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PATENTS AS PROPERTY FOR THE TAKINGS

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The Fifth Amendment's Compensation Clause contains only a few simple words: "nor shall private property be taken for public use without just compensation." Yet these simple words have confounded legal minds for over 200 years, and as Congress has contemplated various patent law reforms in recent decades, the specter of the Fifth Amendment looms on the horizon. Conventionally, commentators and judges break down the clause into a few different components, each of which has generated a voluminous body of caselaw and corresponding scholarly inquiry. First, there is the question of takings: How does one know if something has been "taken" to begin with? Second is the "public use" requirement, which is often treated as an outright prohibition against takings for "private use." Finally, when the other conditions are met, what constitutes "just compensation"? But the scholarship has largely neglected, by comparison, the clause's crucial, first component. Namely, what does the clause mean by "private property"?

This article seeks to bridge the gap in the literature by addressing this question of increasing practical importance. Namely, does the Compensation Clause apply to patents for inventions? The question, put slightly differently, is whether patents should be considered "private property" within the meaning of the term as used by the Compensation Clause. Several recent scholars have argued that it does. In contrast, this article offers the first, comprehensive analysis—considering theory, history, constitutional textual and structural dissection, judicial interpretations, and the nature of patents—concluding that from all of these perspectives, patents do not fall within the Fifth Amendment's Compensation Clause.

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INTRODUCTION	199
I. FOUNDING FOOTSTEPS.....	208
A. <i>Patents & Private Property: Origins Through the Early Republic</i>	208
1. <i>Private Property as a “Core” Private Right</i>	208
2. <i>Patents as a Quintessential Public Franchise</i>	213
B. <i>Original Meaning of the Compensation Clause</i>	223
II. THE LANGUAGE ITSELF: TEXTUAL & STRUCTURAL ANALYSIS	226
A. <i>Constitutional Text—The Patent Clause</i>	227
B. <i>Constitutional Structure</i>	232
1. <i>The Lesser Power</i>	232
2. <i>Surrendering Control</i>	234
3. <i>Enumeration in Art. I, §8</i>	236
C. <i>§261: What it Does Not Mean</i>	239
III. JUDICIAL INTERPRETATIONS.....	244
A. <i>Takings Claims for Other Public Rights</i>	245
B. <i>19th Century Caselaw</i>	251
C. <i>§1498 and its Interpretation</i>	256
D. <i>Modern Caselaw</i>	259
IV. THE NATURE OF THE BEAST	267
CONCLUSION	271

INTRODUCTION

The Fifth Amendment’s Compensation Clause contains only a few simple words: “nor shall private property be taken for public use without just compensation.”¹ Yet these simple words have confounded legal minds for over 200 years. In fact, the only consensus that academics and judges consistently reach is that there is no consensus.²

¹ U.S. CONST. amend. V.

² See, e.g., William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 HOFSTRA L. REV. 1, 3 (1995) (observing that the Supreme Court’s “characterization [of the clause] is more a question than an answer”); Eduardo Moisés Peñalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182, 2186 n.18 (2004) and sources cited therein (compiling various lamentations over the confused state of just compensation law); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 561-62 (1984) (referring to the takings issue as “[b]y far the most intractable constitutional property issue”).

As a historical matter, few academics dare attempt to explain just how the clause ended up in the Federal Constitution.³ More troubling still is the continual difficulty that judges seem to have in formulating consistent principles for applying it.⁴ The text of the Amendment itself only adds to the mystery by raising the question of why a substantive protection of property rights is grouped together with a string of criminal procedure rules. The remainder of the Constitution's text seems to offer little clarification, for the document as a whole appears to be hardly concerned at all with property, the term on which the clause hangs its hat.⁵

None of this would be of interest beyond arcane academic inquiry, if the issue were not arising in a critical modern context. As Congress has contemplated various patent law reforms in recent decades,⁶ the specter of the Fifth Amendment

³ See, e.g., BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 7 (1977) (“[T]he fact of the matter is that the legislative history of the compensation clause is quite unilluminating, with hardly a recorded word bespeaking sustained reflection.”); Yxta Maya Murray, *The Takings Clause of Boyle Heights*, 43 N.Y.U. REV. L. & SOC. CHANGE 109, 127 (2019) (“[T]he original purpose of the Takings Clause remains mysterious . . .”); William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1793 (2013) (“There is scant specific evidence about the purpose of the Takings Clause . . .”); Janet Thompson Jackson, *What Is Property? Property Is Theft: The Lack of Social Justice in U.S. Eminent Domain Law*, 84 ST. JOHN’S L. REV. 63, 97 (2010) (“To add to the mystery, the Takings Clause distinguishes itself as the singular Amendment in the Bill of Rights that no state requested.”). The most complete historical account is that offered by Professor Treanor. See *infra* Section I.B.

⁴ See, e.g., Peñalver, *supra* note 2, at 2186 (“Takings Clause jurisprudence is characterized by nothing if not the confusion and intense disagreement it generates.”); Holly Doremus, *Takings and Transitions*, 19 FLA. ST. U. J. LAND USE & ENV’T L. 1, 1-2 (2003) (referring to regulatory takings law as “famously incoherent”); ACKERMAN, *supra* note 3, at 8 (describing takings doctrine as “a chaos of confused argument”); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1078 n.2 (1993) (compiling additional descriptions from the literature, including “crazy-quilt pattern,” “liberally salted with paradox,” and “a welter of confusing and apparently incompatible results”) (citations omitted).

⁵ Some scholars argue that the Constitution implicitly served property interests at the founding through its debt, contract, and currency provisions. See, e.g., MICHAEL J. KLARMAN, *THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION* (2016). Others stress, to the contrary, that the Constitution hardly mentions property and argue that the document is remarkably egalitarian. They point out, for example, that at a time when property qualifications to vote or hold office were common, the Constitution was bold to require not even minimal property qualifications. See, e.g., AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 66-71 (2005). But see KLARMAN, *supra*, at 123-24.

