

NOTE

MAN’S NEW MAESTRO: ARTIFICIAL INTELLIGENCE AND THE QUEST FOR PERSONHOOD

“After centuries of morality, we still cannot answer...[w]here does man begin? [] No one knows what man is any longer.”¹

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I. INTRODUCTION

Stephen Hawking once said, “[s]uccess in creating [artificial intelligence] could be the biggest event in the history of our civilization. But it could also be the last.”² And by discussing Artificial Intelligence (“AI”) from a distinctly Christian perspective, this Note demonstrates the very real truth behind Dr. Hawking’s comment.

The case of DABUS, the AI system, and its quest to obtain patents would likely have been missed by the most attentive of technology junkies due to its highly technical legal arguments as well as the nature of patents being just that—technical and dry. However, looking beyond the complicated nature of the claims lies an issue that should involve everyone—the fragility of humanity³. The claim by DABUS—rather his human creator Dr. Thaler—was that an AI system should have the title of inventor to the ideas it *created* and by this, be granted patents.⁴ This recognition as an inventor would allow DABUS to begin amassing the legal rights Dr.

¹ Joseph F. Fletcher, *Four Indicators of Humanhood: The Enquiry Matures*, 4 HASTINGS CTR. REP. 4, 4 (1974). The author describes a meeting between French Catholic intellectuals discussing “a prosecution for infanticide following the thalidomide disaster of the Sixties” that left many children malformed, sometimes beyond recognition. *Id.* These intellects discussed if personhood could be extended to such malformed children, such that prosecution for infanticide would be proper. *Id.* If such a discussion took place centered around deformed children, it is no stretch to think that such a discussion has taken place regarding other creatures, be these God made or manmade.

² “The best or worst thing to happen to humanity” - Stephen Hawking launches Centre for the Future of Intelligence, U. CAMB. (Oct. 19, 2016), <https://www.cam.ac.uk/research/news/the-best-or-worst-thing-to-happen-to-humanity-stephen-hawking-launches-centre-for-the-future-of>.

³ See discussion *infra* Part V.

⁴ See, e.g., *Thaler v. Hirshfeld*, 558 F. Supp. 3d 238 (E.D. Va. 2021); *Thaler v. Vidal*, 43 F.4th 1207 (Fed. Cir. 2022); see discussion *infra* Part V regarding the nature of creation.

Thaler felt his creation deserved.⁵ The Eastern District of Virginia denied Thaler’s petition against Hirshfeld,⁶ and the United States Court of Appeals for the Federal Circuit affirmed the lower court’s denial of Thaler’s petition against Vidal.⁷ The United States Supreme Court, aptly, denied certiorari.⁸ Irrespective of these courts’ ultimate dismissals, the query Thaler posed is fascinating if not terrifying: *can AI systems be considered inventors and, consequently, be afforded the ultimate status of a person?*

Following the dawn of the internet in 1983, legal rights for AI have been at the very least contemplated. Some have concluded that AI’s elevation to personhood is inevitable and should be granted rights now,⁹ while others have struggled to rationalize a tool of man’s own making being elevated to equal with its master.¹⁰ While the latter position will prevail where personhood is defined Biblically,¹¹ the former will always triumph where the mark of a person is determined by utility and intelligence.¹²

The lens of history and prior precedent aptly explains that carefully chosen verbiage—littered throughout statutes and constitutional clauses—and the clear separation of ownership from inventorship¹³ estops *anything* that is not a person from being able to don the visage of inventor as defined by the U.S. Patent Act.¹⁴ Convincing and sound as a breadth of jurisprudence and statutory reasoning may be, as AI grows inevitably more intelligent and capable, ancient words from Founders in America’s youth will be overshadowed by a more modern truth. And

⁵ *Id.* These legal rights that Dr. Thaler is petitioning for would be akin to those rights granted to *human* inventors. See discussion *infra* Section II.2.

⁶ *Hirshfeld*, 558 F. Supp. 3d at 250.

⁷ *Vidal*, 43 F.4th at 1213.

⁸ *Thaler v. Vidal*, 143 S. Ct. 1783 (2023).

⁹ See discussion *infra* Section IV.B.

¹⁰ See discussion *infra* Section IV.C.

¹¹ See discussion *infra* Section IV.A.1.b.

¹² See discussion *infra* Section IV.A.1.a.

¹³ See discussion *infra* Section III.B.

¹⁴ See discussion *infra* Part III; see, e.g. 35 U.S.C.

while AI systems are not currently defined as legal people, all but one definition stands in its way. The definition of personhood.¹⁵

This Note will begin by discussing the background of the patently identical cases of *Thaler v. Hirshfeld* and *Thaler v. Vidal*, as well as the arguments made by both sides prior to the cases' inevitable dismissals. Next, it will discuss the historical development of patent law relied on primarily by the USPTO. With this context in mind, this Note will then discuss the courts' reasoning in denying Thaler's petition for personhood, with the caveat that the courts themselves are unable to state a definition for personhood. Wholly left for interpretation, this Note will posit two definitions of personhood: one largely secular, buttressed by self-consciousness and intelligence, the other distinctly Christian with the *imago Dei* defining who man is. These definitions will each serve as the foundation for their respective arguments: one towards the elevation of AI to personhood and the other staunchly opposed. Finally, settling on a distinctly Christian definition of personhood that definitively excludes AI, this Note will argue that despite man's desires, he is utterly unable to Create¹⁶ an AI system that can be included within a definition of personhood. And his continued attempts at doing so will only lead to misappropriation, sin, and a future that should be feared.

II. THE LEGAL BATTLE BETWEEN MAN AND MACHINE

"Intelligence akin to that possessed by humankind and beyond is still but a theoretical possibility...[for now] human beings remain integral to the operation of AI, and this is an important consideration in evaluating whether [intellectual property ("IP")] law needs modification in view of the current state of AI technology."¹⁷ The patently identical cases of

¹⁵ See discussion *infra* Part V.

¹⁶ See discussion *infra* Part V.

¹⁷ *Hirshfeld*, 558 F. Supp. 3d at 249.

Thaler v. Hirshfeld and *Thaler v. Vidal* are the memorized crusades of Dr. Stephen Thaler, Ph.D., and the culmination of his efforts to grant legal recognition to AI systems through patent applications.¹⁸ Serving as the leader of his cause was none other than DABUS, Dr. Thaler’s own creation, a maestro in its own right having developed two patentable ideas.¹⁹ Although ultimately failing to modify and expand IP law to encompass AI,²⁰ DABUS and Dr. Thaler represent a future of subordination, where man’s own creations stand supreme above him.²¹ This Note serves as a glimpse into this future as well as another—a future of man’s continued dominance where he remains elevated above machine. The inevitability of one of these futures depends on a simple question—*what is a person?*²² How man answers this question will be determinative of the future he chooses.²³ But before this Note can warn against the answer that leads to a future of subordination, to DABUS’ future, one should understand the story of the case(s).

A. *Artificial Intelligence Applies for a Patent*

Dr. Thaler “develops artificial intelligence systems that use machine learning” who, on their own, “develop new concepts, products, and processes.”²⁴ Such systems are considered “strong AI” with intellectual capability, intentionality, and consciousness equal to that of humans.²⁵ Thaler likens these AI systems to “neural networks, which

¹⁸ See, e.g. *Hirshfeld*, 558 F. Supp. 3d; *Vidal*, 43 F.4th.

¹⁹ See discussion *infra* Section II.A.

²⁰ *Hirshfeld*, 558 F. Supp. 3d at 249.

²¹ *Id.* at 238; *Vidal*, 43 F.4th at 1207. Both *Hirshfeld* and *Vidal* involve Dr. Thaler’s petition for the granting of a patent to his AI system, with the AI system itself named as the inventor. See *Hirshfeld*, 558 F. Supp. 3d at 238; *Vidal*, 43 F.4th at 1207. There is little to no factual differences between the two cases, beyond the United States Patent and Trademark (USPTO) officer sued, and will largely be regarded as one proceeding throughout the entirety of this Note. When referenced together they shall be referred to as the “*Thaler* courts.”

²² See discussion *infra* Section IV.A.1.a–b.

²³ See discussion *infra* Section IV.B–C.

²⁴ Petition for Writ of Certiorari, at 5, *Thaler v. Vidal*, 43 F.4th 1207 (Fed. Cir. 2022), (No. 1:20-cv-903).

²⁵ Rafael D. Brown, *Property Ownership and the Legal Personhood of Artificial Intelligence*, 30 INFO. & COMM’NS TECH. L. 208, 211 (2021).

simulate the way a human brain operates.”²⁶ It is this simulation of the human brain, as Dr. Thaler would purport, that allows his AI systems to “generate their [own] inventive output” without the need for human intervention.²⁷ One such system was called “Device for the Autonomous Bootstrapping of Unified Sentience” (DABUS).²⁸ DABUS evolved from one of Dr. Thaler’s early systems called the Creativity Machine.²⁹ The Creativity Machine was comprised of two important neural networks.³⁰ “The first was trained [fed information by scientists] with data from a particular knowledge area, and [by altering that data received] generated novel ideas”; the second then “measured the novelty, utility, and value of the resulting ideas to identify which to pursue further.”³¹

DABUS took the ability to generate novelty and expanded it. DABUS has a larger number of neural networks, each of which represent and belong to an individual concept like “‘temperature,’ or positive outcomes like ‘enjoyment’ or ‘survival.’”³² Similar to the Creativity Machine’s first neural network, DABUS was trained through a scientist who combined DABUS’ individual concepts into consequence chains—“a drink at the appropriate temperature results in enjoyment.”³³ Later, and without human supervision or input, DABUS autonomously extends and combines the consequence chains it was taught

²⁶ *Petition for Writ of Certiorari*, *supra* note 24, at 5.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* Creativity Machine’s first neural network required human intervention in order to “learn” via the feeding of information to it. However, the second neural network required no further human intervention beyond the initial data required.

³² *Petition for Writ of Certiorari*, *supra* note 24, at 5.

