the Union of a congressional power for protecting IP. And the closing sentence recounted both the recognition of IP rights by States as well as the inability of the States to separately provide the necessary safeguards for IP.

Contemporary minds may be prone to read a utilitarian understanding of IP rights into Federalist No. 43 by fastening upon its use of the terms "utility" and "public good." But careful attention to context renders a utilitarian interpretation of Federalist No. 43 unsustainable. While Madison undoubtedly considered copyright and patent to be socially beneficial, his use of terms properly fits within a natural rights framework.

#### *The Utility to the Union of a Congressional Power to Protect IP Rights*

To read from Noah Webster's *American Dictionary of the English Language* (1828), utility may be defined as "usefulness," "production of good," or "profitableness to some valuable end." When Federalist No. 43 used the term "utility," it was not with reference to the usefulness of IP rights as such, let alone to the idea that beneficial aggregate economic consequences forms the grounds for the existence of IP rights. Rather, Federalist No. 43 referred to the efficacy to the Union of lodging a power in Congress for securing copyrights and patents.

At the outset, it should be observed that *The Federalist* uses the term "utility" with regard to the advantages of conferring certain powers upon the Union under the proposed Constitution. For example, the authors of *The Federalist* employ the term "The Utility of the Union" in the title of several essays; namely: "The Utility of the Union as a Safeguard Against Domestic Faction and Insurrection," "The Utility of the Union in Respect to Commercial Relations and a Navy," and "The Utility of the Union in Respect to Revenue."

Now Federalist No. 43 was the final installment of a discourse that began in Federalist No. 40 on the quantity of powers conferred by the proposed Constitution on the federal government. "[C]ool and candid people... will see," wrote Madison in Federalist No. 41, "that in all cases where power is to be conferred, the point first to be decided is, whether such a power be necessary to the public good; as the next will be, in case of an affirmative decision, to guard as effectually as possible against a perversion of the power to the public detriment." Madison continued: "That we may form a correct judgment on this subject, it will be proper to review the several powers conferred on the government of the Union." Accordingly, in Federalist No. 41, Madison categorized the powers

conferred by the proposed Constitution into six classes: (1) “Security against foreign danger”; (2) “Regulation of the intercourse with foreign nations”; (3) “Maintenance of harmony and proper intercourse among the States”; (4) “Certain miscellaneous objects of general utility”; (5) “Restraint of the States from certain injurious acts”; and (6) “Provisions for giving due efficacy to all these powers.” Federalist No. 43’s brief discussion of the IP Clause was part of Madison’s review of “Certain miscellaneous objects of general utility” to be “conferred on the government of the Union.” Reading Federalist No. 43 absent the flow of thought begun in Federalist No. 40 renders one more likely to miss the crucial context for Madison’s use of the term “utility.”

Thus, in Federalist No. 43 Madison addressed the “utility” of the proposed Constitution’s shifting of the primary locus of power for protecting IP rights from the states to the government of the Union. This fits with Madison’s conclusion, a few sentences later, that the States could not “make effectual provisions” for copyrights or patents. This understanding of the utility of an IP protection power being lodged with the federal Congress is also consistent with Madison’s memorandum, *Vices of the Political System of the United States* (1787). In *Vices*, Madison similarly expressed the view that there existed a “want of concert in matters where common interest requires it,” among the states, including “the want of uniformity in the laws concerning...literary property,” or copyright. Federalist No. 43 was one of several instances in which Madison drew on his *Vices* memorandum in publishing his papers in defense of the proposed Constitution.

Madison’s explanation that most States “have anticipated the decision of this point, by laws passed at the instance of Congress,” referred to the resolution passed by the Confederation Congress in 1783, urging state legislatures to pass laws protecting copyrights and patents. Madison served on the Confederation Congress committee that issued a report on IP rights and thereby prompted the resolution. Following the adoption of the Confederation Congress’s resolution, copyright and patent laws were subsequently adopted by state legislatures. And Madison helped ensure the passage of Virginia’s state copyright law in 1785. In Federalist No. 43, Madison thus supported giving the federal government lawmaking power to directly protect IP rights through legislation rather than leaving it with a merely declaratory role in supporting IP rights.