⁶ See, e.g., Innovation Act, H.R. 9, 114th Cong. (2015) (seeking to suppress the business model of “patent trolls” through, among other things, heightened pleading standards, requiring unsuccessful plaintiffs to pay winners’ costs and fees in infringement suits, and transparency requirements); Preserve Access to Affordable Generics and Biosimilars Act, S. 1428, 117th Cong. (2021) (seeking to shift the burden of proof to settling parties to show that certain drug patent infringement settlements are not anticompetitive).

looms on the horizon.⁷ What regulatory power does Congress have with regard to patented inventions, and is that power hampered by the Fifth Amendment's requirement to provide just compensation? Most important, the Supreme Court has quietly flagged the question of whether patents constitute private property for the purposes of the Fifth Amendment's "Takings Clause," suggesting that the Court may turn to the issue in the near future.⁸

Conventionally, commentators and judges break down the clause into a few different components,⁹ each of which has generated a voluminous body of caselaw and corresponding scholarly inquiry. First, there is the question of takings: How does one know if something has been "taken" to begin with?¹⁰ Second is the "public use" requirement, which is often treated as an outright prohibition against

⁷ A number of plaintiffs and a small group of academics have recently advanced the claim that the Compensation Clause protects patent owners whenever their patents are "taken for public use," in whatever sense the clause uses the phrase. For academics advancing this view, see sources cited *infra*, notes 20-24. For lawsuits claiming Fifth Amendment takings, see discussion *infra* Sections III.B., III.D. If the judiciary were to adopt that position, it would significantly restrict the government's ability to enact legislative and regulatory changes.

⁸ See *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1379 (2018) (in the context of upholding the constitutionality of *inter partes* review at the U.S. Patent and Trademark Office, the Court noted: "We emphasize the narrowness of our holding. . . . [O]ur decision should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause.").

⁹ See JAMES L. HUFFMAN, *PRIVATE PROPERTY AND THE CONSTITUTION: STATE POWERS, PUBLIC RIGHTS, AND ECONOMIC LIBERTIES* 114-15 (2013).

¹⁰ For a taste of the literature on the "Takings Clause," see generally Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Jones, *supra* note 2; Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I*, 77 CAL L. REV. 1299, 1303-04 (1989); Douglas Kmiec, *The Original Understanding of the Taking Clause is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630 (1988); Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis "Goes Too Far"*, 49 AM. U. L. REV. 181 (1999). In the Supreme Court, the compartmentalized clause has been further subdivided, the most notorious branch being the so-called "regulatory takings." Despite the Court's attempts at a neat classification scheme, Takings law continues to produce such controversial decisions as *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978); and *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

takings for “private use.”¹¹ Finally, when the other conditions are met, what constitutes “just compensation”?¹²

Attempting to sort through the morass, numerous authors together have produced a tremendous amount of literature on each of these components, but the scholarship has largely neglected, by comparison, the clause’s crucial, first component. Namely, what does the clause mean by “private property”?¹³ Certain authors have proposed theories that seek to make sense of the clause holistically, reading its takings, public use, and just compensation components in concert with one another.¹⁴ Others look to the legal or ethical foundations of property to inform their takings analysis, but their examples typically involve land ownership so as to avoid having to ask whether private property exists in the first place.¹⁵ As beneficial as these approaches might be in harmonizing takings doctrine, they address only half of the issue: While they may provide a consistent meaning to the clause’s predicate (“shall . . . [not] be taken for public use without just compensation”), the literature leaves largely untouched the clause’s subject (“private property”).¹⁶

¹¹ See, e.g., Lynn E. Blais, *The Public Use Clause and Heightened Rational Basis Review*, 48 CONN. L. REV. 1497 (2016). By far the most divisive of the “Public Use” cases is *Kelo v. City of New London*, Conn., 545 U.S. 469 (2005), which Justice Antonin Scalia went so far as to liken to *Dred Scott*. Justice Antonin Scalia, Keynote Address at the Illinois Institute of Technology Chicago-Kent College of Law (Oct. 18, 2011).

¹² See, e.g., Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677 (2005); Glynn S. Lunney, Jr., *Compensation for Takings: How Much Is Just?*, 42 CATH. U. L. REV. 721, 769 (1993); RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 182-86 (1985); Kevin J. Lynch, *A Fracking Mess: Just Compensation for Regulatory Takings of Oil and Gas Property Rights*, 43 COLUM. J. ENV’T. L. 335 (2018).

¹³ For one admirable attempt to analyze the Supreme Court’s infrequent and inconsistent attempts to define “constitutional property,” for both the Compensation and Due Process Clauses, see Thomas Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2000).

¹⁴ See, e.g., Rubinfeld, *supra* note 4, at 1080 (suggesting that clause’s applicability turns not on whether the property was “taken,” depriving the owner of value, but instead on whether it was “conscripted” and made to serve a “public use”); Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 150-51 (1971) (positing that takings doctrine should ask whether the government, in taking private property, is merely competing for control of a scarce resource and not pursuing a public right or exercising the police power in settling disputes or pursuing a public right); John A. Humbach, *A Unifying Theory for the Just Compensation Cases*, 34 RUTGERS L. REV. 243 (1982).

¹⁵ See, e.g., Richard Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1.

¹⁶ Amidst the avalanche of literature on the Fifth Amendment’s Compensation Clause, a handful of modern works advance the view, from various perspectives, that the Clause should cover patents. See sources cited, *infra* notes 20-24.

That is not to say that insufficient thought has been given to the concept of private property. There are, of course, many important works dedicated to the history, theory, and substance of property rights in the American legal tradition.¹⁷ Nevertheless, the Fifth Amendment's Compensation Clause continues to develop with a remarkable lack of dialogue with property law. Like a rowboat passing a ship in the night, compensation law acknowledges property theory, taking the grand ship's existence and course for granted. Yet Compensation law has, thus far, failed to consider that among the waves it strains to navigate is the unsettled wake churned up by property theory. In their perpetual struggle to define the protection that the Compensation Clause affords to property owners, judges and scholars alike have largely neglected the underlying question of which rights it is meant to protect in the first place.

The Constitution's own text treats the question in the same manner. The term "property" makes only three other appearances in the Constitution, and each is in a procedural context.¹⁸ The Constitution presupposes the existence of "private property" as a legal category with independent meaning. Put differently, the term "private property" referenced in the Compensation Clause does not emanate from constitutional authority; rather, the Constitution assumes its existence and protects it.

