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The Constitution's Approach to Copyright:
Anti-Monopoly, Pro-Intellectual Property Rights

by

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Copyright and patent are rooted in an individual's basic right to the fruits of his or her own labor. Intellectual property (IP) protections are extensions of that basic right. Such protections secure to authors and inventors the financial rewards of their creative works and innovations for limited times, thereby promoting the public good.

Despite the property rights grounding of copyright and patent, some academics and policy analysts have sought, in varying degrees, to undermine the legitimacy of IP rights. One line of attack suggests that IP rights are illegitimate government-conferring monopolies. A related claim is that IP rights are essentially contrary to the anti-monopolistic outlook of America's Founders.

These lines of attack on IP rights are wrong. Government-conferring monopolies over commerce, trade, and occupations are, in fact, almost always anathema to the American constitutional order as well as sound public policy. But basic distinctions set individual IP rights apart from illegitimate government-conferring monopolies. Under a property rights approach to copyright and patent, limited protections are tied to the creation of specific literary works and new inventions. This leaves others like freedom to create and invent, with no geographical or occupational barriers to entry.
Above all else, the U.S. Constitution recognizes the uniqueness of copyright and patent. At the time of the nation's founding, basic differences between government-conferring monopolies and individual IP rights were well known. The Founders were familiar with Britain's sorry history of Crown-chartered monopolies. They were likewise familiar with attempts by English common law courts and by Parliament to restrict such monopolies and to protect IP rights for authors and inventors. Colonial experiences with continuing British monopolistic practices were also a factor in spurring the American Revolution.

While the Founders held an anti-monopolistic outlook, at the same time they supported limited protections for copyright and patent, placing the power to establish those protections in the fundamental law of the land. Article I, Section 8, Clause 8 of the U.S. Constitution grants Congress power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” In other words, it is clear that the framers and ratifiers of the Constitution made a conscious choice to protect individual IP rights and, at the same time, to rely on certain constitutional safeguards against monopolies.

In addition to the limits inherent in the IP Clause, the U.S. Constitution's early supporters stressed structural safeguards against monopolies, including the enumerated powers doctrine. Under this doctrine, Congress could only exercise those legislative powers expressly granted to it, and the U.S. Constitution nowhere granted Congress any power to establish monopolies. Another check against monopolistic abuses was supplied by the republican form of self-government upon which the U.S. Constitution was established and which it guaranteed.

Moreover, concerns regarding government-conferring monopolies over literary publications were expressly addressed in the Bill of Rights. The First Amendment's prohibition on laws abridging the freedom of the press banned government licensing of the press. And it also supplied the federal judiciary with a firm basis for vindicating individual rights to write and publish freely.

Thus, the U.S. Constitution rightfully should be considered to be anti-monopoly and pro-IP rights. Both of these conceptions rightfully coexist in our constitutional order, and they should drive public policy to limit government-conferring monopolies and to promote and protect individual IP rights.

**Principled Differences Between Government Monopolies and Individual IP Rights**

In recent years, intellectual property rights have come under attack. Some academics and policy analysts have alleged that copyrights and patents amount to little more than illegitimate government-conferring monopolies. IP has also been attacked as a once useful but now dispensable set of government-bestowed privileges.

These broadsides against IP's institutional legitimacy miss the mark. To be sure, anti-monopolistic principles – premised on equal protection under the law, individual liberty, and limited government – are staples of American constitutionalism and deserve careful
adherence. Government-conferred monopolies are rightly to be opposed in almost all circumstances. Yet there are obvious differences between illegitimate monopolies over particular industries or occupations as opposed to individual copyright and patent protections. Those differences should drive public policy to limit monopolies, on the one hand, and to promote and protect IP rights, on the other.

Government-conferred monopolies are characteristic of arbitrary rule and denial of equal protection under the law. Corruption and self-dealing are all but unavoidable – if not institutionalized – when government issues monopolies to chosen individuals or entities. By granting private entities a monopoly over commercial activity in a certain geographical area or for a particular occupation, government imposes barriers to new entrants and undermines marketplace competition. This violates an individual's basic liberty to engage in commerce and to pursue a lawful occupation of his or her own choice.

Such monopolies are also harmful from a consumer welfare standpoint. They constitute restrictions on outputs of goods or services, encouraging price increases and discouraging innovation. In sum, government-granted monopolies are at odds with principles of free market enterprise.

