

# ARTICLE I AND THE FIRST INVENTOR TO FILE: PATENT REFORM OR DOUBLESPEAK?

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## ABSTRACT

There is presently a frantic push to reform the U.S. patent laws.<sup>1</sup> Vigorous, often rancorous, debate surrounds many elements of the proposed changes. However, from a constitutional perspective, there is one particularly troubling aspect—the departure from our centuries old “first to invent” system of priority. By seeking to award patents to true inventors, the United States maintains a strict and appropriate adherence to the constitutional language that created the patent right in the first place. In keeping with the plain meaning of the document, Congress does not have the authority to allow patents to be granted to anyone but inventors. As such, any change in the patent statutes to allow a subsequent creator of an otherwise patentable invention to obtain a patent grant in derogation of a true inventor is plainly unconstitutional.

## I. BACKGROUND

Patents grant an exclusive right to inventors that is similar to, but not quite, a true monopoly because a patent provides for exclusion for a limited time of a thing that did not exist prior to its creation by the inventor—that is, it would not exist but for the act of inventing.<sup>2</sup> This takes nothing from the public domain that was already available to the public, but it does allow the inventor to

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<sup>1</sup> Patent Reform Act of 2010, S. 515, 111th Cong. (1st Sess. 2010), *available at* <http://judiciary.senate.gov/legislation/upload/PatentReformAmendment.pdf>; Dennis Crouch, *Patent Reform Act of 2010: An Overview*, PATENTLY-O, Mar. 8, 2010, <http://www.patentlyo.com/patent/2010/03/patent-reform-act-of-2010-an-overview.html>.

<sup>2</sup> *United States v. Univis Lens Co.*, 316 U. S. 241, 250 (1942).

exclude the invention from the public for the term of the patent.<sup>3</sup> A true monopoly, on the other hand removes from the public domain that which the public would otherwise have access to.<sup>4</sup> As such, patents tend to frustrate those who would otherwise benefit from access to the patented inventions but for this exclusive right. This frustration can often lead to a belief that the patent system is broken. This sentiment stems from a perceived injustice to the frustrated individual because he must pay to use or even refrain from using the patented invention.<sup>5</sup> However, these issues must be viewed from a more objective standpoint. Quasi-monopoly rights, such as patents, are necessarily polarizing: for every entity that maintains exclusive control of something, there are multitudes of entities that necessarily do not. Indeed, this is the essence of a monopoly. Thus, it is often difficult for one who is excluded from something to see the benefits of the practice when it seems to harm him. There is good reason that the United States has historically opposed monopolistic practices,<sup>6</sup> and the so-called patent

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<sup>3</sup> See *Bonito Boats v. Thunder Craft Boats*, 489 U.S. 141, 146 (1989).

<sup>4</sup> Aristotle, *Politics: Book One: XI*, in *THE POLITICS OF ARISTOTLE* 29 (Ernest Barker eds., trans., 1964).

<sup>5</sup> Wilbur Wright, *Are the Wrights Justified?*, 6 *AERONAUTICS*, Apr. 1910, at 141.

When a couple of flying machine inventors fish, metaphorically speaking, in waters where hundreds had previously fished for thousands of years in vain, and after risking their lives hundreds of times, and spending years of time and thousands of dollars, finally succeed in making a catch, there are people who think it a pity that the courts should give orders that the rights of the inventors shall be respected, and that those who wish to enjoy the feast shall contribute something to pay the fishers.

*Id.*

Letter from Wilbur Wright to Octave Chanute (Jan. 29, 1910), *available at* [http://invention.psychology.msstate.edu/inventors/i/Wrights/library/Chanute\\_Wright\\_correspond/1910/Jan29-1910.html](http://invention.psychology.msstate.edu/inventors/i/Wrights/library/Chanute_Wright_correspond/1910/Jan29-1910.html).

You apparently concede to us no right to compensation for the solution of a problem ages old except such as is granted to persons who had no part in producing the invention. That is to say, we may compete with mountebanks for a chance to earn money in the mountebank business, but are entitled to nothing whatever for past work as inventors.

*Id.*

<sup>6</sup> Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in *V THE WRITINGS OF JAMES MADISON: COMPRISING HIS PUBLIC PAPERS AND HIS PRIVATE CORRESPONDENCE, INCLUDING NUMEROUS LETTERS AND DOCUMENTS NOW FOR THE FIRST TIME PRINTED* 269, 274–75 (Galliard Hunt ed., 1904) (stating that monopolies are “justly classed among the greatest nuisances in Government. . . . Monopolies are sacrifices of the many to the few”); Letter from Thomas Jefferson to the Secretary of Treasury (Albert Gallatin) (June 19, 1802), in *VIII THE WRITINGS OF THOMAS JEFFERSON* 158 (Paul Leicester Ford, ed. 1897) (“The mo-

monopoly has proven to be a valuable one despite the multitudes that it must exclude. An honest evaluation of the patent system must look to the greater progress that it creates even though it inconveniences some.

## II. THE CONSTITUTION IS STRICTLY AN AMERICAN DOCUMENT, AND EFFORTS TO INTERPRET IT SHOULD BE ROOTED IN AMERICAN TRADITION

In the present analysis of the U.S. patent system, we must first turn our attention to a frequently cited passage in the Constitution: “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>7</sup> To properly address the question of which entity may receive a patent, we must examine the clause that grants the Federal Government the power to issue patents in the first place.

According to modern interpretive methodology, the proper understanding of the Constitution comes from determining the original meaning of the language used.<sup>8</sup> This requires us to look back at what those who ratified the Constitution would have understood the document to mean.<sup>9</sup> However, we need not, and should not, look backward to the patent practices of Great Britain to understand the language that empowers U.S. patent laws.

The United States Government, defined by the Constitution, did not adopt the English common law and the Framers did not seek to re-create the Continental monarchy on local soil. Instead, they took on the solemn task of building a government of their own design. Like masons, the Framers built a government structure using discretely authorized powers as their bricks. They built a framework that granted the Federal Government authority to act only where it was deemed necessary “in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, pro-

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nopoly of a single bank is certainly an evil.”); *see also* WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 59–61 (1965) (“The principle that government should create no monopolies was one of those deep political convictions that the colonists had brought with them from England.”). Letwin goes on to describe several colonial and early state constitutions that banned government monopolies, and discusses the general public animosity toward monopolistic practices. *Id.*

<sup>7</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>8</sup> Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1139 (2003) (discussing the trend in original meaning textualism for interpreting the Constitution).

