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Edward C. Walterscheid. *To Promote the Progress of Useful Arts: American Patent Law and Administration 1798-1836*. Littleton, Col.: Fred B. Rothman & Co., 1998. xii + 516 pp. \$75.00 (cloth), ISBN 978-0-8377-1354-0.

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Patents and the Early American Republic

In his 1984 book on the English patent system, Harry Dutton laments that “the operation of the patent system during the Industrial Revolution has rarely been the subject of scholarly research.”[1] As historians have concentrated their work mainly on inventions and innovation, they have ignored the patent administration. Dutton seeks to correct this, detailing the role of the patent system in England and assessing “the impact of the patent system on inventive activity.”[2] Others continued the work that Dutton began, most notably Christine MacLeod’s *Inventing the Industrial Revolution: The English Patent System, 1660-1800*. Like Dutton, MacLeod does not seek only to “provide an administrative history of the patent system” but also to explore “the relationship between patents and inventions in seventeenth- and eighteenth-century England, and to suggest a more fruitful role for the patent records than those to which they have usually been reduced.”[3] The works of Dutton and MacLeod mark the beginning of a historical revision within the historiography of the English industrial system and the role of patents within that system.

Edward C. Walterscheid’s *To Promote the Progress of Useful Arts* continues this revision in the United States and serves as a reexamination of the origins of the U.S. Patent system as well as its early administration. This reexamination was sparked by the author’s reading of Kenneth Burchfiel’s criticism that the U.S. Supreme Court had used “pseudo-history” in interpreting the intellectual property clause of the Constitution. By relying heavily on Thomas Jefferson’s views of the intellectual property

clause of the Constitution and not taking into account other interpretations, Burchfiel argued that the Supreme Court had continually misinterpreted the early history of the American Patent System. This conclusion went against Walterscheid’s own notions of the development of early American patent law and the role that Thomas Jefferson played in it. After further research, Walterscheid came to agree with Burchfiel’s view, that Thomas Jefferson was not the creator of the U.S. patent system, but merely its first administrator. The Supreme Court throughout the twentieth century elevated the role of Jefferson when it came to the American Patent system, even going so far as to state that Jefferson was the author of the Patent Act of 1793. In helping to substantiate this Jeffersonian mythology, the U.S. Supreme Court had “in fact created ‘revisionist’ history” (p. ix).

The demythologizing of Jefferson’s role in the patent administration raised for Walterscheid the broader question: “If the Jeffersonian mythology was so much at odds with the reality, what else was unknown or misconstrued about the patent law and its administration in its early years?” (p. x). As his research indicates, and as Dutton had seen in Britain, much has been left out of the historical record. Walterscheid notes that little had been written on the origins of American patent law, its inclusion in the Constitution, or early interpretations of the intellectual property clause. Without this information, the Patent Act of 1836 seems to stand on its own as the foundation of the modern patent system in the United States, not as the culmination of years of patent practice

in the early nineteenth century. Walterscheid, Acting Laboratory Counsel at the Los Alamos National Laboratory, seeks to correct this gap in the historiography.

Walterscheid arranges the book chronologically, beginning with the historical background and influences which led to the inclusion of the intellectual property clause within the Constitution. The book also details the specific policies of Congress and the Patent Board as they attempted to implement the powers specified within the Constitution. Particular attention is given the Patent Acts of 1790, 1793, and 1836 as well as a number of bills which were never passed into law. Interspersed throughout this narrative is an examination of the actual practices of the patent administration under its different guises.

To show that the Patent Act of 1836 reflected the culmination of years of prior experience with patent practice, Walterscheid traces the origins of the patent system, going as far back as English common law. He notes that “one major purpose of this work is to point out both those parallel features of the American statutory law and the common law of patents and where the two systems of patent law ... parted company” (p. 5). Two of the most important differences between the two models can be seen in the U.S. Patent Law of 1790—the lack of a registration system and a unique definition of novelty.

Deficiencies in the system, most notably the lack of an examination system, persuaded Congress to enact the Patent Act of 1793, a law that Walterscheid describes as transitional. It changed how Congress would implement the patent system, but it should still be considered a patent custom: “there had yet to develop either the uniform administrative practice nor the consonant legal principles under rule of law needed for a true ‘patent system’” (p. 17). Significantly, however, the registration system set up by the Patent Act of 1793 remained largely in existence for the next forty-three years.

