"NOT" MADISON

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By Jorge L. Contreras

This essay challenges the claim that President James Madison, the namesake of the Trump Administration's "New Madison" Approach to Antitrust and Intellectual Property Law, was an advocate for strong patent rights unrestrained by the limitations of antitrust law. While Madison supported the authority of Congress to grant patents to inventors, this view was widely shared by his contemporaries. Rather than advocating for strong patent rights, Madison's writings reveal that he was concerned about the "exorbitant gains" that patents and other monopolies could confer upon their holders, while at the same time preventing individuals from exercising their trades. Most importantly, Madison formulated his views a full century before the enactment of the antitrust laws, in an economic environment in which private firms could not acquire market power absent governmentally-issued monopolies. This suggests that Madison is an inapt namesake for the policies of a federal agency that is charged with enforcing the antitrust laws today. For all of these reasons, the "New Madison" approach is plainly "Not" Madison, and the continued misuse of this label distorts the views of a major figure in American Constitutional history.

In March 2018, Makan Delrahim, President Donald Trump's Assistant Attorney General for the U.S. Department of Justice Antitrust Division, delivered a speech titled "The New Madison Approach to Antitrust and Intellectual Property Law."[2] In it, Mr. Delrahim sought to unseat Thomas Jefferson as the acknowledged "father of U.S. patent law" in favor of James Madison.[3] His stated rationale for doing so was to counteract the "vogue among some critics of the U.S. patent system to selectively quote Jefferson to make the case that intellectual property rights ought to be reined in."[4] Unlike Jefferson, Delrahim contended, Madison was a proponent of "strong patent protections."[5] As such, Delrahim argued that courts and scholars should regard Madison, not Jefferson, as the "true father of U.S. patent law,"[6] thereby embracing a more appreciative, and hands-off, attitude toward patent assertion.

Mr. Delrahim was particularly concerned with patents that are essential to industry standards, an area in which he saw an alarming shift toward "reducing the power of intellectual property rights."[7] In essence, the four "basic premises" of the New Madison approach would have relieved patent holders of antitrust scrutiny for exacting rents from manufacturers of standardized products, notwithstanding their commitments to license those patents on terms that are "fair, reasonable and nondiscriminatory" (FRAND).[8]

Mr. Delrahim's strenuous advocacy on behalf of patent holders generated both praise[9] and criticism.[10] This essay does not rehash my prior critiques of the Trump DOJ's positions on standards or intellectual property law.[11] Rather, it challenges the recruitment of James Madison, one of the nation's founding intellects, the chief drafter of the Constitution and its fourth President, to the cause of patent maximalism.[12] First, it argues that Madison was not unique in supporting the authority of Congress to grant patents to inventors, a policy that was widely supported by his contemporaries. Second, rather than advocating for strong patent rights, Madison's writings reveal that he was concerned about the "exorbitant gains" that patents and other monopolies could confer upon their holders. Finally, and most importantly, the fact that Madison formulated his views a full century before the enactment of the antitrust laws, in an economic environment in which private firms could not practically acquire market power absent governmentally-issued monopolies, suggests that Madison is an inapt namesake for the policies of a federal agency that is charged with enforcing the antitrust laws today.

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2 Makan Delrahim, The "New Madison" Approach to Antitrust and Intellectual Property Law – Remarks as Prepared for Delivery at the University of Pennsylvania Law School, March 16, 2018.

3 *Id.* at 1.

4 *Id.* Over the past two decades, there has been significant debate regarding Jefferson's views on the patent system and what effect those views should have on current interpretations of the Patent Act. See e.g. Edward C. Walterscheid, The Nature of the Intellectual Property Clause: A Study in Historical Perspective ix (2002) (arguing that the Supreme Court in *Graham v. John Deere*, 383 U.S. 1 (1966), in discussing Jefferson's views, "materially mischaracterized and misrepresented both the role and the views of Jefferson in the development of the nascent United States patent system"); Adam Mossoff, *Who Cares What Thomas Jefferson Thought about Patents - Reevaluating the Patent Privilege in Historical Context*, 92 Cornell L. Rev. 953, 955 (2007) ("Jefferson's hegemony over the history of American patent law is as indisputable as it is wrong.")