<sup>9</sup> *See id.* at 1117 (stating that the public, as the ratifying entity, gave force to the document).

mote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.”<sup>10</sup> The range of powers that could have been granted to the new government were great, but just as a pile of bricks may remain unused when a building is complete, there were powers that the Framers found fit to leave out of the Constitution. As *The Federalist* points out, the government can only act where it has been given the power to do so.<sup>11</sup> Any “brick” that was not included at the Federal Convention cannot be inferred into the structure.<sup>12</sup> The Federalist’s reluctance to include a Bill of Rights bears this out. Why should a Bill of Rights be included when it is clear that the government has no authority to do anything but that which is explicitly stated in the Constitution?<sup>13</sup> The Framers clearly rejected many aspects and methods of other governments, such as Britain’s parliamentary system, so we can safely conclude that our Constitution is exceptional and should be interpreted in view of the American intentions and philosophies that gave it life.<sup>14</sup>

Still, some scholars argue that the peculiar definition that the British adopted for the word “inventor” should be imported to the U.S. Constitution.<sup>15</sup> In light of the differences between the English monarchy and the government created by the U.S. Constitution, it is clear that we cannot simply conclude that the foundation of American government was merely a local codification of English Laws. Specifically, due to the English governmental system, the foundation of the English patent laws cannot exist in America. Although the result of a patent—a limited monopoly right in an invention—is the same, the justifications are necessarily incongruous.

In England, patents were grants of privilege bestowed by the grace of the Crown.<sup>16</sup> They were considered “contract[s] with the King.”<sup>17</sup> Patents on

<sup>10</sup> U.S. CONST. pmb.

<sup>11</sup> *McCulloch v. Md.*, 17 U.S. 316, 405 (1819) (“This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, . . . is now universally admitted.”). See *THE FEDERALIST NO. 84* (Alexander Hamilton) (noting that the Constitution limits government power).

<sup>12</sup> *Id.* This is simply an extension of the “building” metaphor from before. It relies on the fact that our government is one of enumerated powers, and that powers not granted *explicitly* in the constitution cannot be inferred or inserted without constitutional amendment.

<sup>13</sup> See *THE FEDERALIST NO. 84* (Alexander Hamilton).

<sup>14</sup> Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1238 (1995).

<sup>15</sup> See Edward C. Walterscheid, *Priority of Invention: How the United States Came to Have A “First-to-Invent” Patent System*, 23 AIPLA Q.J. 263, 265–66, 267 n.8 (1995) (pointing out that “true and first inventor” from the English Statute of Monopolies did not require the patentee be the literal inventor).

<sup>16</sup> George Ramsey, *The Historical Background of Patents*, 18 J. PAT. OFF. SOC’Y 6, 10 (1936).

inventions were merely one subset of the general royal practice of granting monopolies to individuals whom the monarch favored.<sup>18</sup> However, these monopolies ultimately worked injustices to the people of England. “By the 17th century, it was apparent (at least to members of Parliament) that patents were being used as a form of patronage to reward the favored subjects of the crown with monopoly profits at the expense of the public at large.”<sup>19</sup> To attempt to remedy this, Parliament passed the Statute of Monopolies in 1624, which declared all monopolies null and void, yet carved out an exception for monopoly privileges on “any manner of new manufacture within this realm to the first and true inventor or inventors of such manufactures.”<sup>20</sup> The act was merely declaratory because several common law decisions had already outlawed monopolies, yet it established that the king could still grant certain patents as a matter of “ancient custom.”<sup>21</sup> The Statute of Monopolies is largely viewed as the foundation of modern patent law.<sup>22</sup> However, even after the Statute of Monopolies was enacted, and inventive patents were maintained, there were still royal grants of privilege given by the grace of the Crown.<sup>23</sup> Although this act allowed a system whereby exclusive rights could be granted to the inventor of a new manufacture, those rights were still essentially a gift that the monarch granted as a matter of grace, favor, and ancient custom.<sup>24</sup>

While the act indicates that patents may still be granted to the “true and first inventor,” the English courts interpreted that language somewhat contrary

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<sup>17</sup> *Id.* at 9.

<sup>18</sup> Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550–1860*, 52 HASTINGS L.J. 1255, 1259, 1261 (2001) (“[T]hey represented royal privileges that supported royal policies. . . . The use—and abuse—of this royal privilege was exemplified in Queen Elizabeth’s monopoly grants, which proved to be the catalyst for the next two hundred years of evolving patent doctrine.”).

<sup>19</sup> Michael F. Martin, *Federalism, Natural Law, and the First-to-Invent Rule: A Concise History* 9 (May 5, 2006) (unpublished working paper), available at <http://ssrn.com/abstract=1123572>. One could argue, not without reason, that the Patent Reform Act of 2009 is a good, long step in this direction.

<sup>20</sup> Statute of Monopolies, 1624, 21 & 22 Jac. I, c. 3, § 90 (Eng.).

<sup>21</sup> Frank D. Prager, *Historic Background and Foundation of American Patent Law*, 5 AM. J. LEGAL HIST. 309, 314 (1961).

<sup>22</sup> See, e.g., ROGER E. SCHECHTER & JOHN R. THOMAS, *PRINCIPLES OF PATENT LAW* 14 (2004); Mossoff, *supra* 18, at 1273.

<sup>23</sup> Ramsey, *supra* note 16, at 10.

<sup>24</sup> *Id.*; Prager, *supra* note 21, at 314.

to its obvious meaning.<sup>25</sup> Elizabethan patent “grants” sought to induce foreign artisans to bring their trade knowledge into England.<sup>26</sup> These “patents on importation” provided economic incentive to skilled tradesmen, while giving England the benefits of the skilled labor.<sup>27</sup> In a time where invention as we know it today was not a driving economic force, it is clear that patents on importation were a valuable way to stimulate local economy and self-sufficiency. Thus, when the Statute of Monopolies was enacted, a valuable economic incentive was apparently banned. Despite the somewhat obvious language, “true and first inventor” was ultimately construed to include patents granted to the first importer of an item, even if he was not the literal inventor.<sup>28</sup> Although grammatically disjoint, this result made good economic sense at the time, that is, England could continue to use what it determined to be the most economically valuable monopolies. While England had used monopolies of all kinds in the past, they were now limited to those that were best suited to benefit the country without imposing unnecessary hardships on English citizens.<sup>29</sup> Where the crown once had vast, unchecked monopoly powers, they were now limited to those that had maximum economic benefit.