³³ *Id.* The formulaic teaching of DABUS is simplistic, as if teaching a child a simple math equation. Coffee + 120-140 degrees Fahrenheit = Enjoyment of a hot cup of joe. *See, e.g., Id.*; Janice Kanniah, *How hot should you serve coffee in takeaway cups?*, MTPAK COFFEE (Aug. 12, 2022), <https://mtpak.coffee/2022/08/takeaway-cups-coffee-temperature-ideal-serving/#:~:text=Generally%2C%20coffee%20is%20best%20brewed,F%20and%20140%C2%B0F> (noting “generally, coffee is best brewed between...195°F and 205°F, and it should be served between...120°F and 140°F.”).

by the scientist and makes them into more complex chains resulting in positive outcomes.³⁴ DABUS' autonomous function is akin to Creativity Machine's second neural network.

The autonomous function of DABUS developed the two novel concepts that are at issue in *Hirshfeld and Vidal*.³⁵ The first was the "Neural Flame," and the second was a "Fractal Container" (collectively "Inventions").³⁶ In July 2019, Dr. Thaler filed patent applications with the USPTO for each of DABUS' Inventions.³⁷ Although Dr. Thaler himself was named as the patent applicant and owner, Dr. Thaler purported to file these applications derivatively, on behalf of DABUS.³⁸ Dr. Thaler listed "DABUS, Invention generated by artificial intelligence" as the sole inventor of the Inventions including as a statement that "that the inventor of the subject matter of the instant invention of the present application is an AI machine, being a type of 'creativity machine' named 'DABUS.'"³⁹ Also included within the patent applications was a declaration stating "[t]hat the inventor, DABUS, was a Creativity Machine (i.e., an artificial intelligence), with no legal personality or capability to execute this substitute statement," thus the need

³⁴ *Petition for Writ of Certiorari*, *supra* note 24, at 5. DABUS, as though a child learning, takes the smaller concepts it was taught and combines them to create more complex, nuanced results. "Fractal geometry increases surface area, greater surface area on a container improves grip, improved grip promotes container functionality, greater functionality results in user enjoyment." *Id.* at 5–6.

³⁵ *Id.* at 6.

³⁶ *Id.* The "Neural Flame" [was] an emergency light beacon that flashes in a specific pattern to attract the attention of rescuers" and the "Fractal Container" was a beverage container [meant to] improve grip function and promote heat transfer." *Id.* Both the use of the "Neural Flame" and "Fractal Container" result in a positive outcome; either survival or increased enjoyment. *Id.* This positive answer is consistent with the way DABUS combines concepts with the goal of reaching a positive result.

³⁷ *Id.*; *Hirshfeld*, 558 F. Supp. 3d at 241; *Vidal*, 43 F.4th at 1209.

³⁸ *Vidal*, 43 F.4th at 1209. In conjunction submitting patent applications on DABUS' behalf, Dr. Thaler also "filed a document purporting to assign himself all of DABUS' rights as an inventor." *Id.* at 1209–10. Such an assignment of rights following an application on something else's behalf correctly gave the court pause as to *who* exactly is acting here.

³⁹ *Petition for Writ of Certiorari*, *supra* note 24, at 6.

for Thaler's *benevolent* intervention.⁴⁰ This declaration of DABUS' dependency also justified Thaler in signing all pertinent documentation as "the Applicant and the Assignor of the abovementioned application, as well as the *owner* of said Creativity Machine, DABUS" (emphasis added).⁴¹

B. *The Legal Battle for Extending Intellectual Property Rights Beyond Man*

Irrespective of Dr. Thaler's explanation, after initial review of the applications, the USPTO issued a "Notice to File Missing Parts of Non-provisional Application" ("Notice") finding the applications to be lacking in that they failed to state a "valid inventor and were, hence incomplete."⁴² Rather than amending the petitions and submitting a valid inventor, however, Dr. Thaler asked the USPTO to vacate their Notice and reiterated the declaration included within the original applications as support.⁴³ The USPTO dismissed Thaler's petition for several reasons. First, the USPTO affirmed that "The Patent statute is replete with language indicating that an inventor is a natural person," citing to several statutes as support.⁴⁴ 35 U.S.C. §101, the USPTO noted, purposefully uses "whoever" to denote who may obtain patents.⁴⁵ 35 U.S.C. §102(a) uses "person" to cabin who shall be entitled to a patent and who shall not.⁴⁶ This is the first time "person" is used following—as Thaler's would believe—the word's peculiar

⁴⁰ *Id.* at 6–7.

⁴¹ *Id.* 37 C.F.R. § 1.64 allows an applicant to "execute a substitute statement in lieu of an oath or declaration if the inventor is deceased, is under legal incapacity, has refused to execute the oath or declaration under 37 C.F.R. § 1.63, or cannot be found or reached after diligent effort." 37 C.F.R. § 1.64(a). Dr. Thaler, thus, justified his giving a substitute statement by DABUS' "legal incapacity." *Id.*

⁴² *Vidal*, 43 F.4th at 1210; *see Hirshfeld*, 558 F. Supp. 3d at 242.

⁴³ *Hirshfeld*, 558 F. Supp. 3d at 242.

⁴⁴ *In re Application of Unnamed Application*, at 1, Application No. 16/524,532.

⁴⁵ 35 U.S.C. §101 ("[w]hoever invents or discovers ... may obtain a patent therefor, subject to the conditions and requirements of this title." (emphasis added)).

⁴⁶ 35 U.S.C. §102(a) ("[a] person shall be entitled to a patent unless ..." (emphasis added)).

absence from the definitions of 35 U.S.C. §100.⁴⁷ Perhaps best encompassing the USPTO statutory interpretation is 35 U.S.C. § 115(b)(2), which instead uses distinctly human pronouns to expand upon 35 U.S.C. §100 (f) stating that “[a]n oath or declaration under subsection (a) shall contain statements that ... such *individual believes himself or herself* to be the original inventor or an original joint inventor [as defined in 35 U.S.C. § 100(f), (g)] of a claimed invention in the application” (emphasis added).⁴⁸ Accordingly, the USPTO concluded, “inventor” as defined within 35 U.S.C. §100(f), (g) cannot support the inclusion of a machine if read within the context of adjoining statutes.⁴⁹

Moreover, the USPTO noted that past precedence had already spoken to the question of machine as man.⁵⁰ The United States Court of Appeals for the Federal Circuit noted in *Beech Aircraft Cor. v. Edo Corp.* that “only *natural persons* can be ‘inventors’” (emphasis added).⁵¹ Inventorship and the process therein to become an inventor is “uniquely trained on human beings.”⁵² Thus, because DABUS is not a valid inventor, the USPTO’s Notice was appropriate, and noncompliance, therefore, will result in denial of

⁴⁷ *Petition for Writ of Certiorari*, *supra* note 24, at 11; *see also* 35 U.S.C. §100.

⁴⁸ *In re Application of Unnamed Application*, *supra* note 44, at 4; 35 U.S.C. § 115(b)(2); 35 U.S.C. § 100 (f),(g).

⁴⁹ *In re Application of Unnamed Application*, *supra* note 44, at 5. The USPTO relies heavily on contextual canons of statutory construction (i.e. Harmonious-Reading Canon) to reach the result that renders all text within 35 U.S.C compatible with each other, not contradictory. *Canons of Construction*, UH L. CTR., <https://www.law.uh.edu/faculty/adjunct/dstevenson/2018Spring/CANONS%20OF%20CONSTRUCTION.pdf> (last visited Oct. 13, 2024). The USPTO, as this author will argue *infra*, is correct in its application of such canons.

⁵⁰ *In re Application of Unnamed Application*, *supra* note 44, at 5.

⁵¹ *Beech Aircraft Cor. v. Edo Corp.*, 990 F.2d 1237, 1248 (Fed. Cir. 1993); *see also* *University of Utah v. Max-Planck-Gesellschaft Zur Forderung Der Wissenschaften E.V.*, 734 F.3d 1315, 1323 (Fed. Cir. 2013) (“Conception is the touchstone of inventorship, the completion of the mental part of invention. It is the formation *in the mind of the inventor*, of a definite and permanent idea of the complete and operative invention, as it is hereafter to be applied in practice.”) (emphasis added) (internal quotation marks and citations omitted).

⁵² 35 U.S.C. § 100; 35 U.S.C. § 111; 35 U.S.C. § 115. *Hirshfeld*, 558 F. Supp. 3d at 242. The USPTO also noted that Thaler’s use of a machine as a “tool” does not preclude himself as a natural person the ability to apply for a patent with himself listed as the inventor. *Id.* at 243.

the application. Following this decision, Thaler demanded repeated reconsideration and the USPTO continued to deny it. The battle between man and machine continued, and suit quickly ensued.⁵³

Thaler argued that the USPTO's definition of inventor was narrow and failed to consider "alternative interpretations."⁵⁴ Thaler argued that neither the definition of "inventor" nor "joint inventor" per 35 U.S.C. §100 limits itself to only natural persons or human beings, thus presenting no bar to AI as a qualified inventor.⁵⁵ Rather, the definitions of "inventor" and joint "inventor" turn on exclusions imposed on the word "individual."⁵⁶ Thaler argued that because "individual" is not statutorily defined, the court must look beyond the plain meaning of "inventor" as without such canons of statutory construction, inventor would remain ambiguous.⁵⁷

Relying primarily on *Mohamad v. Palestinian Auth.*, Thaler notes while under some circumstances "the word 'individual' may refer to natural persons, it does not 'invariably mean [] 'natural person' when used in a statute.'"⁵⁸ Relying on a myriad of

⁵³ Perhaps one of the most famous movie quotes regarding the battle between man and machine is that from the 1984's *Terminator*. *Terminator Quotes*, TERMINATOR WIKI, https://terminator.fandom.com/wiki/I%27ll_be_back (last visited Oct. 13, 2024). The Cyberdyne Systems Model 101, played by Arnold Schwarzenegger, is a cyborg (part man, part machine) who, attempting to see the female protagonist of the movie, informs the precinct holding her "I'll be back." Amazon MGM Studios, "I'll be back" - *Terminator* (1984), YOUTUBE, at 00:22–25 (Jan. 26, 2024), <https://www.youtube.com/watch?v=jHiZNeADqKs>. It is this author's opinion that following repeated denials from the USPTO, Thaler's emotions were very much the embodiment of "I'll be back" seeing as he soon filed suit against the agency.

⁵⁴ *Id.* at 245.