In contrast, as we explained in the first paper in this series, "The Constitutional Foundations of Intellectual Property," copyrights and patents are grounded in an individual's basic right – indeed, a natural right – to the fruits of his or her own labor. IP rights protections are extensions of that basic property right. In a civil society, and under our Constitution, IP protections secure to authors and inventors exclusive but time-limited rights to the proceeds of their creations and inventions.

The contours of IP rights protections are guided by public purposes, chiefly incentivizing commercial, artistic, and scientific advances for the benefit of the broader public. According to a 2012 report by the Economics and Statistics Administration and the U.S. Patent and Trademark Office, employment in IP-intensive industries totaled more than 27 million in 2010, with nearly 13 million jobs indirectly associated with those industries. This amounted to 27.7% of jobs in the U.S. economy. That same year, according to the report, "IP-intensive industries accounted for about $5.06 trillion in value added," or 34.8% of U.S. gross domestic product.

Importantly, IP rights are tied to the specific literary works or inventions of respective authors and inventors. And those rights are subject to important limitations regarding scope and term. Literary or artistic expressions can be copyrighted, for instance, but abstract ideas or facts cannot. Fair use of copyright materials by the general public is also permitted for purposes of criticism, comment, news reporting, teaching, scholarship, or research. And patents are not granted unless they involve novelty and pass a non-obviousness requirement.

Unlike government-conferred trade monopolies, copyrights and patents do not bar entry into an occupation or prohibit competition in any particular trade. Protection extends only to the proceeds of the author's or inventor's particular literary or artistic work or
invention. When copyrights and patents are granted, others remain free to create and invent as they so chose. The liberty of prospective authors and inventors to offer their own creations and inventions as competing alternatives is limited only by their own creative and inventive resources and by the limited rights of original authors or inventors.

IP rights exclude others from using copyrighted materials or patented inventions for commercial gain without permission or licenses. But this exclusionary aspect hardly renders copyright or patent illegitimate kinds of government-conferred monopolies. Exclusion is a common characteristic of property rights. In some instances, the ability to exclude may be an inherent feature of the tangible or intangible good or service in question. By technological design, access to copyrighted information in digital format, like movies or songs, may require an encryption code obtainable only by purchase through a secure platform. Or a particular parcel of land may be protected by natural barriers or by high fences. But as a general matter, exclusion as an attribute of property primarily comes in the form of enforcement through administrative or legal process. A copyright holder may obtain an award of damages from an infringer through a civil action, for example. Or a trespasser on a property owner's land may be prosecuted.

These basic distinctions between illegitimate government monopolies and limited IP rights for authors and inventors should not be difficult to grasp. Just as importantly, these distinctions were understood in America at the time of the nation's founding. American constitutional history offers lessons in this regard, and these lessons reinforce the uniqueness and importance of IP rights.

**The British Backdrop to American Anti-Monopolistic Understanding**

Early American understanding about illegitimate government-conferring monopolies as well as individual IP rights was informed by the history of monopolistic abuses by the British Crown. Common law court rulings and Parliamentary statutes designed to prohibit or restrict those abuses provided a backdrop to the monopolistic outlook of Colonial-turned-Revolutionary-turned-Independent Americans.

The British Crown granted monopolistic charters as a means of securing revenue apart from a resort to Parliament. Sir Edward Coke's *Institutes of the Law of England* (1664), and abridged versions of the same, were studied and known to early American lawyers. In his *Institutes*, Coke defined a monopoly as an:

> Institution or allowance by the King by his grant, commission, or otherwise to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working or using of anything whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade.

The printing press, in particular, was also subject to a Crown-granted monopoly. Under the Licensing Act of 1662, no book could be printed in England without
prior registration with the Stationers' Company, a Crown-chartered guild of
printers and booksellers. The copyrights could only be secured by guild members,
could not be bought or sold to non-members in the public marketplace, and lasted
forever.

Celebrated cases like *Darcy v. Allen* (1603) struck down royal grants of trade privileges
as void under the common law. Coke's report on *Darcy*'s case stressed the importance to
society of allowing individuals to work freely in trades of their own choosing.

Despite such anti-monopolistic rulings, the Crown's persistence in issuing monopolies
prompted Parliamentary response. The Statute of Monopolies (1624) significantly
curtailed the British Crown's ability to grant special privileges. One of the Statute's
limited exceptions applied in the case of patents on inventions. Such patents were
generally limited to 14 years and allowed living inventors to renew them for an additional
14 years.

Also, following the expiration of the Licensing Act in 1695, Parliament enacted the
Statute of Anne (1710). This effectively ended the Stationers' Company monopoly. The
Statute made authors the original copyright holders, thereby eliminating guild
membership requirements. It also imposed term limit on copyrights, generally tracking
with the Statute of Monopolies by limiting copyrights to 14 years and allowing living
authors to renew their copyrights for an additional 14 years.

