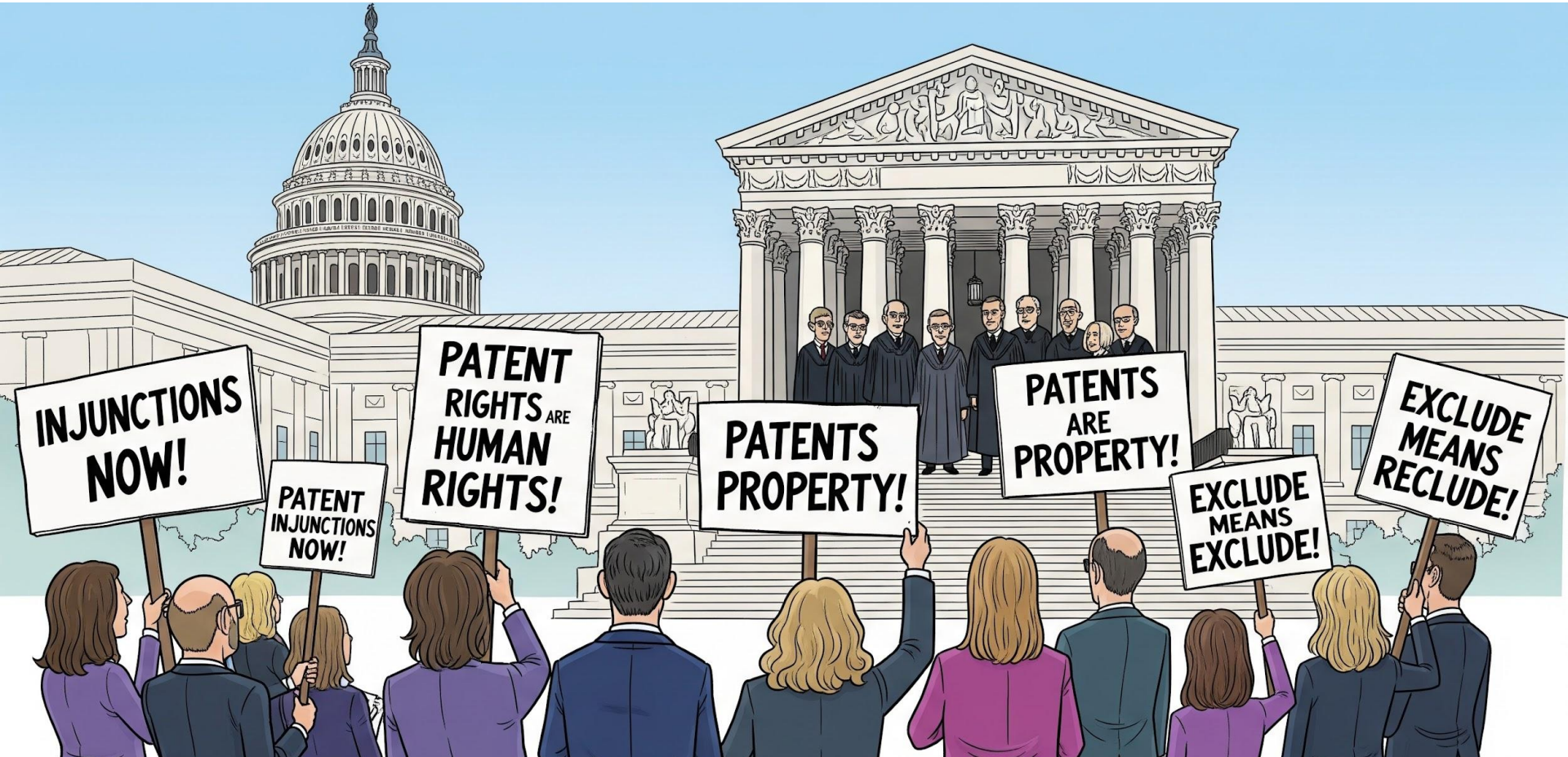
The Patent Industry Versus *eBay*

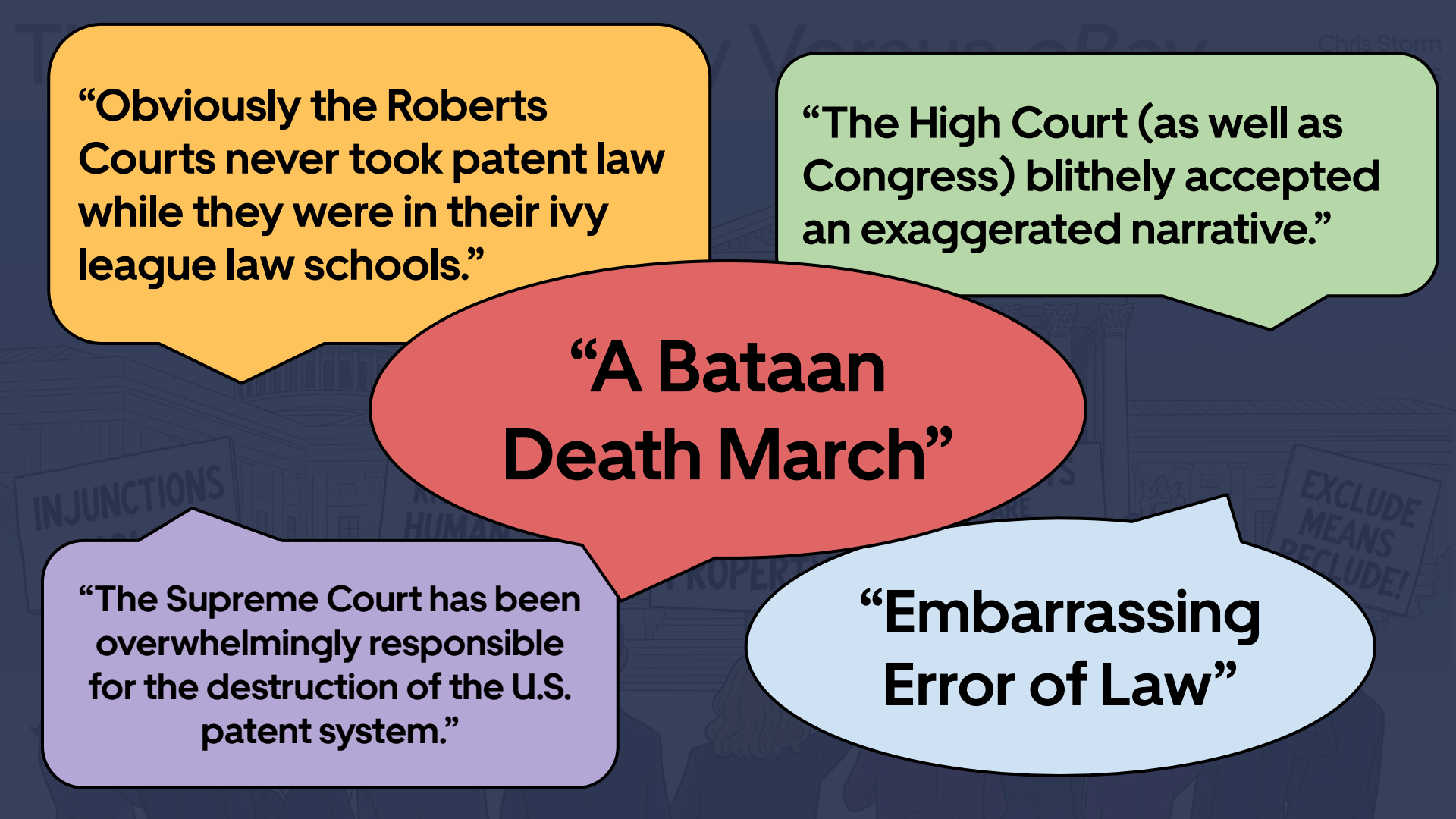
Chris Storm
IPSC 2025



Chris Storm
IPSC 2025

Patent Industry *noun* –
a sector of economic activity organized around extracting value from two products: patent protection and protection from patents*

*Working Definition


“Obviously the Roberts Courts never took patent law while they were in their ivy league law schools.”
“The High Court (as well as Congress) blithely accepted an exaggerated narrative.”
“A Bataan Death March”
“The Supreme Court has been overwhelmingly responsible for the destruction of the U.S. patent system.”
“Embarrassing Error of Law”
INJUNCTIONS
EXCLUDE MEANS PRECLUDE!
Chris Storm

“

The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.

cates that Congress intended such a departure. To the contrary, the Patent Act expressly provides that injunctions "may" issue "in accordance with the principles of equity." 35 U. S. C. § 283.[2]

To be sure, the Patent Act also declares that "patents shall have the attributes of personal property," § 261, including "the right to exclude others from making, using, offering for sale, or selling the invention," § 154(a)(1). According to the Court of Appeals, this statutory right to exclude alone justifies its general rule in favor of permanent injunctive relief. 401 F. 3d, at 1338. But the creation of a right is distinct from the provision of remedies for violations of that right. Indeed, the Patent Act itself indicates that patents shall have the attributes of personal property "[s]ubject to the provisions of this title," 35 U. S. C. § 261, including, presumably, the provision that injunctive relief "may" issue only "in accordance with the principles of equity," § 283.