In contrast to England’s parliamentary government, the United States is a government “of the people, by the people, for the people.”<sup>30</sup> The Federal Government need not, and indeed cannot, rely on ancient custom or royal privilege to grant patents. The U.S. patent system was not a holdover from the English system. The Federal Government has no power beyond that which the Constitution has granted to it.<sup>31</sup> While England could look to the vast monopoly powers that it had granted in the past when construing the Statute of Monopolies, when

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<sup>25</sup> “First Inventor” in *United Kingdom Patent Law*, 3, [http://www.aipla.org/Content/ContentGroups/Meetings\\_and\\_Events1/International\\_Symposium1/FtFapp.pdf](http://www.aipla.org/Content/ContentGroups/Meetings_and_Events1/International_Symposium1/FtFapp.pdf) (citing *Forsyth v. Rivière*, (1819) 1 W.P.C. 97 (K.B.)).

<sup>26</sup> ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, *PATENT LAW AND POLICY: CASES AND MATERIALS* 4–5 (4th ed. 2007).

<sup>27</sup> *Id.*

<sup>28</sup> See *Walterscheid*, *supra* note 15, at 266–67 (citing *Edgeberry v. Stephens*, 2 Salk. 447, 1 Abbot’s P.C. (K.B. 1691)).

<sup>29</sup> Mossoff, *supra* note 18, at 1315.

<sup>30</sup> Abraham Lincoln, 16th President of the U.S., *The Gettysburg Address* (Nov. 19, 1863), available at <http://showcase.netins.net/web/creative/lincoln/speeches/gettysburg.htm>.

<sup>31</sup> See *McCullough v. Md.*, 17 U.S. 316, 405 (1819) (noting the government is one of enumerated powers); *THE FEDERALIST* NO. 84, *supra* note 13 (noting that the Constitution limits government power).

construing the U.S. Constitution, we can only look to the Constitution itself.<sup>32</sup> The Constitution grants Congress the power to secure to inventors exclusive rights in their discoveries.<sup>33</sup> The United States, then, cannot grant a patent to someone who is not an inventor.

Use of importation patents continued in England under a system with a history of granting monopolies. On the other hand, the United States generally despised those monopolistic practices. In fact, one of the fundamental political ideas that shaped the formation of the United States was a distaste and distrust of monopolistic practices.<sup>34</sup> James Madison stated that monopolies were “justly classed among the greatest nuisances in Government.”<sup>35</sup> Thomas Jefferson originally believed that the government should not even take part in the monopolistic practice of granting exclusive patent rights.<sup>36</sup> In a comment on the newly drafted Constitution, Jefferson stated:

I do not like . . . the omission of a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of the press, protection against standing armies, restriction against monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land . . . .<sup>37</sup>

These words demonstrate that any grant of exclusive rights in America must be carefully considered in light of a clear distrust and distaste for monopolies.<sup>38</sup> Even in the “patent clause,”<sup>39</sup> the word “patent” was not used. The contemporaneous usage of the term was a government grant of economic rights, something clearly contrary to the Framers’ anti-monopolistic tendencies.<sup>40</sup> As one com-

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<sup>32</sup> U.S. Constitution should not be interpreted in light of English statutory history. *See supra* notes 7–15 and accompanying text.

<sup>33</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>34</sup> *See LETWIN, supra* note 6, at 59–62.

<sup>35</sup> Letter from James Madison to Thomas Jefferson (Oct. 7, 1788), in 11 THE PAPERS OF JAMES MADISON 297, 299–300 (Robert A. Rutland et al. eds., 1977).

<sup>36</sup> Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in VI THE WRITINGS OF THOMAS JEFFERSON: BEING HIS AUTOBIOGRAPHY, CORRESPONDENCE, REPORTS, MESSAGES, ADDRESSES, AND OTHER WRITINGS, OFFICIAL AND PRIVATE 175, 181 (Washington ed., 1854).

<sup>37</sup> Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 12 THE PAPERS OF THOMAS JEFFERSON 438, 440 (Julian P. Boyd ed., 1955).

<sup>38</sup> *See also* *Graham v. John Deere Co.*, 383 U.S. 1, 7 (1966) (“Jefferson, like other Americans, had an instinctive aversion to monopolies. . . . His abhorrence of monopoly extended initially to patents as well.”).

<sup>39</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>40</sup> Karen E. Simon, *The Patent Reform Act’s Proposed First-to-File Standard: Needed Reform or Constitutional Blunder?*, 6 J. MARSHALL REV. INTELL. PROP. L. 129, 150 n.21 (2006).

mentator notes, “redefining the ‘Inventors’ to be the people anointed by the act of a government filing disregards the Framers’ concern that government patent monopolies should be strictly limited.”<sup>41</sup>

While the English pared down a monopoly system and left a few specific branches, the United States spliced a single branch on an empty trunk. Given the American distaste for monopolies, it would be inappropriate to view the Article I grant of rights to authors and inventors as authorizing anything but the most limited privileges.

### III. TO WHOM DOES THE CONSTITUTION GRANT A PATENT RIGHT?

Having established that Britain’s ancient custom is not a valid tool for interpreting the U.S. Constitution, we must employ some method for evaluating what the Framers meant when they granted to “Inventors the exclusive Right to their . . . Discoveries.”<sup>42</sup> At this point, other scholars would be happy to reintroduce piles of evidence from European sources to decipher what the Constitution meant by “inventors.”<sup>43</sup> This effort clouds and confuses the issue at hand. An elaborate attempt to decode the meaning of a provision in the Constitution is of dubious value because there are few, if any, hidden meanings in the document, and an attempt to find one insults its very purpose.<sup>44</sup> Although there is debate as to whether the Framers understood “inventor” to be a legal term of art which did not actually mean “inventor,”<sup>45</sup> the Constitution was ratified by the

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<sup>41</sup> *Id.* at 143.

<sup>42</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>43</sup> See EDWARD C. WALTERSCHEID, *THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE* 93–95 (2002) (arguing that the Founders were conversant in the English usage of “inventor” in the Statute of Monopolies, and thus understood the IP clause to include patent grants to those who are not literal inventors).

<sup>44</sup> *McCullough v. Md.*, 17 U.S. 316, 406–07 (1819) (“[The Constitution’s] nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.”).