Many American Colonists came to believe they were entitled to the protections of
English common law and Parliamentary statutes that expressed principles of fundamental
law. However, uncertainty revolved around the extent to which English common law and
statutes prohibiting or restricting the Crown's monopolistic abuses actually applied to the
Colonies.

**The Anti-Monopolistic Spur to the American Revolution**

The persistence of British monopolistic policies in the Colonies – and resentment toward
such policies – played directly into the American Revolution. British Navigation Acts
incurred Colonists' resentment, as those Acts restricted the export of American raw
materials to England and likewise prohibited foreign goods and vessels from American
ports. A group of Virginians at a meeting presided over by Chairman George Washington
described such policies in the *Fairfax County Resolves* (1774):

> [T]he British Parliament have claimed and exercised the Power of
regulating our Trade and Commerce, so as to restrain our importing from
foreign Countrys, such Articles as they cou'd furnish us with, of their own
Growth or Manufacture, or exporting to foreign Countrys such Articles
and Portions of our Produce, as Great Britain stood in Need of, for her
own Consumption or Manufactures.

Most notably, the Boston Tea Party's protest against taxation without representation
involved taxation of tea imported by the East India Company's trade monopoly. The
*Fairfax County Resolves* declared:
[A]s we consider the said Company as the Tools and Instrument of Op-pression in the Hands of Government and the Cause of our present Distress, it is the Opinion of this Meeting that the People of these Colonies shou'd forbear all further Dealings with them, by refusing to purchase their Merchandize, until that Peace Safety and Good-order, which they have disturbed, be perfectly restored.

Undoubtedly, the Colonists regard for freedom of the press from prior restraints or from monopolistic licensing practices was evident in practice. The Colonies saw wide circulation of pre-revolutionary pamphlets by English opposition writers, supplemented by tracts addressed to Colonial concerns at the dawn of the Revolution, such as Thomas Jefferson's *A Summary View of the Rights of British America* (1774) or Thomas Paine's *Common Sense* (1776). As the First Continental Congress declared in its *Appeal to the Inhabitants of Quebec* (1774):

> The last right we shall mention regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honorable and just modes of conducting affairs.

By the time of the 1787 Constitutional Convention, aversion to monopolies and government-conferred privileges had become a key theme in American constitutional thought. But another emerging theme in American constitutionalism was the importance of IP rights.

**Anti-Monopoly, Pro-IP Rights: The Constitution's Approach to Copyright and Patent**

As previously explained in our essay, "Literary Property: Copyright's Constitutional History and its Meaning for Today," James Madison and his colleagues in the 1787 Constitutional Convention regarded copyright as "literary property." And, importantly, as we explained in our first essay in this series, "The Constitutional Foundations of Intellectual Property," they grounded copyright protection in Lockean principles concerning the rightful ownership of the fruits of one's labor. They believed that the promotion of arts, discoveries, and commerce depended upon the securing of IP rights to authors as well as inventors. Their grasp of the significance of IP rights enabled them to distinguish such rights from illegitimate government-conferred monopolies – and to establish constitutional safeguards against such monopolies.

The so-called IP Clause is contained in Article I, Section 8, Clause 8 of the U.S. Constitution. It grants Congress power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The IP Clause addressed anti-monopolistic concerns by placing limits on the purpose, scope, and terms of IP rights.
While attuned to the dangers of government-conferred monopolies by history and experience, the framers and ratifiers of the U.S. Constitution made a conscious choice to promote copyright and patent in the fundamental law of the land. Madison elaborated on that choice in a 1788 letter to Thomas Jefferson, writing:

> With regard to Monopolies, they are justly classed among the greatest nuisances in Government. But is it clear that, as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced? Would it not suffice to reserve in all cases a right to the public to abolish the privilege at a price to be specified in the grant of it?

While Madison acknowledged wrongfulness of monopolies, he nonetheless thought it unnecessary to adopt a constitutional amendment expressly prohibiting them. In retirement, Madison would restate the distinction between abusive monopolies and beneficial IP rights – and the IP Clause's constitutional policy favoring the latter with limitations. According to his so-called *Detached Memoranda* (circa 1820):

> Monoplies tho' in certain cases useful ought to be granted with caution, and guarded with strictness agst abuse. The Constitution of the U.S. has limited them to two cases, the authors of Books, and of useful inventions, in both which they are considered as a compensation for a benefit actually gained to the community as a purchase of property which the owner might otherwise withhold from public use. There can be no just objection to a temporary monopoly in these cases: but it ought to be temporary, because under that limitation a sufficient recompence and encouragement may be given. The limitation is particularly proper in the case of inventions, because they grow so much out of preceding ones that there is the less merit in the authors: and because for the same reason, the discovery might be expected in a short time from other hands.