This approach is consistent with our treatment of injunctions under the Copyright Act. Like a patent owner, a copyright holder possesses "the right to exclude others from using his property." *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 127 (1932); see also *id.*, at 127–128 ("A copyright, like a patent, is at once the equivalent given by the public for benefits bestowed by the genius and meditations and skill of individuals and the incentive to further efforts for the same important objects" (internal quotation marks omitted)). Like the Patent Act, the Copyright Act provides that courts "may" grant injunctive relief "on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." 17 U. S. C. § 502(a). And as in our decision today, this Court has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction auto-

[2] Section 283 provides that "[t]he several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable."

A Regulatory Capture Theory of American Patent Law

Rebecca Henderson & Karthik Ramanna (2013):
"For example, the political market for patent regulation in the United States is one that is generally well-represented by diverse, powerful, and (importantly) competing interests."

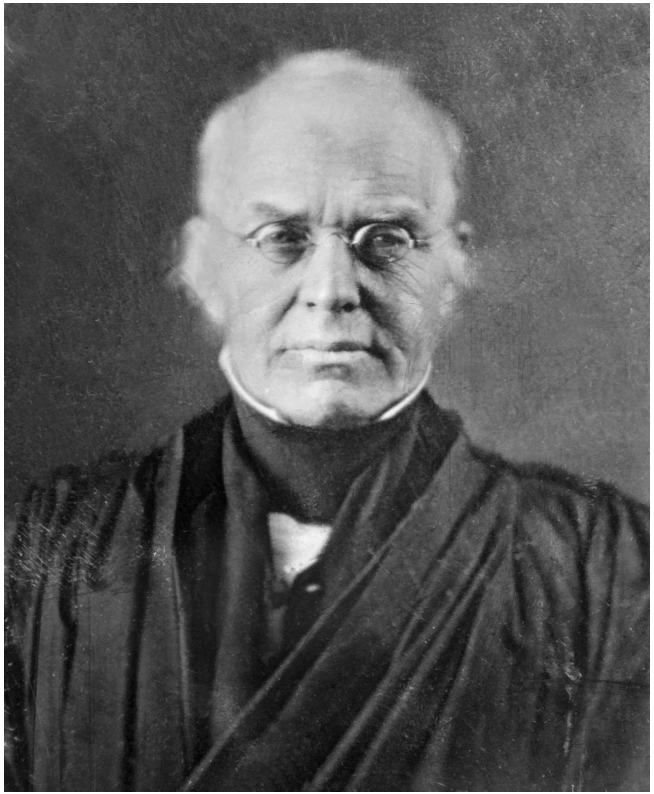
But . . .

Andrew P. Morriss & Craig Allen Nard (2011):
"[P]atent law from 1790 to 1865 is a story of the creation and growing dominance of the patent bar as an interest group."

Patent Acts of 1790, 1793, and 1800

"**The patent acts of the United States are, in a great degree, founded on the principles and usages which have grown out of the English statute on the same subject.** It may be useful, therefore, to collect together the cases which have been adjudged in England, with a view to illustrate the corresponding provisions of our own laws; and then bring in review the adjudications in the courts of the United States."