5 Delrahim, *supra* note 2, at 4. Mr. Delrahim also makes the claim that, thanks to Madison, the Constitution guarantees to innovators the "right" to a patent – the only such "right" guaranteed by the original text of the Constitution. *Id.* at 3. This attempt to find an individual "right" to a patent within the Constitutional enumeration of Congressional powers is not well founded. For a discussion of the use of the word "right" in the Intellectual Property Clause, see e.g. Walterscheid, *supra* note 4, at 255-65.

6 Delrahim, *supra* note 2, at 1. In thus associating his proposed enforcement strategy with James Madison, Mr. Delrahim engages in what has been termed "Founders Chic" – "an excessive fascination with the thoughts and actions of a small group of elite men at the other political actors and social groups". Francis D. Cogliano, *Founders Chic*, 90 History 411, 412 (2005) (noting the scholarship of "variable quality" that has resulted from this trend and collecting references). I thank Chris Beauchamp for introducing me to the literature of Founders Chic.

7 Delrahim, *supra* note 2, at 4.

8 *Id.* at 5.

9 See e.g. David J. Teece, *Pivoting toward Schumpeter: Makan Delrahim and the Recasting of U.S. Antitrust towards Innovation, Competitiveness, and Growth*, 32 Antitrust 32 (2018), John D. Harkrider, *Antitrust in the Trump Administration: A Tough Enforcer That Believes in Limited Government*, 32 Antitrust 11 (2018).

10 See e.g. Christopher R. Leslie, *The DOJ's Defense of Deception: Antitrust Law's Role in Protecting the Standard-Setting Process*, 98 Oregon L. Rev. 379 (2020), Carl Shapiro & Mark A. Lemley, *The Role of Antitrust in Preventing Patent Holdup*, 168 Univ. Penn. L. Rev. 1 (2020).

11 See e.g. Jorge L. Contreras, *Taking it to the Limit: Shifting U.S. Antitrust Policy Toward Standards Development*, 103 Minn. L. Rev. Headnotes 66 (2018); Jorge L. Contreras, *Rationalizing U.S. Standardization Policy: A Proposal for Institutional Reform*, 35 Antitrust 41 (2021).

12 See Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 Geo. L.J. 1771, 1822 (2006) ("The heated debate over the desired shape of intellectual property law is commonly described as one between intellectual property minimalists (or "pessimists"), who wish to cut back on the current levels of protection or even abolish intellectual property law, and intellectual property maximalists (or "optimists"), who believe that expanding intellectual property rights in duration, scope, and subject-matter is socially desirable").

I. JAMES MADISON AND THE INTELLECTUAL PROPERTY CLAUSE

Article I, Section 8, Clause 8 of the U.S. Constitution (the "Intellectual Property Clause") grants Congress the 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 1787, as a member of Virginia's delegation to the Constitutional Convention in Philadelphia, James Madison was a principal drafter of the so-called "Virginia Plan" on which the federal Constitution was eventually modeled. Article I of the draft Constitution enumerated the powers of the proposed federal Congress. The predecessor of the Intellectual Property Clause was most likely introduced by Charles Pinckney of South Carolina, the only state then having its own patent legislation.[13] Pinckney's proposal was to authorize Congress "to grant patents for useful inventions." On the same day, Madison proposed a more vague power "to secure to the inventors of useful machines and implements the benefits thereof for a limited time" and "to encourage by premiums and provisions, the advancement of useful knowledge and discoveries."[14]

Though there are no known records of the Convention's debate on the Intellectual Property Clause, Professor Dotan Oliar convincingly traces the merger of Pinckney's and Madison's proposals into the eventual Clause approved by the Convention.[15] Based on contextual evidence, the current form of the Intellectual Property Clause likely represents a compromise between proponents of a strong national government (Madison, Pinckney, and Alexander Hamilton, among others) and those preferring strong states' rights.[16] There is no indication, however, that any of the Framers opposed the IP Clause as eventually drafted.