¹⁷ Surveys of the landscape of property law include ROBERT ELLICKSON, CAROL ROSE & BRUCE ACKERMAN, *PERSPECTIVES ON PROPERTY LAW* (2d ed. 1995); and STUART BANNER, *AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN* (2011). Further complicating the matter is the fact that a right might be "property" for certain constitutional purposes and not others. See Jonathan S. Masur, *Institutional Design and the Nature of Patents*, 104 IOWA L. REV. 2535, 2541 (2019) ("To be sure, a baseline view that a patent is property (or not) is not determinative with respect to all of these questions. A patent could be property for purposes of the Due Process Clause without being property for purposes of the Takings Clause. A patent could be property but nonetheless constitute a public right for Article III purposes. The constitutional questions are not answered purely by typology.").

¹⁸ For present purposes, procedural rules may be thought of as specifying *how* government may do certain things, whereas substantive rules may be thought of as specifying *what* government may do. The only other instances in which property is mentioned in the Constitution are, U.S. CONST. art. IV, §3 (placing in Congress the power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"); *id.* amend. V (barring Congress from "depriv[ing] ["any person"] of life, liberty, or property, without due process of law"); *id.* amend. XIV, §1 (barring states from "depriv[ing] any person of life, liberty, or property, without due process of law").

This article seeks to bridge the gap in the literature by addressing this question of increasing practical importance.¹⁹ Namely, does the Compensation Clause apply to patents for inventions? The question, put slightly differently, is whether patents should be considered “private property” within the meaning of the term as used by the Compensation Clause. Several recent scholars have argued that it does. The most extensive piece was written by scholar Adam Mossoff, who argues according to a historical interpretation that patents are protected under the Fifth Amendment’s Compensation Clause.²⁰ Several others have argued that certain types of government action related to patents would constitute takings under that Clause, such as the post-grant review processes instituted in the 2011 America

¹⁹ To his credit, Professor Humbach acknowledges the importance of defining private property to making sense of the Compensation Clause. Pessimistically, he writes: “Although the meaning accorded to the word property is critically related to the scope and import of the just-compensation clause, no definitive conception of the property idea seems possible. The boundaries of the concept in ordinary usage are too vague and unspecifiable to be analytically useful in fixing the limits of the just-compensation requirement. Precise conceptual boundaries can be defined, but they would be inherently artificial, often unconvincing, and infected by any weaknesses in the philosophico moral axioms on which they are based.” Humbach, *supra* note 14, at 245. While this article does not claim to provide a perfect definition, it does reflect optimism that the conversation may be advanced, particularly by considering its application to a discrete example.

²⁰ See Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. REV. 689 (2007) [hereinafter Mossoff, *Patents*]; see also Thomas F. Cotter, *Do Federal Uses of Intellectual Property Implicate the Fifth Amendment?*, 50 FLA. L. REV. 529, 529, 532-33 (1998) (describing the law related to Fifth Amendment Compensation Clause and intellectual property as a “muddle” and concluding that “most federal uses of patents and copyrights probably do implicate the Takings Clause, but . . . noninfringing uses of trademarks and some other forms of unfair competition probably do not.”); cf. Christopher S. Storm, *Federal Patent Takings*, 2 J. BUS. ENTREPRENEURSHIP & L. 1 (2008) (temporarily assuming that patents are private property within the Fifth Amendment’s Compensation Clause to examine how 250 years of Fifth Amendment decisions would apply to federal takings of patent rights); Shubha Ghosh, *Toward a Theory of Regulatory Takings for Intellectual Property: The Path Left Open After College Savings v. Florida Prepaid*, 37 SAN DIEGO L. REV. 637, 667 (2000) (arguing that although the Fifth Amendment’s Compensation Clause would apply to intellectual property only through analogy, that is because modern thinking went astray when legal realists rejected natural rights theories of property). *But cf.* Jonathan S. Masur & Adam K. Mortara, *Patents, Property, and Prospectivity*, 71 STAN. L. REV. 963, 991-93 (2019) (discussing the Fifth Amendment’s Compensation Clause in the context of the argument that, because judges know their decisions can do violence to reliance interests, they should be allowed to make patent rulings purely prospective); Mark A. Lemley, *Why Do Juries Decide If Patents Are Valid?*, 99 VA. L. REV. 1673, 1680-91 (2013) [hereinafter Lemley, *Juries Decide*] (discussing the history of patent practice in England in the context of an article about the role of juries in U.S. patent law); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007) (discussing patents as public franchises in the context of an article on the separation of powers and a discussion of constitutional conceptualizations of the public/private distinction).

Invents Act,²¹ Federal Circuit rulings that result in a dramatic change departing from precedent,²² state (as opposed to federal) infringement of intellectual property rights,²³ and application of a federal statute related to sovereign immunity.²⁴ In contrast, this article offers the first, comprehensive analysis—considering theory, history, constitutional textual and structural dissection, judicial interpretations, and the nature of patents—concluding that from all of these perspectives, patents do not fall within the Fifth Amendment’s Compensation Clause.²⁵

At this point, it is worth pausing to briefly draw attention to the fact that, unlike its other three appearances in the Constitution,²⁶ the use of the word property in the Compensation Clause is modified. Specifically, the Compensation Clause is concerned not just with “property,”²⁷ but rather with “*private* property.” With this distinction, the clause cabins the bounds of the broader notion of “property” with the limiting modifier of “private.” Thus, any inquiry into the meaning of the clause must, of necessity, center on the term “private property.”

Returning to the question at hand, this article analyzes the evidence that may be relevant to determining whether courts should begin applying the Compensation Clause’s protection of private property to patents. Considering historical, textual, structural, and precedential indicators, this article demonstrates that patents should not be held to constitute private property for purposes of the Compensation

²¹ See Gregory Dolin & Irina D. Manta, *Taking Patents*, 73 WASH. & LEE L. REV. 719 (2016).

²² See J. Nicholas Bunch, Note, *Takings, Judicial Takings, and Patent Law*, 83 TEX. L. REV. 1747 (2005).