- Joseph Story



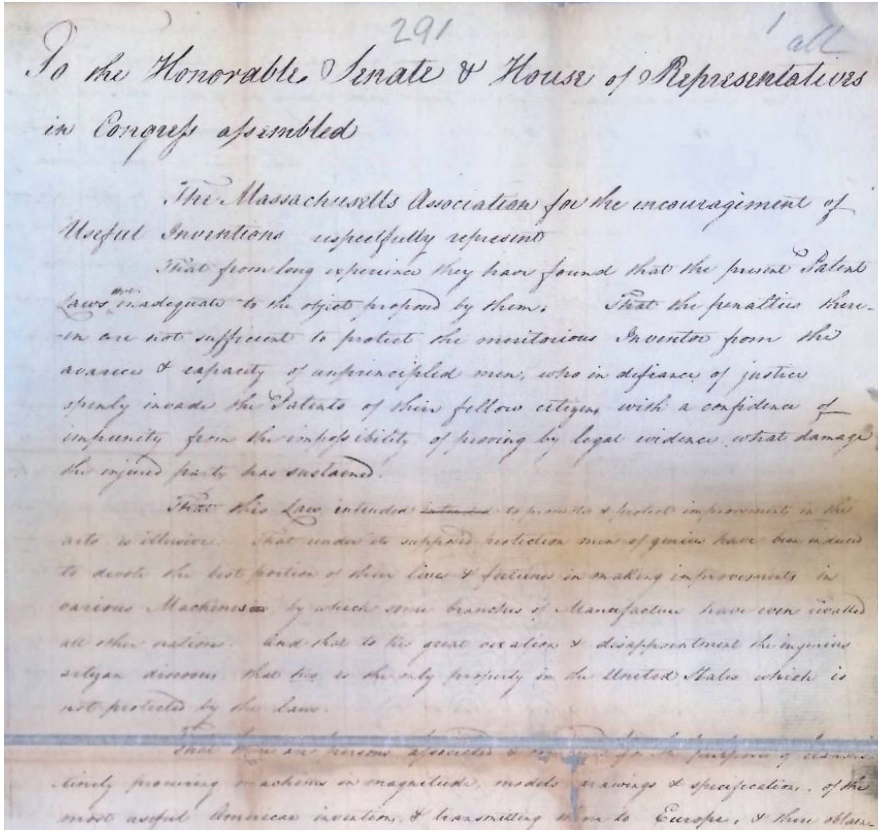
Morris & Nard (2011): "This concentration [of patent cases in the Northeast] coincided with a sympathetic judiciary in the region, including Joseph Story."

Beauchamp (2016): ". . . the role of patentees in pushing for equity liberalization . . ."

Beauchamp (2016): "Once equity was established as the near-universal forum for patent suits, the law simply reshaped around that assumption."

Morris & Nard (2011): "Interest groups therefore turned to Congress on occasion to **'lock in' changes** in the law that they had achieved through the courts."

Patent Act of 1819



291 all

To the Honorable Senate & House of Representatives in Congress assembled

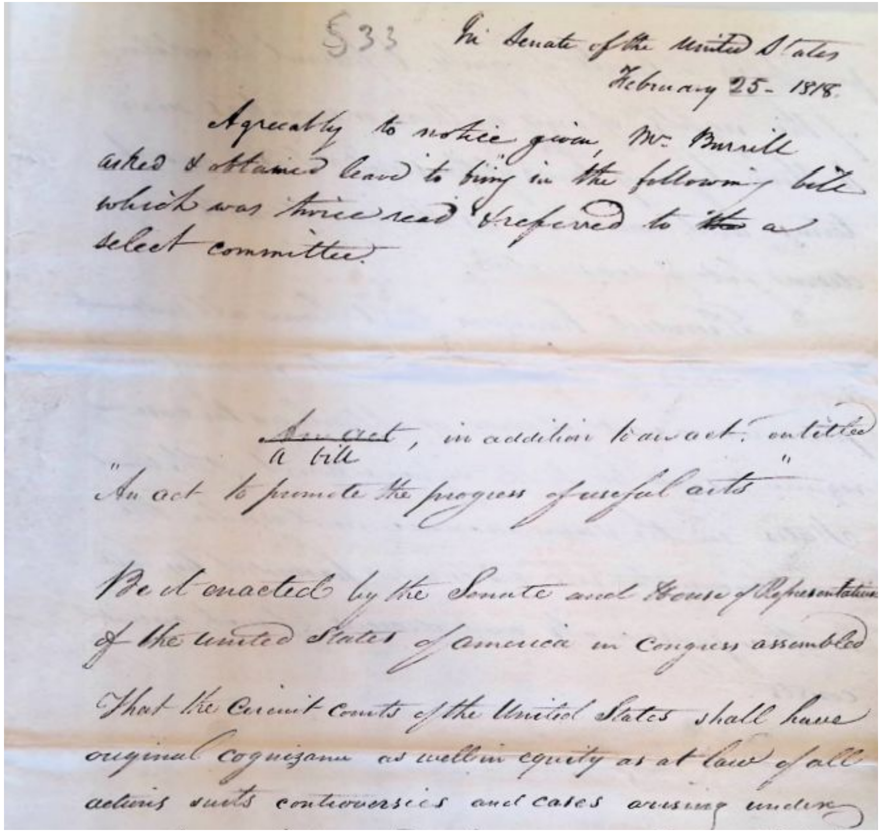
The Massachusetts Association for the encouragement of Useful Inventions respectfully represent

That from long experience they have found that the present Patent Laws are inadequate to the objects proposed by them. That the penalties therein are not sufficient to protect the meritorious Inventor from the avarice & rapacity of unprincipled men, who in defiance of justice openly invade the Patents of their fellow citizens with a confidence of impunity from the impossibility of proving by legal evidence what damage the injured party has sustained.

That this Law intended to promote & protect improvements in the arts is illusive. That under its supposed protection men of genius have been induced to devote the best portion of their lives & fortunes in making improvements in various Machines by which some branches of Manufacture have even rivalled all other nations. And that to the great vexation & disappointment the ingenious citizen discovers that his is the only property in the United States which is not protected by the laws.

That there are persons associated & [illegible] for the purpose of [illegible] tinely procuring machines in magnitude, models, drawings & specifications of the most useful American inventions & transmitting them to Europe, & there obtain-

Massachusetts Association for the Encouragement of Useful Inventions



§33 In Senate of the United States
February 25 - 1818.