Following the Constitutional Convention, Madison, John Jay and Alexander Hamilton embarked on a campaign to persuade state conventions to ratify the new Constitution. This campaign resulted in the famous *Federalist Papers*, published between October 1787 and August 1788. *Federalist No. 43*, written by pseudonymously by Madison in January 1788, briefly addresses the Intellectual Property Clause, arguing that "'The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals ..."[17] The Constitution was ratified by the requisite majority of states in July, 1788, with no recorded debate concerning the Intellectual Property Clause.[18]

As summarized above, the historical record clearly shows that Madison supported the creation of a patent system. But he was hardly alone in this regard. By 1787, several states were already issuing patents, and South Carolina, Pinckney's home state, already had its own patent legislation.[19] Madison's primary concern, as articulated in *Federalist No. 43*, appears to have been centralizing the patent function in the new federal Congress, rather than allowing it to remain distributed across the states.[20]

Moreover, Madison's original proposals to the Constitutional Convention regarding the Intellectual Property Clause were more modest than the clause that was eventually adopted. For example, as Professor Oliar points out, Madison's original proposal would have authorized Congress to issue patents for "useful machines and implements," but not the broader category of "discoveries" that was included in the Intellectual Property

13 Kenneth W. Dobyns, The Patent Office Pony: A History of the Early Patent Office 24 (1994) (citing Levin H. Campbell, Power to grant patents for inventions - proceedings of the framers of the constitution in 1787, 64 Scientific Am. 241 (1891)); Walterscheid, *supra* note 13, at 101-04 ("Madison himself provides the best evidence that it was Pinckney who first proposed that the Constitution grant power to the Congress to issue patents for useful inventions").

14 Though there is some debate whether Madison actually proposed the "useful machines" clause at the Convention, Professor Oliar, after a detailed analysis, concludes that he did. Dotan Oliar, *The (Constitutional) Convention on IP: A New Reading*, 57 UCLA L. Rev. 421, 435-46 (2009).

15 Oliar, *Making Sense, supra* note 12, at 1788-1816.

16 *Id.* at 1813-14.

17 James Madison, Federalist No. 43 (1788), https://avalon.law.yale.edu/18th_century/fed43.asp.

18 See Walterscheid, *supra* note 4, at 2 ("The almost total lack of discussion in the federal convention was followed by an equal lack of discussion in the ratifying conventions"); Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent and Copyright Clause*, 84 J. Patent & Trademark Off. Soc'y 909, 923 (2002) ("In the subsequent ratification debates, the Clause was rarely mentioned.")

19 See Walterscheid, *supra* note 4, at 57-58; Ochoa & Rose, *supra* note 18, at 921-22.

20 Federalist No. 43, *supra* note 17 ("The States cannot separately make effectual provisions for either of [patents or copyrights], and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.") Difficulties arising from dispersed patent granting powers were well-known at the time. See e.g. Jeanne C. Fromer, *The Intellectual Property Clause's External Limitations*, 61 Duke L.J. 1329, 1345 (2012) (citing Bruce W. Bugbee, Genesis of American Patent and Copyright Law (1967)).

Clause.[21] Indeed, Madison's original proposal was even narrower than Charles Pinckney's, which would have authorized the granting of patents on "useful inventions." This evidence suggests that Madison was not among the promoters of strong patents at the Convention, placing Mr. Delrahim's characterization of Madison's "dogged perseverance in favor of strong patent protection"[22] at odds with the historical record.