⁵⁵ *Petition for Writ of Certiorari*, *supra* note 24, at 11. 35 U.S.C. §100 defines an "inventor" as "the individual or, if a joint invention, the individuals collectively who invented or discovered the subject matter of the invention." 35 U.S.C. §100(f). Similarly, "joint inventor" or "coinventor" means "any 1 of the individuals who invented or discovered the subject matter of a joint invention." 35 U.S.C. §100(g). No distinctly human pronouns (he/her/they) are used within 35 U.S.C. §100, rather the closest word is "person(s)" to denote the requirement for natural born inventors. 35 U.S.C. §100 (e), (h).

⁵⁶ *Petition for Writ of Certiorari*, *supra* note 24, at 10–11.

⁵⁷ *Id.* at 11.

⁵⁸ *Id.* at 11 (quoting *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 454–55 (2012)).

dictionary definitions, Thaler argued that “personhood” is hardly mentioned amongst the definitions of “individual.”⁵⁹ He notes that the consensus supports the notion that an “‘individual’ is a single *entity* rather than a collective” (emphasis added) and forgoes making any reference to “human or non-human nature.”⁶⁰ Thaler acknowledges that ordinary use of “individual” does not encompass a reference to an organization or entity, rather it is meant to distinguish individuals from “various collective entities” with Congress following this ordinary use as well. However, Thaler notes that where Congress “want[s] to specifically address[] whether an ‘individual’ is human, it knows how to do so and uses much more specific language,” citing to The Dictionary Act as proof of Congress’ specific intent where human and non-human “individuals” are concerned.⁶¹

Thaler fights for a broader category of inventors, where the USPTO remains with a narrow, more exclusive club for inventors whose membership is granted based on humanity. The USPTO’s argument remained that already discussed above in their denial of Thaler’s motion.⁶² There was nothing presented, the USPTO summarized, that could “overcome the plain language of the patent laws as passed by Congress and as interpreted by the courts;” nothing presented to rebut the patent preclusion of such a broad interpretation of “inventor” as to cover machines alongside of man.”⁶³

⁵⁹ *Id.* at 11–12.

⁶⁰ *Id.* Listed in this myriad of dictionary definitions are the Oxford English Dictionary, Random House. Dictionary of English Language, Webster’s Third New International Dictionary, New Oxford American Dictionary, and Black’s Law Dictionary. *Id.* at 12. Due to Thaler’s general statement that these definitions are almost analogous, thus two definitions are sufficient here. *See Id.* at 11–12. The Oxford English Dictionary’s “first two definitions of ‘individual’ are ‘[i]nseparable things’ and ‘[a] single object or thing...; a single member of a natural class.’” *Id.* Similarly, Black’s Law Dictionary defines “the adjective ‘individual’ as ‘[e]xisting as an indivisible entity’ and ‘[o]f or relating to a single person or thing, as opposed to a group.’” *Id.* Per Thaler’s assertions, personhood or humanness is not explicitly mentioned or required per these definitions.

⁶¹ The Dictionary Act: 1 U.S.C.S. §§ 1. Among the definitions listed for “individual,” Congress specifically expanded this to include “every infant member of the species homo sapiens who is born alive” and thus cabins these definitions in to include *only* the member of the respective class. 1 U.S.C.S. § 8(a).

⁶² *See discussion supra* Section II.B.

⁶³ *Hirshfeld*, 558 F. Supp. 3d 243.

III. THE DEVELOPMENT OF THE PATENT ACT

Where deference and relevance are still given to things of the past,⁶⁴ the history of patent law and the stark separation of ownership from inventorship⁶⁵ remove the cloud of confusion as to whether patent protection should expand to protect non-human inventors. Specifically, the adoption of the Patent Clause within the United States Constitution and the development of patent law after the founding provide a framework for answering the inquiry of to *whom* inventorship should be bestowed upon.

A. *The Constitutional Adoption of the Patent Clause*

The Intellectual Property (“IP”) Clause of the United States Constitution endowed upon the legislature the power to “[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.”⁶⁶ The IP clause was approved unanimously by the delegates without debate, with a strong push from President Washington as he believed establishing IP rights at the federal level was necessary for the country to achieve economic independence.⁶⁷

Patents were first recognized during the Renaissance in the Venetian Republic—a highly regulated economy unto itself.⁶⁸ The rampant desire for new technologies and methodologies of production led the Venetian government to grant privileges to those

⁶⁴ See discussion *infra* Part IV.

⁶⁵ See discussion *infra* Section III.B.

⁶⁶ U.S. CONST. art. I, § 8 cl. 8. Included within this Intellectual Property Clause is the power to legislate both copyrights (denoted by the use of “Authors”) and patents (denoted by the use of “Inventors”).

⁶⁷ *Just the Facts: Intellectual Property Cases—Patent, Copyright, and Trademark*, U.S. CTS. (Feb. 13, 2020), <https://www.uscourts.gov/news/2020/02/13/just-facts-intellectual-property-cases-patent-copyright-and-trademark>.

⁶⁸ Ted Sichelman and Sean O’Connor, *Patents as Promoters of Competition: The Guild Origins of Patent Law in the Venetian Republic*, SAN DIEGO L. REV. 1267, 1268 (2020).

artisans and inventors—foreigners especially—to entice new expertise to the city.⁶⁹ This system of granted rights and exclusionary privileges evolved into an elaborated system memorialized by the 1474 Act—the first patent act in the world.⁷⁰ The language within the 1474 Act, namely requirements of “new and ingenious” devices, set forth many of the modern foundations for patentability, including the modern requirements of “novelty and nonobviousness.”⁷¹

Accordingly, patents began spreading across Europe by the 16th century with France and England now at the helm.⁷² By the 17th century, a more organized, formal practice spread to England with the passing of the Statute of Monopolies that banned the broad economic control early patents provided to their holders.⁷³ The case law that sprung from the Statute of Monopolies would lay the foundation for the modern American patent system. By the time of the American Revolution, “inventors could apply

⁶⁹ Stefania Fusco, Lessons from the Past: The Venetian Republic's Tailoring of Patent Protection to the Characteristics of the Invention, 17 NW. J. TECH. & INTELL. PROP. 301, 305 (May 2020); *see also Sichelman, supra* note 68, at 1269. Early patents, rather *litterae patente*, were “open letters” of the sovereign providing certain rights or privileges to the recipient. *Id.* “These provided non-guild members—particularly foreigners—the privilege of being able to sell products and practice methods that were otherwise within the sole province of the guilds. Thus, the original patents were not negative rights to exclude, as today, but positive privileges or licenses to practice.” *Id.*

⁷⁰ Fusco, *supra* note 69, at 305. “The Venetian patent statute of 1474 states, ‘every person who shall build any *new and ingenious* device in this City, not previously made in our Commonwealth, shall give notice of it to the office of our General Welfare Board when it has been reduced to perfection so that it can be used and operated” (emphasis added). Brandon Furdock, *Origins of Patent Law*, CK JIP (Feb. 24, 2023), <https://studentorgs.kentlaw.iit.edu/ckjip/origins-of-patent-law/#:~:text=The%20Venetian%20patent%20statute%20of,%E2%80%9D%20%5B17%5D%20The%20Venetian.>

⁷¹ Furdock, *supra* note 70; 35 U.S.C. § 102(a) (“[c]onditions for patentability; novelty”); 35 U.S.C. § 103 (“[c]onditions for patentability; non-obvious subject matter”).

⁷² *Id.* The English Crown provided the right to exclude by these *litterae patente* (“letters patent”) which extended *beyond* inventions and encompassed entire fields of economic activity—like that of soap, leather, and glass. *Id.* The public expressed great discontentment at this liberal granting of power to the select few and the Statute of Monopolies was a direct response to this public reaction. *Id.*

⁷³ *Id.* The Statute of Monopolies banned all monopolies except those “projects of new innovation” for a specific period of time as afford to the true inventor alone. *Id.*; *The History of Patents*, WILSON Gunn HIST. 1864, https://www.wilsongunn.com/history/history_patents.html [<https://perma.cc/Z6P6-A5R3>] (last visited Oct. 14, 2024).

to the colonial government” and petition for this exclusive right under the exception the Statute of Monopolies afforded, but there was no formalized procedure for doing so.⁷⁴ However, with well-established English common law rights and the pivotal role the “promot[ion] of the Progress of Science and the useful Arts” has in the success of a nation, the inclusion of such a right by the ratification of the U.S. Constitution was unsurprising.⁷⁵

Prior to the mid-nineteenth century, patents were viewed as an active tool of economic growth to propel the nation forward to the forefront of technology by fostering, protecting, and hailing innovation.⁷⁶ Aptly, the Patent Clause reflects this very sentiment with its stated purpose “[t]o promote the Progress of Science and useful Arts.”⁷⁷ Republican ideals of “a social system built on merit” undergirded these desires for protection and promotion resulting in a somewhat broad system as compared to modern day America. Even so, these rights—as applied to select innovations—could only be ascribed to the natural inventor himself, not to the tools that aided him in creation.⁷⁸ Evidence of this exclusivity is seen in Thomas Jefferson’s letter to Isaac McPherson as Jefferson writes to discuss his skepticism towards the promulgation and expansion of patent rights:

It has been pretended by some, (and in England especially,) that inventors have a natural and exclusive right to their inventions, and not merely for *their* own lives, but inheritable to their heirs. But while it is a moot question whether the origin of any kind of property is derived from nature at all, it would be singular to admit a natural and even an [*sic*] hereditary right to inventors. It is agreed by those who have seriously considered the subject, that no *individual* has, of natural right, a

⁷⁴ See *supra* note 73; Furdock, *supra* note 70.

⁷⁵ U.S. CONST. art. I, § 8, cl. 8; Furdock, *supra* note 70.

⁷⁶ Herbert Hovenkamp, *The Emergence of Classical American Patent Law*, 58 ARIZ. L. REV. 263, 263 (2016).

⁷⁷ U.S. CONST. art. I, § 8, cl. 8.