As Walterscheid notes, in the years between 1793 and 1836, there still existed a need “to fill in the legal interstices of the statutory framework to make [the Patent administration] truly a patent system as opposed to merely the semblance of one, although based on statute” (p. 223). This was achieved largely in two steps, an introductory phase that lasted until 1800 and was marked by nearly no reported case laws and the second phase, in which judicial interpretation helped define the evolving patent system. This judicial interpretation was largely accomplished through the decisions of two circuit court Justices, Bushrod Washington and Joseph Story. (Of the

fifty-eight lower-court cases reported, Washington and Story heard forty.) Walterscheid also looks at the nature and varied content of issuance and administration of patents during the early nineteenth-century, a process that William Thornton, the first Superintendent of Patents, heavily influenced. It was Thornton who continually argued that the Patent system was designed to “reward and protect the interest of the inventors,” not the public (p. 19).

In separate chapters, the author looks at three of the major problems hindering the creation of a true patent system: the continued debate concerning the role of secrecy, novelty, and specification with relation to patent applications. Debates concerning these issues were widespread, and by 1835 “the continuing chorus of public and judicial complaint with regard to [the Patent Act of 1793’s] inadequacies made reform inevitable.” Criticisms usually revolved around the length of the patent term, the lack of a patent of importation, and the number of fraudulent patents resulting from the Act of 1793. With the appointment of John Ruggles as Senator, a campaign began in Congress that eventually led to the Patent Act of 1836, an act representative of “a fundamental change in the manner in which the patent system would henceforth be administered” but one that “represented a synthesis of and a reaction to almost fifty years of patent practice” (p. 432).

Walterscheid concludes his book with the observation that “my purpose has been to shed some light on what came before the [Patent] Act of 1836” (p. 432). As such, this book has done an admirable job in tracing the fluid and evolving patent administration from 1787 to 1836. Using a wide array of contemporary letters, legal documents, and court cases, Walterscheid has filled a considerable gap in the historiography. Regrettably, the absence of a bibliography makes it difficult for the reader to plumb through these sources.

In detailing the history of American Patent law and its administration from 1787 to 1836, Walterscheid has done a good job following the work of Dutton and Macleod’s research on the English system and has shown that there is much more work for historians to do in this area. But there seems to something missing here. Both Dutton and Macleod detail the operations of the patent system, but then move beyond it, analyzing the impact of the patent system on inventive activity. Walterscheid does an excellent job in detailing the administration process during these early years of patent administration, but the book at times seems internalized, not breaking

out of the halls of Washington to see how this debate affects the rest of America.

One chapter, "Perspectives, Public and Private," does attempt to broaden the narrative, but one wishes that this was done throughout the work. In addition, more information on the major actors in this drama is warranted. For example, when discussing the stimulus behind the origins of the Patent Act of 1836, Walterscheid notes that the major force behind it, John Ruggles, "had a strong interest in mechanics and engineering and was desirous of becoming a patentee in his own right," but does not give any further detail concerning these influences (p. 421). He also notes that Justices Washington and Story played a large role in defining the nature of the patent system, part of a general pattern in which "judges in the first two decades of the nineteenth century came to increasingly see themselves as agents of legal change" (p. 365). If that is the case, one wonders how the background and history of Story and Washington affected their judicial interpretations?

Walterscheid has left that part of the story to the work of other historians. To aid them in this quest, fifteen Patent Bills, Acts and Forms from 1789 to 1836 are reprinted in a seventy-five page appendix. (Carolyn Cooper has already started some of this work, in *Shaping Invention: Thomas Blanchard's Machinery and Patent Management in Nineteenth Century America* [4].) In detailing the evolution of the Patent system from 1787 to 1836, *To Promote the Progress of Useful Arts* serves as

a good foundation for a reinterpretation of the role of American Patent Law and administration and the early American republic and should be of interest to Constitutional historians, legal historians, historians of technology, as well as historians of the early American Republic.

Notes

[1]. H. I. Dutton, *The Patent System and Inventive Activity during the Industrial Revolution, 1750-1852* (Manchester University Press, 1984), 1.

[2]. Dutton, 8.

[3]. Christine Macleod, *Inventing the Industrial Revolution: The English Patent System, 1660-1800* (New York and Cambridge, England: Cambridge University Press, 1988), 1-2.

[4]. Using Peter Berger and Thomas Luchmann's theories regarding the social construction of reality, Cooper argues that inventions should be seen as a social construct and that the American patent system "harnessed psychological processes (inventive activity) with economic processes." See Carolyn C. Cooper, *Shaping Invention: Thomas Blanchard's Machinery and Patent Management in Nineteenth Century America* (New York: Columbia University Press, 1991), 3-4.

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