This distinction between abusive monopolies and beneficial IP rights was also articulated by Noah Webster. The pro-ratificationist lexicographer Webster was a collaborator with Madison in urging copyright protections for American authors. Webster's *American Dictionary of the English Language* (1828) makes that distinction plain in light of American Revolutionary political theory and history. His dictionary defined "monopoly" as:

> The sole power of vending any species of goods, obtained either by engrossing the articles in market by purchase, or by a license from the government confirming this privilege. Thus the East India Company in Great Britain has a monopoly of the trade to the East Indies, granted to them by charter. *Monopolies* by individuals obtained by engrossing, are an offense prohibited by law. But a man has by natural right the exclusive power of vending his own produce or manufactures, and to retain that exclusive right is not a monopoly within the meaning of the law.
The Constitution's Structural Safeguards Against Monopolies

In addition to the inherent limits on copyright and patent protections established in the IP Clause, the proposed U.S. Constitution's structural limits on federal power presumably prohibited federal government-conferred monopolies. According to Madison in *Federalist No. 45*, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined." Article I, Section 8 nowhere provided Congress a general power to grant monopolies.

Madison also emphasized that the republican form of government, embodied in the U.S. Constitution, provided a vital check on potential monopolistic abuses. In *Federalist No. 39*, he defined the republican form as "a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior." Madison explained:

> It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government.

In his 1788 letter to Jefferson, Madison described the check against monopolistic abuses that would be furnished by self-government under the proposed U.S. Constitution:

> Is there not also infinity less danger in this abuse in our Governments than in most others? Monopolies are sacrifices of the many to the few. Where the power is in the few it is natural for them to sacrifice the many to their own partialities and corruptions. Where the power as with us is in the many not in the few the danger cannot be very great that the few will be thus favored. It is much more to be dreaded that the few will be unnecessarily sacrificed to the many.

**Literary Property and Liberty of the Press: Copyright and the Free Press Clause**

A subset of anti-monopolistic concerns that emerged during the U.S. Constitution ratification debates involved liberty of the press and fears of a federal power grab to license the printing press. Those concerns would eventually be accommodated by the First Congress and state legislatures in proposing and ratifying the First Amendment. The Amendment's Free Press Clause expressly prohibited monopolistic press licensing by the federal government while leaving individual copyright protection intact under the U.S. Constitution.

During the ratification period, Anti-Federalist George Mason raised fears over the prospect of the federal government asserting control over the press. James Iredell, a pro-ratification floor leader at North Carolina's unsuccessful first Ratification Convention and a future member of the U.S. Supreme Court, published *Answers to Mr. Mason's*
Objections to the New Constitution (1788). In that pamphlet, Iredell contended that the unamended U.S. Constitution secured liberty of the press while protecting copyright:

The Liberty of the Press is always a grand topic for declamation; but the future Congress will have no authority over this than to secure to authors for a limited time the exclusive privilege of publishing their works. This authority has long been exercised in England, where the press is as free as among ourselves, or in any country in the world, and surely such an encouragement to genius is no restraint on the liberty of the press, since men are allowed to publish what they please of their own; and so far as this may be deemed a restraint upon others it is certainly a reasonable one, and can be attended with no danger of copies not being sufficiently multiplied, because the interest of the proprietor will always induce him to publish a quantity fully equal to the demand—besides, that such encouragement may give birth to many excellent writings which would otherwise have never appeared.

Iredell also specifically responded to the hypothetical that Congress could grant monopolies in trade and commerce pursuant to the IP Clause. He stated:

I am convinced Mr. Mason did not mean to refer to this clause. He is a gentleman of too much taste and knowledge himself to wish to have our government established on such principles of barbarism as to be able to afford no encouragement to genius.

Similar reassurance regarding liberty of the press under the proposed U.S. Constitution came from pro-ratificationists such as Noah Webster and Alexander Hamilton. In Federalist No. 84, Hamilton asked: "Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?" Hamilton posed the question in the course of his broader argument against the necessity of adopting a Bill of Rights. One aspect of Hamilton's argument – similar to Madison's arguments against a constitutional provision expressly banning monopolies – was rooted in the republican nature of government under the U.S. Constitution. Expressly referring to the liberty of the press, Hamilton wrote:

[I]ts security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and of the government. And here, after all, as is intimated upon another occasion, must we seek for the only solid basis of all our rights.