II. MONOPOLIES, MADISON, AND JEFFERSON

Thomas Jefferson, who served as the American republic's Minister to France during the Constitutional Convention, initially disapproved of the Intellectual Property Clause.[23] Like many of the Founders, one of Jefferson's primary concerns was with monopolies – the exclusive privileges that had been granted by European governments to favored private parties.[24] Notorious examples of this practice included the monopoly in playing cards granted by Queen Elizabeth to one of her favorites,[25] the tea monopoly conferred by the crown on the British East India Company,[26] and the French tobacco and agricultural monopoly that Jefferson witnessed choke trade with the United States.[27] Government-granted monopolies offended the conscience of the Founders and many citizens of the new republic, who viewed them as serious impediments to the free ability to practice trades and engage in productive activities.[28] Worse, such monopolies were widely viewed as forms of political patronage, in which the government rewarded supporters and political cronies without regard to the economic opportunities that they foreclosed to others.[29]

During the debates over the Constitution, Jefferson believed that monopolies should be expressly prohibited.[30] When the Constitution was ratified (in his absence) without such a prohibition, he immediately began to propose amendments that would achieve that purpose.[31] Jefferson acknowledged that eliminating such monopolies could "lessen[] the incitements to ingenuity," but nevertheless concluded that "the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression."[32]

In an October, 1788 response to Jefferson, Madison agreed that monopolies were "justly classed among the greatest nuisances in Government." But Madison also asked whether "as encouragements to literary works and ingenious discoveries, they are not too valuable to be wholly renounced?"[33] Madison noted that, unlike Britain, in which Parliament was authorized to grant monopolies to its favorites, in the new and

21 See Oliar, *New Reading, supra* note 14, at 457-58.

22 Delrahim, *supra* note 2, at 4.

23 See Walterscheid, *supra* note 4, at 4 ("One may only speculate as to what the style and content of the Constitution might have been had [Jefferson] been present to take active part, but there is good reason to believe that he would have opposed the intellectual property clause.")

24 See e.g. Ochoa & Rose, *supra* note 18, at 926-28, Walterscheid, *supra* note 4, at 9-11; Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harvard J. L. & Pub. Pol. 983, 1009-15 (2013). But see Oliar, *Making Sense, supra* note 12, at 1785 ("there is some doubt that an intense abhorrence to monopolies existed generally at the time").

25 The Case of Monopolies (1603) 77 Eng. Rep. 1260 (Q.B.). See Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550-1800*, 52 Hastings Law Journal 1255, 1267-70 (2001); Calabresi & Leibowitz, *supra* note 24, at 989-94.

26 See Amy Klobuchar, Antitrust: Taking on Monopoly Power from the Gilded Age to the Digital Age 24-27 (2021).

27 See Joseph J. Ellis, American Sphinx: The Character of Thomas Jefferson 106-07 (1997).

28 See Madison, *Property*, *supra* note 49.

29 See Calabresi & Leibowitz, *supra* note 24, at 1013 (quoting one 'Son of Liberty' who feared that "monopolies in trade, [would be] granted to the favorites of government, by which the spirit of adventure will be destroyed, and the citizens subjected to the extortion of those companies who will have an exclusive right, to engross the different branches of commerce.").

30 See Letter from Thomas Jefferson to James Madison, Dec. 20, 1787, https://founders.archives.gov/documents/Madison/01-10-02-0210 (suggesting a prohibition on monopolies in the body of the Constitution).

31 See Letter from Thomas Jefferson to James Madison, July 31, 1788, http://founders.archives.gov/documents/Madison/01-11-02-0147.

