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American Patent Law: Liberal and Republican Theories of Governance

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i Abstract

This paper explores the history of American patent law in relation to classical liberalism and classical republicanism. In a basic sense liberalism emphasizes the importance of individuals, while republicanism underscores individual sacrifice for the good of the community. A patent creates a temporary monopoly privilege for an individual to encourage disclosure of his invention to the public. On the one hand, patent law exists to protect an individual's claim to his invention. On the other hand, patent law exists to facilitate the transfer of ideas into the common knowledge pool. In this way, a patent balances an individual's property right with an obligation to sacrifice exclusive hold over an idea by publishing that idea from which the community may benefit.

A historical analysis indicates that classical liberalism and classical republicanism balance and shape the development of early patent law. Now, the emergence of multinational pharmaceutical companies has created new concerns adding layers of complexity to the law. These modern developments make the balance between these ideologies more difficult to discern and distort traditional attentions of both. Although new issues dominate patent law, these theories of governance still linger below the surface and a debate between individualism and altruism reappears during the most recent legislation, influencing patent law. Inadvertently, this debate is shallow, and overlooks problems of the modern patent system, demonstrating the power of classical liberalism and classical republicanism to obscure political reality in patent law.

"Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; and to give his personal service, or an equivalent, when necessary. -John Adams, Thoughts on Government, 1776

"[O]thers, like the pharmaceutical industry, oppose any change to drug pricing, no matter how justifiable and modest, because they believe it threatens their profits." --Barack Obama: United States Health Care Reform Progress to Date and Next Steps, 2016

ii Introduction

In 1787, representatives from across the nation met in Philadelphia to revise the Articles of Confederation. Instead of revising the Articles, the result was a new Constitution. Although the issues of representation and taxation took center stage at the Convention, the Constitution addressed a spectrum of issues including patents. Article 1 section 8 of the Constitution gives congress the power "[t]o 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."[1]

American patent law originates from 16th century British law. In the 16th century, it was common for the British royal family to grant monopoly rights. Patents were intended to promote the growth of new industries but were abused by the Crown. The British Royal Family used patents to generate revenue and patronage without collecting taxes. In response, Parliament passed the Statute of Monopolies in 1623 to repeal patents granted "upon…untrue [pretenses] of [the] public good."[2] Monopolies for "any manner of new manufactures… to the true and first inventor" remained protected in section 6 of the document. Following this tradition, patents in colonial America resembled the British system closely. This typically meant

[1] U.S. Const. art. I, section 8, clause 8.
[2] English Statute of Monopolies of 1623, section 1.

patents were granted for an invention or new industry, however, in some cases patents were also granted for well-established industries such as candle making.[3]

The Constitution gives Congress the ability to make deals with inventors whereby inventors are compensated with temporary monopolies in return for disclosing their secrets to the public. In the context of American political governance theory, classical liberalism is concerned with the rights of the individual, while classical republicanism emphasizes the importance of altruistic contributions to the community. In American patent law, private property rights are issued to protect and encourage creative innovation, but with the stipulation that the invention must be disclosed to the public. In this sense patent rights are dual in their purpose. On the one hand, they treat an idea as private property, granting exclusive access. Like ownership of tangible property, exclusive ownership of an invention allows inventors to recuperate costs and generate profits using their intellectual capital. On the other hand, this property right exists only for a limited time and requires full disclosure, to allow knowledge to diffuse into public domain allowing the community to utilize the invention.

An analysis of patent law is a valuable exercise for scholars of both liberalism and republicanism because patent law has changed in small increments and appears to reflect concerns of both ideologies throughout the course of its political development. Beginning with the signing of the Constitution, American patent law can be depicted as navigating an unpredictable path between accentuating individual property rights and restricting the eligibility of patentable material to promote the transfer of ideas. In the early history,

[3] Floyd L. Vaughan, The United States Patent System: Legal and econom. conflicts in American patent history (Norman (Oklahoma): Univ. of Oklahoma Press, 1956), p. 14-16.

legislators were concerned with the issues of the burgeoning democracy leaving judges to shift the balance between individual rights and the public interest in patent law. In more recent history, judges and legislators appear less concerned with patent law's relation to an individual's property rights. Instead, the interests of large corporations dominate patent law. Ironically, some legislators continue to conceptualize the patent system as an instrument that allows the small inventor to achieve financial success cultivate the common good. Sadly, this view appears to be an overly idealistic and fails to consider the current challenges for small entities. Large companies, such as those in the pharmaceutical industry, dominate the legal process because of extreme costs of litigation and complexities of the law. This places independent inventors at an immense disadvantage in the patent process. This phenomenon demonstrates the power of classical liberalism and republicanism to influence American political actors. Without pressure from their constituents or consideration of the current conditions, politicians rekindle an emotional debate between individual property rights and the common good in an inappropriate setting. This element of American political culture has created dangerous stagnation in American Patent law that must be addressed moving forward. Patent law can be powerful tool for society if addressed properly.

iii Literature Review

Lockean liberalism has been an important force in American political development. Louis Hartz explains the importance of liberalism on American political culture in his book *Liberal Tradition in America.* He uses liberalism in the "classical Lockean sense" in which citizens have innate rights to life, liberty, and property.[4] Hartz argues the values of Lockean liberalism suited the American populace because there is no feudal system in the New World. Lockean liberalism thrived on a "storybook truth about American history: that America was settled by men who fled from the feudal and clerical oppressions of the Old World."[5]

American political traditions have reinforced liberal principles. Hartz identifies several political phenomena that may have preserved Lockean ideas in patent law. In many cases the devotion to the Constitution and the "Lockean doctrine…has been [noticeably] irrational."[6] In explaining the persistence of the liberal tradition, Hartz mentions "the unusual power of the Supreme Court."[7] Hartz argues "Judicial review …would be inconceivable without acceptance of the Lockean creed, ultimately enshrined in the Constitution."[8] Further evidence can be seen in instances of Constitutional controversy. Resistance to change is based on an emotional belief of "some authentic and substantive quality of [the founders' thoughts and experiences]."[9] Hartz describes this phenomenon as a "cult of Constitutional worship," reaffirming our commitment to Lockean principles, including property rights over time.[10]

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[4]Louis Hartz, The Liberal Tradition in America (1991), p. 4.
[5] Ibid., p.3.
[6] Ibid., p.11
[7] Ibid., p.9.
[8] Ibid., p.9.
[9] Jack N. Rakove, "The Madisonian Moment," (1988), p.473.
[10]Louis Hartz, The Liberal Tradition in America (1991), p.9.

Property is an essential component of American political culture. A massive supply of available land has made the right to property a cornerstone of our republic. The importance of property rights resonated "[w]here land was abundant and the voyage to the new world itself a claim to independence."[11] In a hypothetical parallel, intellectual property creates a metaphysical frontier, attainable for all citizens. An abundance of inventions tied to financial incentives made Americans feel they were in control of their economic destiny. This sentimentalized conception likely bolstered an attachment to the concept of intellectual property that continues into the present. As Hartz argues, "a society which begins with Locke…stays with Locke, [and] by virtue of an absolute and irrational attachment it develops from him."[12] Hartz conceptualizes American political development along a liberal path.