<sup>45</sup> Walterscheid, *supra* note 15, at 274, 275 n.30. Walterscheid suggests that an accurate assessment of the meaning of “inventor” at the time of ratification should comport with the definition that was given to the same word in the Statute of Monopolies. *Id.* at 274. This is asserted even in light of the understanding that “the common law interpretation of this language was not a literal grammatical interpretation.” *Id.* The drafters of the Constitution took great care to state the functions and powers of the federal government in plain language. If the Framers intended to use the common law interpretation, knowing full well that it was not the “literal grammatical interpretation,” the Constitution would reflect that meaning. They did not include words intending that they would be understood as contradictory to their “literal

public and it is how the public understood the document that is critical.<sup>46</sup> The Framers did not create the United States by writing and unilaterally enacting the Constitution. Rather, they drafted the document and submitted it to the public; it was for the public to choose whether to establish it or not.<sup>47</sup> Accordingly, simply reading the text of a clause should provide the proper starting point for its meaning; the extent to which we interpret the language should be limited to the ratifying public's interpretation of that language in 1787.<sup>48</sup>

It should be emphasized that the Supreme Court adopted this basic method of Constitutional interpretation early on. In *Gibbons v. Ogden*,<sup>49</sup> Chief Justice Marshall noted:

As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution [sic], and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.<sup>50</sup>

We must also respect the fact that our government is one of enumerated powers, and powers that are not explicitly granted in the Constitution cannot be exer-

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grammatical interpretations.” The document was meant to be a Constitution, not a code or puzzle:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the 9th section of the 1st article, introduced? It is also, in some degree, warranted, by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a *constitution* we are expounding.

*McCulloch*, 17 U.S. at 407.

<sup>46</sup> See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856–57 (1989) (noting that the ratifying debates would offer proper historical context to analyze the constitution).

<sup>47</sup> U.S. CONST., art. VII.

<sup>48</sup> Edwin A. Suominen, *Re-Discovering Article I, Section 8—The Formula for First-to-Invent*, 83 J. PAT. & TRADEMARK OFF. SOC'Y 641, 646 (2001).

<sup>49</sup> 22 U.S. 1 (1824).

<sup>50</sup> *Id.* at 188.

cised.<sup>51</sup> The power that is enumerated here is explicit: inventors shall be given exclusive rights to their discoveries.<sup>52</sup> Of course, “close attention to historical sources is necessary to recapture the text’s original meaning.”<sup>53</sup> If we seek to understand what the Constitution means by the term “inventor,” a simple reading of the clause in light of contemporary definition and understanding of the term should be sufficient.

Even opponents of this view are compelled to quote the most commonly used dictionary at the time of ratification.<sup>54</sup> According to Samuel Johnson’s *A Dictionary of the English Language*, an inventor is “one who produces something new; a devisor of something not known before.”<sup>55</sup> Also, discovery is “the act of finding anything hidden; the act of revealing or disclosing any secret.”<sup>56</sup> One commentator states that these definitions somehow do not belie a contemporaneous understanding that the word “inventor” should actually have meant, literally, the person who conceives first.<sup>57</sup> The contemporaneous definitions, however, do not leave any room for this interpretation.<sup>58</sup> Definitions attempt to describe what something is rather than what it is not. These definitions indicate that an inventor must produce something new, something not known before.<sup>59</sup> This supports the notion that an invention is a singular entity, moment, and idea.

<sup>51</sup> *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 585 (1952) (referring to “inherent [Presidential] powers,” the Court stated, “[t]he President’s power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself”).

<sup>52</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>53</sup> William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar’s Bill of Rights*, 106 MICH. L. REV. 487, 494 (2007).

<sup>54</sup> See, e.g., Walterscheid, *supra* note 15, at 281–82 (quoting SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1818)).

<sup>55</sup> *Id.* at 282 (quoting SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1818)).

<sup>56</sup> *Id.* (quoting SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1818)).

<sup>57</sup> *Id.* at 281–82 (quoting SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1818)).

<sup>58</sup> As will be discussed further *infra* notes 79–82 and accompanying text, this understanding was also demonstrated by contemporaneous legislators. Justice Stevens recently detailed the legislative history from the first patent statute in 1790. *Eldred v. Ashcroft*, 537 U.S. 186, 228 (2003) (Stevens, J., dissenting). When debating “[w]hat eventually became the Patent Act of 1790,” the bills introduced only extended patent protection to inventions not before known or used. *Id.* at 229. As Justice Stevens explained, there were those who wanted to allow patenting of inventions new only to the United States—called “patents of importation.” *Id.* But, the legislators of that time were concerned about the constitutionality of “providing United States patent protection for inventions already in use elsewhere.” *Id.* In the end, the Patent Act of 1790 limited protection to those who “invented or discovered any useful art, manufacture, machine, or device, or any improvement therein not before known or used.” Act of Apr. 10, 1790, ch. 7, § 1, 1 Stat. 109, 110.

<sup>59</sup> *Id.*

There cannot be an invention if something has been done before. Or, in other words, when something new is devised which was not known before, it may be an invention. Thus, something that has been invented once cannot be invented again. Further, aside from noting that the Framers were conversant in English law, and that there was an anomalous interpretation of “inventor” in English law, opponents of a singular inventive entity fail to provide any evidence that the ratifying public would have had any contrary notion of invention.

Another contemporary source that can be used to interpret how the public would have understood the Constitution is the Federalist Papers. In *The Federalist*, Madison discusses the policy considerations that support including the Article I grant to inventors.<sup>60</sup> He argued that authors and inventors should be given exclusive rights “with equal reason.”<sup>61</sup> Article I, Section 8 secures exclusive rights to both patents and copyrights in the same clause.<sup>62</sup> Accordingly, a commonality must exist between an author and an inventor. Nobody seriously contends that a non-author can secure a copyright—there can only be one creator for any given work of art. With equal reason, for any given invention there can be only one inventor.<sup>63</sup>

In patent law commentary it is common to discuss Thomas Jefferson’s views on the subject.<sup>64</sup> Jefferson’s views on patents varied throughout his life, and scholars use his quotes to support seemingly contradictory positions.<sup>65</sup> Regardless, Jefferson had intimate knowledge and experience with the patent system and his views help inform discussions on the origins of American patent law.<sup>66</sup> Although Jefferson was not involved in drafting the Constitution, he is

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<sup>60</sup> THE FEDERALIST NO. 43 (James Madison).

<sup>61</sup> *Id.*

<sup>62</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>63</sup> There may be co-inventors for a single invention, but this is distinct from the notion of multiple independent inventors who come up with the same idea separate from one another.

<sup>64</sup> Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Historical Context*, 92 CORNELL L. REV. 953, 955 (2007).

<sup>65</sup> Compare *id.* at 975–76 (Supporting Natural Law) with Doc Searls, *Patent Absurdities*, LINUX JOURNAL, May 1, 2000, <http://www.linuxjournal.com/article/3982> (Opposing Natural Law). See also Kevin Watkins, *WTO Policy is Patently Unfair*, COMMON DREAMS.ORG, Nov. 15, 2000, <http://www.commondreams.org/views/111500-105.htm>.