²³ See Ghosh, *supra* note 20, at 641.

²⁴ See Joshua I. Miller, Note, *28 U.S.C. § 1498(a) and the Unconstitutional Taking of Patents*, 13 YALE J. L. & TECH. 1 (2010).

²⁵ Despite the evidence presented herein, there remains a strong intuition that certain government actions that might be described as “patent takings” seem wrong. The Constitution’s Due Process principles, for example, may restrict such patent takings if they are arbitrary or lack necessary procedural elements. Beyond the Compensation Clause, this paper makes no claim as to the viability of other constitutional protections as applied to patents.

²⁶ For the relevant constitutional provisions, see *supra* note 18.

²⁷ The word property comes to English through old French, from a Latin root meaning “special character,” a noun representing the quality of being “one’s own” or “special.” See *Etymology of “Property”*, ONLINE ETYMOLOGY DICTIONARY, <http://etymonline.com/word/property>. The current French cognate, “propre,” referring to one’s “own” or “self” (as in, to do something “on one’s own” or “by one’s self”), hews closer to the Latin root. Though English speakers frequently use “property” as a synonym for “quality,” “aspect,” or “characteristic,” this other definition is now uncommon in legal contexts.

Clause.²⁸ Readers attuned to interpretive theory will likely differ on which sources of evidence matter most in constitutional argumentation²⁹—this paper is agnostic as to which the reader affords the most weight—but on each account, the inevitable conclusion is that patents are not and should not be classified as private property for purposes of the Compensation Clause.

Part I offers evidence from constitutional history. It begins by situating the concepts of private property and patents within the Anglo-American legal tradition. Distinguishing between the “core” private rights of the Common Law and the “public rights” that historically originated in discretionary grants from policy makers, this Part places private property squarely in the former and patents squarely in the latter. In making this determination, Part I also explains the way in which differences between the British and American constitutional systems, as well as the evolution of these concepts over time, do and do not influence the import of the historical evidence it offers. Part I concludes by focusing on the Compensation Clause’s constitutional origin. Limited as it is, what evidence exists suggests that the Clause was originally intended and understood narrowly, covering direct physical deprivations or occupations of land and chattels.

Reinforcing these findings, Part II proceeds by evaluating the objectives of patent law and takings law in light of constitutional and statutory text, history, and structure. First, it analyzes Article I, Section 8’s Patent and Copyright Clause, from which Congress’s power to issue patents originates. Specifically, it establishes the clause’s presumption that knowledge is public domain and its utilitarian nature. Part II continues, on a more holistic level, by observing the grounds related to the Constitution’s structure for maintaining the distinction between patents and private property.³⁰ Chief among them is the fact that the Constitution’s grant of a power to issue patents logically includes the lesser power to issue patents subject to modifications and conditions that do not prejudice constitutional rights. In addition, it calls attention to the fact that treating patents as private property

²⁸ PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12-13 (1991) (identifying 6 “modalities” of constitutional argumentation: historical, textual, structural, doctrinal, ethical, and prudential).

²⁹ For articulation of a few different interpretive theories, see, *e.g.*, ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997); JACK M. BALKIN, *LIVING ORIGINALISM* (2011); DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

³⁰ BOBBITT, *supra* note 28 (defining structural arguments as “inferring rules from the relationships that the Constitution mandates among the structures it sets up”).

would entail that Congress surrender a significant amount of authority over patent law to states and courts. Finally, assuming, *arguendo*, that Congress even has the power to deem public benefits to be private property endowed with Compensation Clause protection, the article finds no evidence that Congress intended to do so with patents.

In Part III, the article turns to the interpretive history surrounding this question. Notwithstanding efforts by some actors to “propertize” patents around the turn of the 19th century, the limited interpretive precedent that exists has compelled contemporary courts to reject Compensation Clause claims for patent takings. In this context, Part III analyzes dicta and legislative history from the late 19th through late 20th century; despite indications that contrary opinions might have existed, this Part finds neither any authoritative precedent nor any binding legal rule having held that the Compensation Clause applies to patents. This analysis includes a group of cases from the latter part of the 19th century concerning claims of patent infringement by the government as well as passage of a 1910 law, later recodified as 28 U.S.C. §1498, establishing a statutory cause of action against the government for patent infringement. Part III also examines more recent caselaw, explaining that the themes and strands that emerge weigh heavily against the patents-as-property theory.

Before concluding, this article considers, in Part IV, what the patents-as-property theory puts at stake. Reinforcing the evidence offered in Parts I-III, Part IV offers a pragmatic gloss on the question, demonstrating that aspects such as the regulatory structure and lack of certainty with patents would mix with the Compensation Clause’s theory and doctrine like oil and water.

Despite this article’s focus on property, the analysis throughout will, at times, refer to the Compensation Clause’s takings, public use, and just compensation aspects—at least to the extent that these concepts carry implications for the question of whether the entire clause applies to patents. Nonetheless, given that the article examines the question of whether the Compensation Clause applies to patents, the article’s analysis largely avoids taking positions on a number of issues that continue to frustrate other aspects of the jurisprudence.

In short, whether one observes from the historical and theoretical perspectives embedded in our Nation’s founding footsteps, from a textual and structural analysis

of the constitutional language, or from the logic of judicial analyses, the conclusion is the same. Patents do not constitute private property for purposes of the Fifth Amendment's Compensation Clause.

I

FOUNDING FOOTSTEPS

A historical analysis of early private property and patent law demonstrates that there is no historical basis for including invention patents in the category of constitutionally protected private property. Section A introduces the distinction between public rights, which owe their existence and are subordinate to the state, and the “core” private rights of life, liberty, and private property, which the state exists to protect, according to 18th century conceptions of natural law. Section A examines the concepts of private property and patents as their English law antecedents had been understood at the nation's founding, finding that the rights encompassed by private property rights were limited to those tied to land and chattels, whereas patents were consistently viewed as public rights, which the government established at its discretion for policy reasons. Section B turns to the Compensation Clause itself, concluding that it was most likely intended and understood to cover direct, physical takings or occupations of land and chattels, excluding public rights like patents.