It would appear a single factor analysis fails to explain the oscillations in the development of patent law over time. In *Politics and Time*, Paul Pierson describes the theory of path dependency. Path dependency conceptualizes political development as the amplification of an idea, institution, or event, over time. This creates a powerful self-reinforcing cycle. As it relates to patent law, path dependency does not explain its current state in some instances. For example, for most of patent law in America history the "first and true inventor" was prioritized if he followed the necessary legal diligence. If one accepts prioritization of the "first and true inventor" as an extension or related branch of the property right prescribed in Lockean liberalism, patent law deviates from its Lockean liberal path by changing to a first-to-file system

[11]Ibid., p.17.
[12] Ibid., p.6.

in 2011. Thus, the theory of path dependency appears too simplistic to provide a thorough understanding of the ideological meaning embedded in patent law.

Intercurrence is perhaps a more appropriate tool for this analysis. Unlike path dependency, the theory of Intercurrence considers multi-causality. Intercurrence recognizes the various pushes and pulls of political forces in tandem. In *Institutions and Intercurrence: Theory Building in the Fullness of Time*, Orren and Skowronek visualize intercurrence as "different ordering principles [converging], [colliding], and [folding] onto one another" filling up three-dimensional political space.[13]

One facet of American political space is classical republicanism. Classical republicanism prioritizes the common good. In *Liberalism and Republicanism in the Historical Imagination*, Joyce Appleby provides historical evidence of classical republicanism in early American politics. Republicanism prioritized the protection and preservation of society over the interests of individuals. Although there has been a tendency to show liberalism and republicanism in conflict with one another, Appleby argues that republicanism coexists, perhaps even complements liberalism. In the 1780s, republicanism was a "final attempt to come to terms with the emergent individualistic society that threatened" the common good.[14] "Since the men who led the colonial resistance movement presided over the affairs of the new nation for the

[13] Karen Orren and Stephen Skowronek, Political order, ed. Ian Shapiro and Russell Hardin (New York: New York University Press, 1996), p.138.
[14] Joyce Appleby, Liberalism and republicanism in the historical imagination (Cambridge, MA: Harvard University Press, 1993), p.338.

next fifty years, it could reasonably be inferred that they would carry their republican world view with them into the nineteenth century."[15]

Patent property is consistent with core tenets of classical republican thought. Patent rights are meant to incentivize innovations that are beneficial to the community and create economic prosperity. In classical republicanism, the "wisdom of the majority" is a valuable resource for governance.[16] As it relates to patent law, the intellectual capital of a society is in part the wisdom of the majority. In this model, intellectual property may be a shared reserve that can be harnessed to promote the common good. Using this lens, an "individual['s] thinking may now be viewed as a social event."[17] Classical republicanism also espouses that "only men secure in landed property were free to practice civic virtue." [18] This component of classical republicanism provides a specific connection to patent law. In a republican leaning society "the innovator [is not a] hero" at all.[19] As a citizen, innovation is a form of civic virtue and expected. In this conceptualization, Intellectual property rights give inventors the economic security to engage in this form of civic virtue, and forfeit an idea for the common good.

It appears that liberal and republican theories of governance influenced the development of patent law concurrently. "Leaving slavery in a conceptual limbo… America stood for free men, free land, free institutions, and free choice."[20] In both classical liberal and republican theories property rights are necessary. Property in Lockean liberalism is a right of

[15] Ibid., p.278.
[16] Ibid., p.285.
[17] Ibid, p.285.
[18] Ibid.,p.285.
[19] Ibid., p.285.
[20] Ibid., p.5.

the individual, while property ownership in republicanism disaggregates power, thereby protecting the smaller entities from domination. In a sense, patent property does the same. Patent privileges protect an individual inventor by awarding intellectual property to protect the inventor against economic domination by citizens with no personal stake in the invention allowing them to engage in this form of civic virtue.

The history of patent law provides a unique case study for political theorists because it changes incrementally and remains relatively untainted by partisan politics. The novelty of patent law is that the fundamentals of the modern applications have not changed significantly over the course of American History. Some of the laws are closely based on legislation and court cases from the 18th and 19th century. In short, by remaining apolitical, this area of the law has minimal political noise. Although seeking to explain political development in relation to two theories of governance requires some generalization, this exercise with patent law may provide the clearest picture of how classical liberalism and classical republicanism balanced, evolved, and adapted to extraneous changes over the course of American history.

First, Chapter 1 will examine how James Madison and Thomas Jefferson perceived patent law in relation to classical liberalism and classical republicanism. Next, Chapter 1 will analyze and discuss legislation and case law chronologically, ending with the codification of patent law in 1952. Chapter 2 will continue a chronological analysis of patent case law, ending with the America Invents Act of 2011. Chapter 2 will conclude with an extensive analysis of the debate on the America Invents Act, and relate the contemporary arguments to classical liberalism and classical republicanism.

iv Chapter 1: Liberalism and Republicanism in Early Patent Law

Patent property contains characteristics of classical liberalism and classical republicanism. This chapter will present the opinions of James Madison and Thomas Jefferson on patent property. After, this chapter will analyze patent legislation and case law chronologically to show a conceptual timeline of the patent law development between liberal and republican theories of governance.

v Evidence from Madison and Jefferson

James Madison's conception of patent property blends individual and communitarian concerns. In 1792 he argues "a man has a property in his opinions… liberty of his person… [and] free choice." [21] Classical liberalism emphasizes the importance of an individual's natural right to property and the obligation of government to secure it. Madison reiterates this point in 1792 when he writes "[g]overnment is instituted to protect property of every sort."[22] In Federalist 43, Madison discusses how patent property should be conceptualized. He argues "[t]he public good fully coincides…with the claims of the individual" inventor.[23] This quote perfectly depicts patent law as a balance between individual rights and the collective interests of society.

Madison saw the court system as a valuable political mechanism with potential for American law. "Madison consciously preferred to bring the judiciary directly into the lawmaking process."[24] Madison's favorable perception of the court system and his role in drafting the

[21]James Madison, "Property," March 29, 1792.
[22]Ibid.
[23] James Madison, Federalist No. 43.
[24] Jack N. Rakove, "The Madisonian Moment," (1988), p.493.

patent clause may explain why the courts are given substantial power and discretion when interpreting patent law.

Thomas Jefferson's view of patents evolved over time. After the adoption of the Constitution in 1788 Jefferson argues against patents in a letter to Madison. He says "[t]he saying there shall be no monopolies, lessens the incitements to ingenuity, which is spurred on by the hope of a monopoly for a limited time…but the benefit of even limited monopolies is too doubtful to be opposed to that of their general suppression."[25] In this letter, Jefferson is skeptical of the benefits of temporary monopolies in relation to the common good. Soon after however, Jefferson expressed the opposite opinion and supported protecting limited "monopolies" in the Bill of Rights.[26]

Jefferson saw the communitarian value of the patent as more important than an individual's claim. He makes a distinction between patent property and natural rights in 1813. In one letter, he argues that "the exclusive right to invention as given not of natural right, but for the benefit of society."[27] In this quote, Jefferson depicts patent protection in a classical republican role. As one would expect, Jefferson was not a believer in "granting patents for small details…he [believed in] in a high standard of invention" while serving on the first board.[28] While natural rights establish the foundation for a society, Jefferson saw the patent as a secondary right that exists to create benefits for the community.