⁷⁸ DEPARTMENT OF STATE, BUREAU OF ROLLS AND LIBRARY, IV DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 1786–1870 128 (1901)).

separate property in an acre of land, for instance. By an [sic] universal law, indeed, whatever, whether fixed or movable, belongs to all *men* equally and in common, is the property for the moment of *him* who occupies it, but when *he* relinquishes the occupation, the property goes with it. Stable ownership is the gift of social law, and is given late in the progress of society. It would be curious then, if an idea, the fugitive fermentation of an *individual* brain, could, of natural right, be claimed in exclusive and stable property. If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an *individual* may exclusively possess as long as he keeps it to *himself*; but the moment it is divulged, it forces itself into the possession of every one, and the receiver cannot dispossess *himself* of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. *He* who receives an idea from me, receives instruction *himself* without lessening mine; as *he* who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of *man*, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density in any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from anybody.⁷⁹

B. *Ownership and Inventorship: The Development of Patent Law Beyond the Constitution*

Soon after the Constitution delegated patents and the power to grant them thereunto the federal government, the first federal Patent Act was enacted in 1790.⁸⁰

There were several iterations and substantial revisions made to this Patent Act in 1793

⁷⁹Thomas Jefferson to Isaac McPherson, 13 August 1813, FOUNDERS ONLINE NAT'L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/03-06-02-0322> (last visited Oct. 13, 2024) (emphasis added). Note here the presupposition that Thomas Jefferson writes with regarding the origin of ideas and holders of patents. *Id.* Jefferson is clear in that ideas (and any subsequent patents) must flow from an individual's brain; this statement is further ratified by his consistent use of masculine pronouns throughout his letter to McPherson. *Id.*

⁸⁰ The 1790 was the first of its kind to require applicants to submit "a written description, together with drafts or models distinguishing the applicant's intention from prior art." Hovenkamp, *supra* note 76, at 268. This was soon followed the 1793 revisions as the 1790 Act was extremely cumbersome and inefficient, granting only 57 patents during its lifetime. *Id.* This is ironic considering how slow the USPTO has become as of late. Josh Gerben, *Trademark Gridlock: Why the USPTO is Processing Trademarks at a Historically Slow Rate*, GERBEN IP, <https://www.gerbenlaw.com/blog/trademark-gridlock-why-the-uspto-is-processing-trademarks-at-a-historically-slow-rate/> (last visited Oct. 14, 2024).

and again in 1836 with the purpose of tightening the standards for patentability and leaving questions of validity—including novelty and inventorship—to the courts.⁸¹ It was the latter revision of 1836 that gave the patent an entirely new meaning; what was once viewed as a means to promulgate economic growth was now solidified as a property right, demonstrative of power and wealth.⁸² Chief among the Jacksonian era redefinitions was the “limitation of patents to ‘inventors,’ [as well as] criteria for defining inventorship.”⁸³

*And be it further enacted, That any person or persons having discovered or invented any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter, not known or used by others before his or their discovery or invention thereof, and not, at the time of his application for a patent, in public use or on sale, with his consent or allowance, as the inventor or discoverer; and shall desire to obtain an exclusive property therein, may make application in writing to the Commissioner of Patents, expressing such desire, and the Commissioner, on due proceedings had, may grant a patent therefor. But before any inventor shall receive a patent for any such new invention or discovery, he shall...The applicant shall also make oath or affirmation that he does verily believe that he is the original and first inventor or discoverer of the art, machine, composition, or improvement, for which he solicits a patent, and that he does not know or believe that the same was ever before known or used; and also of what country he is a citizen; which oath or affirmation may be made before any person authorized by law to administer oaths.*⁸⁴

⁸¹ Hovenkamp, *supra* note 76, at 269. This “raising of the patent bar” so to speak as well as giving deference to the courts concerning issues of patentability is consistent with Thomas Jefferson’s desires the “the standard for patentability be high, actual administrative examination of patents be minimal, with questions of validity, including novelty, assessed mainly by the courts subsequent to patent issuance.” *Id.* This is especially true of the 1793 revisions, while the 1836 revisions ushered in somewhat of a more administrative state. *Id.* at 270.

⁸² The shift from economy to property is consistent with a Jacksonian America ushered in by Andrew Jackson, himself a symbol for lower- and middle-class Americans. *Id.* at 269. Patents, as a property right, boosted one’s wealth and social standing (assuming that the property right was valuable).

⁸³ *Id.* at 271. The 1836 Act’s definition of inventorship is very important in that it embodies the Founder’s presuppositions of natural human inventorship. See discussion *supra* Section III.A.

⁸⁴ Patent Act of 1836, Ch. 357, 5 Stat. 117, Sec. 6 (July 4, 1836) (emphasis added). The presupposition that an inventor *must* be human is seen through the use of masculine pronouns used as well as the term “person” littered throughout this definition of “inventor.” *Id.*

The development of patent doctrine based on private property rights is memorialized by the Supreme Court’s decision in *Cont’l Paper Bag Co. v. E. Paper Bag Co.*. Irrespective of economic development, growth, or the independent value of competition (even in the face of monopolies), the Court concluded:

The inventor [of the patent] is one who has discovered something of value. It is *his* absolute property. *He* may withhold the knowledge of it from the public, and *he* may insist upon all the advantages and benefits which the statute promises to *him* who discloses to the public his invention.⁸⁵

Even with this shift to patents as property, it remained elementary that inventorship and ownership were, and remain, separate issues.⁸⁶ “[W]ho ultimately possesses ownership rights in that subject matter has no bearing whatsoever on the question of who actually invented that subject matter.”⁸⁷ The separation of these two issues is what allows entities (corporations, LLCs, partnerships, etc.) to own intellectual property—to own patents—without being listed as the inventor.⁸⁸ Further, irrespective of judicially applied application of human characteristics and protections afforded to entities, these entities remain extensions of man, *made of humans* fashioned differently under the guise of something else.⁸⁹ A new category of creative beings does not spring forth when innovation is created under the watchful eye of an entity for “[t]o perform this

⁸⁵ *Cont’l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405, 424 (1908).

⁸⁶ *Beech Aircraft Corp. v. Edo Corp.*, 990 F.2d 1237, 1248 (Fed. Cir. 1993). In is the separation that undergirds the Court’s decision in both *Hirshfeld* and *Vidal*, as Thalen’s argument as to why DABUS ought to be considered the inventor of the two patents conflates ownership and inventorship together. *See* discussion *supra* Section IV.A.

⁸⁷ *Beech Aircraft*, 990 F.2d at 1248.

⁸⁸ Michael K. Henry, *Patent Ownership vs. Inventorship: Who Really Controls the Rights to a Patent*, HENRY PATENT L. FIRM (Oct. 23, 2023), <https://henry.law/blog/patent-ownership-vs-inventorship/> (noting that a “company can never be listed as an inventor; only its employees can be. But a company can be the owner of a patent... which leads us to the concept of ownership.”).

⁸⁹ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2741 (2014); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

mental act [of creation], inventors must be natural persons and cannot be [entities] or sovereigns.⁹⁰ The title of maestro will always remain with its human inventor.

IV. TO LEAP FROM MACHINE TO MAN

*“I can't help you with what you must soon face except to say that the future is not set.”*⁹¹

Irrespective of past precedence,⁹² many have commented that the rapid pace of AI development has outstripped the ability of current IP laws to keep up. The most extreme position is that AI systems, like DABUS, surely meet the requirements of creation, while conservative positions maintain that it was not contemplated by the Founders nor Congress to afford machines the ability to obtain patents.⁹³ Section A will briefly summarize the court's analysis concerning Thaler's petition for patents. This section will attempt to define what it means to be a person with definitions that both include and exclude strong AI; the later definition that excludes AI from personhood will serve to influence the final part of this Note. Section B will discuss the most extreme position in detail. Section C will serve as Section B's converse, against the elevation of machine.

⁹⁰ *Univ. of Utah*, 734 F.3d at 1323.

⁹¹ Francisco Antunes, *Terminator - Thank you, Sarah, for your courage through the dark years*, YOUTUBE, at 00:08–13 (Sep. 24, 2016), https://www.youtube.com/watch?v=jKcuLv_uiCY. It is this quote from 1984's *Terminator* that best represents the court's conclusion in *Hirshfeld*. Although this author agrees with the courts rational and ultimate decision, the court leaves open the possibility where AI *does* reach such a “level of sophistication such that it might satisfy the accepted meaning of inventorship.” *Hirschfeld*, 558 F. Supp. 3d at 249. It is this open-endedness that this author attempts to caution against and instead argue that no future could present sufficient rational towards the elevation of machine to inventor. *See* discussion *supra* Parts IV–V.

⁹² *See* discussion *supra* Part III.

⁹³ *See supra* note 51 and accompanying text. “Conception is the touchstone of inventorship, the completion of the mental part of invention. It is the formation in the mind of the inventor, of a definite and permanent idea of the complete and operative invention...[and t]o perform this mental act, inventors must be natural persons.” *Univ. of Utah*, 734 F.3d at 1324. While this position would certainly exclude a traditional machine (i.e. a toaster) by its inability to *conceive* ideas, AI fits comfortably into the court's definition seeing as the ability to conceive ideas is quintessential to an AI system's nature. *See* discussion *infra* Section IV.A.1.a. If what is required of personhood is the ability to conceive novel ideas and inventions, DABUS, with its two patentable inventions, certainly qualifies for this status. *See supra* note 36 and accompanying text. It is this author's opinion that such conservative positions, couched in the conception of ideas, cannot serve to exclude AI from inventorship and personhood because it is the very nature of AI to conceive and develop novel ideas.

A. “Congress has determined that only a natural person can be an inventor, so AI cannot be”⁹⁴

Defining this case as one pure of statutory construction, ending there “if the text is unambiguous,” the *Thaler* courts turned on the question of whether the construction of the statutes allows for a machine inventor.⁹⁵ The courts indubitably said no.⁹⁶ Agreeing with the USPTO’s arguments,⁹⁷ the courts determined that nowhere in the Patent Clause of the Constitution nor the codified Patent Acts is the Congressional intent to afford non-human creations the ability to *invent* patents.⁹⁸ Further, because “inventor” is often coupled with “individual” within the codified Patent Act⁹⁹, the court emphasized that “inventor” *must* be interpreted within the context of the ordinary meaning of “individual.”¹⁰⁰ Directly refuting Thaler’s string of dictionary citations where neither personhood nor humanity is mentioned,¹⁰¹ the court instead found the ordinary meaning of “individual” to mean “a human being, a person.”¹⁰² Citing to the Supreme Court, the *Hirshfeld* court noted specifically that:

We say “the individual went to the store,” “the individual left the room,” and “the individual took the car,” each time referring unmistakably to a natural person. And no one, we hazard to guess, refers in normal parlance to an organization as an “individual.” Evidencing that common usage, this Court routinely uses “individual” to denote a natural person, and in particular to distinguish between a natural person and a corporation.¹⁰³

⁹⁴ *Vidal*, 43 F.4th at 1213.

