

## **The Patent Clause of the United States Constitution: The Hidden Force behind the Success of the American Economy?**

Audrey Boochever, Sidwell Friends School

Granting protection for inventions was not a novel idea on the part of the framers of the United States Constitution. Nevertheless it is surprising that in the very first Article of the Constitution, the supreme law of the United States, a clause granting exclusive rights to inventors is specifically established: “The Congress shall have Power [...] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

<sup>1</sup> A distinguishing feature of the early US patent system was that patents were available to anyone, regardless of the inventor’s gender or social class.<sup>2</sup> At the time of American independence from Britain, the economy of the United States was comparable in relative wealth to the average South American country today.<sup>3</sup> How did a not-so-wealthy country in the late 1770’s turn into the most successful economy in the world, accounting for a quarter of its wealth? There is evidence that the development of the early US economy was helped significantly by the patent protection of the Constitution, available to anyone regardless of religion, sex, or origin, and subsequent laws and institutions.

Before the Constitution set out exclusive rights to inventions and discoveries, each state had its own patent policies. A national patent system was urgently needed to

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<sup>1</sup> Zorina Khan, The Democratization of Invention: Patents and Copyrights in American Economic Development, 1790–1920 (New York: Cambridge UP, 2005) 1.

<sup>2</sup> Khan 10.

<sup>3</sup> Khan 1.

resolve competing inventions, geographic coverage, and infringement claims between the states.<sup>4</sup> Among the topics discussed at the 1787 Philadelphia Convention, was how to encourage invention with democratic values. On September 17<sup>th</sup>, the Constitution of the United States set forth a written set of “rights” for the American people which included Article I, Section 8. This gave Congress the power to promote knowledge by securing an inventor’s rights to his work and was the first time a government proclaimed that patent protection was for the purpose of supporting progress.<sup>5</sup> George Washington himself stated in his First Annual speech to Congress that “there is nothing that can better deserve your patronage, than the promotion of science and literature.”<sup>6</sup>

The Founding Fathers were quite deliberate in how they framed the Patent Clause in the Constitution. A notable feature of Article I, Section 8 is that there is no mention of who can have the rights, where they apply, or for how long; the exact rules of patent law were left up to the courts.<sup>7</sup> To understand the intent of the Founding Fathers in including this unusual power in the very first Article granting Congressional rights, one can refer to the *Notes of Debates of a Federal Convention of 1787*, the transcript of the Philadelphia Convention. These and other writings by the Founders make it clear that constitutional protection for patents was intended to endorse the government’s role in promoting economic progress and that this should be one of the main purposes of the new government.

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<sup>4</sup> Floyd L. Vaughan, *The United States Patent System* (Westport: Greenwood, 1972): 18.

<sup>5</sup> Frank D. Prager, “Historic Background and Foundation of American Patent Law,” *The American Journal of Legal History* 5.4 (1961): 318.

<sup>6</sup> Khan 2.

<sup>7</sup> Travis Brown, *Historical First Patents: The First United States Patent for Many Everyday Things* (London: Scarecrow, Inc, 1994): 1.

What were some of the factors that made the United States' patent system more beneficial than others? One of the main arguments is that the US system was open to everyone, not just the elite, as in Britain.<sup>8</sup> In America, in addition to engineers and machinists, patentees were poets, factory workers, housewives, farmers, teenagers, and economists. In 1860, patent fees in Britain cost between £100-120 (\$585), approximately four times the per capita annual income at that time.<sup>9</sup> Working class inventors very often could not afford to submit their inventions for patent approval because of the steep price. In fact, one of the reasons for setting such a high price was the British government's belief that patents submitted by the 'working class' would be trivial improvements unworthy of a patent in the first place.<sup>10</sup> In contrast, patents in the United States cost \$30 from 1787-1836.

For a democracy to function, the Founders believed that all members of society had to take part in innovation. There is considerable data on the background of inventors awarded patents in the early Republic. The majority of patentees in the US before the Civil War received no formal or only primary education.<sup>11</sup> Many inventors came from working class backgrounds, for example 39.4 percent of patentees' fathers were farmers.<sup>12</sup> The democratic effect of the US patent system was further supported because anyone could sell, trade or license his or her invention rather than having to produce it on their own: "The ability to transfer their human inventive capital into tradable assets

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<sup>8</sup> Khan, Democratization of Invention 13.

<sup>9</sup> Khan, Democratization of Invention 31.

<sup>10</sup> Khan, Democratization of Invention 31.

<sup>11</sup> Khan, Democratization of Invention 192.

<sup>12</sup> Khan, Democratization of Invention 192.

disproportionately helped inventors from disadvantaged backgrounds who lacked the financial resources or contacts that would have allowed them to extract returns by commercializing their inventions on their own.”<sup>13</sup>

Another contrast with British patent laws was that American judges believed that the utility of an invention should be determined by the markets, rather than by the courts. The goal of “promoting public welfare” came first.<sup>14</sup> In addition there were national guidelines to distinguish whether an invention was patent worthy. This is another way the United States set itself apart from other countries: it trained and organized a large group of patent examiners into an independent Patent Office. The Patent Office financed itself, and was thus free from political corruption.<sup>15</sup> After the patent was awarded there were very few restrictions, such as requiring the invention to actually work or forcing it to be put into use. Being able to access the markets and trade for inventions led to greater specialization and a division of labor among inventors which furthered the spread of new technologies.<sup>16</sup> Alexis de Tocqueville, an early observer of American society, noted:

“You may be sure that the more a nation is democratic, enlightened, and free, the greater will be the number of these interested promoters of scientific genius [...]

For in democracies the working class takes a part in public affairs; and public

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<sup>13</sup> Khan, Democratization of Invention 10-11.

<sup>14</sup> Prager 316.

<sup>15</sup> Khan, Democratization of Invention 219.

<sup>16</sup> Dam 247.

honors as well as pecuniary remuneration may be awarded to those who deserve them.”<sup>17</sup>

“Those who deserve them” specifically included women. The 1790 Patent Act declared that “upon the petition of any person or persons that he, she, or they, hath invented or discovered any useful art, [...] it shall be lawful [...] to cause letters patent to be made out in the name of the United States.” Not restricting patent protection to men played a role in the success of America’s patent laws in America’s economy over others’. 3,975 patents were filed by women inventors alone between 1790 and 1895.<sup>18</sup>

From the early days of the Republic, other countries recognized the United States’ successful patent laws, and made associations between strong patent systems and a thriving economy. For example, a Japanese delegation in 1899 asserted: “What is it that makes the United States such a great nation? And we investigated and found it was patents [...].”<sup>19</sup>

It would not be accurate to claim that America’s economic success sprang directly from patent protection in the US Constitution and its subsequent evolution – innovation and progress would undoubtedly have happened with or without a specific constitutional right. However, there is a strong case that the way the right was framed by the Founders, put into law, and supported by unique institutions like the Patent Office had a big effect on the spread of inventions, which contributed to rapid American economic development from the earliest years of the Republic.

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<sup>17</sup> Khan Democratization of Invention 2.

<sup>18</sup>Khan, Democratization of Invention 132.

<sup>19</sup> "Property Rights and Patent Litigation in Early Nineteenth-Century America." The Journal of Economic History 55. 1 (Mar. 1995): 58-95. 1 Nov. 2007 <<http://www.jstor.org/search/AdvancedSearch>>.