A. Patents & Private Property: Origins Through the Early Republic

1. Private Property as a “Core” Private Right

The 18th century property theory in existence at the time of the Nation's founding embraced a decidedly particularized definition of property. Property attached to things in the physical realm, either land—something one could touch but not pick up and move—or chattel—physical items that were moveable, such as goods and paper money. One can see these conceptualizations at work in the writings of influential thinkers such as Blackstone and Locke, who attributed rights over property to a theory of natural law in which people gained dominion over items in the physical world by mixing their labor with those items.³¹

³¹ II WILLIAM BLACKSTONE, COMMENTARIES 2-15; JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §27.

In typically soaring language, Blackstone, for example, defined property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe”³² and then identifies the objects of that dominion as separated into two categories: “[t]hings real . . . which cannot be carried out of their place; as lands and tenements . . .” and “all other movables; which may attend the owner’s person wherever he thinks proper to go.”³³ Locke, similarly, conceived of property in a manner contingent on a metaphysical relationship between an individual and a piece of the physical work, with the individual gaining property rights through the act of mixing labor with a physical item otherwise given to humanity in common.³⁴

During the 20th century, new ways of thinking about the law saw many aspects of Blackstonian property theory dismantled, from its metaphysical origin to its absolutist implementation.³⁵ From the ruins emerged the “bundle of sticks” theory of property, which conceives of property as a socially constructed bundle of limited rights, generally including those of use, exclusion, and disposal.³⁶ Nevertheless, to answer the question of what the Framers thought about “property” when penning the Constitution in the late 18th century, it was all about control over the physical.

Perhaps of greater importance than the focus on the physical was the long-standing distinction between private and public rights. Private rights were thought of as those that existed prior to the state. These stood in contrast to rights that the Commonwealth, or the Crown, brought into existence by the action of law. In this context, private rights were life, liberty, and property—again, with property being tied to tangible items.

³² II BLACKSTONE, *supra* note 31, at 2.

³³ *Id.* at 16-17. (“The objects of dominion or property are *things*, as contradistinguished from *persons*: and things are by the law of England distributed into two kinds, things *real* and things *personal*. Things *real* are such as are permanent, fixed, and immovable, which cannot be carried out of their place; as lands and tenements: things *personal* are goods, money, and all other movables; which may attend the owner’s person wherever he thinks proper to go.”).

³⁴ LOCKE, *supra* note 31, at §27.

³⁵ See Felix Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 359, 373 (1954), for an example of the methodology brought by 20th century legal realists to property rights. See also Kirk A. Kennedy, *Reaffirming the Natural Law Jurisprudence of Justice Clarence Thomas*, 9 REGENT U. L. REV. 33 (1997), for an exploration of modern jurisprudence that hews more closely to natural law conceptualizations and places Thomas’s jurisprudence, including his opinions on property, in the natural law tradition.

³⁶ Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 VT. L. REV. 247, 247, 253 (2007).

Property, being what Professor Nelson calls a “core” private right, is fundamentally different from socially constructed rights.³⁷ Property, along with life (sometimes denoted “personal security”) and liberty, transcend the formation of governments, according to the Locke-inspired 18th century theorists.³⁸ Although the distinction has been obscured in the ensuing centuries, 18th century readers of Locke and Blackstone would have understood a clear distinction between those rights which government exists to protect, and “public rights,” “franchises,” and “privileges,” which, to use Blackstone’s words, “result from, and are posterior to, the formation of states and societies.”³⁹ According to Nelson, the dichotomy is substantive in origin but carries structural implications: It is in the protection of these core private rights that the judiciary finds its purpose.⁴⁰ Although he does not dwell on it, the apparent synergy between the procedural safeguards of the judiciary and life, liberty, and property in the language of the Fifth, Thirteenth, and Fourteenth Amendments⁴¹ is consistent with the relationship that Nelson describes between core natural rights and government’s role as their guardian.

A useful litmus test for whether a right is public or private is whether it originated in the political branches or was found at common law. Generally speaking, those rights which the common law courts “discovered” are likely to be

³⁷ See generally Nelson, *supra* note 20, at 559. See I BLACKSTONE, *supra* note 31, at 141 (“the three great and primary rights, of personal security, personal liberty, and private property”).

³⁸ I BLACKSTONE, *supra* note 31, at 123 (“By the absolute *rights* of individuals, we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it.”); Nelson, *supra* note 20, at 622 (“The Lockean view [is] that the individual is anterior to political society[] and that the fundamental object of government is to render more secure the core private rights that have analogs in the individualistic state of nature . . .”).

³⁹ Nelson, *supra* note 20, at 561-62, 567-68 (“Historically, Americans have concluded that the protection of individual rights to person and property—core ‘private rights’ of the sort that (on John Locke’s influential account) government was instituted to safeguard—triggers different political calculations, and therefore requires different institutional arrangements, than the protection of ‘public rights’ belonging to the body politic.”); see I BLACKSTONE, *supra* note 31, at 124. Indeed, much of what Reich called “The New Property” is of this latter type, owing its existence to the state. See generally Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

⁴⁰ Nelson, *supra* note 20, at 562.

⁴¹ U.S. CONST. amend. V (“[N]or be deprived of life, liberty, or property, *without due process of law* . . .”) (emphasis added); *id.* amend. XIII (“Neither slavery nor involuntary servitude, except as a punishment for a crime *whereof the party shall have been duly convicted* . . .”) (emphasis added); *id.* amend. XIV (“[N]or shall any State deprive any person of life, liberty, or property, *without due process of law* . . .”) (emphasis added).

private rights, whereas those “established” by the legislature are likely to be public rights or privileges.⁴² Some rights have mixed statutory and common law origins⁴³ blurring the distinction between common law and statutory rights, so a right’s origin in the courts or Congress is not necessarily determinative. Still, the fact, as discussed below, that patents have no such mixed origin and so clearly fall on the government-originating-side-of-the-line weighs heavily against classification as property.⁴⁴

⁴² Although the original significance of the term is now largely lost, the term “privilege” stood in opposition to “rights” in that politically conferred benefits were described as the former and not the latter. Because this article has no ambition of reviving the terminological distinction, it contents itself to use the modifiers “public” and “private” to differentiate between the two types of rights. Laura Ferguson, *Revisiting the Public Rights Doctrine: Justice Thomas’s Application of Originalism to Administrative Law*, 84 GEO. WASH. L. REV. 1315, 1330 (2016) (“Private rights, on the other hand, refer to individual rights to life, liberty, and property that every citizen possesses independent of the state . . . Privileges developed as a separate way to distinguish rights that public authorities created purely for reasons of public policy. The goal of privileges was to create entitlements that would operate like private rights—for example, forming the basis for private claims against other individuals—but would actually enable private citizens to use civil power for the public benefit, in effect allowing private citizens to carry out public ends.”) (footnotes omitted).