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[25] P. J. Federico, "Operation of the Patent Act of 1790," Journal: Patent and Trademark Office Society, (1936)., p.36.
[26] Ibid., p.36.
[27] Thomas Jefferson to Isaac McPherson, August, 13,1813.
[28] Fredrico,(1936), p.37.

vi Evidence in Early Legislation and Case Law

The Patent Act of 1790 relates to individual rights and the common good in some respects. The Patent Act of 1790 references the "first and true inventor or discoverer." This wording indicates prioritization of a patent is based on time of invention. This resembles the right to property in Lockean liberalism. Like an individual's right to property is created at birth in Lockean liberalism, priority of a patent right is created at the inception of the invention. The Patent Act of 1790 features attributes of classical republicanism as well. For example, in section 6, the law lists "concealment" from the public as a case where the claim of the "first and true" inventor would be invalidated. This condition shows that public disclosure is an integrated component of patent property, which suggests it exists to promote the common good at the same time.

Conversely, certain components of this law suggest the patent property may not be ideological. Under the Patent Act of 1790, "no oath [by an applicant] was required" to affirm one was the first and true inventor.[29] Instead, patent rights were granted to the first applicant. A judge could repeal the patent if there was sufficient evidence that the patentee was not the "first and true inventor."[30] However, the case must be initiated within one year after the patent was granted. The one year limit provides strong evidence that patent rights are not related to natural rights. Intuitively, if legislators saw a patent with the same importance as a citizen's natural right to property, a one year period hardly seems sufficient. The Act of 1790 did not have an appeal process in the event the patent board rejected an application. Likewise, if

[29] Ibid., p.33.
[30] The Patent Act of 1790, Section 5.

this right was seen on a comparable level, legislators would have likely created a secondary channel for individuals to appeal.

The Patent Act of 1793 suggests early patent law was not ideological as well. For example, the change in 1793 "went from the extreme of a rigid examination by high government officials to the opposite extreme of no examination at all."[31] Under the patent registration system, applicants were required to swear "the originality of [their] invention" but if they "paid the stipulated fees [they] could secure a patent."[32] This patent law also omitted an appeal process for interfering applications. Section 9 of the Patent Act of 1793 stipulates in the "case of interfering applications" there will be an "arbitration of three persons" to determine who is entitled to the patent. The reasons the arbitrators would rule in favor of the plaintiff or defendant are unclear, leaving the arbitrators with substantial discretion, and their decision was final.

The case of Oliver Evans is an important case in the ideological development of the patent. Evans was issued a patent for the "useful improvement in the art of manufacturing meal" that expired in 1804.[33] Evans petitioned congress for an extension the circuit court of Pennsylvania, "expressed in their unanimous opinion that the description of the machines, stated in the patent to have been invented by him, was imperfect and insufficient..[making the] trail was void."[34] Oliver was unable to appeal to the Supreme Court because the case was for a dispute of less than two thousand dollars. Evan's patent was not recognized by the court

[31] Fredrico, (1936), p. 45.
[32] Vaughan, (1956), p. 19.
[33] Congressional record: (December, 1807) p. H1058.
[34] Congressional record: (December, 1807) p. H1058.

because the patent office made an administrative error on his document. The committee appealed to the "Secretary of State," none other than James Madison, "for his opinion on the subject" and policy direction.[35] The Secretary's letter conveyed that "he [did] not think himself justified in introducing a principle" to patent law.[36] This response indicates that Madison recognized the importance of patent law and indicates he saw some ideological meaning to it.

Congress granted Evans an extension. In his petition, Evan's argued he was not able to collect any "net profit" from this invention, despite following the proper diligence.[37] In handling this petition, Congress recognized his claim as an individual, but also his value to the community. A committee reported that "the petitioner appears to possess a mind capable of conceiving, and a strong propensity for making new discoveries and inventions, and the greater part of his life seems to have been devoted to improvements in labor-saving machines… his discoveries may be rendered useful to his country, and at the same time profitable…to himself."[38] The committee ultimately reinstated Evan's patent rights arguing that he "complied with the patent law [and] the defect" in his document were beyond his control.[39] The administrative error inhibited Evan's ability to exercise his property right. Therefore, Congress reasoned it had an obligation to honor Evan's agreement with the state, and encourage him to contribute additional innovation to society in the future.

In Evans v. Jordan & Morehead 13 U.S. 199 (1815), the court bolstered the association between patent property and the natural right to property. Evans sued the defendant for

[35] Congressional record: (December, 1807) p. H1058.
[36] Congressional record: (December, 1807) p. H1058.
[37] Congressional record: (January, 1805) p. H1002.
[38] Congressional record: (January, 1805) p. H1002.
[39] Congressional record: (December, 1807) p. H1059.

damages after receiving an extension for his patent. The Circuit Court of Virginia gave its opinion that the second patent was separate from the first, and gave the Plaintiff the right to seek damages for infringement after the second patent was issued. The lower court was divided on this issue and looked to the Supreme Court to confirm their conclusion. The Supreme Court, including Chief Justice John Marshal, agreed with the judges that, "[t]he Constitution and law, taken together, give to the inventor, from the moment of invention, an inchoate property therein, which is completed by suing out a patent…This inchoate right is exclusive [and] It can be invaded or impaired by no person." The court states that although legal diligence is required to secure the patent right, the moment invention itself establishes the inventor's priority to intellectual property.

Jefferson disagreed with the decision in Evans v. Jordan & Morehead 13 U.S. 199 (1815) and suggested had court misconstrued patent law. In a letter on this case, Jefferson suggests the need to "guard our citizens against harassment by law-suits."[40] Jefferson believed the ruling would allow litigious persons to file frivolous law suits. Jefferson was himself affected by Mr. Evan's patent extension. Jefferson had built a mill on his property unaware that his device infringed on Mr. Evan's rights. Evan's requested that Jefferson pay a royalty on his mill. Jefferson paid the requested fee, but criticizes the courts direction in a rather sarcastic way. He said that Oliver's invention "belongs to a branch of science in which, as I have before observed, it is not incumbent on lawyers to [study]."[41] In this letter Jefferson argues that lawyers and

[40] Thomas Jefferson to Isaac McPherson:(August, 13,1813)
[41] Ibid.

judges lack the necessary knowledge of science and mathematics to properly understand what constitutes a patentable invention.

Legislators modified the patent system in 1836 in response to the decision in this case. Evans v. Jordan & Morehead 13 U.S. 199 (1815) ruled the right of the first inventor was created from the moment of invention. The new law in 1836 required "novelty," meaning the applicant "must be [the] first to invent."[42] The courts continued to change the balance between liberalism and republicanism purposes in several novel case after 1836.