32 *Id.*

33 Letter from James Madison to Thomas Jefferson, Oct. 17, 1788, http://founders.archives.gov/documents/Madison/01-11-02-0218.

democratic United States, "Where the power … is in the many not in the few, the danger can not be very great that the few will be thus favored."[34]

Jefferson, who was himself a noted inventor, agreed.[35] Writing to Madison almost a year later, Jefferson proposed a clause for the new Bill of Rights providing that "Monopolies may be allowed to persons for their own productions in literature and their own inventions in the arts for a term not exceeding —— years but for no longer term and no other purpose."[36] Jefferson returned from Paris in October 1789 as the French Revolution became increasingly deadly. The Bill of Rights, which had been drafted principally by Madison, was ratified in December, 1791, but did not contain a prohibition on monopolies.

III. THE FATHER OF PATENT LAW?

Congress enacted the first Patent Act in April, 1790. Serving as Secretary of State under George Washington from 1790-93, Jefferson was one of the country's first patent commissioners and, as the Supreme Court has observed, became the group's "moving spirit."[37] As such, Jefferson is reputed to have reviewed personally every patent application filed under the 1790 Act.[38] Responding to deficiencies in the implementation of the 1790 Act, including the excessive workload on himself and his fellow commissioners, Jefferson supported the legislation that became the Patent Act of 1793.[39]

Despite his earlier misgivings, Jefferson came to accept and admire the patent system, writing in 1790 that "An act of Congress authorising the issuing patents for new discoveries has given a spring to invention beyond my conception. Being an instrument in granting the patents, I am acquainted with their discoveries. Many of them indeed are trifling, but there are some of great consequence which have been proved by practice, and others which if they stand the same proof will produce great effect."[40]

In 1807 (during his second term as President) Jefferson wrote that "Certainly an inventor ought to be allowed a right to the benefit of his invention for some certain time … Nobody wishes more than I do that ingenuity should receive a liberal encouragement."[41] Yet Jefferson's view of patents remained cautious, the "embarrassment of an exclusive patent" being outweighed in his mind only with respect to inventions of significant value to the public.[42] Jefferson's extensive writing and commentary on the patent system has been widely cited, including by the U.S. Supreme Court.[43]

Madison, in contrast to Jefferson, wrote little about the patent system or the Intellectual Property Clause. By the time that Madison became Secretary of State under Jefferson in 1801, the duties of patent examination had largely been delegated to lesser officials. Madison thus

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34 *Id.* In this sentence and elsewhere, Madison argues that rule by majority diminishes the risk that members of a powerful aristocratic minority will legislate to enrich itself through the grant of favorable trade monopolies, as did members of the British Parliament. Mr. Delrahim offers a mystifying interpretation of these words, arguing that "Madison understood that replacing monarchy with democracy reversed the threat of the misapplication of power, *creating a risk that patent holders might suffer from the tyranny of the majority Seeking to benefit unfairly from their innovation*." Delrahim, *supra* note 2, at 3 (emphasis added). I find no plausible reading of Madison's words to support this interpretation.

35 See William I. Wyman, *Thomas Jefferson and the Patent System*, 1 J. Pat. Off. Soc'y 5, 6 (1918) ("He was remarkably apt in the practical application of mechanical principles, as is shown by the fact that he was the first discoverer of an exact formula for the construction of mould-boards of least resistance for plows.").

36 Letter from Thomas Jefferson to James Madison, Aug. 28, 1789, Founders Online, National Archives, https://founders.archives.gov/documents/Jefferson/01-15-02-0354.

37 *Graham v. John Deere Co.*, 383 U.S. 1, 7 (1966).

38 See Wyman, *Jefferson, supra* note 35, at 6 , Walterscheid, *supra* note 4, .

39 *Graham*, 383 U.S. at 7 (claiming that Jefferson drafted the 1793 Act). But see Dobyns, *supra* note 13, at 47-48 (describing Jefferson's more limited role in the creation of the 1793 Act).

40 Letter from Thomas Jefferson to Benjamin Vaughan, Jun. 27, 1790, Founders Online, National Archives, https://founders.archives.gov/documents/Jefferson/01-16-02-0342.