<sup>66</sup> See, e.g., *Graham v. John Deere Co.*, 383 U.S. 1, 7 (1966):

Thomas Jefferson, who as Secretary of State . . . might well be called the “first administrator of our patent system.” He was not only an administrator of the patent system under the 1790 [Patent] Act, but was also the author of the 1793 Patent Act. In addition, Jefferson was himself an inventor of great note. . . . Because of his active interest and influence in the early development of the patent system, Jefferson’s views on the general nature of the limited patent

undoubtedly one of the founding fathers.<sup>67</sup> Consequently, when pursuing the original public meaning of our Constitution, Jefferson's words can be very valuable in understanding the prevailing thoughts on the topic at hand, if only because of his articulate style and the accurate record of his writings. In a letter to James Madison, discussing the possibility of including a Bill of Rights in the Constitution, Jefferson stated that "monopolies may be allowed to persons for their own productions in literature, and their own inventions in the arts, for a term not exceeding -- years, but for no longer term, and no other purpose."<sup>68</sup> This statement evidences that Jefferson, at least, did not intend to leave room to grant limited monopolies to anyone other than a true inventor.

Even Abraham Lincoln, a patent holder himself, once presented a lecture on discoveries and inventions.<sup>69</sup> When discussing the Constitution's Article I grant of rights to authors and inventors he pointed out that "before then, any man might instantly use what another had invented; so that the inventor had no special advantage from his own invention. The patent system . . . secured to the inventor, for a limited time, the exclusive use of his invention . . ."<sup>70</sup>

Clearly, none of the founding era documentation provides the straightforward statement that proponents of a first-to-invent system would like—which can also be said for opponents, of course. A plain reading of these quotes, however, leaves little room for an interpretation that supports patent grants to subsequent inventors. By remaining true to the precepts of the plain meaning doctrine and giving these words their plain meaning, Jefferson, Madison, and Lincoln simply did not contemplate that patents could be given to any individual who simply fulfilled the procedural prerequisites of the patent filing process.<sup>71</sup> They were chiefly concerned with limiting the availability and use of

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monopoly under the Constitution, as well as his conclusions as to conditions for patentability under the statutory scheme, are worthy of note.

<sup>67</sup> DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 91, 94–95 (1994); P.J. Federico, *Operation of the Patent Act of 1790*, 18 J. PAT. OFF. SOC'Y 237, 238 (1936) (stating that Thomas Jefferson "may justly be called the first administrator of our patent system").

<sup>68</sup> Letter from Thomas Jefferson to James Madison (1789), available at <http://etext.virginia.edu/jefferson/quotations/jeff0950.htm>.

<sup>69</sup> Abraham Lincoln, *Lecture on Discoveries and Inventions* (Apr. 6, 1858), available at <http://showcase.netins.net/web/creative/lincoln/speeches/discoveries.htm>.

<sup>70</sup> Abraham Lincoln, *Second Lecture on Discoveries and Inventions* (Feb. 11, 1859), in 3 *COLLECTED WORKS OF ABRAHAM LINCOLN* 363 (Roy P. Basler ed., Rutgers University Press 1953) (brackets omitted from original).

<sup>71</sup> If patents were available to anyone who simply applied for one, without also requiring that they were the true inventor, patents would be no better than the monopolies that the founders so disliked. See *supra* notes 34–44 and accompanying text.

nuisance monopolies, and ensuring to the inventor the benefit of his labors.<sup>72</sup> Aside from these quotes, the first U.S. patent statute provides valuable insight into how the early government viewed the Article I grant.<sup>73</sup>

Acts of Congress are not themselves valid interpretations of the Constitution.<sup>74</sup> However, they can help show what issues were considered important for one to properly implement and use a Constitutional grant of lawmaking authority. Accordingly, the Patent Act of 1790, the first patent statute pursuant to the new Constitution, included the statement that a patent can be repealed if it is determined that the owner is not the “first and true inventor or discoverer.”<sup>75</sup> One scholar suggests that this act “came into being with no provision whatever concerning how priority of invention should be established or even if it could or should be established.”<sup>76</sup> Furthermore, it is true that there was no procedural mechanism in place for priority determinations.<sup>77</sup> However, this is more akin to a procedural oversight than implicitly recognizing a non-inventor’s patent right. The Act clearly stated that patents are voidable if not granted to the true inventor, and to suggest otherwise denies the Act’s plain language.<sup>78</sup>

Practitioner Edward C. Walterscheid notes that the first Congress debated whether to allow patents of importation.<sup>79</sup> “If patents of importation could be permitted under the Constitution, then clearly there was nothing therein that required patents to issue only to the original inventor.”<sup>80</sup> Ultimately, the Patent Act of 1790 passed without including language that would allow patents of importation, “apparently out of concern that there indeed was a constitutional impediment to patents of importation.”<sup>81</sup> Again, Congress does not interpret the Constitution. The fact that Congress considered including authority to grant patents on importation only proves that some people believed they were valuable mechanisms. It does not prove, however, that the original understanding of “inventor” included “subsequent inventors.” Nor does the first patent act’s passage prove that the Constitution necessarily considers only true inventors, but it

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<sup>72</sup> See *supra* notes 60–61, 68 and accompanying text.

<sup>73</sup> Patent Act of 1790, ch. 7, 1 Stat. 109 (April 10, 1790) (repealed 1793).

<sup>74</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

<sup>75</sup> Patent Act of 1790, ch. 7, 1 Stat. at 109–112.

<sup>76</sup> Walterscheid, *supra* note 15, at 290–91.

<sup>77</sup> Federico, *supra* note 67, 248.

<sup>78</sup> Patent Act of 1790, ch. 7, § 5, 1 Stat. at 111.

<sup>79</sup> Walterscheid, *supra* note 15, at 282.

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

<sup>81</sup> *Id.*

does prove that a majority of representatives believed that the Constitution meant to grant patents only to literal inventors.<sup>82</sup> While not valid for interpreting the Constitution, Congress' actions certainly support the original public meaning of inventor and evidence the necessity of our first-to-invent system.

The first-to-invent system finds a friend in the Natural Rights and Social Contract philosophies of John Locke.<sup>83</sup> Because individuals are the rightful owners of their own ideas, the government grants patents to those who invent something.<sup>84</sup> It may be conceded that there is no “natural right” to a patent.<sup>85</sup> We are also not born with the inherent right to exclusive use of our own inventions for 20 years. However, it can scarcely be argued that an idea is not naturally under the exclusive control of the individual who conceived it. An idea is a thought, and the freedom of thought is the most personal, individual, natural right that people have. This right is so fundamental that it is not even codified in our Constitution's Bill of Rights. Individual thought is the very foundation of personhood, not to mention the basis for the freedoms of religion and speech that we as Americans hold so dear. An invention is not a physical thing, but an idea that the inventor nurtures after conception until it is reduced to something practical and useful. It is often the product of the focused thoughts and efforts of an individual. Accordingly, if a person chooses not to share his invention, he shall not be made to share it through persuasion by any man or government, hence, the jurisprudence of trade secrets.<sup>86</sup> Ideas are so intimately personal that they are beyond the scope of proper governmental interference. Thus, although there is no fundamental right to a patent grant, there is a fundamental right to one's own thoughts and any inventions conceived therein.<sup>87</sup>

A patent is granted to encourage inventors to come forth with their discoveries and turn them over to the public.<sup>88</sup> The patent right is consideration

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<sup>82</sup> See *id.* at 282 n.52 (noting the unconstitutionality of import patents).