In Gayler v. Wilder 51 U.S. 477 (1850) the courts diverge from a natural rights interpretation of patent property towards a republican purpose. Wilder purchased the rights for a patent on an innovative fireproof chest design. The plaintiffs filed a suit against Wilder claiming he bought the patent rights from someone other than the "first true inventor." In this case, Justice Daniel rules patent rights are not natural rights. He says, to argue "that the single circumstance of invention creates an estate or property at law… [is a] mischievous and alarming attempt to introduce a quasi and indefinite, indefinable, and invisible estate [independent] of the Constitution." In this quote, Justice Daniel resists the ruling in Evans v. Jordan & Morehead 13 U.S. 199 (1815). He also makes an additional statement on patents in the context of the public good. He says "patent privileges are allowed as incitements to inventions and improvements by which the public may be benefited." The word privilege in the ruling is especially important because it implies that an inventor is not entitled to a patent at all.

[42] Vaughan, (1956), p.19.

In response to this case, the Supreme Court made a concurrent statement on patent property which distances patent law from the natural right to property. The court said that "the party who invents is not strictly speaking the first and original inventor [and] the law assumes that the improvement may have been known and used before his discovery…[and] his patent is valid if he discovered it by the efforts of his own genius, and believed himself to be the original inventor."[43] In this instance the court states that it is irrelevant whether or not the inventor was first to conceive an idea at all, only that the inventor genuinely believed this is the case when they filed for the patent. This casts doubt on the association between liberal property and patent property. Furthermore it suggests that the wording "first and true" in the early laws may have been used to protect inventors from direct theft of their ideas rather than to prioritize rights base on time.

In Consolidated Fruit-Jar co v Wright, 94 U.S. 92 (1876) another court readjusts the relationship between public and private interests in patent law. Justice Noah Swayne states that patents exist for the common good and have the same legal value as physical property. In this case John Mason filed an infringement suit against Wright for his patent on mason jars. The court decided the Mason's patent right was void because he did not file his application in the allotted period. The judges decided this delay this constituted public abandonment by Mason. In the court's decision, Swayne says inventors "are public benefactors…[who] add wealth and comfort to the community and promote the progress of society." In return the inventors are given a patent with the "same sanctions" as physical property. However, Mason did not

[43] Joe Matal, "A Guide to the Legislative History of the America Invents Act: Part I of II., p.462.

disclose his invention to the public in the allotted period, as is part of the agreement. Therefore, his invention became "irrevocably a part of the domain which belongs to the community at large."

In another case, Densmore v. Scofield 102 U.S. 375 (1880) Judge Swayne romanticizes the concept of invention by associating it with genius. In this case "the court employed the expression 'a flash of thought' or genius in describing an essential characteristic of invention. This shows the emergence of new narrative in patent law that favors individual inventors. He reaffirmed his conception of a patent as having the same "rights and sanctions" as physical property. However, the patent, for an improvement on oil tank cars, was not created by the "flash of thought" or genius that the court decided was a requirement. This ruling shows an interesting ideological transition because the patent was associated with the mental facilities of the inventor, rather than the quality or usefulness of the invention itself.

Another case, Solomon's v. United States 137 U.S. 342 (1890) clarifies the relationship between an inventors. In this case the courts further separated a patent right from the American government. The Plaintiff was Chief of the Bureau of Engraving and Printing. He invented a "self-canceling revenue stamp… [that was useful] for the prevention of fraud." The plaintiff filed for a patent and sued the government for compensation. The Supreme Court ruled the defendant's status as a government employee did not make his patented invention property of the United States Government. The court ruled the government made a profit of this invention and "the owner of such patent… never consented to its use…[therefore] an obligation on the part of the government to pay naturally arises." The court reasoned that patent property has the same attributes as tangible property in this case. The decisions states

that “the government has no more power to appropriate a man's property invested in a patent than it has to take his property invested in real estate.” Even if the invention was created while working for the United States Government, the invention can become the individual’s temporary private property if the inventor follows the proper legal diligence.[44]

vii Post WWII & Codification in 1952

About 50 years later, Sinclair v. Interchemical 325 U.S. 327 (1945) patent law shifts towards a more republican purpose. In this case Judge states that patents are issued for “an innovation for which society is truly indebted to the efforts of the Patentee.” The Judge in this case reiterates the relevance of patent rights to the common good. He says “[t]he primary purpose of our patent system is not reward of the individual but the advancement of the arts and science…it is not a certificate of merit, but an incentive to disclosure.” This ruling shows the movement away from the flash of thought doctrine in Densmore v. Scofield 102 U.S. 375 (1880). Unlike the ruling in Densmore v. Scofield 102 U.S. 375 (1880) the quality of the invention is the primary concern when determining the validity of a patent, rather than the mental capabilities of the individual.

In 1952, American legislators passed An Act to Revise and Codify Laws Relating to Patents. From June 13 through the 15th of 1951, the house committee on the Judiciary held a hearing on HR 3760. The “intention was not to change the law as it [was] written; the purpose [was] just to make it clearer.”[45]

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[44] There is a substantial gap in the timeline at this point in the paper due to time constraints. Further research should explore the period to identify other court cases related to the topic.

[45] H.R. 3760 (1951)., p.127.

The influence of the courts on patent law was seen with some discontent in the Congressional Hearing on HR 3760. Contributory infringement was one important example that shows some tension between Congress and the Courts. Contributory infringement was "established by a court decisions in suits on infringement."[46] HR 3760 established the concept of contributory infringement in section 271 (c) in response to this judicial decision. P.J. Fredrico advocated this specific statue on contributory infringement to create "a guidepost which would settle or determine the way the development of the law" would continue in the future.[47] This suggest Fredrico saw a need to divert power from the judicial channel. Others at the hearing presented a cynical view on the courts as well. Mr. Beyson complained in response to Fredrico's suggestion saying that even with a specific provision, the Supreme Court would "follow its precedent by exercising its right to have the last …last say-so."[48] This shows Beyson was frustrated with the courts power. In another instance that demonstrates frustration Mr. Kent, a Canadian patent lawyer, criticizes the judicial branch for issuing low value patents in his testimony. He cites Supreme Court case of Great Atlantic & Pacific Tea Company v. Super-Market Equipment Corporation 340 U.S. 147(1950). In this case the courts is criticized for issuing patents with "commercial utility but low inventive novelty."[49] Kent argues this type of patent offers no benefit for society, and inhibits technological progress.

The courts are also criticized for obscuring the definition of invention in the Congressional Hearing on HR 3760. Kent argues" words like "invention," "creation," and so

[46] Ibid., p.111.
[47] Ibid., p.111.
[48] Ibid., p.111.
[49] Ibid., p.112.

forth, have become surrounded with an enormous enveloping cocoon of metaphysical hocus-pocus."[50] He uses the case of Densmore v. Scofield 102 U.S. 375 (1880) in which "the court employed the expression a flash of thought or genius" to demonstrate his point. Kent argues the flash of genius doctrine is "really nothing more than a concealed way of asserting that the only thing entitled to a patent is that which evokes the gasp of amazement and the state of emotional bedazzlement."[51] In Kent's view the court added an emotional component to the law that does not relate to its purpose.