Agreeably to notice given, Mr Burrill asked & obtained leave to bring in the following bill which was twice read & referred to ~~the~~ a select committee.

~~An act~~ A bill, in addition to an act, entitled "An act to promote the progress of useful arts"

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled

That the Circuit Courts of the United States shall have original cognizance as well in equity as at law of all actions suits controversies and cases arising under

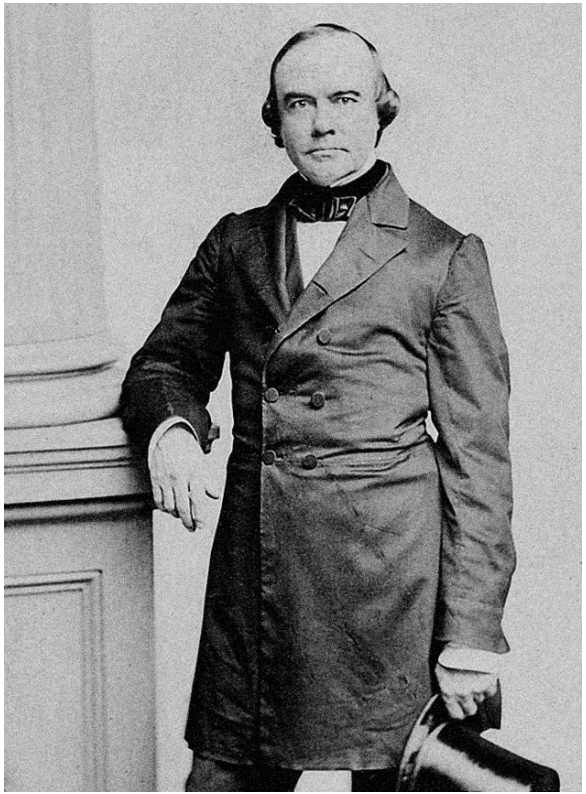
Senate Bill 33 (1818)

Patent Act of 1819

Justice Livingston (1825): "This act does not enlarge or alter the powers of the court. . . ."

Justice Washington (1826): "no doubt" patentee can obtain profit accounting

Judge Betts (1853): "We see no reason for regarding the power to issue injunctions as the primary and substantive authority of courts of equity, under this statute."



Benjamin Robbins Curtis
U.S. Supreme Court Justice from 1851 to 1857

Justice Curtis in *Stevens v. Gladding* (1854): 1819 Act "manifestly intended" to include "analogous rights" like profit disgorgement

John Duffy (2002): "the golden age of the Supreme Court's patent jurisprudence — the decade from 1850 to 1859"

Beauchamp (2016): Curtis "led a wing of the Court that included all of its Northern- and Whig-appointed Justices"

Patent Act of 1870

July 8, 1870. CHAP. CCXXX.—*An Act to revise, consolidate, and amend the Statutes relating to Patents and Copyrights.*

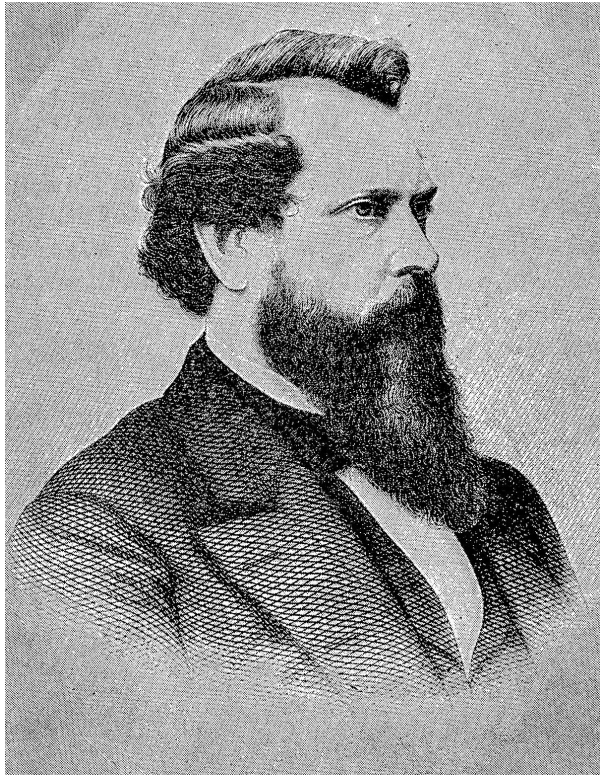
Patent office attached to Department of the Interior.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be attached to the Department of the Interior the office, heretofore established, known as the patent office, wherein all records, books, models, drawings, specifications, and other papers and things pertaining to patents shall be safely kept and preserved.

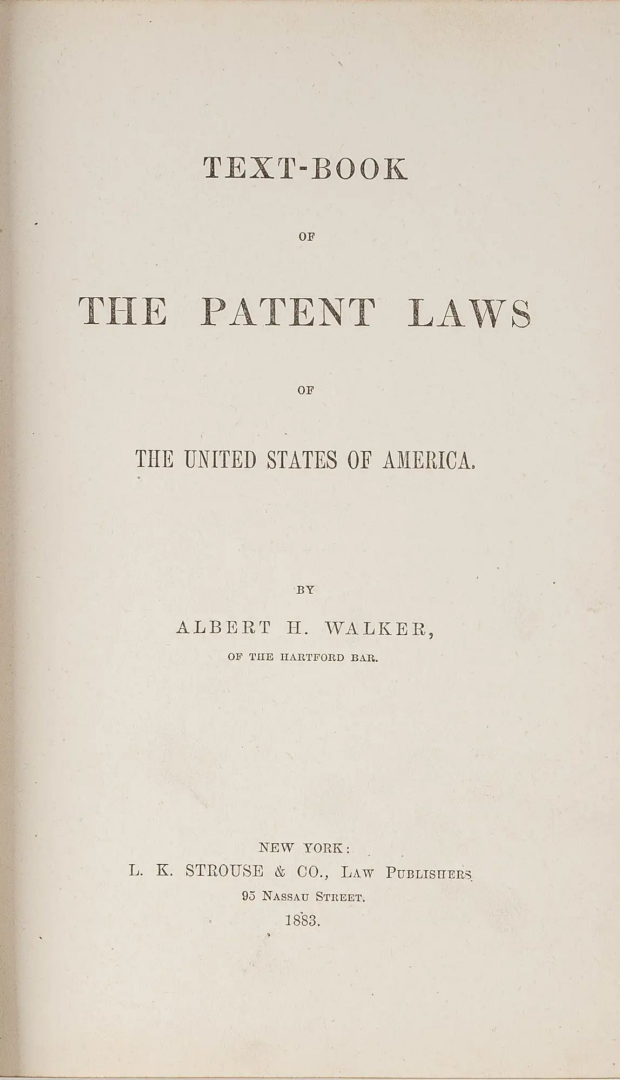
Officers and employees of patent office. Appointments by the President; by the Secretary of the Interior upon nomination of commissioner of patents.