<sup>83</sup> See generally Mossoff, *supra* note 64 (providing background on the prevailing social and political philosophies at the time of ratification).

<sup>84</sup> *Id.* at 972.

<sup>85</sup> See Paul M. Schoenhard, *Who Took My IP?—Defending the Availability of Injunctive Relief for Patent Owners*, 16 TEX. INTELL. PROP. L.J. 187, 210 (2008) (discussing the difference between a property right in an idea and a property right in a patent).

<sup>86</sup> 18 U.S.C. § 1839 (2006); *U.S. v. Dubilier Condenser Corp.*, 289 U.S. 178, 186 (“[The inventor] may keep his invention secret and reap its fruits indefinitely.”); see generally Unif. Trade Secrets Act (amended 1985), 14 U.L.A. 433 (1990).

<sup>87</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT, Book II, Ch. 5, § 26 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

<sup>88</sup> U.S. CONST. art. I, § 8, cl. 8; *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150–51 (“The federal patent system thus embodies a carefully crafted bargain for encourag-

granted to the inventor in exchange for relinquishing his fundamental right to his idea.<sup>89</sup> The absolute nature of the exclusion right that accompanies a patent affirms the value of this exchange. So, while patents may not issue as a matter of individual right, the inventive idea in the patent exchange requires us to view patents in light of traditional notions of individual liberties. Further, the Constitution states that this exchange—relinquishing an idea for the legally recognized property right—belongs to the inventor.<sup>90</sup> Therefore, the only proper party to this exchange is the person who made the invention.

In the eighteenth century, the prevailing political philosophies were the Social Contract and Natural Law theories of John Locke.<sup>91</sup> The Framers wrote the Declaration of Independence and the Constitution with these notions in mind,<sup>92</sup> and an understanding of them helps us to explicate those documents. Locke stated that an individual has a property right in his own person, and what man creates is an extension of that personhood.<sup>93</sup> Thus, each man has a property right in what he creates.

Since an invention is the fruit of a person's intellectual labor, it is clear why the legal rights that protect inventions are termed and treated as property rights. This position is supported throughout history and Supreme Court case law. The right in a patent has been termed an "inchoate right" in property that can be perfected by prosecution with due diligence.<sup>94</sup> Properly understood as a legal recognition of an individual right, the Article I grant should be read as doing more than merely granting a favor to industrious individuals. It provides

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ing the creation and disclosure of new, useful, and nonobvious advances in technology and design in return for the exclusive right to practice the invention for a period of years.”).

<sup>89</sup> *Dubilier*, 289 U.S. at 186 (“[An inventor] may keep his invention secret and reap its fruits indefinitely. In consideration of its disclosure and the consequent benefit to the community, the patent is granted.”).

<sup>90</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>91</sup> See generally Mossoff, *supra* note 64 (providing background on the prevailing social and political philosophies at the time of ratification).

<sup>92</sup> CARL LOTUS BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS* 26–30 (1942); *The Letters of Thomas Jefferson: 1743–1826* Bacon, Locke, and Newton (“Bacon, Locke and Newton, whose pictures I will trouble you to have copied for me: and as I consider them as the three greatest men that have ever lived, without any exception, and as having laid the foundation of those superstructures which have been raised in the Physical & Moral sciences.”); see Mossoff, *supra* note 64, at 958 (“In surveying . . . the Founders’ writings, congressional records, judicial decisions, and philosophical and legal treatises, this Article reveals how ‘privilege’ was a legal term of art in the eighteenth and nineteenth centuries that referred to a civil right justified by natural rights philosophy.”).

<sup>93</sup> LOCKE, *supra* note 87, at Ch. 5, § 26.

<sup>94</sup> Mossoff, *supra* note 64, at 995.

a legal basis upon which the government is authorized to engage in the beneficial exchange of ideas for just and reasonable compensation.<sup>95</sup> Recognizing the patent right as personal property is that compensation.

Because the patent grant is inextricably linked to fundamental individual rights to property, when the Article I grant states that exclusive use should be granted to inventors, it follows that the inventor should be understood as the sole entity “who produces something new.”<sup>96</sup> When an inventor produces something new, it has been invented at that moment and cannot be subsequently invented. Once this act is done, the inchoate right that the inventor, or collaborating inventors, has in that invention is secured.<sup>97</sup> The subsequent discovery of that same thing is no longer an invention, and no rights attach to it.

It may be argued that multiple entities can invent the same thing independently of one another. If this is the case, opponents could argue, each inventor is entitled to a patent, and it would work an injustice to deny the other inventors a patent. Therefore, why not level the playing field and simply grant the patent to the first inventor to file his application? This notion betrays the plain meaning of the words used in the Constitution. An invention can only be made once. According to the logical extension of the opponent’s argument, any subsequent creation or discovery to the first instance would be the proper subject of a patent. It would be similar to every ‘49er who found gold in the stream of an established mine and said, “I found this, and I am entitled to it!” Clearly, gold can only be newly found once. Likewise, the title “invention” can only be given to something that was new when it was created. Even if novel to the creator’s mind, but not novel to the world, the thing is no longer an invention.<sup>98</sup> Admittedly, it is a tribute to the ingenuity of mankind that there are situations where multiple people can separately conceive of the same technological advancement through their own faculties. However, if we are true to the notion of invention and the plain meaning of the term, then only the first to conceive of the new thing is the inventor. Even if the patent claimants conceived the thing within days, it is the very nature of the invention that the first to create is the inventor. The subsequent creator, then, is just a subsequent inventor. As much as that person may be a genius, his claim is merely that of “genius,” but not “inventor.”

<sup>95</sup> 3 ANNALS OF CONG. 855 (1793) (“[T]he citizen has a *right* in the inventions he may make, and considers the law but as the mode by which he is to enjoy their fruits.”). For an example of taking this declaration at face value see, Ramsey, *supra* note 16, at 16.

<sup>96</sup> *Id.* at 282 (quoting SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1818)).