Pharmaceutical corporations are a new concern that can be observed in this hearing. By changing the definition to include "composition of matter," law makers incorporate the pharmaceutical patents into the law.[52] This change was in response to case of Funk Brothers Seed Co. v. Kalo Inoculant Co., 333 U.S. 127 (1948). In this case "mixed cultures of root-nodule bacteria capable of inoculating the seeds" were found ineligible for receiving a patent. They decided to support expanding the definition to include "composition of matter" to create a broader definition. Following the "decision of the Supreme Court" in Funk Brothers Seed Co. v. Kalo Inoculant Co., 333 U.S. 127 (1948), those at the hearing argued in favor of this change because otherwise "[many of the patents of] pharmaceutical industry [would be] thrown out."[53] This subject adds new complexity to patent law. Pharmaceuticals patents create new issues between the property rights of companies and individual citizens. Price discrimination

[50] Ibid., p.60.
[51] Ibid., p.60.
[52] Ibid., p.62.
[53] Ibid., p.124.

makes access to medicine more expensive for the public, but is required for companies to recover research and development costs.

The Congressional Hearing on HR 3760 also showed that some were concerned that patent law was developing in a way that placed small inventors at a disadvantage. Several speakers voiced their opinions that patent law was steadily becoming inaccessible for small business and individual inventors. For example, Kent says, "It is well suited to the circumstances of the great corporations because of the technical complexity of patent law and the high cost of litigation arising out of that complexity."[54] This concern is reminiscent of the association of patent property rights with the individual property rights prescribed by the Lockean doctrine. Kent continues patent monopolies in the modern age may become problematic because large companies "have vast research facilities…[allowing] them a huge advantage."[55] This concern becomes a recurring theme as patent law transitions into the 21st century.

viii Summary of Analysis

An analysis of James Madison and Thomas Jefferson on property shows a complex balance between classical liberalism and republicanism enshrined in patent law. Early law was not clear on this relationship. Thus, the courts were given immense discretion allowing case law to shift the balance between liberal and republican values. Inklings of this debate reappear in 1952. For example, during the hearing in 1951, there is a concern for the rights of individual inventors. Likewise, some in the hearing contest patents that have little utility for the

[54] Ibid., p.56.
[55] Ibid., p.69.

community. In addition, the discussion of pharmaceuticals companies in 1952 shows an immensely important development in modern patent law.

Ix Chapter 2: Global Concerns

Early patent law struggles with the tradeoff between individual rights and the common good. As seen in the Congressional Hearing on HR 3760 in 1951, patent law has developed to encompass more complex subjects. Despite the importance of patent law, legislators make only minor changes to patent law until the recent America Invents Act in 2011. As America transitions to the present patent law is about money. This chapter examines legislation and case law chronologically beginning in the 1990s ending with the America Invents Act in 2011.

x A Changing System

The advent of the 21st Century made global intellect property rights a more important concern for legislators. Multilateral trade negotiations between members of the General Agreement on Tariffs and Trade(GATT) expanded intellectual property protection to 123 countries. An important component of this multilateral agreement was the Trade-Related Aspects of Intellectual Property Rights (TRIPS) negotiated in 1994. TRIPS created a minimum level of intellectual property requirements for members of the agreement and was an important step in commercializing American intellectual property abroad.

American legislators favored increased protections for American companies to facilitate trade. The Intellectual Property Rights Protection Act of 1994 shows that legislators viewed American patent property collectively placing less importance on individual rights. On June 9, 1994, Senator William Roth of Delaware introduced the Intellectual Property Rights Protection Act. The Intellectual Property Rights Protection Act of 1994 called for greater enforcement of TRIPS in global trade relations by the executive branch. Roth proposed giving the president additional power to enforce American intellectual property rights to combat international theft.

Roth argues a lack of intellectual property security is detrimental to American economic interests and implied this impacts the common good. He criticizes TRIPS for allowing "up to 10 years for developing countries to adopt the key provisions of the agreement."[56] In this instance, Senator Roth depicts the common good as linked to economic performance in an international setting. Senator Lautenberg of New Jersey co-sponsored this Bill. He also argued that piracy of US IP is a significant cost on the US economy. He suggests that an American company's ability to safely commercialize and market their patents abroad is directly related to the jobs agenda and the wellbeing of the country. Internationally legislators generally see patents as shared property that gives the country a competitive advantage if properly protected. This act is a concrete example of the importance of patent law in American international trade policy in modern times.

In the debate on Intellectual Property Rights Protection Act of 1994, pharmaceutical and software companies are an important concern in patent law as it relates to international trade policy. Roth argues "The lack of full patent protection, for example, costs the U.S. pharmaceutical industry an estimated $5 billion per year, which, in turn, lowers R&D investment by $700 to $900 million on an annual basis."[57] Likewise, he argues high tech companies including "computer software" lose substantial amounts "from piracy and infringement" each year.[58] This provides further evidence of a transformation of patent property in the context of international trade. In a domestic setting the patent property exists to "promote the progress of science and useful arts" in trade it exists to promote profits. Law

[56] Congressional record: (June 1994)p. S.12574
[57] Congressional record: (June 1994) p. S.12574
[58] Congressional record: (June 1994) p. S.12574

makers are not concerned with ensuring small business have fair access in an international patent system.

In State Street Bank and Trust Company v. Signature Financial Group, 927 F. Supp. 502 (D. Mass. 1996) the validity of business methods patents was recognized. A Judge ruled in State Street Bank and Trust Company v. Signature Financial Group, 927 F. Supp. 502 (D. Mass. 1996) that financial modeling software is patentable. Now, business methods patents protect a novel way of doing business including new forms of insurance, financial models and even tax strategies. The foundation for the business method patent was a result of expanding the range of patentable subject matter in 1952 by substituting the word "art" for "process."[59] This change also seems to add a layer of complexity to patent law in a modern context. This specific change seems to benefit individual. Creating these types of inventions is inexpensive, and gives individuals the ability to compete with large companies in virtual marketplaces.

In another case, eBay Inc. v. MercExchange, L. L. C. 547 U.S. 388 (2006) ended mandatory permanent injunction relief which has made patents less appealing for some companies and individuals. In this case eBay infringed on the patent of Mercexchnage. The patent was for a virtual marketplace that facilitates transactions between private individuals. The court subjected the case to a four-factor test to determine if the patent owner required permanent injunctive relief. Earlier cases created a trend where "granting an injunction against a patent infringer almost as a matter of course." However, this case established court further discretion. Justice Roberts said "that Infringement does not entitle a patentee to a

[59] Sterne and Bugaisky, "The Expansion of Statutory Subject Matter Under the 1952," March 10, 2003.

permanent injunction." This case reduced the rewards for bringing an infringement law suit in that the patentee is not guaranteed compensation. The court distinguishes between types of entities in eBay Inc. v. MercExchange, L. L. C. 547 U.S. 388 (2006) in their decision. The court stated that Mercexchnage was a non-participating entity. Therefore, they did not fit the criteria of receiving a permeant relief injunction. Justice Thomas delivered the reason of the court. He said that Mercexchnage's "lack of commercial activity" which showed that the company did not suffer "irreparable damage" from the infringement.[60] In the next line of the decision, however, Judge Thomas states that a non-practicing entity is not necessarily exempt from this type of settlement. In some cases, the four-factor test should be overlooked. "For example, some patent holders, such as university researchers or self-made inventors, might reasonably prefer to license their patents, rather than undertake efforts to secure the financing necessary to bring their works to market."