SEC. 2. *And be it further enacted,* That the officers and employees of said office shall continue to be: one commissioner of patents, one assistant commissioner, and three examiners-in-chief, to be appointed by the President, by and with the advice and consent of the Senate; one chief clerk, one examiner in charge of interferences, twenty-two principal examiners, twenty-two first-assistant examiners, twenty-two second assistant examiners, one librarian, one machinist, five clerks of class four, six clerks of class three, fifty clerks of class two, forty-five clerks of class one, and one messenger and purchasing clerk, all of whom shall be appointed

"An Act to Revise, Consolidate, and Amend the Statutes relating to Patents and Copyrights"



Rep. Thomas Jenckes



TEXT-BOOK

OF

THE PATENT LAWS

OF

THE UNITED STATES OF AMERICA.

BY

ALBERT H. WALKER,

OF THE HARTFORD BAR.

NEW YORK:
L. K. STROUSE & CO., LAW PUBLISHERS,
95 NASSAU STREET.
1883.

Albert H. Walker

1877: Trained by father-in-law and infamous patent "shark," Thomas Sayles

1877: Represents Sayles before Congress in Hearings over S. 300

1879: S. 300 effort dies (so no liberalization of injunctions, reasonable royalties, etc.)

1881: Loses *Root v. Railway Co.* on behalf of Sayles estate

1908: Loses *Continental Paper Bag Co.*

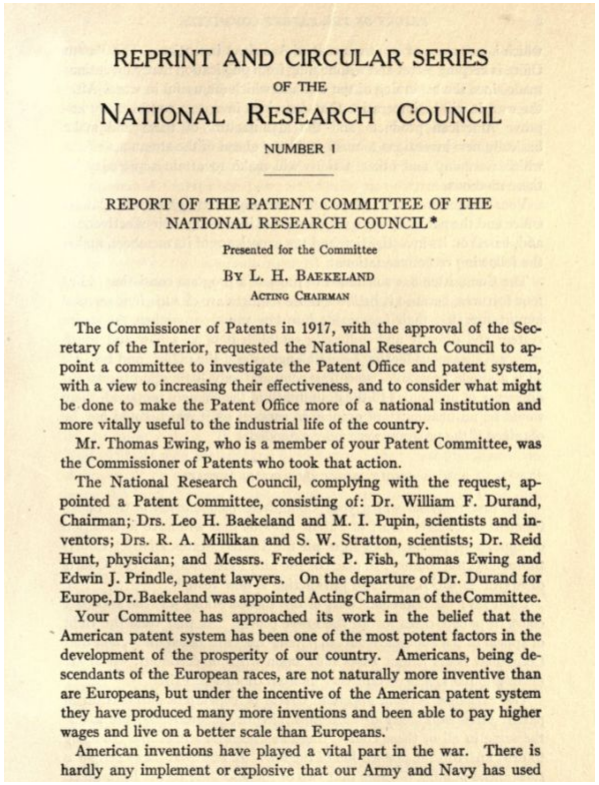
1883: Publishes first treatise and says reasonable royalties are available

1894: *Hunt Brothers Fruit-Packing Co.* upholds reasonable royalty award using Walker's treatise

1914: *U.S. Frumentum Co.* quotes *Hunt Brothers* and Walker in recognizing reasonable royalties

1915: *Dowagiac* recognizes reasonable royalties based on *Hunt Brothers* and *U.S. Frumentum*

Patent Act of 1922



REPRINT AND CIRCULAR SERIES
OF THE
NATIONAL RESEARCH COUNCIL
NUMBER 1

REPORT OF THE PATENT COMMITTEE OF THE NATIONAL RESEARCH COUNCIL*

Presented for the Committee
BY L. H. BAEKELAND
ACTING CHAIRMAN

The Commissioner of Patents in 1917, with the approval of the Secretary of the Interior, requested the National Research Council to appoint a committee to investigate the Patent Office and patent system, with a view to increasing their effectiveness, and to consider what might be done to make the Patent Office more of a national institution and more vitally useful to the industrial life of the country.

Mr. Thomas Ewing, who is a member of your Patent Committee, was the Commissioner of Patents who took that action.

The National Research Council, complying with the request, appointed a Patent Committee, consisting of: Dr. William F. Durand, Chairman; Drs. Leo H. Baekeland and M. I. Pupin, scientists and inventors; Drs. R. A. Millikan and S. W. Stratton, scientists; Dr. Reid Hunt, physician; and Messrs. Frederick P. Fish, Thomas Ewing and Edwin J. Prindle, patent lawyers. On the departure of Dr. Durand for Europe, Dr. Baekeland was appointed Acting Chairman of the Committee.

Your Committee has approached its work in the belief that the American patent system has been one of the most potent factors in the development of the prosperity of our country. Americans, being descendants of the European races, are not naturally more inventive than are Europeans, but under the incentive of the American patent system they have produced many more inventions and been able to pay higher wages and live on a better scale than Europeans.