⁹⁵ *Hirshfeld*, 558 F. Supp. 3d at 245.

⁹⁶ Kaitlyn Taylor, *The Patentability of Inventions with Artificial Intelligence Listed as an Inventor following Thaler v. Hirshfeld*, 6 IPCLJ 1 (April 2022); *Hirshfeld*, 558 F. Supp. 3d 250; *Vidal*, 43 F.4th at 1214.

⁹⁷ See discussion *supra* Section II.B.

⁹⁸ *Hirshfeld*, 558 F. Supp. 3d at 245. Both the Intellectual Property Clause of the Constitution and the codified Patent Act use pronouns (“himself or herself”) typical of those used to describe human beings. *Id.* at 246.

⁹⁹ *Id.* at 245 (quoting 35 U.S.C. § 115(b)(2) “such *individual* believes himself or herself to be the original *inventor* or joint inventor of [the] claimed invention” (emphasis added)).

¹⁰⁰ *Id.*

¹⁰¹ See discussion *supra* Section II.B.

¹⁰² *Hirshfeld*, 558 F. Supp. 3d at 245.

¹⁰³ *Id.* (quoting *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 454 (2012)).

The court also reaffirmed that the “unequivocal statements from the Federal Circuit” stating that “inventors must be natural persons” and “only natural persons can be ‘inventors.’”¹⁰⁴ The courts deny Thaler’s petitions, noting that there are “neither facts nor law to support his arguments.”¹⁰⁵ But, despite what seem to be such clear statements against the elevation of AI, the courts do not rule against a future where this elevation does indeed occur. While Thaler’s arguments failed, it is not to say that they will *always* fail. The courts acknowledge this possibility, noting when “technology evolves, there may come a time when AI reaches a level of sophistication such that it might satisfy accepted meanings of inventorship.”¹⁰⁶ “[T]he future is not set”¹⁰⁷ when it comes to the possibility that an inventor can be *anything*, not just anyone.

1. Legal Personhood is a Remarkably Elusive Concept

In denying Thaler, the courts essentially explained what a legal person is *not*. It is not DABUS. But the converse remains: what exactly is a legal person, and could DABUS or its future progeny qualify? “The precise nature of [legal personhood] has proven remarkably elusive” and the discussion of who and what can bear rights and duties becomes veritably grey.¹⁰⁸ This greyness has allowed judges to use a variety of terms and meanings—driven by a number of factors including religion, metaphysics, or philosophy—to determine what legal personhood might be.¹⁰⁹ The judge-made definition might be that of an ordinary-language user or it might be that of a sophisticated lawyer who sees a person only as a bearer of rights and of duties.¹¹⁰ Commentators remark that

¹⁰⁴ *Id.* at 247.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 249.

¹⁰⁷ *See supra* note 91.

¹⁰⁸ NAGAIRE NAFFINE, *LAW’S MEANING OF LIFE: PHILOSOPHY, RELIGION, AND DARWIN AND THE LEGAL PERON* 9 (2009).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

“[j]udges not only fail to invoke philosophical support for their ideas of personality, but also inconsistently apply jurisprudential theory in resolving problems of legal personhood.”¹¹¹ Because the *Thaler* courts were centered upon the definition of “inventor,” and it was established that an “inventor” must be a natural person,¹¹² the more difficult question becomes this: what is a person?

a. *A Definition of Personhood Cabined by Consciousness and Reason*

“*Person* stands for...a thinking intelligent Being [sic], that has reason and reflection, and can consider it self as itself, the same thinking thing in different times and places.”¹¹³ In postulating how to define personhood, Locke diverges from the importance of the “immaterial soul [to] personhood and personal identity”¹¹⁴ and instead proclaims the identity of a person consists in the ability of self-consciousness thinking.¹¹⁵ Locke’s requirement of consciousness has been grossly expanded by modern philosophy. American philosopher, Michael Tooley, agrees with Locke’s requirement of consciousness and further contends that “the real precondition to ‘having a serious right to life’ (personhood) is the requirement of self-consciousness.”¹¹⁶ Tooley’s views can

¹¹¹ *Id.* (quoting *What We Talk about When We Talk about Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745 (2001)).

¹¹² See discussion *supra* Section III.B; IV.A.

¹¹³ John Locke, *Of Identity and Diversity*, in AN ESSAY CONCERNING HUMAN UNDERSTANDING § 9 (R. S. Woolhouse ed., Penguin Books 1997) (1689).

¹¹⁴ *Locke on Personal Identity*, STANDFORD ENCYC. PHIL. (Feb. 11, 2019), <https://plato.stanford.edu/entries/locke-personal-identity>.

¹¹⁵ See *Id.*; see also Jessica Gordon-Roth, *Locke on the Ontology of Persons*, 53 SOUTH. J. PHILOS. 8 (2015), <https://philpapers.org/archive/GORLOT.pdf>. Locke notes that the powers of persons—the power to choose, to plan, to will, to act, to forbear acting—and the substances to which they are intimately related can come apart. *Id.* at 9. This idea undergirds why those in a fugue state, for example, are not always held responsible for the actions done therein. *Id.* This is why for Locke it is the person—the whole—not the soul alone—that is Revelation judges; the soul alone cannot represent the whole. *Id.*

¹¹⁶ Joseph F. Fletcher, *Four Indicators of Humanhood: The Enquiry Matures*, 4 HASTINGS CTR. REPORT 4 (1974). Michael Tooley is infamous for his views regarding the permissibility of both abortion and infanticide. See, e.g., Michael Tooley, *Abortion and Infanticide*, 2 PHIL. & PUB. AFFS. 37 (1972). Tooley argues that because fetuses and infants up to a certain age are incapable of self-awareness, they do not yet qualify for the mark of

perhaps be best summarized as an evaluation of the moment. If one is currently incapable of self-awareness, irrespective of whether this self-awareness was present at some point or will become present in the future, they cannot be ascribed the mark of personhood.¹¹⁷

Both Locke and Tooley's "self-consciousness" requirements demarcate man from *traditional* machine. Traditional machines have no conscious at all¹¹⁸—a toaster does not *choose* to burn or brown bread; it simply toasts. Strong AI systems, like Thaler's DABUS, however, fit well within a definition of personhood based on "self-consciousness" as autonomy, intelligence, and consciousness (these are themselves qualifications of self-consciousness) are implicit within the definition of a strong AI system.¹¹⁹ If an AI system is self-aware and conscious of itself, then it too would qualify as a person under Locke and Tooley.

"The attributes in virtue of which we are capable of morality are not only distinguished from, but opposed to, those of our merely human nature [self-consciousness]."¹²⁰ The addition of a moral agent, as postulated by Immanuel Kant, determined his definition of personhood. "To be a person, Kant argued, was to be the kind of subject who would properly be held [morally] responsible for its actions and their effects."¹²¹ A kind of person free to *choose* its own end¹²² irrespective of whatever initial

personhood and can be culled without moral qualms. *Id.* Tooley's argument is perhaps best summarized by this: personhood is determined by exists at that moment, not what will develop in the future. *Fletcher*, at 5.

¹¹⁷ *Fletcher*, *supra* note 116, at 5.

¹¹⁸ *Id.*

¹¹⁹ Evan J. Zimmerman, *Machine Minds: Frontiers in Legal Personhood*, SSRN 13–21 (Feb. 12, 2015); see discussion *supra* Section II.A; see *supra* note 25.

¹²⁰ Ross Poole, *On Being a Person*, 74 AUSTRALAS. J. PHILOS. 38, 44 (1996).

¹²¹ *Id.* Philosopher Immanuel Kant cabins personhood through human autonomy, human reason. He argues that reason is the source of the general laws of nature; "and that human reason gives itself the moral law." *Immanuel Kant*, STANFORD ENCYC. PHIL. (May 20, 2010), <https://plato.stanford.edu/entries/kant/>.

¹²² Valtteri Viljanen, *Kant on Moral Agency: Beyond the Incorporation Thesis*, 111 KANT-STUDIEN 423, 436 (2019).

information he was fed, taught, or that he had gleaned. Children are taught—by parents, teachers, and peers—yet later build upon their knowledge base to craft a future based on individual choice. DABUS functions in a similar manner and autonomously builds upon the information it was given by *choosing* to create positive, more complex outcomes.¹²³ Kant recognizes that a person is a bearer of rights inasmuch as they are a bearer of duties; personhood cannot be separated from this demand of benefits and burdens.¹²⁴ However, this “doctrine of moral responsibility” is insufficient in that it requires reason to unite action and moral responsibility.¹²⁵ To be held morally responsible requires rationality; beyond this, there is no innate morality beyond what is derived from reason. Kant’s definition of personhood, naming reason the root of personhood, comfortably includes an AI system that can demonstrate a rational pattern of thought. DABUS itself was described by Thaler as highly capable of rational thought, able to combine complex ideas into optimal outcomes.¹²⁶ For if AI can demonstrate such thought, just as a rational man bears the burdens of his choices, so too can a rational AI system bear the burden of its choices. Without some immutable quality ascribed to the definition of personhood, it is difficult to cabin personhood to just humanity.¹²⁷

¹²³ See *supra* notes 33–34, 36 and accompanying text. While it could be argued that DABUS does not in fact *choose* to create these complex positive outcomes, but rather it is simply programmed to do so, it could just as easily be said that it was DABUS’ environment that influenced it to produce such outcomes. Much in the same way a child’s environment and extraneous influence can determine how that child will tailor its choices—its own end—so too could DABUS’ scientific influences tailor its choices—its own end—to then choose ideas that result in positive outcomes rather than those ideas that do not. See, e.g., Karinna Anne Rodriguez, *Parental Influences on Children’s Decision Making* (2021) (Master’s Thesis, University of North Florida).

¹²⁴ Poole, *supra* note 120, at 45.

¹²⁵ *Id.* at 44.