41 Letter from Thomas Jefferson to Oliver Evans, May 2, 1807, Founders Online, National Archives, https://founders.archives.gov/documents/Jefferson/99-01-02-5538 (quoted in *Graham*, 383 U.S. at 8). For a detailed discussion of Jefferson's interactions with the inventor Oliver Evans, see Christopher Beauchamp, *Oliver Evans and the Framing of American Patent Law*, 71 Case Western Reserve L. Rev. (forthcoming 2022).

42 Letter from Thomas Jefferson to Isaac McPherson, Aug. 13, 1813, Founders Online, National Archives, https://founders.archives.gov/documents/Jefferson/03-06-02-0322 (quoted in *Graham*, 383 U.S. at 9-11). Jefferson's now-famous McPherson letter (which concerned the Evans patent, *supra* note 41) has been quoted often to support arguments to limit patent protection.

43 See, e.g., *Graham*, 383 U.S., Wyman, *Jefferson, supra* note 35, Ochoa & Rose, *supra* note 18, Mossoff, *supra* note 4, Beauchamp, *Evans, supra* note 41.

had less daily interaction with patent matters than Jefferson. His duties in this regard concerned the appointment in 1802 of the first superintendent of the newly-formed Patent Office,[44] opining on Congress's extension of expiring patent terms,[45] and, as President, in 1810, authorizing the purchase of the Blodgett Hotel in Washington, DC, to house the first permanent Patent Office.[46] If Madison is, as Mr. Delrahim has proposed, to be rebranded as the "true father of U.S. patent law," then he must have been a disinterested parent, at best.[47]

IV. MADISON, PROPERTY, AND PATENTS

Like many of his contemporaries,[48] Madison supported the protection of private property against interference and expropriation by the government.[49] He is credited with introducing the protection of property against state seizure to the Bill of Rights, a guaranty that was eventually adopted as part of the Fifth Amendment.[50]

Yet during the eighteenth century, there is little evidence that the exclusive rights granted to inventors through patents were considered to be legal forms of "property," as opposed to government-issued monopolies, which is how they were typically characterized.[51] Madison, in fact, lumps patents together with other forms of monopoly when proposing that the federal government be entitled to revoke such "privileges" at will, upon payment to the holder of a specified amount.[52] He explains that such a right of revocation "would guard against the public discontents resulting from the exorbitant gains of individuals, and from the inconvenient restrictions combined with them."[53] Thus, far from endorsing the ability of patent holders to exploit their rights without limitation (as promoted under the "New Madison" approach), Madison expresses concerns about both the "exorbitant gains" that patent owners may make from their monopolies, and the accompanying "inconvenient restrictions" that they may place on individuals and the market. Thus, despite potential social benefits that might be encouraged by some monopolies, they must in any case be "guarded with strictness [against] abuse."[54]

Moreover, Madison does not speak of patents as property, but as governmental *limitations* on one's right to use and employ the property inherent in one's own persona and labor. This view of property is Lockean in nature,[55] encompassing the entire set of things and activities originating in one's person. He complains that monopolies act to prevent individuals from exercising their rights, asking, among other things, "What

44 Madison appointed Dr. William Thornton to this position. See William I. Wyman, *The First Chief of the Patent Office*, 1 J. Pat. Off. Soc'y 152 (1918).

45 See Ochoa & Rose, *supra* note 18, at 930.

46 Dobyns, *supra* note 13, at 77.

47 Neither the Intellectual Property Clause nor the patent system is discussed or indexed in the numerous modern biographies or historical accounts concerning Madison that the author has reviewed. See e.g. Noah Feldman, The Three Lives of James Madison: Genius, Partisan, President (2017), Joseph J. Ellis, The Quartet: Orchestrating the Second American Revolution, 1783-1789 (2015); Lynne Cheney, James Madison: A Life Reconsidered (2014); Richard Brookhiser, James Madison (2011), Andrew Burstein & Nancy Isenberg, Madison and Jefferson (2010); Edward J. Larson & Michael P. Winship, The Constitutional Convention: A Narrative History from the Notes of James Madison (2005); Irving Brant, James Madison: The Virginia Revolutionist (1941).