American inventions have played a vital part in the war. There is hardly any implement or explosive that our Army and Navy has used

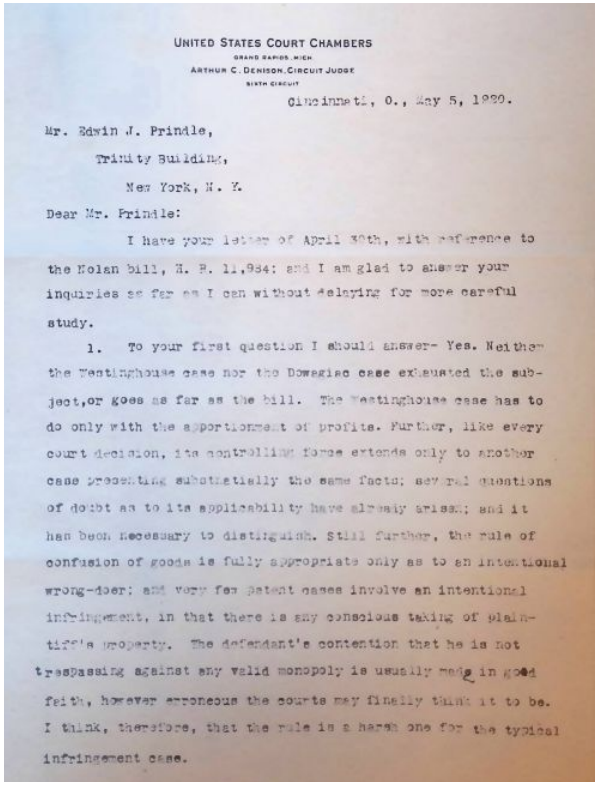
1917: Patent Commissioner Thomas Ewing requests committee "to make the Patent Office more of a national institution and more vitaly useful to the industrial life of the country"

1919: Committee recommends codifying *Dowagiac* because "it may take a generation to induce United States courts generally to adopt this position, if at all" **(left)**

1920: "[S]ome of the ablest patent lawyers in the United States" objected to defining reasonable royalties as an estimate of damages only

1920: Judge Denison writes letter supporting reasonable royalties as an estimate of infringer profits **(right)**

1922: "a reasonable sum as profits or general damages"



UNITED STATES COURT CHAMBERS
GRAND RAPIDS, MICH.
ARTHUR C. DENISON, CIRCUIT JUDGE
SIXTH CIRCUIT

Cincinnati, O., May 5, 1920.

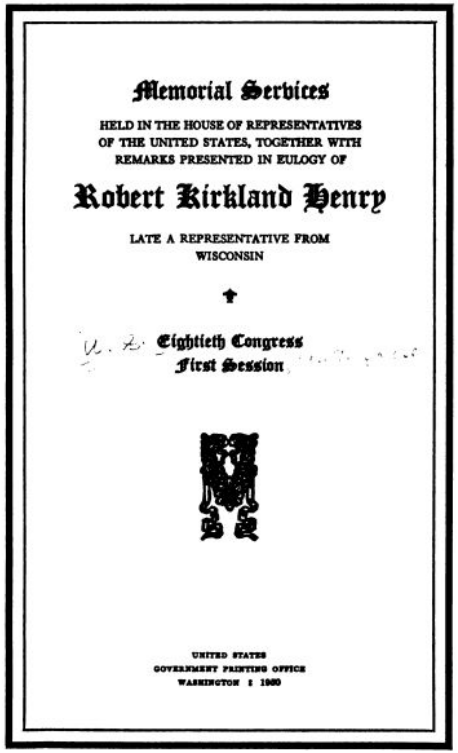
Mr. Edwin J. Prindle,
Trinity Building,
New York, N. Y.

Dear Mr. Prindle:

I have your letter of April 30th, with reference to the Nolan bill, H. R. 11,984; and I am glad to answer your inquiries so far as I can without delaying for more careful study.

1. To your first question I should answer- Yes. Neither the Westinghouse case nor the Dowagiac case exhausted the subject,or goes as far as the bill. The Westinghouse case has to do only with the apportionment of profits. Further, like every court decision, its controlling force extends only to another case presenting substantially the same facts; several questions of doubt as to its applicability have already arisen; and it has been necessary to distinguish. Still further, the rule of confusion of goods is fully appropriate only as to an intentional wrong-doer; and very few patent cases involve an intentional infringement, in that there is any conscious taking of plaintiff's property. The defendant's contention that he is not trespassing against any valid monopoly is usually made in good faith, however erroneous the courts may finally think it to be. I think, therefore, that the rule is a harsh one for the typical infringement case.

Patent Act of 1946



Memorial Services

HELD IN THE HOUSE OF REPRESENTATIVES
OF THE UNITED STATES, TOGETHER WITH
REMARKS PRESENTED IN EULOGY OF

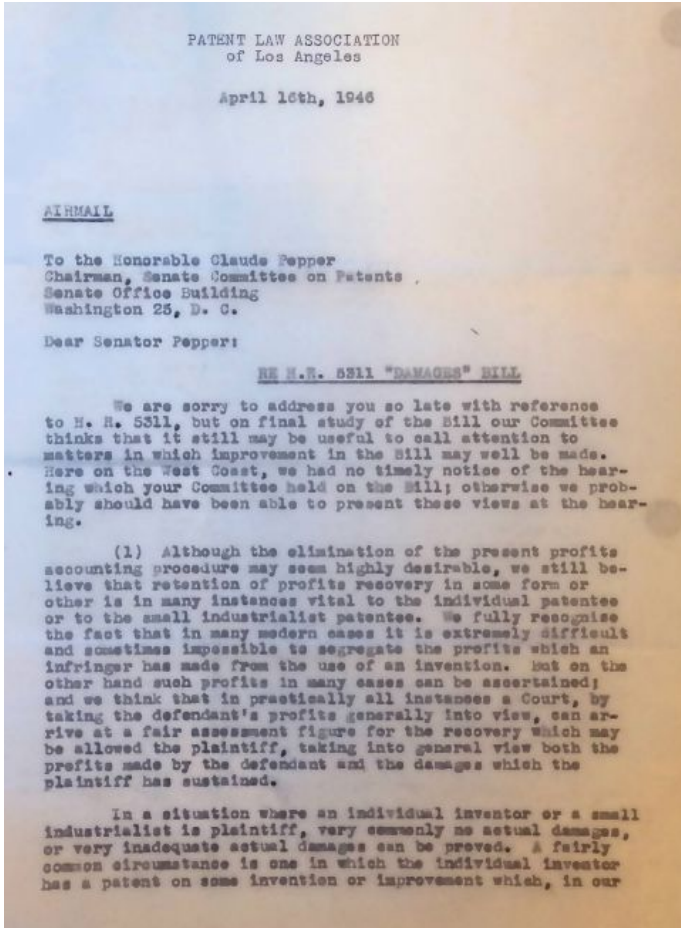
Robert Kirkland Henry

LATE A REPRESENTATIVE FROM
WISCONSIN

Eightieth Congress
First Session

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1980

Memorial for Representative
Robert Kirkland Henry (1890-1946)



PATENT LAW ASSOCIATION
of Los Angeles

April 16th, 1946

AIRMAIL

To the Honorable Claude Pepper
Chairman, Senate Committee on Patents
Senate Office Building
Washington 25, D. C.