This case exposes an inherent contradiction in the US patent system. This decision may be a protection of an individual's property rights in theory, but in practice it creates a great irony. Justice Thomas states in section 261"the Patent Act declares that "patents shall have the attributes of personal property."[61] However, "the creation of a right is distinct from the provision of remedies for violation of that right." By eliminating the pattern of mandatory injunctions, the court did the opposite. "According to a 2009 economic survey commissioned by the American Intellectual Property Law Association (AIPLA), in [US] patent infringement cases where the amount in dispute is between $1 million and $25 million, total litigation costs

[60] eBay Inc. v. MercExchange, L. L. C. 547 U.S. 388 (2006)
[61] eBay Inc. v. MercExchange, L. L. C. 547 U.S. 388 (2006).

average in excess of $3 million." [62] Likewise, costs are driven up by the length of these proceedings. The WIPO reported, including the appeal process, the average duration of the legal proceeding is three years in 2010.[63] Without a guarantee of payment in the event successful infringement case, individuals need to invest an unrealistic amount of money and time in the legal proceeding and hope they are successful and that judges compensate them adequately. This places small businesses at a huge disadvantage in the patent litigation process.

Cornell University v. Hewlett-Packard Co. 609 F.Supp. 2d 279 (N.D.N.Y. 2009) cut damages standards. In another landmark patent case, Cornell University v. Hewlett-Packard Co. 609 F.Supp. 2d 279 (N.D.N.Y. 2009), Judge Randal Rader changed the standards in awarding damages in an appeal. The case discussed the concept of patent exhaustion. Patent exhaustion is the legal doctrine that limits a patent holder's ability to control and individual component of their patented product after an authorized sale or licensing. The judge cut the damage award in half. Instead of giving Cornell equal to the market value of the entire computers, he gave them damages only for the market value of the single processor that was infringed. The application of this legal principle cut the award from $184 to $53 million. [64] Like eBay Inc. v. MercExchange, L. L. C. 547 U.S. 388 (2006) this ruling appears to make patent litigation more risky for small entities, giving large entities a substantial advantage.

[62] IP Litigation Costs," World Intellectual Property Organization, February 2010, 3.
[63] Ibid., p.19.
[64] Kelley, "HP appeals Cornell's legal victory in patent dispute | Cornell Chronicle."

xi The America Invents Act: First-to-invent

Legislative action on patent law came to a point in 2011. The American Invents act was the firsts "comprehensive patent bill to be enacted since the Patent Act of 1952…[and] makes the most substantial changes to the law since those imposed by the Patent Act of 1836."[65]

The change to a first-file system was one of the more controversial provisions in the 2011 Act. Section 102 changed "an invention's priority date [to] its effectives filing date…[making] the United States to the first-to-file system.[66] Ironically, there was little opposition to this alteration at first. In fact, "the issue was scarcely mentioned and was regarded as uncontroversial during the first five years that Congress considered proposals to shift the United States to a first-to-file system."[67]

Several reasonable arguments were presented to justify this change. First, using the filing date was clear and objective which creates legal certainly in litigation. Second, legal certainly would eliminate "the expense and burden of interference proceedings and eliminate the need for inventors to maintain" detailed official records.[68] The third argument was it would make the American system more like the rest of the world The United States was the only country that operated with a first-to-invent standard. Having a different system required companies and individuals "to follow and comply with two different filing systems "when applying for patents in other countries.[69]

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[65] Joe Matal, "A Guide to the Legislative History of the America Invents Act: Part I of II., p.435.
[66] Joe Matal, "A Guide to the Legislative History of the America Invents Act: Part I of II., p. 453.
[67] Ibid., p. 453.
[68] Ibid., p. 453.
[69] Ibid., p. 453.

These was a substantial amount of support for practical reasons. In March of 2011 "Senators Coons and Klobuchar spoke briefly on the subject, arguing that the first-to-file system would be more objective and would eliminate the need to resolve priority disputes through interference proceedings, which were generally too expensive to be pursued by small inventors." [70] Senator Coons references the founders to support his position. He says "our founding fathers recognized that investment in innovation will not occur without a system of patent rights to allow inventors to reap the fruits of their labor." [71] Here Senator Coon argued the inefficiencies of the first-to-invent system require the first-to-file change to make the system consistent with the principle of the founders. In this lens, he saw the first-to-invent system as a benefit for small inventors. Several members of the Senate saw efficiency as a key concern as well. Leahy cites a letter from a group of university presidents who agree that harmonizing "the U.S. patent system with that of our major trading partners, enabling U.S. inventors to compete more effectively in the global marketplace."[72]

Senator Kyl argues that first-to-file will be better for small entities. He was a staunch supporter of the change. Quoting testimony from Gene Quinn, "a patent lawyer who writes for IP Watchdog Web site," Kyl tells the senate that "only one independent inventor has actually prevailed in an interference proceeding in the last 7 years." [73] Moreover "to prevail as the first to invent and second to file, you must prevail in an Interference proceeding, and according to 2005 data from the AIPLA, "the average cost through an interference is over $600,000."[74] This is

[70] Ibid., p. 453.
[71] Congressional record:(March 2011) p. S1031
[72] Congressional record:(March 2011) p. S1178
[73] Congressional record:(March 2011) p. S1105
[74] Congressional record:(March 2011) p. S1105

well beyond the financial capabilities of a small business or independent inventor. In fact, he points out that in most cases, "it is typically major corporations that invoke and prevail in interference proceedings… [and] The very cost of the proceeding alone effectively ensures that it is these larger parties that can benefit from this system." [75] This shows that the first-to-invent system places individual inventors at a disadvantage in most cases.

Opponents argued right of the first-to invent is a valuable piece of patent law. Amendment No. 133, the Feinstein Amendment, was proposed to strike the first-to-file change from the 2011 America invents act. She argues the "proposed transition from our first-to-invent system to a first-to-file system would be severely harmful to innovation, and especially burdensome on small inventors, startups, and small businesses."[76] Feinstein argues "that the first-to-file provisions would eliminate the pre‐AIA grace period [for first and true inventors and] …[forcing] small inventor[s] to file provisional applications before their invention[s] [are] fully developed."[77] Feinstein also "argued that adoption of the first-to-file system was unnecessary [from an efficiency standpoint], because only approximately fifty interferences were ordered every year, out of about 480,000 annual patent applications."[78] Meaning the monetary cost of the first-to-invent standard was relatively small. The benefit of prioritizing inventors based on the time of conception is therefore worth this small cost.