⁴³ To offer just one example, consider recording a phone call in California without the consent of both parties. The action implicates the right to privacy and corresponding torts, which are largely rooted in common law. *See, e.g.,* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Yet, nearly every aspect of a civil suit seeking damages for such a recording would be controlled by statutes. These statutes not only control procedural aspects like statutes of limitations, but they codify, expand, and restrict the tort’s scope. *See, e.g.,* Flanagan v. Flanagan, 41 P.3d 575 (Cal. 2002). Accordingly, Mossoff points out that property rights in land, often thought of as “common law rights,” are rooted in acts of parliament. Adam Mossoff, *Statutes, Common Law Rights, and the Mistaken Classification of Patents as Public Rights*, 104 IOWA L. REV. 2591, 2602-04 (2019) [hereinafter Mossoff, *Mistaken Patent Classification*]. Perhaps the most relevant contrast for patents is copyrights, whose common law origin can be traced back to Roman Law but which have been primarily creatures of statute since the early 18th century. *See infra* text accompanying note 131 (contrasting copyright statutes, which stipulate that rights arise automatically upon the creation of a creative work, and patent statutes, which require application and granting).

⁴⁴ *See* discussion *infra* Section I.A.2; *see also, e.g.,* *Intellectual Property, the Right to Health, and Human Rights*, 2006 U. ILL. J.L. TECH. & POL’Y 63, 94-95 (“Courts and commentators agree in characterizing copyrights and patents not as natural property rights, but rather as statutory creations designed to maximize public welfare.” (quoting Tom W. Bell, Professor of Law at Chapman Univ. L. Sch., Federalist Society’s “Life, Liberty, and Intellectual Property” Panel Discussion (Oct. 12, 2005))); Robin Feldman, *Federalism, First Amendment & Patents: The Fraud Fallacy*, 17 COLUM. SCI. & TECH. L. REV. 30, 71 (2015) [hereinafter Feldman, *Federalism*] (asserting that the Patent and Copyright Clause represents a “creation of a narrow public franchise for limited policy reasons [that] stands in sharp contrast to the Framers’ conception of core private property rights, and the way in which those rights are treated in the Constitution”); Chidi Oguamanam, *Beyond Theories: Intellectual Property Dynamics in the Global Knowledge Economy*, 9 WAKE FOREST INTELL. PROP. L.J. 104, 110 (2009) (“[I]ntellectual property rights, for the most part, are statutorily created rights rather than inherent and inalienable natural rights.”); J.H. Reichman & Jonathan A. Franklin, *Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good*

Diligence requires noting, however briefly, that in American legal tradition, the word “property” is sometimes used far more expansively than jurists like Blackstone can account for. For example, consistent with the distinction between core private rights and public rights, some 18th century thinkers speak in more expansive terms in which property becomes a single term incorporating the other two core private rights—life and liberty. The Compensation Clause’s own author, James Madison,⁴⁵ expounded on the dual meaning of property, writing:

This term in its particular application means “that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.”

In its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and which leaves to every one else the like advantage.

In the former sense, a man’s land, or merchandize, or money is called his property.

In the latter sense, a man has a property in his opinions and the free communication of them.

He has a property of peculiar value in his religious opinions . . .

In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights . . .

Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses.⁴⁶

Uses of Information, 147 U. PA. L. REV. 875, 922 (1999) (“[S]tatutory intellectual property rights confer legal monopolies on qualified creators and inventors . . .”); cf. Shyamkrishna Balganesh, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543, 1544 (2010) (“Intellectual property is today thought to be principally of statutory origin.”).

⁴⁵ See generally AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 77-80 (1998).

⁴⁶ James Madison, *Property*, THE NAT’L GAZETTE (Mar. 29, 1792), reprinted in RICHARD A. EPSTEIN, *CLASSICAL FOUNDATIONS OF LIBERTY AND PROPERTY: LIBERTY, PROPERTY, AND THE LAW* 185-87 (2000)).

Thus, in addition to the Blackstonian framing of property as dominion over part of the physical world with which one has mixed their labor, Madison also uses property as a stand in for the set of naturally occurring rights the protection of which is the object of government, according to his early liberal framework.⁴⁷

Good reason exists for understanding that Madison followed the narrower definition in constructing the Compensation Clause. First, applying Madison's second definition of property to the Compensation Clause would lead to the untenable conclusion that compensation was required each time the government violated privacy, imposed on religious liberty, or restricted speech. If the Compensation Clause is extended to provide just compensation in this broad manner, then the Supreme Court could have awarded monetary compensation when, for example, it found that New York's COVID-19 restrictions violated worshipers religious freedoms.⁴⁸ Simply put, the broad reading needed to protect patents with the Compensation Clause by way of an expansive definition of property would leave the Clause with no limiting principle as to the substantive rights that it covers.

Moreover, in understanding the narrow scope of the Compensation Clause as drafted, the modifier "private" is especially important.⁴⁹ It is the word "private" that signals the limitation of the Compensation Clause to the narrow subset of private rights—"that which the term particularly expresses," to use Madison's language⁵⁰—rather than ones granted by government.

2. *Patents as a Quintessential Public Franchise*

As noted above, the conceptualization of rights at the time of the Constitution can be understood as falling into two categories: core, private rights that exist without the action of government (generally listed as life, liberty, and property)

⁴⁷ For a discussion of early American liberal philosophy and its role in Madison's thought, *see infra* notes 102-105 and accompanying text.