Dear Senator Pepper:

RE H.R. 5311 "DAMAGES" BILL

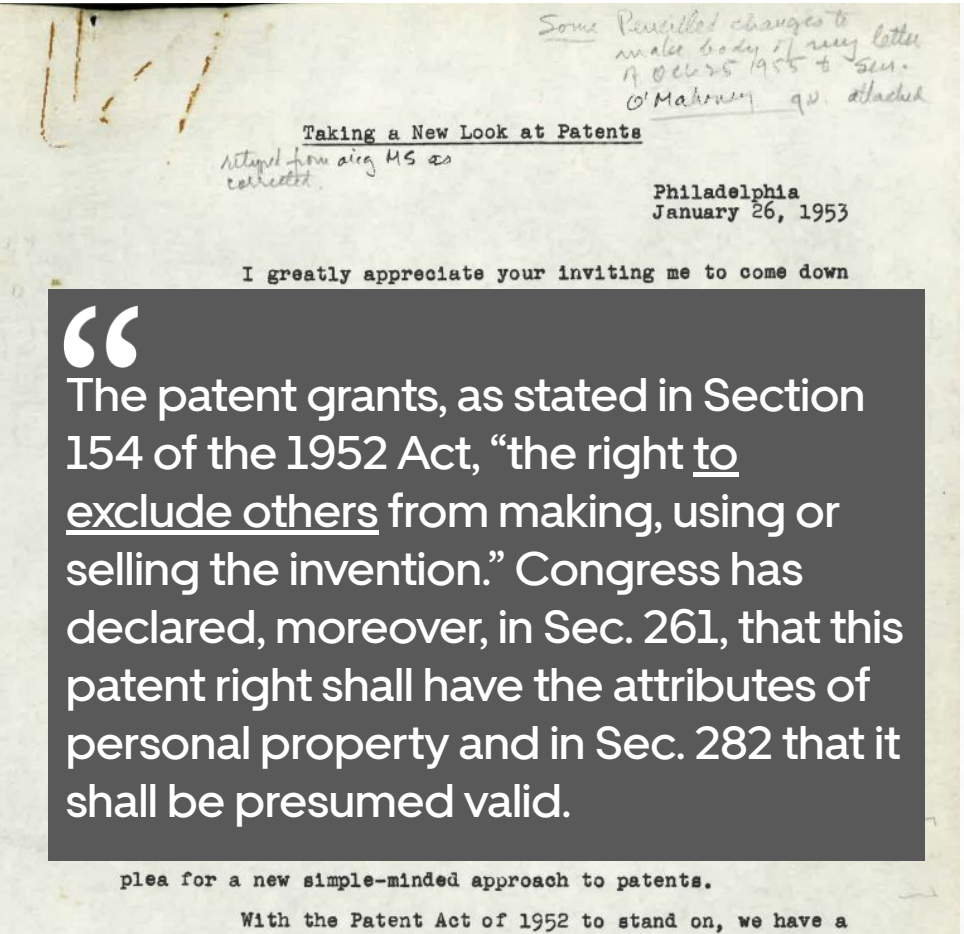
We are sorry to address you so late with reference to H. R. 5311, but on final study of the Bill our Committee thinks that it still may be useful to call attention to matters in which improvement in the Bill may well be made. Here on the West Coast, we had no timely notice of the hearing which your Committee held on the Bill; otherwise we probably should have been able to present these views at the hearing.

(1) Although the elimination of the present profits accounting procedure may seem highly desirable, we still believe that retention of profits recovery in some form or other is in many instances vital to the individual patentee or to the small industrialist patentee. We fully recognize the fact that in many modern cases it is extremely difficult and sometimes impossible to segregate the profits which an infringer has made from the use of an invention. But on the other hand such profits in many cases can be ascertained; and we think that in practically all instances a Court, by taking the defendant's profits generally into view, can arrive at a fair assessment figure for the recovery which may be allowed the plaintiff, taking into general view both the profits made by the defendant and the damages which the plaintiff has sustained.

In a situation where an individual inventor or a small industrialist is plaintiff, very commonly no actual damages, or very inadequate actual damages can be proved. A fairly common circumstance is one in which the individual inventor has a patent on some invention or improvement which, in our

Letter from the Patent Law Association of Los Angeles to Senator Claude Pepper (1946)

Patent Act of 1952



Some Pencilled changes to make body of my letter Oct 25 1955 + Sen. O'Mahoney qv. attached