Senator Feinstein demonstrates an emotional attachment to the first-to-invent system in the debate. She argues prioritization of the "first and true" inventor prevents the small

[75] Congressional record:(March 2011) p. S1105
[76] Congressional record:(March 2011) p. S1094
[77] Congressional record:(March 2011) p. S1094
[78] Joe Matal, "A Guide to the Legislative History of the America Invents Act: Part I of II., p.459.

inventor from being steamrolled by large corporations. She believes the "genius of America is inventions [made in] in small garages and labs, in great ideas that come from inspiration and perspiration in such settings and then take off."[79] In this romanticized narrative, she references companies such as google, apple, and AT&T, who began in in these types of environments, and progressed to become a center stone of the American economy. Feinstein shows her strong emotions for the first-to-invent system of patent law that only exists in America. Her belief in this system is so strong that the democratic Senator from California joins with conservative "organizations …including the Gun Owners of America… and the Christian Coalition" in opposing the bill without her amendment. [80]

Feinstein argues that the first-to-invent standard is an important American cultural component of the American business environment. She displays this view when she says, "I believe it is critical that we continue to protect and nurture this culture of innovation, and preserving the first-to-invent system that has helped foster it is essential to do this." [81] Senator Feinstein's argument is very consistent with the ideological principles of classical and Lockean liberalism. Feinstein's case for the first-to-file system is concerned with the rights of the individual and resembles the natural right to property in Lockean liberalism. She says even if only "one-one hundredth of 1 percent of patent applications" fall into this category, it is worth keeping the first-to-invent system because the rights of these American inventors are significant and deserve to be protected.[82]

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[79] Congressional record:(March 2011) p. S1094
[80]Joe Matal, "A Guide to the Legislative History of the America Invents Act: Part I of II., p. 459.
[81] Congressional record:(March 2011) p. S1094
[82] Congressional record:(March 2011) p. S1095

Senator Boxer supports of the first-to-invent system citing the founders. Boxer argues the constitutional origin of the patent is meaningful because "We are the only country in the world whose Constitution specifically mentions "the inventor" in our Constitution."[83] Boxer takes this word choice a sacred and a protected constitutional right of the American citizenry. Once again Boxer argues the new bill eliminates a valuable grace period. "The [unconditional] grace period is important because it allows smaller entities, like startups or individual inventors, time to set up their businesses, seek funding, offer their inventions for sale or license, and prepare a thorough patent application."[84] Like Feinstein, Boxer also points out that in Interference proceeding where two parties claim to be the true inventor it has an impact on the life of a real person. Therefore, the cost they create is well worth protecting the rights small entities and inventors, and changing the system changes the core ideological foundation of American patent law.

Senator Reid expresses concerns that the first-to-file system will harm small inventors. He was another major supporter of the Feinstein Amendment. Reid argued in the same way that "the loss of the unconditional 1-year grace period under current law" would have negative impacts on American inventors.[85] The reality of inventing is something far more complicated than the change this change accounts for. Small inventors engage in a process of "many trials, errors, and iterations before [their invention] becomes a patent-worthy invention." Full disclosure of an invention before it is complete subjects the inventor to additional risk. For example, if an inventor talks discusses issues with the invention with others, the new law

[83] Congressional record:(March 2011) p. S1096
[84]Congressional record:(March 2011) p. S1096
[85] Congressional record:(March 2011) p. S1112

means they will be forced "worry of losing their rights if these activities result in an accidental disclosure" of the patentable component of the invention.[86] Reid argued this change acts as an impediment to innovation because it forces inventors to be especially careful and secretive, creating lower quality patents.

Senator Cantwell makes shows emotional attachment to the first-to-invent system as well. Cantwell is sympathetic to small business arguing disparities in wealth place them at a huge disadvantage. In some cases of invention, "The only thing the small inventor has is their intellectual property and a fair day in court."[87] Cantwell's presentation of what is at stake further inflates the predatory narrative of large corporations. In the process, she further romanticizes the liberal ideological conception of the patent. The first-to-invent patent is a leveler and like the natural rights defined in the constitution, is something uniquely American. The patent is "creative opportunity" secured by the financial incentives of the Patent that harnesses the entrepreneurial spirit and ingenuity of individuals in society. [88]

The Feinstein Amendment is important because it shows the impact of early American political theory classical liberalism and classical republicanism on a modern debate. Although it was rejected by a vote of eighty-seven to thirteen, it shows these political theories are still active in the 21st century.[89] The debate in the House mirrors the Senate in this respect. In June, the House considered a similar amendment proposed by Representative Jim Sensenbrenner.

[86] Congressional record:(March 2011) p. S1112
[87] Congressional record:(March 2011) p. S1181
[88] Congressional record:(March 2011) p. S1181
[89] Joe Matal, "A Guide to the Legislative History of the America Invents Act: Part I of II p.459.

There was substantial opposition in the House of Representatives to the first-file change. “During the House constitutionality debate, Representatives Lamar Smith and Bob Goodlatte argued that early American patent law’s registration system was similar …[and] confirm the constitutionality of the first-to-file.”[90] Smith argues specifically that the first-to-invent system creates “the belief that” patents can easily be obtained by the first to invent, “when, in reality, interferences are prohibitively expensive.”[91] He says this “lulls inventors into a false sense of security.”[92] Likewise the benefits for American companies engaging in international trade are an important argument made by proponents.

Some rejected the global appeal of a first-to-file system in the House. Rohrabacher argues against the first-to-file change on an anti-globalization platform. Rohrabacher argues the United States has “the strongest patent system in the world” and rejects the bill because it “change[s] the fundamentals of this system… to harmonize with weaker systems.” [93] Although this argument seems to rely on the fallacy of American exceptionalism, Rohrabacher’s position rejects globalization. He argues changing the law to suit the interests of multinational corporations elevates has a negative impact on the American people. He argues “multinational corporations, they're creating jobs overseas [and] don't care if the jobs are lost” domestically if it creates larger profits.” [94] This statement identifies a disagreement on who the patent exists to benefit, as well as a disagreement on who constitutes the American community.

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[90] Joe Matal, "A Guide to the Legislative History of the America Invents Act: Part I of II p.463.
[91]Joe Matal, "A Guide to the Legislative History of the America Invents Act: Part I of II p.463.
[92] Joe Matal, "A Guide to the Legislative History of the America Invents Act: Part I of II p.463.
[93]Congressional record:(March 2011) p. H4429
[94] Congressional record:(March 2011) p.H4429

Several politicians in the House make constitutional arguments against the change to the first-to-file system. Rohrabacher argues, ‘‘Inventor’’ is in the Constitution, ‘‘filers’’ is not in the Constitution.”[95] The constitutional origins mean that Americans have “constitutionally protected patent rights” that cannot be infringed in the same way as the rights enumerated in the bill of rights. Likewise, Representative Capture argues “the bill denies a patent to the actual inventor simply because he or she files second.”[96] Capture sees this as an example of excessive bureaucratization.