⁴⁸ *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020).

⁴⁹ While it may be accurate in some sense to state that patents are not property at all, the frequent casual use of the term "property" renders it prudent to limit the present inquiry to the narrower sub-category of *private* property. *See, e.g.,* Walter T. Champion, Jr., *The Baseball Antitrust Exemption Revisited: 21 Years After Flood v. Kuhn*, 19 T. MARSHALL L. REV. 573, 575 (1994) ("Under the reserve system, a ballplayer was the property of his team for life").

⁵⁰ Madison, *supra* note 46.

and public rights that arise from an action of government. In contrast to property in land and chattels, patents bear none of the key features historically associated with “core” private property rights but rather, embody rights arising from an action of government.⁵¹ In particular, patents do not attach to anything corporeal, they have little basis in natural rights theory, and they are primarily political in origin.⁵²

Despite the clarity of that point, it is prudent to detour briefly into the history of the terms “patent” and “letters patent,” to avoid any possibility of confusion. None of the narrative, however, alters the theoretical perspectives at the time of the Constitution in which core, private rights such as life, liberty, and property are separated from those things government-granted. Moreover, none of the history of the term “patent” can be read to suggest that the term, in the American constitutional context, embodied substantive rights resembling core, private rights.

As the following discussion will demonstrate, historically, the term “patent” merely indicated that something was accomplished in a public manner by a letter from the king. The things accomplished ranged from conferring knighthood,⁵³ to appointing a sheriff,⁵⁴ assenting to a bill of parliament,⁵⁵ and delegating the erection of light-houses⁵⁶ —a far cry from what we think of today with the term “patent.” One can think of the older meaning of the term as perhaps more linguistically related to the modern use of the term “patently” (as in, “patently obvious”), meaning “clearly.” Even today, we use vestiges of the term to apply to certain things delivered by the government, but without necessarily a reflection on the content of what is being delivered.

By way of introduction, the term “patent” has its origin in the centuries-old practice of issuing “*literae patentes*” or “letters patent,” meaning open letters. Letters patent were one of the three commonly used forms by which the King conducted royal business. As one scholar summarizes:

⁵¹ See *infra* text accompanying notes 79-80, 83-84, 94, and 98.

⁵² *Id.*

⁵³ I BLACKSTONE, *supra* note 31, at 272.

⁵⁴ *Id.* at 340.

⁵⁵ *Id.* at 185.

⁵⁶ *Id.* at 264-65.

The kings of England did much of their state business by means of charters, letters patent, and letters close. At least initially, charters were used for their more solemn acts. Letters patent were used to set forth their public directives, of whatever sort, whereas letters close were used to provide private instructions to individuals. Royal charters and letters patent often were similar in content and differed only in their form.⁵⁷

The term letters patent signifies the royal action's form more than its content. Put differently, letters patent were simply a way of doing business. They indicate a "how" but not a "what."⁵⁸ Blackstone's *Commentaries* succinctly describe their use:

[The King's] grants, whether of lands, honors, liberties, franchises, or aught besides, are contained in charters, or letters patent, that is, open letters, literae patentes: so called, because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom; and are usually directed or addressed by the king to all his subjects at large.⁵⁹

These sentences, one should note, touch on only some of letters patent's many uses. In this context, Blackstone points out that letters patent were used when the King conferred or granted something, but letters patent were also used to become an English subject,⁶⁰ nominate a bishop,⁶¹ create a court⁶² or judgeship,⁶³ annex foreign territory,⁶⁴ and establish a corporation⁶⁵ or political office.⁶⁶

It can be safely said, therefore, that the use of the term "patent" in any context said very little about the nature of its content beyond the fact that it is intended to

⁵⁷ Edward C. Walterscheid, *The Early Evolution of the United States Patent Law: Antecedents (Part 1)*, 76 J. PAT. & TRADEMARK OFF. SOC'Y 697, 700 (1994) [hereinafter Walterscheid, *Part 1*].

⁵⁸ *Id.* at 700-01.

⁵⁹ II BLACKSTONE, *supra* note 31, at 346. Note that in 1515, the formal distinction between charters and letters patent was eliminated, and all subsequent royal grants were recorded in the Patent Rolls. Walterscheid, *Part 1*, *supra* note 57, at 700-01.

⁶⁰ I BLACKSTONE, *supra* note 31, at 374-75.

⁶¹ *Id.* at 380.

⁶² III BLACKSTONE, *supra* note 31, at 76.

⁶³ *Id.* at 40.

⁶⁴ I BLACKSTONE, *supra* note 31, at 100.

⁶⁵ *Id.* at 473.

⁶⁶ *Id.* at 272.

be made public. If the letters patent granted a right or privilege, the form of the patent had no bearing on the right's content. The use of the term "patent" adds no weight in favor of a patent-holder's claim to specific rights, their strength, or their conditions, and applied to what we now call "intellectual property," it weighs, if anything, against their "property-ness."

One commentator has noted how letters patent, as described by Blackstone, became used as tools for economic development, writing, "The crown's prerogative to issue letters patent was a central tool in bestowing privileges upon individuals in the furtherance of royal policies. When the crown thus wished to buttress the realm's lagging industrial development at the end of the Middle Ages, the issuance of letters patent was central to enticing tradesmen and industrialists to come to England. This policy is the progenitor of the doctrine of patents for inventions."⁶⁷ The earliest examples date from the reign of Edward III.⁶⁸ The letters patent offered in the 14th and 15th Centuries created protections for skilled foreigners willing to come to England and share their skills.⁶⁹ Unlike U.S. patent law's modern notion of introducing an invention that is "new and useful," this royal prerogative simply enticed those who were able to ply an existing trade to bring those talents to England.⁷⁰

In the mid-16th century, English monarchs began issuing monopoly patents in manufacturing. Queen Elizabeth's use of monopoly patents did not consistently share all the features we now associate with patents. Many went to foreigners as

⁶⁷ Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550-1800*, 52 HASTINGS L.J. 1255, 1259 (2001) (footnote omitted) [hereinafter Mossoff, *Rethinking*].