<sup>97</sup> Mossoff, *supra* note 64, at 995.

<sup>98</sup> 35 U.S.C. § 102 (2006); Walterscheid, *supra* note 15, at 282 (quoting SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1818)) (“[O]ne who produces something new; a deviser of something *not known before*.”) (emphasis added).

**IV. FIRST INVENTOR TO FILE, DOUBLETHINK, AND DOUBLESPEAK**

George Orwell defined “doublethink” as “the power of holding two contradictory beliefs in one’s mind simultaneously, and accepting both of them.”<sup>99</sup> The Patent Reform Act of 2010 attempts to establish the right of the “first inventor to file.”<sup>100</sup> This clever manipulation of words seems to be no more than an attempt to quell the outcries from those who respect the history, tradition, and constitutional mandate of patents in the United States. By defining the patent right as to the first to file, we are to believe the Article I grant will be honored because anyone who gets a patent was an inventor, even if they were not necessarily the true inventor. In effect, we are first asked to hold the belief that an inventor is anyone who files a patent application and that, for the purpose of granting a patent, all one merely need do is to be the first individual to submit a patent application. Therefore, the act of being the first individual to file a patent application makes one an inventor for purposes of the Article I grant. We must also hold the contradictory belief that the act of inventing itself, and the inventor, is no longer necessary because there are, by definition, many inventors of any given invention and only the first of these many inventors to file a patent application receives the patent grant. Why even use the term “inventor” at this point. Does it even matter? This is meant to appease some and distract others. If we can accept these two logically inconsistent positions at the same time, we won’t be bothered by the intellectual betrayal that would otherwise plague this approach. This would be a significantly more palatable debate if the first-to-file proponents were upfront about the ramifications of the proposed change rather than framing the issue in “doublespeak.”<sup>101</sup> The fact is there cannot be more than one inventor. The only inventor that can get a patent is the one who invented. There is only one inventive entity, and to codify a term such as “first inventor to file,” is to ask all to agree that something can be both multiple and singular at the same time. The phrase refers to “one of many,” while the word “inventor” clearly denotes a singular entity.

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<sup>99</sup> GEORGE ORWELL, 1984, at 214 (New Am. Library 1950) (1949).

<sup>100</sup> Patent Reform Act of 2010, S. 515, 111th Cong. § 2 (2010); Crouch, *supra* note 1.

<sup>101</sup> For a discussion of “doublespeak,” see William Lutz, *Doublespeak*, BOOKNOTES, Dec. 31, 1989, <http://www.booknotes.org/Transcript/?ProgramID=1451>. William Lutz defines “doublespeak” as “language designed to evade responsibility, make the unpleasant appear pleasant, the unattractive appear attractive. Basically, it’s language that pretends to communicate, but really doesn’t. It is language designed to mislead, while pretending not to.” *Id.* Professor Lutz goes on to argue that the government is the “worst offender” of this method of communication.

## V. WHY CHANGE? WHAT ARE THE RAMIFICATIONS OF FIRST TO FILE IN THE U.S.?

That patents should only be given to the actual inventor is a matter of right, but there is another more practical consideration which we must address. The Supreme Court stated that Article I, Section 8, Clause 8 is “both a grant of power and a limitation.”<sup>102</sup> Further, “[i]nnovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must ‘promote the Progress of . . . useful Arts.’ *This is the standard expressed in the Constitution and it may not be ignored.*”<sup>103</sup> Thus, Congress is not authorized to grant patents unless they will further the progress of useful arts. It should be reiterated that the grant of power to Congress to issue patents expressly limits inventors as the proper recipient of patent rights. It is not critical that the limitation—that progress in the useful arts must be promoted—support the same conclusion. However, economic analyses show<sup>104</sup> that maintaining a first-to-invent priority system is better suited to promoting the “Progress of Science and useful Arts.”<sup>105</sup>

There are many groups advocating for the change to a first-to-file system in the U.S. Not surprisingly, many of them are currently in a position of great market command: Google, Yahoo, Microsoft, Apple, Intel, and Oracle, just to name a few.<sup>106</sup> There is reason to view these lobbying efforts with skepticism. These are large corporations, and we can be safe in assuming that they are looking out for their own best interests. Patent litigation can be very expensive, ranging from five hundred thousand to over four million dollars per party.<sup>107</sup> The greater ease with which these companies could secure patents would give them an obvious edge in markets that, by virtue of their sheer size, they already dominate to the exclusion of smaller newcomers who seek a foothold in such markets based on their innovations. To use a well-known analogy, large corporations limiting the availability of patent protection to independent inventors is like Goliath removing the stone from David’s sling.

<sup>102</sup> *Graham v. John Deere Co.*, 383 U.S. 1, 5 (1966).

<sup>103</sup> *Id.* at 6. (emphasis added).

<sup>104</sup> See, e.g., Coe A. Bloomberg, *In Defense of the First-to-Invent Rule*, 21 AIPLA Q.J. 255, 259–60 (1993); Suzanne Konrad, *The United States First-to-Invent System: Economic Justifications for Maintaining the Status Quo*, 82 CHI.-KENT L. REV. 1629, 1643–51 (2007).

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

<sup>106</sup> Patent Fairness Coalition, <http://www.patentfairness.org/learn/who/supporters/> (last visited Mar. 7, 2010).

<sup>107</sup> Jeff A. Ronspies, *Does David Need a New Sling? Small Entities Face a Costly Barrier to Patent Protection*, 4 J. MARSHALL REV. INTELL. PROP. L. 184, 211 n.4 (2004).

Large corporations do deserve protection for their inventions and that fact should not be lost in this debate. However, given the costs of obtaining and enforcing patent rights, Congress should be cautious in its changes to the patent system. At this point in time, the technology industry in the U.S. is enormous, and enormously important. It is understandable that we should want to protect such an important industry from the inevitable collapse that is seemingly foretold by reform proponents.<sup>108</sup> However, today's hot technology is tomorrow's old news and Congress should not be so quick to give greater power to those entities that currently wield substantial market control. While they may be at the cutting edge today, if they have the tools to stay on top without staying at the edge, you can bet that they will. Research and development is expensive. Why do it if there is no threat of competition or if the innovations of other, less powerful entities are free for the taking?<sup>109</sup>

A patent system that effectively takes the individual inventor out of the equation, by altering the definition of who constitutes an inventor to mean anyone who is the first to file a patent application, makes the process of obtaining a patent grant a race to the Patent Office that is typically best run by experienced and well financed entities, and not best run by individuals who have limited time and resources and, often, a lack of sophistication. A large patent application and patent litigation budget is less costly than the risk of a failed research and development investment and/or the potential of being taxed with royalty bearing licenses for the use of patents owned by others. This patent and patent litigation large budget is a luxury that can only be enjoyed by large enterprises. The first to file system tilts the playing field to such large enterprises by allowing them to build a large patent portfolio on nothing more than their ability to finance the early filing of large numbers of patent applications. Once such portfolios are established, they can be used ruthlessly to establish a patent hegemony over a nascent industry by way of threat and deed, in essence effecting freedom to operate without regard to actual contribution to the art. The smaller, innovative companies and individuals in this system are both denied the reward and protection of a patent grant for their sacrifices as true first inventors, and are left, unprotected, at the mercy of large and powerful enterprises. The Hobson's

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<sup>108</sup> See *supra* note 106 and accompanying text.