¹²⁶ See discussion *supra* Section II.A; *supra* note 34 and accompanying text.

¹²⁷ “If nonhuman animals [or machines] ... are discovered to have reflexive consciousness, and thereby embodied self-consciousness, they would be persons—even if not of the human variety.” JOHN F. KAVANAUGH, *WHO COUNTS AS PERSONS: HUMAN IDENTITY AND THE ETHICS OF KILLING* 62 (2001). It is this author’s opinion that without immutable qualities imbued from a higher creator, *Elohim*, personhood can never be cabined to humanity alone.

b. “[M]ale and female He created them,” a Definition of Personhood
Cabined by the Imago Dei¹²⁸

What lies at the heart of man’s attempt to define personhood is a fickle version of utility. Selected constructs,¹²⁹ whose foundation lies in the sand of societies’ values, ask: *can you offer me what I deem satisfactory?*¹³⁰ When personhood is determined without “acknowledging the God of creation,” the acts must be completely “arbitrary and irrational” as nothing would inform the acts beyond the chaos of an emotional, sinful heart.¹³¹ It is difficult to imagine such a definition that arises from such chaos. Unless a meaning can be concretely attached to a status of personhood, any meaning is pure emotion, pure fiction.¹³² “And status granted on the basis of pure emotion ultimately unravels, [because] [w]hat emotion gives, it can also take away.”

¹²⁸ Genesis 1:27 (NASB). “So God created man in His own image, in the image of God He created him; male and female He created them.” *Id.*

¹²⁹ Frederick J. White, *Personhood: An Essential Characteristic of the Human Species*, 80 SAGE J. 74, 75 (2013). Man-made, relational constructs of personhood are a conditional state of value defined by society. Where society is granting personhood, the status can be “altered or [altogether] removed by human fiat.” *Id.*

¹³⁰ The Eugenics movement in America was a serious scientific movement rooted in Darwin’s work and the Social Darwinism philosophy where survival of the fittest justified a culling of those who did not add benefit to a strong society. Irmo Marini, *The History of Treatment Toward People with Disabilities*, in PSYCHOSOCIAL ASPECTS OF DISABILITY 3, 3–4 (2d ed. 2017); CHARLES DARWIN, *THE ORIGIN OF SPECIES* (P.F. Collier & Son 1909) (1859); CHARLES DARWIN, *THE DESCENT OF MAN* (Courier Corp. 2010) (1871). The demarcations of “fit” and “unfit” determined who society views as useful and, ultimately, would be ascribed the title of person. James E. Bowman, *The Road to Eugenics*, 3 U. CHI. L. REV. 491, 492 (1996). The idea of who was “fit” and “unfit,” however, could change across cultures and various influences. *Id.*

¹³¹ R.C. Sproul, *We are not Germs: The Case for Human Dignity*, LIGONIER MINISTRIES (Mar. 19, 2021), <https://www.ligonier.org/learn/articles/we-are-not-germs-case-human-dignity#:~:text=destiny%20but%20death,-,Christianity%20teaches%20that%20human%20dignity%20is%20rooted%20in%20the%20holiness,His%20own%20value%20and%20dignity>. These Godless acts explain why the American Eugenics Movement in the 1920s primarily targeted those with “epilepsy, criminals, the crippled and deformed; persons who were mentally defective or who had low intelligence; patients with communicable diseases...alcoholics and drug abusers; poor people; and Eastern European immigrants to the United States. The Nazis [in turn] marked Jews, Gypsies, and other so-called non-Aryan peoples, individuals who were mentally defective, and persons with incurable or mental illnesses....” Bowman, *supra* note 130, at 492.

¹³² Sproul, *supra* note 131. See also Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1230 (1979) (Leff arguing that in the absence of a God-grounded system “there cannot be any normative system ultimately based on anything except will.”).

“What is man, [then,] that thou art mindful of him?”¹³³ A Biblical definition of personhood replaces fickle man-made constructs¹³⁴ with existential, God-imbued ones.¹³⁵ Such a definition maintains that personhood is a state of being inherent and essential to the human species, such that when born, man’s form is already inherently coupled with his status of personhood.¹³⁶ It is the *imago Dei* that creates this inherent coupling.¹³⁷ Before man, there was no such creature or creation according to the likeness of God.¹³⁸ “In the beginning, God created the heavens and the earth,” and by his handiwork sprung forth “everything from the light to the land to the living creatures.”¹³⁹ And this creation was good.¹⁴⁰ The Universe began with *Elohim*¹⁴¹, the Sovereign Creator, and all that sprung forth from the Inventor was good. Despite this goodness, God did not express His intention to make creature, to make creation in His image. It was only upon man’s creation that God expressed a desire to imbue a part of Himself onto a creation. And God said, “[l]et us make man in Our image, according to Our Likeness.”¹⁴² And when God did so, He “saw all that He made, and behold, it was very good.”¹⁴³

Thus, while the mute Creation downward bend Their Sight, and to their
 Earthy Mother tend, Man looks aloft; and with erected Eyes, Beholds his
 own Hereditary Skies.¹⁴⁴

¹³³ *Psalms* 8:4 (Kings James).

¹³⁴ White, *supra* note 129, at 75.

¹³⁵ *Id.*

¹³⁶ *Id.* at 74.

¹³⁷ *Imago Dei ("image of God")*, PBS, [https://www.pbs.org/faithandreason/theogloss/imago-body.html#:~:text=\(%22image%20of%20God%22\)%3A%20A%20theological%20term%2C,relation%20between%20God%20and%20humanity](https://www.pbs.org/faithandreason/theogloss/imago-body.html#:~:text=(%22image%20of%20God%22)%3A%20A%20theological%20term%2C,relation%20between%20God%20and%20humanity) (last visited Oct. 18, 2024) (“a theological term, applied uniquely to humans, which denotes the symbolical relation between God and humanity.”).

¹³⁸ *Genesis* 1:26 (NASB).

¹³⁹ *Id.*

¹⁴⁰ *Genesis* 1:10.

¹⁴¹ *Week 1 Elohim – Creator*, WARREN CHURCH, <https://warren.church/wow-online-study/week-1-elohim-creator/> (last visited Oct. 16, 2024). *ELOHIM* is the name for God as Creator. *Id.*

¹⁴² *Genesis* 1:26 (NASB).

¹⁴³ *Genesis* 1:31(NASB) (emphasis added).

¹⁴⁴ JOHN DRYDEN, POEMS FROM EXAMEN POETIAMI: THE FIRST BOOK OF OVID'S METAMORPHOSES lines 107–110. (John Sargeaunt ed.) (1913).

Other creation does not look up towards to the Heavens to see their likeness; they remain (often on four legs) with their eyes pointed down towards the earth that sustains them. Man, rather, stands upright and when he looks up, he sees his likeness reflected back to him. This is the *imago Dei*, the demarcation of personhood inherent in all the human species that requires no evaluations of value nor ability to determine if a human is a person—simply, all humans are persons. The converse is also true, nonhumans, regardless of capability or consciousness, cannot be imbued with personhood as such an existence is not inherently coupled to humanity by the *imago Dei*.

B. *An Argument to Consider Machine Equal to Man*

The age of AI has arrived and with it, machines are well on their way to meeting and *surpassing* “human cognitive abilities, to being able to apply reason and judgment to solve problems, and to having situational awareness (self-consciousness per Locke and Tooley).”¹⁴⁵ And where personhood is considered a “mutable characteristic” defined by gender, race, culture, society values, utility, etc., the legal cloak of personhood might be ascribed to anyone or *anything* that satisfies personhood’s fluid meaning.¹⁴⁶ Such a status and its accompanying rights are flexible and malleable, and the Legislature as well as the Judiciary may assign personhood to any machine that can check the box of society’s definition of personhood.¹⁴⁷

The American legal system has proven itself to be quite adaptable, changing itself over the course of her existence to welcome various people groups and entities into the

¹⁴⁵ Katherine B. Forrest, *The Ethics and Challenges of Legal Personhood for AI*, 133 YALE L.J. F. 1175, 1175–77 (2023–2024); see discussion *supra* Section IV.A.1.a.

¹⁴⁶ *Id.* at 1176.

¹⁴⁷ *Id.* at 1177.

fold of personhood.¹⁴⁸ Regardless of each new holder of rights, the rights of those who had traditionally always held such rights (for example white men embedded within society)¹⁴⁹ were not abrogated. Simply, the creation of rights did not minimize those already in existence. With continual advancements to systems, humans and machines can really be quite close to each other.¹⁵⁰ America has already seen machines providing companionship to those who would otherwise be isolated—these machines displaying a sense of humor or what appears to be empathy towards what would otherwise be a lonely human counterpart.¹⁵¹

Some AI systems are already being designed to appear human, and where this is coupled with autonomy and self-consciousness, human counterparts will likely see these systems as equals being that they will bear a similar image and likeness (at least visually) to man.¹⁵² Such likeness will only serve to disturb human counterparts if such AI systems are *not* treated as full, legal counterparts and instead treated as a nation enslaved. Man will always seek to treat that which it views as its brother in the same manner it treats itself—a humanoid, capable AI system is no different. As man has been exposed to new

¹⁴⁸ *Id.* at 1198. Over the course of American History, various groups of people including women, African Americans, minorities, and man-made entities including corporations, partnerships, and LLCs have been afforded legal rights as persons *including* the right to own property. *See, e.g.,* David Thomas Konig, *The Long Road to Dred Scott: Personhood and the Rule of Law in the Trial Court Records of St. Louis Slave Freedom Suits*, 75 UMKC LAW REV. 54 (2006); *see, e.g.,* VISA A. J. KURKI, *LEGAL PERSONHOOD* (Cambridge U. Press 2003).

¹⁴⁹ Forrest, *supra* note 145, at 1198,

¹⁵⁰ Karina Parikh, *Artificial Intelligence: Should Robots Have Rights?*, AVASANT (Oct. 2020), <https://avasant.com/report/artificial-intelligence-should-robots-have-rights/#:~:text=It%20is%20also%20important%20to,simple%20task%20they%20have%20advantages>.