New York and ten other states proceeded to ratify the proposed U.S. Constitution, putting the new government into effect. Several ratifying states would pass resolutions calling for a constitutional amendment to guarantee liberty of the press. North Carolina's Convention refused to ratify, however, prompting Iredell's published responses to Anti-Federalists in hopes of securing that state's
ratification in a subsequent convention.

Madison would ultimately change his mind regarding the efficacy of adopting a Bill of Rights. In his speech to the First Congress introducing a Bill of Rights, Madison expressed the need "to satisfy the public mind that their liberties will be perpetual, and this without endangering any part of the constitution, which is considered as essential to the existence of the government by those who promoted its adoption."

Referring to the refusal of North Carolina and Rhode Island to ratify the constitution, Madison declared "it is a desirable thing, on our part as well as theirs, that a re-union should take place as soon as possible." Madison believed that by proposing a Bill of Rights, Congress would induce those two states to ratify, restoring their relations with the other states in Union. Madison also declared that a Bill of Rights would be enforced by the judiciary to vindicate individual rights from governmental overreach.

Consistent with the views he set out in his 1788 letter to Jefferson regarding the benefits and necessity of constitutional protections for IP rights, Madison did not propose any general anti-monopoly amendment to the U.S. Constitution. He did, however, propose a provision that "[t]he powers not delegated by this constitution, nor prohibited by it to the states, are reserved to the States respectively" – later embodied in the Tenth Amendment. Diverging from his Federalist co-author Hamilton, Madison also proposed a provision securing liberty of the press: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." This provision would eventually become a part of The First Amendment, which provides, in pertinent part, that "Congress shall make no law… abridging the freedom of speech, or of the press."

Under Madison's leadership, the First Congress proposed – and the state legislatures ratified – an amendment to the U.S. Constitution containing an anti-monopoly component regarding literary publications. The First Amendment's Free Press Clause expressly prohibited what the nation's Founders historically regarded as the primary monopolistic concern regarding literary publications – government control and licensure of the press. The Free Press Clause was thus consistent with the anti-monopolistic but pro-IP rights understanding of the Constitution's framers and ratifiers.

Conclusion

Copyright and patent are rooted in an individual's natural right to the fruits of his or her own labor. Intellectual property protections are inextricable, necessary extensions of that basic right. Such laws secure to authors and inventors the financial rewards of their own creative works and innovations for limited times, promoting the public good.

Despite the property rights grounding of copyright and patent derived from Lockean principles adopted by our Founders and incorporated into the Constitution, some
academics and policy analysts have sought to undermine the legitimacy of IP rights by comparing them to illegitimate government-conferred monopolies. Such attacks on IP rights are misguided.

Government-conferred monopolies over commerce, trade, and occupations are anathema to the American constitutionalism. But basic distinctions set copyright and patent protections apart from illegitimate government-conferred monopolies. Under a property rights approach to copyright and patent, limited protections are tied to the specific literary works and inventions of individuals or individual entities. This leaves others like freedom to create and invent, with no geographical or occupational barriers to entry.

Above all else, the U.S. Constitution recognizes the uniqueness of copyright and patent. The Founding Fathers held an anti-monopolistic outlook and at the same time supported limited protections for copyright and patent. The Constitution's framers and ratifiers made a conscious choice both to protect individual IP rights and to rely on certain constitutional safeguards against monopolies.

In addition to the limits contained in the IP Clause, the U.S. Constitution's early supporters stressed structural safeguards against monopolies. Congress could only exercise those legislative powers expressly granted to it, and the U.S. Constitution nowhere granted the power to establish monopolies. The republican form of self-government embodied in the U.S. Constitution also checked monopolistic abuses. And the First Amendment's Free Press Clause prohibited government licensing of the press.

All told, the U.S. Constitution established an anti-monopoly, pro-IP rights outlook.

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**Further Readings**

*Appeal to the Inhabitants of Quebec* (1774).


*Fairfax County Resolves* (1774).

James Iredell, *Answers to Mr. Mason's Objections to the New Constitution* (1788).

James Madison, *Detached Memoranda* (circa 1820).


James Madison, *Speech to the First Congress Proposing a Bill of Rights* (1789).
Publius (James Madison), *Federalist No. 39*.

Publius (James Madison), *Federalist No. 45*.

Publius (Alexander Hamilton), *Federalist No. 84*.


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