Taking a New Look at Patents

retyped from orig MS as corrected

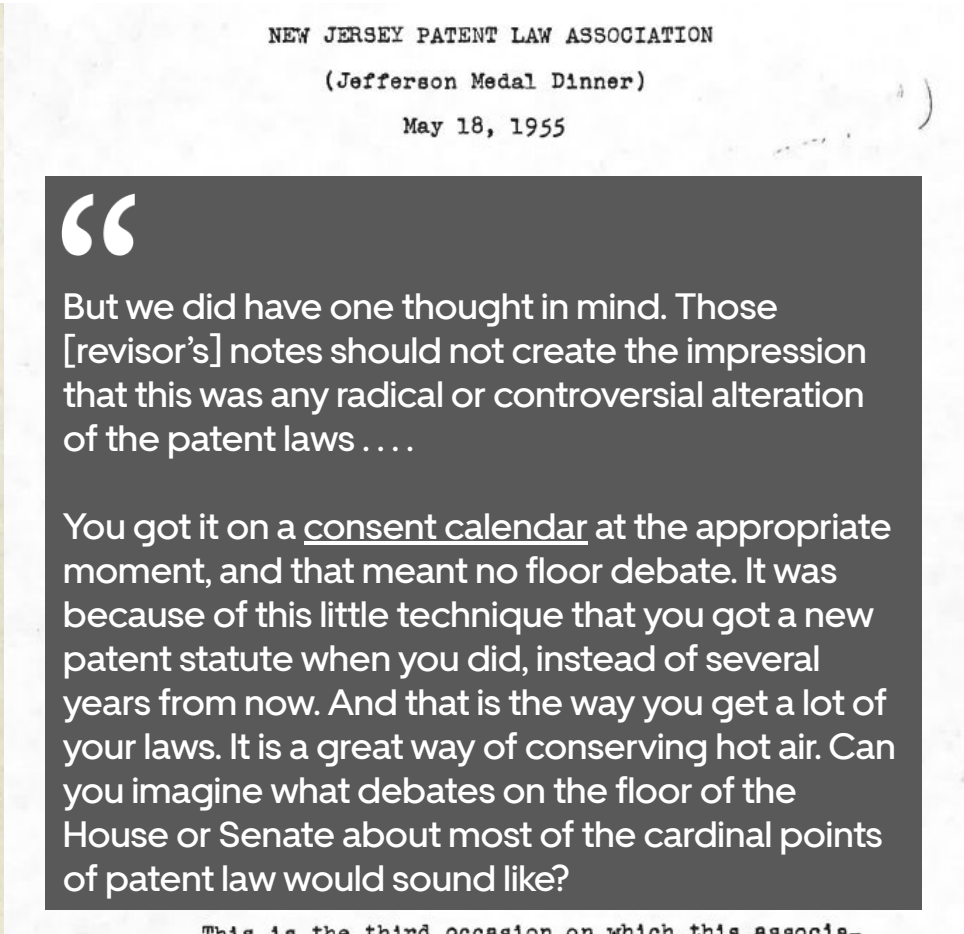
Philadelphia
January 26, 1953

I greatly appreciate your inviting me to come down

> The patent grants, as stated in Section 154 of the 1952 Act, "the right to exclude others from making, using or selling the invention." Congress has declared, moreover, in Sec. 261, that this patent right shall have the attributes of personal property and in Sec. 282 that it shall be presumed valid.

plea for a new simple-minded approach to patents.

With the Patent Act of 1952 to stand on, we have a



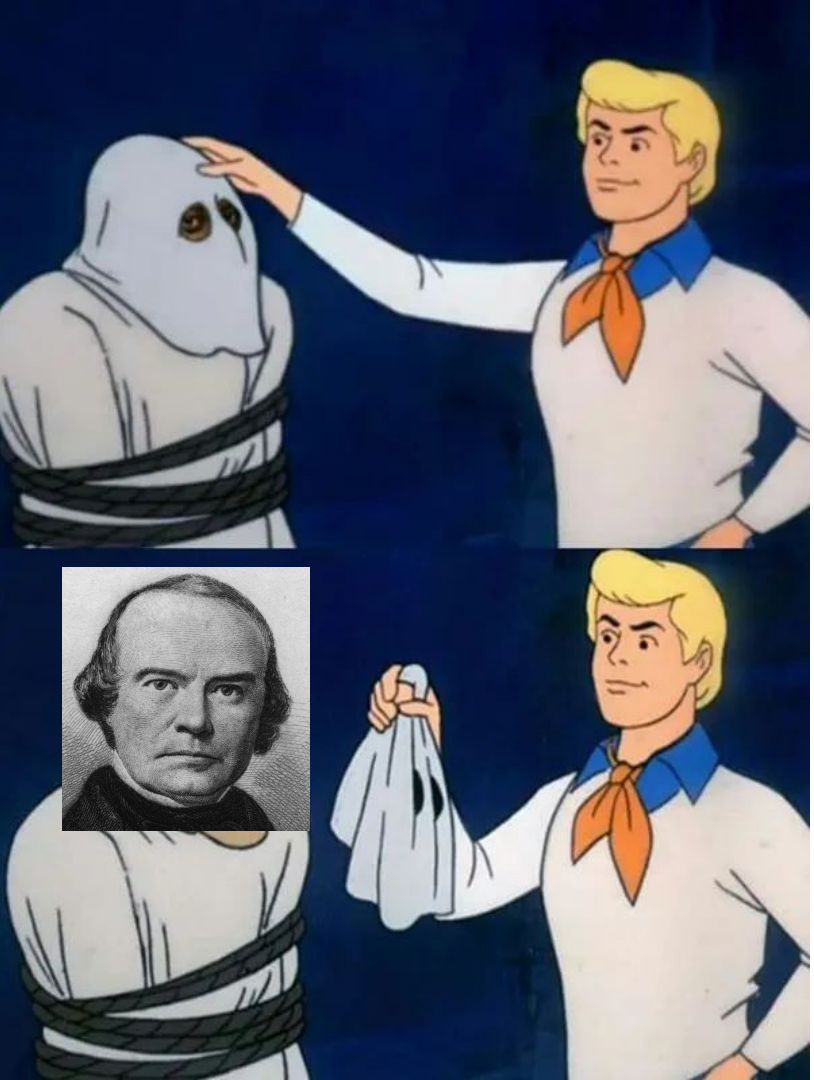
NEW JERSEY PATENT LAW ASSOCIATION

(Jefferson Medal Dinner)

May 18, 1955

> But we did have one thought in mind. Those [revisor's] notes should not create the impression that this was any radical or controversial alteration of the patent laws . . . .
>
> You got it on a consent calendar at the appropriate moment, and that meant no floor debate. It was because of this little technique that you got a new patent statute when you did, instead of several years from now. And that is the way you get a lot of your laws. It is a great way of conserving hot air. Can you imagine what debates on the floor of the House or Senate about most of the cardinal points of patent law would sound like?

This is the third occasion on which this associa-



Takeaway #1 – It's Almost Always a Patent Lawyer

Takeaway #2 - History Rhymes

RESTORE Patent Rights Act of 2025	Historical Examples
Finding 5: “courts historically presumed that an injunction should be granted”	Morriss & Nard: “Interest groups therefore turned to Congress on occasion to ‘lock in’ changes in the law that they had achieved through the courts.” 1819, 1870 and 1922 Acts
Finding 5 (assuming actual harm as a “given”) and Finding 7 (emphasizing drop in injunction rates and “predatory acts of infringement”)	1952 Act (e.g., Section 103)
Press release and one-pager featuring quotes from former judges, patent directors, and select academics	Judge Arthur Denison, Judge Learned Hand, Commissioner of Patents Thomas Ewing, and others who supported the 1922 Act 19th century treatises that advanced policy changes

Questions?