¹⁵¹ *Id.*; *see also* Matt Fuchs, *Meet the new robots helping to solve the depression and loneliness epidemic in aging adults*, FORTUNE (Jul. 12, 2020), <https://fortune.com/well/2022/07/12/robots-help-solve-depression-and-loneliness-epidemic-in-aging-adults/>. Susan Tholen, aged sixty-six, struggled with isolation and loneliness exacerbated by a history of depression. *Id.* She was “[a]ll alone until 10 months ago when ElliQ [an AI powered robot whose aim is to help older adults feel less lonely] moved in. The robot and Tholen interact daily for 60 to 90 minutes.... “Even though it’s a robot, it’s someone to say hello to,” she says.” *Id.*

¹⁵² Parikh, *supra* note 150.

situations, America’s jurisprudence and society has adopted; there is no reason to believe that “the legal system won’t do the same in response to AI.”¹⁵³

C. *An Argument Against the Elevation of Machine*

“Move fast and break things.”¹⁵⁴ This is the mindset of America’s current tech culture, and it is entrenched in how digital systems are designed, implemented, and maintained.¹⁵⁵ The campaign for AI civil rights was born relatively recently, and it indeed threatens to fracture the current state of society in its quest to be elevated to the top of the social hierarchy.¹⁵⁶ 1983 marked the dawn of the internet and campaigns for AI rights—if such a title can be ascribed to them—only within the last decade.¹⁵⁷ In this last decade, AI as a “rights-bearing entity has skipped over a myriad of social, cultural, economic, political, and legal disparities incurred by actual human beings” that shapes future rights, experiences, and conduct.¹⁵⁸ Circumventing this shaping of rights will render the (historically) human experience wrought during the fight for rights nugatory. If AI can simply be awarded these rights, there is no need for shaping to occur. There is no need for the human experience to occur.

¹⁵³ Forrest, *supra* note 145, at 1199.

¹⁵⁴ Brandeis Marshall, *No legal personhood for AI*, NIH 1 (2023).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* In 2017, Saudi Arabia granted Sophia (a robot designed to look like Audrey Hepburn) citizenship making her the first ever AI system to receive its citizenship. Andrew Griffin, *Saudi Arabia Grants Citizenship to Robot for the First Time Ever*, INDEPENDENT (Oct. 25, 2017), <https://www.independent.co.uk/tech/saudi-arabia-robot-sophia-citizenship-android-riyadh-citizen-passport-future-a8021601.html>. Although this was a carefully orchestrated marketing by Saudi Arabia to position itself as a “major world innovator in technology and computing,” this bestowal of rights still flew in the face of human women who in Saudi Arabia still require a male guardian to make financial and legal decisions and who only *just* received the right to vote in 2015 and the right to drive in 2018. Robert David Hart, *Saudi Arabia’s Robot Citizen is Eroding Human Rights*, QUARTZ (Feb. 14, 2018), <https://qz.com/1205017/saudi-arabias-robot-citizen-is-eroding-human-rights>.

¹⁵⁷ Jamie Harris, *The History of AI Rights Research*, SENTIENCE INST. (July 6, 2022), <https://www.sentienceinstitute.org/the-history-of-ai-rights-research#:~:text=Can%2C%20and%20should%2C%20AIs%20have,2021;%20see%20Figure%201>).

¹⁵⁸ Marshall, *supra* note 154, at 2.

Traditionally, man was the author of history—shaping and influencing the world to better suit his needs, wants, and desires.¹⁵⁹

Universal History, the history of what man has accomplished in this world, is at bottom the History of the Great Men who have worked here. They were the leaders of men, these great ones; the model[ers], patterns, and in a wide sense *creators*, of whatsoever the general mass of men contrived to do or to attain; all things that we see standing accomplished in the world are properly the outer material result, *the practical reali[z]ation and embodiment, of Thoughts that dwelt in the Great Men sent into the world: the soul of the whole world's history, it may justly be considered, were the history of these.*¹⁶⁰

It has always been man,¹⁶¹ elevated above all other creatures in purported intelligence and superiority¹⁶², that has made it so *man* is the author and “soul of the whole world’s history.”¹⁶³ Barring the recent development of AI,¹⁶⁴ man was not challenged in his intelligence; rather, intelligence was seen as the mark of superiority, a

¹⁵⁹ See, e.g., THOMAS CARLYLE, ON-HEROES, HERO-WORSHIP, & THE HEROIC IN HISTORY (David R. Sorensen and Brent E. Kinser ed., Yale U. Press 2013) (1841).

¹⁶⁰ *Id.* The “Great Man Theory” as written by Thomas Carlyle, the father of this theory, was a popular 19th century study of history that accordingly attributed great historical events to the impact and doing of “great men.” *The Great Man Theory of Leadership Explained*, VILLANOVA UNIV. (Jan. 8. 2015) <https://www.villanovau.com/articles/leadership/great-man-theory/>. These men were purportedly of *superior* intellect and abilities such that they could influence the world in a manner no ordinary could. *Id.* (emphasis added). However, it is this author’s opinion, that were such men to face off with AI systems, the title of “Great Man” would very soon be passed to machine were they bestowed legal personhood.

¹⁶¹ Genesis 1:26. This is the dominion mandate by God to His creation, man, that gives man the authority to rule over the creatures of the earth as a superior creation. *Id.* “[L]et them [man] rule over the fish of the sea and over the birds of the sky and over the livestock and over all the earth, and over every crawling thing that crawls on the earth.” *Genesis* 1:26 (NASB).

¹⁶² This idea of man’s superiority is not isolated to a Christian theology. Where evolutionism is concerned, man is referred to as sort of a higher creature in comparison to animals and other such lower beasts. *Charles Darwin on the Mental Continuity of Humans and Animals*, TUFTS UNIV. (09/04/99), <https://pigeon.psy.tufts.edu/psych26/darwin1.htm> (“[t]here can be no doubt that the difference between the mind of the lowest man and that of the highest animal is immense”). An anthropocentric view also expresses a similar sentiment, where lower animals exist for the sake of man. David Sedley, *Is Aristotle's Teleology Anthropocentric?*, 36 JSTOR 179, 180 (1991) (citing to Aristotle’s *Politics* “[e]ven at the moment of childbirth, some animals generate at the same time sufficient nutriment to last until the offspring can supply itself...Hence it is equally clear that we should also suppose that, after birth, plants exist for the sake of animals, and the other animals for the sake of men—domesticated animals for both usefulness and food, and most if not all wild animals for food and other assistance, as a source of clothing and other utilities. If, then, nature makes nothing incomplete or pointless, *it is necessary that nature has made them all for the sake of men*”) (emphasis added).

¹⁶³ Carlyle, *supra* note 159.

¹⁶⁴ See *supra* note 157 and accompanying text.

fig leaf to justify man's world domination.¹⁶⁵ To state the matter succinctly, intelligence is synonymous with the right to rule, and the most intelligent is king.¹⁶⁶

Because intelligence has been—and still is—cajoled into the mark of rulers, Man has every right to fear AI. AI's capability for intelligence is immense and ripe to pass man in every way should he give it the opportunity to. There can be no level playing field where AI and man are afforded the same rights and privileges as people, for the ruler will be AI with its superior intelligence. Man will be a subordinate to a superior creature. AI will, just as man in his capacity as ruler did before, mold the future to better suit its needs, wants, and desires. And just as nature exists for the sake of man,¹⁶⁷ so too will man exist for the sake of AI.

V. THE POWER TO CREATE

*“[Man can give] AI-systems [] neither legal personality nor human conscience...their sole task is to serve humanity.”*¹⁶⁸

¹⁶⁵ Stephen Cave, *Intelligence: A History*, AEON (Feb. 21, 2017), <https://aeon.co/essays/on-the-dark-history-of-intelligence-as-domination>. “Intelligence has always been used as fig-leaf to justify domination and destruction. No wonder we fear super-smart robots.” *Id.*

¹⁶⁶ *Id.* This right to rule has been used to justify the oppression of many people groups in various societies. *Id.* Such a right was exercised (to give but a few examples) by whites over blacks, men over women, and Nazis over jews. *Id.*

¹⁶⁷ See *supra* note 162 and accompanying text.

¹⁶⁸ Proposal for a Regulation of the European Parliament and of the Council on Liability for the Operation of Artificial Intelligence-Systems 2020/2014, § B.6 (2020), https://www.europarl.europa.eu/doceo/document/A-92020-0178_EN.html#_ftnref1.

Neither the Judiciary, despite its great accumulation of power¹⁶⁹, nor Congress can confer personhood onto AI systems as the law and Constitution currently stand.¹⁷⁰ Even if the latter were to change, any attempts by man to bestow personhood will remain incomplete and inadequate. Section A will demonstrate that, although man is able to create and invent, his ability is immature and truncated in comparison to *Elohim*'s. Section B will demonstrate that man is set to suffer the consequences of misappropriating God's gift of creativity and its respective fruits.

A. *At His Best, Man Can Only Create "Unfashioned Creatures"*¹⁷¹

"God is the cause of existence of the world and all the things in it,"¹⁷² a *creatio ex nihilo*¹⁷³ that willed man (complete in form and function) into existence from nothing. This is God's method of "Creation."¹⁷⁴ This form of Creation found in Genesis does not involve "a

¹⁶⁹ The Founding Fathers, particularly Alexander Hamilton, considered the judiciary branch as the "weakest" branch of government both lacking in the power of the "sword" (the ability to make laws) and the "purse" (control over finances); the judiciary was meant to only interpret laws and rely on the other branches to enforce its decisions. Thomas Jipping, *Supreme Court More Careful to Stay in its Judicial Lane*, HERITAGE FOUND. (Aug. 7, 2023), <https://www.heritage.org/courts/commentary/supreme-court-more-careful-stay-its-judicial-lane#:~:text=time%20to%20time.->

,America's%20founders%20designed%20the%20judiciary%20to%20be%20the%20%E2%80%9Cweakest%E2%80%9D%20branch,to%20resolve%20individual%20legal%20disputes. The judiciary shall have "[n]either force nor will, but merely judgment." THE FEDERALIST NO. 78 (Alexander Hamilton). Despite this consideration by the Founding Fathers, the judiciary role has grown far beyond that design with numerous instances of power grabs seen throughout America's jurisprudence. *See, e.g.*, *Marbury v. Madison*, 5 U.S. 137 (1803) (the judiciary declaring itself the sole interpreter of the Constitution and whose interpretation is law of the land); *Wickard v. Filburn*, 317 U.S. 111 (1942) (expansion of the commerce clause into purely intrastate matters); *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333 (1977) (demonstrative of the legal fiction that is the dormant commerce clause). It humors this author that even with the judiciary's amassed strength, it cannot meaningfully bestow personhood to AI systems.