*The Public Good: Rights of Liberty and Property in the Interests of All,  
According to the Rules of Justice*

Federalist No. 43’s conclusion that “[t]he public good fully coincides in both [copyright and patent] cases with the claims of individuals,” likewise cannot finally be understood in utilitarian terms.

Although Madison does not offer an explicit definition of “the public good” in Federalist No. 43, a constructive definition of the term emerges from other papers in *The Federalist*. The “public good,” according to the sense of *The Federalist*, encompasses the interests of all people in the security and enjoyment of their rights to liberty and property, consistent with impartial rules of justice – as opposed to the interests of a sect or faction of the people.

In Federalist No. 10, Madison described “[t]he diversity in the faculties of men, from which the rights of property originate.” For Madison, rights to liberty and property belong to individuals by nature. But while every man and woman may possess an equal natural right to liberty and property, inequality inevitably results in their exercise and enjoyments of those rights: “From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.” (As we have observed in prior essays such as [“Reasserting the Property Rights Source of IP,”](#) Madison regarded copyrights and patents as “kinds of property,” grounded in the rights of authors and inventors to the fruits of their labors.)

In explaining the division of society into different interests and parties, Madison concluded that “the most common and durable source of factions has been the various and unequal distribution of property.” By a faction,” continued Madison, “I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.” Factions are all but inevitable as “[t]he latent causes of faction are thus sown in the nature of man.” Because mankind is characterized by finiteness in perception, fallibility in reasoning, and by “a degree of depravity” in moral character, activities and circumstances of society that have led them into factions, “inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good.”

Since “in a state of nature, where the weaker individual is not secured against the violence of the stronger,” societies form governments to protect the life, liberty, and property of the individuals composing it. According to Madison, “the protection of these faculties [“of men, from which the rights of property originate”] is the first object of government.” This object in protecting individual rights of property Madison identified with the establishment of justice. “Justice is the end of government,” concluded Madison in Federalist No. 51: “It is the end of civil society.”

An 18th Century audience generally would have understood the term “justice” to include its classical sense. According to Webster, “justice” is “[t]he virtue which consists in giving to everyone what is his due; practical conformity to the laws and to principles of rectitude in the dealings of men with each other; honesty; integrity in commerce or mutual intercourse.” The term also encompassed notions of “impartiality,” “equity,” and “agreeableness to right.”

For Madison, when it came to contending factions, “Justice ought to hold the balance between them.” But “[e]nlightened statesmen will not always be at the helm” to impartially administer a system of rules to protect individual rights. Rather, “the most powerful faction must be expected to prevail,” partial to its own interest rather than with “a sole regard to justice and the public good.”

Given human nature and its tendency toward factionalism, in “a government which is to be administered by men over men,” wrote Madison in Federalist No. 51, there is a “necessity of auxiliary precautions” to “control the abuses of government.” “In the extent and proper structure of the Union,” concluded Madison, “we behold a republican remedy for the diseases most incident to republican government.” One key remedy was the proposed federal Constitution’s separation of power between the executive, legislative, and judicial branches. Another remedy was the proposed Constitution’s extension of the sphere of representative government. Explained Madison: “In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good.”

As observed above, justice, protection of individual rights, and the public good were interrelated concepts in Madison’s thought. He believed the proposed Constitution’s extended sphere of representative government would make the government more prone to further the interests of all people in the security and enjoyment of their rights to liberty and property, consistent with impartial rules of justice. Madison’s constitutional biographer William Lee Miller sheds further light on the matter in describing Madison’s answer to the question of how a republic under majority rule can function justly:

It included protections against that human inclination to neglect the public good, and to prefer private advantage...but it also presumed a capacity for human beings, to a degree and under the right restraints, to serve justice and the common good. The point of Madison’s form of republican government was to arrange institutions so as to encourage that capacity, in part exactly by restraining that inclination.