48 See Burstein & Isenberg, *supra* note 47, at 145 ("All were committed to the protection of property rights and class privilege. Madison had reason to expect that they and he were of one mind").

49 James Madison, Federalist No. 54 (1788) ("Government is instituted no less for the protection of the property than of the persons of individuals." (Regrettably, Madison makes this point in the midst of his infamous justification for counting slaves as only three-fifths of a person for purposes of determining the number of seats to be allocated to a state in the House of Representatives.)) See *also* James Madison, *Property*, in Papers 14:266-68 (Mar. 29, 1792), https://press-pubs.uchicago.edu/founders/print_documents/v1ch16s23.html ("Government is instituted to protect property of every sort").

50 See Burstein & Isenberg, *supra* note 47, at 197.

51 Professor Adam Mossoff disagrees, finding support in Madison's 1792 essay, *supra* note 49, for the idea that Madison and his contemporaries considered patents to be a form of property. Mossoff, *supra* note 4, at 985 n. 149.

52 See e.g. Letter to Jefferson, Oct. 1788, *supra* note 33 ("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?"), James Madison, *Monopolies. Perpetuities. Corporations. Ecclesiastical Endowments.* Detached Memoranda (1819) in James Madison – Writings 756, 757 (Jack N. Rakove, ed., 1999) ("In all cases of monopoly, not excepting those specified in favor of authors & inventors, it would be well to reserve to the State, a right to terminate the monopoly by paying a specified and reasonable sum.") It is worth noting that several state patent statutes also included such buyout provisions prior to the enactment of the federal constitution. See Beauchamp, *Evans, supra* note 41, at § I.B.5.

53 Madison, *Monopolies*, *supra* note 52, at 757.

54 *Id.*

55 See Mossoff, *supra* note 4, at 971.

must be the spirit of legislation where a manufacturer of linen cloth is forbidden to bury his own child in a linen shroud, in order to favour his neighbour who manufactures woolen cloth?"[56]

In modern terms, Madison appears more interested in preserving individual "freedom to act" than giving inventors the right to exclude others from practicing their inventions. In his 1792 essay on Property, Madison reasons, "That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that *free use of their faculties, and free choice of their occupations*, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called."[57]

For all of these reasons, it is hard to find a property-based rationale for characterizing Madison as a champion of strong patent rights.

V. ANTEBELLUM ANTITRUST?

Perhaps the most remarkable, and telling, aspect of the Trump Antitrust Division's adoption of James Madison as its historical standard-bearer is the fact that Madison formulated his views of the Constitution more than a century before the enactment of the antitrust laws in the United States. And while Madison and his contemporaries were concerned about governmental monopolies, as discussed above, these monopolies were not the types of private business arrangements that led to the enactment of the antitrust laws in the late nineteenth and early twentieth centuries. In the largely agrarian economy of Madison's day, monopolies could be granted by the sovereign, but the economic, legal and technological conditions necessary for the rise of dominant business combinations did not emerge until after the Civil War. Those conditions, which included sophisticated corporate governance mechanisms, increasingly liquid financial markets, increased industrialization, and a national communications and transportation infrastructure, gave rise to the infamous trusts that controlled the oil, railroad, steel, sugar, coal, lead and other industries from the late nineteenth to early twentieth centuries.[58] It is doubtful that Madison or his contemporaries could have envisioned the momentous technological, legal and financial changes that would sweep the country during the next century, or fathom the need for laws to curb the abusive practices of businesses that grew to unprecedented scale on the backs of those changes.