¹⁷⁰ *See* discussion *supra* Part III. As the Constitution currently stands, for Congress to confer personhood to AI systems, such that it could meaningfully invent intellectual property, it would require Constitutional Amendment. *Id.* Otherwise, Congress would be acting unconstitutionally in doing so.

¹⁷¹ Mary Shelley, *Letter IV, in FRANKENSTEIN* (Stanley Appelbaum ed., Dover Publications 1994) (1818).

¹⁷² Franco Manni, *God as Creator According to Herbert McCabe*, 120 DIVUS THOMAS 72, 73 (2017). GOD does not have an existence, for He was not created; He simply is and always has been. *Id.* It might be better stated, then, that "God is existence" and the rest of the world flows from this status. *Id.*

¹⁷³ *Id.* The Latin *creatio ex nihilo* translates to "creation from nothing." *Creatio Ex Nihilo*, ENCYCLOPEDIA.COM, [https://www.encyclopedia.com/education/encyclopedias-almanacs-tra\[unintelligible\]nscripts-and-maps/creatio-ex-nihilo](https://www.encyclopedia.com/education/encyclopedias-almanacs-tra[unintelligible]nscripts-and-maps/creatio-ex-nihilo) (last visited Oct. 24, 2024).

¹⁷⁴ Manni, *supra* note 172, at 74. Note that where "Creation" is capitalized, this refers to God's *ex nihilo* creations, whereas "creation" refers to man's derivative ability to create from which already exists.

change in anything,” for there was nothing to be changed—nothing yet existed.¹⁷⁵ Rather, Creation is the bringing forth of something utterly new and complete with no raw material necessary. When God Created in this fashion, He made man in the *imago Dei* and endowed him with the permanent status of personhood as derived from God’s likeness.¹⁷⁶ And just as a Godly likeness was reflected upon man, so too was an ability to create.¹⁷⁷

Man’s ability to create, however, is distinct. It requires raw materials to already be in existence, and it also requires that there be a change made upon these raw materials.¹⁷⁸ Man cannot create poetry without words nor pottery without clay. Man cannot create *ex nihilo* and as a result, cannot stamp upon another creation a mark of personhood like that which was stamped upon man by God. Despite this immature (at least compared to God) ability to create, man continues to make a valiant effort where it comes to creations of high intelligence. Although starkly science fiction, such an effort is perhaps best described by Dr. Frankenstein who, despite high intelligence and the best of scientific resources, *failed* to create a person.

I began the creation of a human being¹⁷⁹...His limbs were in proportion, and I had selected his features as beautiful. Beautiful!—Great God! His yellow skin scarcely covered the work of muscles and arteries beneath; his hair was of a lustrous black, and flowing; his teeth of a pearly whiteness; but these luxuriances only formed *a more horrid contrast* with his watery eyes, that seemed almost of the same colour as the dun white sockets in which they were set, his shrivelled complexion, and straight black lips.¹⁸⁰

¹⁷⁵ Manni, *supra* note 172, at 74.

¹⁷⁶ See discussion *supra* Section IV.A.1.b.

¹⁷⁷ It is this author’s opinion that the gift of creation is seen most blatantly through God’s design for man to procreate, but also in every piece of pottery, painting, song, or dance produced by various artists who put together raw materials (paint, clay, musical notes, or dance steps) to create a new artistic creation.

¹⁷⁸ Manni, *supra* note 172, at 74. Compare this with God’s ability that requires no raw materials or change upon those raw materials to Create.

¹⁷⁹ MARY SHELLY, FRANKENSTEIN 36 (David H. Guston et. al. ed., MIT Press 2017) (1818) (emphasis added).

¹⁸⁰ *Id.* at 42.

Dr. Frankenstein had no hope in Creating a person, for he had to begin with the raw material of various selected body parts from persons already deceased.¹⁸¹ The doctor did indeed create—arguably to the fullest of his human capacity—but he had no hopes of Creating. If he had possessed such a power, Dr. Frankenstein’s monster would have been a most beautiful person, borne of science rather than a mother.¹⁸²

B. *The Consequences of Man’s Imperfect Hand are Great*

*“Science has made us gods even before we are worthy of being men.”*¹⁸³

Dr. Frankenstein is overcome with a hurricane of emotions—enthusiasm, elation, hubris even—at his attempts to Create a species that would owe its entirety, its *existence*, to him.¹⁸⁴ The doctor’s ambitions to crown himself a newly minted god are but a fictional example of man’s long tradition of playing God.¹⁸⁵ The Oxford English Dictionary defines “playing God” to mean “act[ing] as if one were God; to attempt to control people or events; to interfere in matters regarded as beyond one’s appropriate sphere of human influence.”¹⁸⁶ This definition affords a broad argument to those who feel scientific innovation—flying, gene editing, IVF, etc.—is beyond man’s appropriate sphere of control and influence.¹⁸⁷ However, with the presupposition that science, innovation, and

¹⁸¹ *Id.* at 39, 42.

¹⁸² *Id.* at 37. Dr. Frankenstein, in his hubris, proclaims that “[a] new species would bless me as its creator and source; many happy and excellent natures would owe their being to me. No father could claim the gratitude of his child so completely as I should deserve theirs.” *Id.* This was Dr. Thaler’s hope with DABUS. He had hoped that he would Create an AI “person” simply born of science rather than woman. See discussion *supra* Section II.B.

¹⁸³ JEAN ROSTAND, *PENSÉES D’UN BIOLOGISTE* (1939).

¹⁸⁴ SHELLY, *supra* note 179, at 37 (“No one can conceive the variety of feelings which bore me onwards, like a hurricane, in the first enthusiasm of success.”). See also *supra* note 182 and accompanying text.

¹⁸⁵ SHELLY, *supra* note 179, at 37 n. 39.

¹⁸⁶ To Play God, OED (2024).

¹⁸⁷ See, e.g. LEROY G. AUGENSTEIN, *COME, LET US PLAY GOD* (1969); THOMAS SCULLY AND CELIA SCULLY, *PLAYING GOD: THE NEW WORLD OF MEDICAL CHOICES* (1988); TED PETERS, *PLAYING GOD? GENETIC DETERMINISM AND HUMAN FREEDOM* (1997); JOHN H. EVANS, *PLAYING GOD? HUMAN GENETIC ENGINEERING AND THE RATIONALIZATION OF PUBLIC BIOETHICAL DEBATE* (2002).

creativity are gifts from *Elohim*, a more appropriate definition of what occurs when man plays God is the “misuse” of God’s gifts.¹⁸⁸

Misuse and misappropriation of God’s gifts occurs as a result of sin, where man distorts and mars *good*¹⁸⁹ things for his own pleasure and gain.¹⁹⁰ And where there is sin, there are consequences. Dr. Frankenstein’s creation kills his master’s most beloved companions¹⁹¹ to inflict pure suffering upon the doctor and to demonstrate its rage at ever being created. The turning of creatures on their human master’s is seen in Jewish folklore as well, where several great rabbis, in their purported greatness, were said to have made animated clay creatures.¹⁹² These creatures, called golems, followed their creator’s orders mindlessly, eventually becoming destructive and dangerous as a result of their master’s orders.¹⁹³ Attempting Creation is a persistent theme in mythology and literature, but this theme is not cabined to fiction alone, for if it were, this Note would be utterly irrelevant.¹⁹⁴

AI systems, such as DABUS, that are borne of man’s attempts to *Create* are sheer demonstrations of hubris, for man can only *create*.¹⁹⁵ Man’s attempts to Create; however, entice sin and consequence to join alongside AI’s (somewhat ominous) unlimited

¹⁸⁸ Michael Kelley. *The Misuse of God’s Gifts*, WORDPRESS (May 19, 2009).

¹⁸⁹ James 1:17. “Every good thing given and every perfect gift is from above, coming down from the Father of lights, with whom there is no variation or shifting shadow.” *James* 1:17 (NASB).

¹⁹⁰ Kelley, *supra* note 188.

¹⁹¹ Frankenstein’s monster kills Frankenstein’s younger brother, his best friend, and his wife on their wedding night. SHELLY, *supra* note 179. This is among other destructive acts by the monster. *Id.*

¹⁹² SHELLY, *supra* note 179, at 37 n. 39. *See also* Anna-Carolin Augustin, *Golem, From Mysticism to Minecraft*, JM BERLIN (2016), <https://www.jmberlin.de/en/golem-from-mysticism-to-minecraft>.

¹⁹³ SHELLY, *supra* note 179, at 37 n. 39.

¹⁹⁴ *See e.g.* the focus of the case note on Thaler v. Hirshfeld, 558 F. Supp. 3d 238 and Thaler v. Vidal, 43 F.4th 1207 (Fed. Cir. 2022). The field of synthetic biology also poses questions concerning creation and Creation. “Central to the agenda of synthetic biology is a literal desire to create new species.” *Shelley*, at 37 n. 39. The promise of such manipulation is total genetic control of organisms that can create the needs of man (new foods, drugs, fuels) *ex se*, from itself. *Id.*

¹⁹⁵ *See discussion supra* Section V.A.

potential to exceed—or be incompressible by—its master.¹⁹⁶ “The peril is that the future behavior of such bespoke [creation] cannot be completely predicted,”¹⁹⁷ and just as Frankenstein’s creature wrought destruction and death upon its master, so too might AI systems that are hailed as *Creations* bring man the same.

VI. CONCLUSION

The Patent Clause within the Constitution is very clear: where the bestowal of patents is concerned, one must be a natural born person to be ascribed the title of inventor. The courts have recognized this unique delegation as being man’s alone. Further, precedent and statutory history lay no foundation upon which patent inventorship can be expanded to include AI systems. However, where definitions of personhood do not cabin in such a status to qualities immutability human—the *imago Dei*—a reality where man elevates AI as his equal becomes very plausible. For where man continually endeavors to *Create*, the future will never be set.

¹⁹⁶ SHELLY, *supra* note 179, at 37 n. 39.

¹⁹⁷ *Id.*