Another Representative makes an argument that patent rights are related to natural rights during the debate. Scott Garrett says “the Founders rejected the idea that rights are bestowed to the people by the government in favor of the revolutionary principle that men are born with natural rights.”[97] This is consistent with Lockean liberal thought. He continues, “Inventions created by the fruits of intellectual labor are the property of the inventor… and only these first and true inventors [is] entitled to public protection of their rightful property.”[98] Intellectual property is a grey area in the sense that it’s not tangible like a plot of land. Garrett makes the argument the constitution bridges the gap between physical and mental effort. American collectively believe that if you work hard you can become successful. The patent serves to protect the autonomy of the individual inventor to pursue this intellectual property and use it as a source of capital by providing public protection from predatory companies. By granting a patent to the first to file a patent application, if they are not the first inventor, the

[95] Congressional record:(March 2011) p. H4422
[96] Congressional record:(March 2011) p. H4422
[97] Congressional record:(March 2011) p.H4422
[98] Congressional record:(March 2011) p.H4422

government strips the true inventor of theirs rights in some cases, and transfers property to another arbitrarily. For this reason, Garrett argues, “To remain true to the principles of liberty, we must preserve a system that protects the true and first inventor.” [99]

The vote in the house shows the change was quite controversial. Like the Feinstein Amendment, the Sensenbrenner was defeated. However, this was by a much closer margin of 129 to 295. Something the opposition said on the floor resonated with almost a third of the Representatives.

xii The America Invents Act: Pharmaceuticals and Section 37

Section 37 of the America Invent Act is an important example of the importance of money in modern patent law. In 2001 application extension was denied a patent-term extension to Medicine Company for a drug because the application “was filed outside of the sixty-day statutory deadline.”[100] The patent term extension extends the coverage to the time the product was under government scrutiny. The company was unable to collect “legal malpractice insurance” because the “value of this patent-term extension was approximately one and a half billion dollars.” [101]

An amendment to change the deadline for Medicine Company surfaced in the House. Representative Conyers offered the Amendment. He called this amendment a “technical revision” to prevent “confusion regarding the deadline for patent term extension applications.”[102] Instead, this amendment clearly changed the deadline in favor of Medicine

[99] Congressional record:(March 2011) p.H4422
[100] Joe Matal, "A Guide to the Legislative History of the America Invents Act: Part II of II p.647.
[101] Joe Matal, "A Guide to the Legislative History of the America Invents Act: Part II of II p.648.
[102] Joe Matal, "A Guide to the Legislative History of the America Invents Act: Part II of II p.649.

Company. Some members of the house expressed discontent with the amendment. One voice against the Amendment was Representative Lamar Smith. He called it what it was "a special fix for one company."[103] Others agreed with Smith, and the House took the amendment to a vote.

The amendment passed the House in a dramatic way. At first the vote was 209-208 against. In response to this outcome several members were outraged and "a member eventually obtained unanimous consent to vitiate the initial vote (virtually unheard of on the House floor)" and a second vote occurred.[104] In a dramatic ending, "the amendment passed by a vote of 223-198."[105] Next, the bill went to the Senate.

In the senate law makers were also divided on the amendment. Senator Sessions offered an amendment to strike the provision from the bill. He described the amendment as a product of "one of the most ferocious lobbying efforts of Congress" in history. [106] Senator McCain was an especially vocal opponent. He termed it the Dog-Ate-My-Homework Act. He voiced his frustration. McCain voiced his frustration with congress. He said, "There are 14 million Americans out of work and a full day of the Senate's time is being spent debating a bailout of a prominent law firm and a drug manufacturer."[107]

Section 37 of the America Invents Act demonstrates that the classical debate has taken a back seat to corporate money in patent law. The Senate was divided, but ultimately the amendment passed. "In the end, the Sessions amendment [to strike the amendment] was only

[103]Joe Matal, "A Guide to the Legislative History of the America Invents Act: Part II of II p.649.
[104] Joe Matal, "A Guide to the Legislative History of the America Invents Act: Part II of II p.650.
[105] Ibid., p.650.
[106] Ibid., p.650.
[107]Ibid., p. 651.

defeated by a vote of 47-51"[108] Medicine Company lobbied successfully. Although close margins in both chambers suggest the moral concerns of classical governance theory may still exist, money is the dominant force in modern patent law.

[108] Ibid., p.652.

xiii Conclusion

This historical analysis shows a balance of classical liberalism and classical republicanism in early American patent law. In the context of American governance theory, classical liberalism is concerned with rights of individuals, while classical republicanism underscores the importance of donating useful ideas to the community. Unlike a traditional property right, a patent right is time limited and conditional on a public contribution. In this way, the patent is an agreement that balances the inventor's private interests and his duties as a virtuous citizen.

The earliest American patent laws do not appear to have been heavily grounded in an ideological position. It would seem that early American politicians had more important concerns in the 1790's. Legislators were preoccupied with recovering from the unsuccessful government under the Article of Confederation and assuming a massive debt created by the Revolutionary War. Nonetheless, the courts were left to shape the structure of patent law. In many instances the courts actively legislated patent law by strengthening the relationship between patent property and tangible property. In other cases, by limiting the eligibility of patentable subjects, the courts expanded the realm of common knowledge.

Today, on the surface, it would appear patent law has left the principles of classical liberalism and classical republicanism behind. However, the evidence in this analysis demonstrates otherwise. Extraneous forces such as technology and globalization generate unanticipated legal questions. The structure of patent law requires that the courts provide answers based on antiquated texts and court cases with the remnants of these ideologies. The same debate of the purpose of a patent still exists, but the terms have changed. One striking example is the tremendous distortion that multinational pharmaceutical companies have

created. On the one hand, these companies rely heavily on patent monopolies to recover research and development costs. On the other hand, these companies use patents to generate massive profits and restrict access to life-saving medicines. This example shows how the succession of time has replaced the individual with the corporation and redefined the meaning of the common good in response to scientific progress, altering the ideological underpinnings of patent law.

Inklings of classical liberalism and classical republicanism manifest in the 2011 debate, but these arguments are superficial. Senator Feinstein and allies appeal to other lawmakers to preserve the antiquated first-to-invent system. Ironically, the realities of modern patent law do not resemble its past. For example, substantial costs of litigation make patent law a tool for large entities rather than an instrument for individual inventors. Despite overwhelming evidence that the first-to-invent standard is outdated, a large percentage of congress takes an irrational and emotional position. Further irrationality in this position is seen in another controversial section of the 2011 debate. Section 37 of the America Invents Act clearly shows that the narrative of the lone American inventor has died. Large companies purchased an amendment to the America Invents Act in a massive lobbying campaign.

Patent law is unique case study because political actors enjoy a great degree of freedom. For example, when it comes to patent law, legislators are not subject to the pushes and pulls of their constituencies or partisan agendas. In the debate surrounding the first-to-file change, politicians on both sides of the isle gave reasons why the United States should remain a first-to-invent system. Despite the evidence this system does not benefit the small inventor, some legislators exhibit an emotional attachment to the first-to-invent system although this

antiquated system is no longer efficient. As one can see from this analysis, corporate America dominates the patent market and patent politics. In this sense, reducing this matter to a timeless debate, of the individual and the community, misses the boat and ignores the realities of modern patent law.

The underlying American ideological concerns of liberalism and republicanism remain present in spirit, but the influence of money cannot be denied. Most Americans are disconnected and ignorant about patent law. Ironically, the changes in patent law do matter to the average citizen. In an example, changes in patent law have a direct relationship to the pricing of pharmaceutical drugs. Without political pressure or a watchful public eye on upcoming legislation, the question of private interests and the common good will likely be buried beneath a steady buildup of pay-to-play politics.

Relying on a romanticized political framework is irrational and dangerous when it comes to patent law. Patent law can be a powerful tool for change, but this requires seeing the realities of what patent law is today and dissipating ideological fog that clouds some lawmaker's judgement. An updated patent system can spur innovation for society and allow small inventors and the United Sates to realize its full potential.

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