<sup>109</sup> Rather than invest large sums into research and development, a large company, capable of bringing any idea to the patent office faster than an independent inventor, may find it more advantageous to simply develop and patent other, less powerful, entities' ideas. While this may seem like "stealing" an invention, a first-to-file patent system could make it economical, if not legally, feasible.

choice given the true first inventor is to pay up and cross license or get sued out of business.

Congress should maintain a system where a truly good idea can threaten an established “ruling party.” For example, on January 9, 1998 a graduate student at Stanford University filed a patent application for a computer invention with the U.S. Patent and Trademark Office, patent number 6,285,999.<sup>110</sup> If you have not guessed by now, this was Google’s first patent.<sup>111</sup> Google started in Larry Page’s dorm room and following his patent application, the Google founders were able to shop their idea around for investors.<sup>112</sup> Larry Page was able to turn a dorm room enterprise into a garage enterprise, then into the market force that it is today with the help of the patents he obtained for his inventions. Larry Page was able to invent, seek patent protection, and help launch one of the most ubiquitous technology companies in America today. What if the U.S. did not respect the right of the actual inventor? In a first-to-file system we cannot say that this patent would have been issued to another entity.<sup>113</sup> However, we can say that the first-to-invent system is designed to protect entities such as “garage Google.” A first-to-file system, however, is clearly not tailored to protecting the right of the inventor. Implementing that system might very well prevent success stories like this from occurring. Letting the past be our guide, we do not have a problem with innovation in this country. The patent system is not stifling innovation, it is nurturing it as it always has.

It is interesting to see one of the most recent examples of the first-to-invent patent system meeting its goal of “promoting science and the useful arts.” This statement should not be misunderstood to say that the patent system was what made Google successful. However, Google’s success was certainly not impeded by the patent system. In fact, the story of America is largely one of

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<sup>110</sup> U.S. Patent No. 6,285,999 (filed Jan. 9, 1998) (issued Sept. 4, 2001).

<sup>111</sup> See Lisa M. Krieger, *Stanford Earns \$336 Million Off Google Stock*, REDORBIT, Dec. 1, 2005, [http://www.redorbit.com/news/education/318480/stanford\\_earns\\_336\\_million\\_off\\_google\\_stock/](http://www.redorbit.com/news/education/318480/stanford_earns_336_million_off_google_stock/); Google Corporate Information—Technology Overview, <http://www.google.com/corporate/tech.html> (last visited Mar. 18, 2010).

<sup>112</sup> Corporate Information—Google Milestones, <http://www.google.com/corporate/history.html> (last visited Mar. 7, 2010).

<sup>113</sup> A look at the Google patent confirms that 123 subsequently filed patent applications cited the Google patent as prior art, that is, Larry Page was the first to invent at least with regard to these 123 subsequently filed patent applications. U.S. Patent No. 6,285,999 (filed Jan. 9, 1998) (issued Sept. 4, 2001).

economic and industrial growth, and the patent system has been an integral part of that success.<sup>114</sup>

Furthermore, what is the incentive to change our system to first-to-file? Considering how well our system has worked up until this point, we should give deference to what has managed to keep the U.S. above others in innovation and technology for over 150 years.<sup>115</sup> “For many decades the United States has dominated the rest of the world in innovation, to the point that in almost every field of industry today the technology is based largely on inventions which originated in the United States.”<sup>116</sup>

## VI. CONCLUSION

It is clear that the patent grant was never intended to be a race to the U.S. patent office, a race in which the legions of fleet-footed lawyers in the pay of powerful market forces are sure to win. The Article I grant is an individual right granted to the true and first inventor and the Constitution does not support

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<sup>114</sup> See ALBERT ALLIS HOPKINS & ALEXANDER RUSSELL BOND, SCIENTIFIC AMERICAN REFERENCE BOOK 356 (1915):

When the Japanese Government was considering the establishment of a patent system, they sent a commissioner to the United States and he spent several months in Washington, every facility being given him by the Commissioner of Patents. One of the examiners said: “I would like to know why it is that the people of Japan desire to have a patent system.”

“I will tell you,” said Mr. Takahashi. “You know it is only since Commodore Perry, in 1854, opened the ports of Japan to foreign commerce that the Japanese have been trying to become a great nation, like other nations of the earth, and we have looked about us to see what nations are the greatest, so that we could be like them; and we said, ‘There is the United States, not much more than a hundred years old, and America was not discovered by Columbus yet four hundred years ago’; and we said, ‘What is it that makes the United States such a great nation?’ And we investigated and found it was patents, and we will have patents.”

*Id.* See generally Bronwyn H. Hall & Manuel Trajtenberg, *Uncovering GPTS with Patent Data* (The Foerder Inst. for Econ. Research & The Sackler Inst. of Econ. Studies, Working Paper No. 19-2005, Sept. 2005), available at [www.econ.tau.ac.il/papers/foerder/19-2005.pdf](http://www.econ.tau.ac.il/papers/foerder/19-2005.pdf).

<sup>115</sup> Ned L. Conley, *First-to-Invent: A Superior System for the United States*, 22 ST. MARY’S L.J. 779, 779–80 (1991); Richard Florida, *Innovation and Economic Crises*, THE ATLANTIC, July 17, 2009, <http://www.theatlantic.com/NATIONAL/ARCHIVE/2009/07/INNOVATION-AND-ECONOMIC-CRISES/20576/>. Eliot Spitzer, *Inventing a New Economy: What Patent Applications Can Tell Us About America’s Economic Prospects*, SLATE, Dec. 28, 2009, <http://www.slate.com/id/2239986/>.

<sup>116</sup> Conley, *supra* note 115, at 779–80.

a tortured interpretation urged by proponents of a first inventor to file system. One can and should ask: “Which is it: first-to-invent or first-to-file?” We cannot have it both ways, and it soundly seems that the Constitution would have us maintain the right of the inventor to file for the grant of a patent, and not that of the first-to-file a patent application.