What's more, patents played only a minor role in the economic landscape of Madison's day. It was not until the administrative reforms of the 1830s, well after Madison had retired from public life, that patent issuances and litigation began to increase dramatically and to become tools of business competition and, occasionally, abuse.[59]

The Sherman Act, the Clayton Act, the Federal Trade Commission Act and other state and federal legislation enacted beginning in the last decade of the nineteenth century gave government and private plaintiffs the tools necessary to combat anticompetitive conduct, including conduct facilitated by patents.[60] It is ironic that a leader of the federal agency charged with enforcing these laws chose to base his antitrust philosophy on the purported theories of James Madison, a historical figure who had no relationship to antitrust law or enforcement and lived in an era in which the commercial environment that gave rise to the antitrust legislation of the late nineteenth century did not yet exist and could hardly have been imagined.

56 Madison, *Property, supra* note 49.

57 Madison, *Property, supra* note 49 (emphasis added). Madison's understanding of patents as monopolies that tended to *restrict* one's exercise of property rights in his or her own labor or profession appears to mirror that of Jefferson, who took this view in his written debates with the inventor Oliver Evans. See Beauchamp, *Evans, supra* note 41, at Part III.B. Rather, it is Evans, the inventor, who argued that "a man's ideas and inventions, are, by natural law, his own exclusive property". Oliver Evans, Letter to the Editor, A Trip Made by a Small Man in a Wrestle with a Very Great Man, Niles' Wkly. Reg., Feb. 28, 1814 (Second Addenda to Vol. V), at 1 (1814) (quoted in Beauchamp, *Evans, supra* note 41, at Part III.B).

58 See, generally, Lawrence M. Friedman, A History of American Law, 405-06, 446-48 (1973) ("nothing could be more startling than the difference one century made in the law of the business corporation").

59 See Christopher Beauchamp, *The First Patent Litigation Explosion*, 125 Yale L. J. 848, 856-57, 902-03 (2016) (discussing the impact on patents of the shift from an "artisanal" to a "corporate" economy).

60 For a discussion of early twentieth century antitrust cases involving patents, see Ernest S. Meyers & Seymour D. Lewis, *Patent Franchise and the Antitrust Laws*, 30 Geo. L. J. 117 (1941), Jorge L. Contreras, *A Brief History of FRAND: Analyzing Current Debates in Standard-Setting and Antitrust through a Historical Lens*, 80 Antitrust L. J. 39 (2015).

VI. CONCLUSION: NEW MADISON OR NEO-MAXIMALIST?

The so-called New Madison approach was designed to promote the interests of patent holders, particularly in the area of standards. Far from new, such "maximalist" initiatives have existed throughout the history of patent law, and have been advanced by both private industry and government officials.[61] Nevertheless, even within the cynical world of Washington politics, it seems excessive to recruit to one's cause a Founding Father who had so little relation to the issue at hand. James Madison was no patent maximalist. Like his longtime friend Thomas Jefferson, he was an anti-monopolist who believed, along with most of his contemporaries, that Congress should have the authority to issue patents for limited periods to promote the creation of useful inventions.[62] Appropriating Madison's name to justify a neo-maximalist agenda of diminished antitrust enforcement is both wrongheaded and ahistorical, and the continued misuse of this label distorts the views of a major figure in American Constitutional history.

61 See e.g. Beauchamp, *Explosion, supra* note 59, at 924 ("between 1836 and 1861 … Congressional interventions, above all in the form of private bills extending patents, were highly influential and highly controversial in the politics of patents"), Deborah Halbert, *The Politics of IP Maximalism*, 3 WIPO J. 74, 76 (2011) ("to a disturbing degree, government reports and public comments about the role IP plays tend to reflect a maximalist position") and 77-79 (describing maximalist tendencies in U.S. administrations from Reagan to Obama).

62 Professor Oliar argues that Madison's original proposal to the Constitutional Convention would have given Congress greater power to issue patents, untethered to the need to promote the progress of the useful arts. See Oliar, *Making Sense, supra* note 12, at 1813-14.

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