As previously indicated, Madison regarded copyright and patent as kinds of property, grounded in an individual’s right to the fruits of his or her labor. Protecting the IP rights of individuals “for a limited time” in order “to promote the progress of science and useful arts” in society, fits firmly within Madison’s overall understanding of the purpose of government: to protect rights of liberty and property, in the furtherance of the common good rather than in the self-interests of a faction of the people, according to rules of justice.

### **Social Utility Under *The Federalist’s* Natural Rights Framework**

A reading of *The Federalist* as a whole, in addition to other contextual factors related to the political philosophy of Madison, suggests his explanation of the IP Clause in Federalist No. 43 grounded copyright and patent in natural right, not merely utilitarian considerations. A thoroughly primitive 18th Century utilitarian understanding of IP rights would regard them as a means to the greatest good for the greatest number according to some sort of calculation about collective human pleasure and pain responses. But a utilitarian understanding of human life, liberty, or property devoid of any inherent sense of what is right, just, or good, would have been foreign to those who framed and ratified the U.S. Constitution.

As Madison biographer Ralph Ketchum wrote:

A great gulf . . . separates the thought of Madison (and other Founding Fathers) from that of believers in such later concepts as Benthamite utilitarianism and simple majoritarian democracy, who denied that principles of justice and virtue can be identified and made the foundation of government, and therefore have a higher sanction than the will of the majority.

This is not to deny that Madison regarded IP rights as socially useful. Undoubtedly, he endorsed the IP Clause's express purpose "to promote the progress of science and useful arts." As pointed out previously, Madison suggested that the rights of authors and inventors could be protected consistent with the good of the whole people. To quote Federalist No. 43 once more: "The public good fully coincides in both cases with the claims of individuals." Moreover, a natural rights perspective does not eliminate social utility from consideration in defining the boundaries of copyright and patent.

Since an individual possesses, by nature, a right of property in the fruits of his or her labor, natural right may be said to supply the grounding principle for IP rights. Madison and the Founding Fathers understood, as Locke and Blackstone did before them, that in a civil society, individuals enter into a compact to form government that will protect liberty and property under positive law. Living in a civil society necessarily requires government to pass laws ensuring that individuals can enjoy their rights of liberty and property consistent with each other. And that inevitably involves government administering rules by which property is acquired, possessed, and transferred. Considerations of overall social utility, including cost-benefit analyses that take into account short-term and long-term gains and losses likely resulting from IP rights and related questions regarding incentives for investment in IP, have an important role to play in determining the scope and degree of protection that the law can and should provide for various "kinds of property" under particular circumstances. The IP Clause recognizes this by conferring on Congress the power to secure copyrights and patents "for a limited time."

Legal or administrative decisions about how best to secure copyright and patent are often complex and fact-intensive. But they are matters of deciding how best to protect the core of pre-existing rights of property that do not ultimately depend for their existence upon empirical or intuitive economic calculations. Utility may be said to supply a boundary principle for IP rights, but natural right supplies IP's grounding principle.

## **Conclusion**

Given the inherent qualities and renown of *The Federalist*, anyone interested in understanding the Constitution's IP Clause should carefully consider Madison's meaning in Federalist No. 43. That requires examination of its context within *The Federalist* as well as Madison's other writings from that period. Ultimately, Federalist No. 43 reveals a rich understanding of the nature of IP and its place in the U.S. Constitutional order. In subtle and succinct fashion, Federalist No. 43 identifies the ultimate source for copyright

and patent in an individual's natural right to the fruits of his or her labor. Madison regarded copyright and patent as forms of property that government is established to protect. Additionally, as Federalist No. 43 and other numbers point out, securing an individual's IP rights, consistent with the rules of justice, also furthers the public good by incentivizing further investments and discoveries that promote the "progress of science and useful arts." Consistent with Federalist No. 43, considerations of public good or social utility may be said to supply a boundary principle for IP rights, but natural right supplies IP's grounding principle in Publius's exploration of the U.S. Constitution.

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### **Further Readings**

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