⁶⁸ *Id.*

⁶⁹ Ramon A. Klitzke, *Historical Background of the English Patent Law*, 41 J. PAT. OFF. SOC'Y 615, 624 (1959) (describing these early letters patent as like "passports").

⁷⁰ The concept of a legally enforceable exclusionary right to a novel device dates roughly to the 15th century, with many recognizable elements of modern patent law evident in this early Venetian law. Walterschild, *Part 1*, *supra* note 57, at 706. The 1474 Venetian patent law provides:

WE HAVE among us men of great genius, apt to invent and discover ingenious devices; and in view of the grandeur and virtue of our city, more such men come to us every day from divers parts. Now, if provision were made for the works and devices discovered by such persons, so that others who may see them could not build them and take the inventor's honor away, more men would then apply their genius, would discover, and would build devices of great utility and benefit to our commonwealth. Therefore:

inducements to travel to England.⁷¹ Some required that the patentee manufacture or else lose his monopoly right.⁷² Others included a condition that the patentee train others in the craft. Most notably, the monopoly patents granted by Elizabeth did not necessarily go to the inventor of a new device or technique but were granted for many types of products. For example, by the end of the 16th century, the Queen bestowed monopoly patents for things as common as drinking glasses and playing cards out of pure political patronage or as a way of avoiding ever-unpopular taxes by charging patentees for a monopoly.

As a result of the Crown's abuse of the royal prerogative, the crown's ability to issue monopoly patents was curtailed, first by the Courts and subsequently by Parliament. In *Darcy v. Allen (The Case of Monopolies)* (1602) and *The Clothworkers of Ipswich Case* (1615), the Court of King's Bench found Common Law limitations on the royal prerogative of monopoly patents.⁷³ Reports of both cases, especially Sir Edward Coke's, are hostile to monopoly patents in general and especially where the patentee does not create or import something new.⁷⁴

The turning point in English Patent Law was the 1624 Statute of Monopolies.⁷⁵ Significant as the law is, it may be summarized simply. It begins

BE IT ENACTED that, by the authority of this Council, 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. It being forbidden to every other person in any of our territories and towns to make any further device conforming with and similar to said one, without the consent and license of the author, for the term of ten years. And if anybody builds it in violation hereof, the aforesaid author and inventor shall be entitled to have him summoned before any magistrate the said infringer shall be constrained to pay him [one] hundred ducats; and the device shall be destroyed at once. It being, however, within the power and discretion of the Government, in its activities, to take and use any such device and instrument, with this condition however that no one but the author shall operate it.

Id. at 708-09. During the 15th century, knowledge and use of the "Venetian patent custom" spread throughout central Europe and to England. *See Id.* at 710.

⁷¹ E. Wyndham Hulme, *The History of the Patent System under the Prerogative and at Common Law: A Sequel*, 16 L.Q.R. 44, 52 (1900); Mossoff, *Rethinking*, *supra* note 67, at 1259-62.

⁷² Edward C. Walterscheid, *The Early Evolution of the United States Patent Law: Antecedents (Part 2)*, 76 J. PAT. & TRADEMARK OFF. SOC'Y 849, 857 (1994) [hereinafter Walterscheid, *Part 2*].

⁷³ *See* 11 Co. Rep. 84, 77 Eng. Rep. 1260 (K.B. 1602); 78 Eng. Rep. 147 (K.B. 1615).

⁷⁴ *Id.*

⁷⁵ Statute of Monopolies 1623, 21 Jac. 1 c. 3 (Eng.).

with a general ban on and annulment of any monopolies, past, present, and future, and then exempts letters patent and grants of privilege to the “true and first inventor and inventors.”⁷⁶ Even after the Statute of Monopolies went into force, Parliament struggled, at first, to rein in continued abuses by the crown,⁷⁷ but eventually, the patent practices of the 16th century were corralled.

Few dispute that patent grants (in general and for monopolies) were originally discretionary policy measures, but one commentator alleges, leaning on the enlightenment-era proclivity for John Locke, that by the late 18th century, inventors’ exclusionary rights had been reformed with the theory of natural rights.⁷⁸ Certainly, greater oversight by Parliament and the courts moved patents partially into the domain of common law.⁷⁹ Nevertheless, patent rights still came in the form of letters patent issued at the discretion of the monarch. Unlike with private property rights, the king, through the Privy Council, retained the power (though it was seldom exercised) to revoke patents.⁸⁰ Furthermore, neither

⁷⁶ *Id.* at §6 (specifying that, “shall not extend to any letters patents and grants of privilege for the term of fourteen years or under, hereafter to be made, of the sole working or making of any manner of new manufactures within this realm to the true and first inventor and inventors of such manufactures, which others at the time of making such letters patents and grants shall not use so as also they be not contrary to the law nor mischievous to the state by raising prices of commodities at home, or hurt of trade, or generally inconvenient: the same fourteen years to be accounted from the date of the first letters patents or grant of such privilege hereafter to be made, but that the same shall be of such force as they should be if this act had never been made, and of none other”).

⁷⁷ Lemley, *Juries Decide*, *supra* note 20, at 1681 (“Consistent with the idea that patents were royal grants of privilege, only the King had the power to revoke a patent during this period. Neither Parliament nor the courts could do so. That remained true even after the enactment of the Statute of Monopolies.”) (footnote omitted) (citing W.M. HINDMARCH, A TREATISE ON THE LAW RELATIVE TO PATENT PRIVILEGES FOR THE SOLE USE OF INVENTIONS: AND THE PRACTICE OF OBTAINING LETTERS PATENT FOR INVENTIONS 3 (Harrisburg, Pa., I.G. M’Kinley & J.M.G. Lescure 1847) (“[I]nventors are never *entitled as of right* to letters patent ... but they must obtain them from the Crown by petition, and *as a matter of grace and favour* ...”).

⁷⁸ See generally Mossoff, *Rethinking*, *supra* note 67.

⁷⁹ Though patent-related jurisprudence built up over time, the decision to give a patent was still an exercise of royal prerogative. A slightly stronger argument could be made for the common law-ness of copyrights.

⁸⁰ See Gómez-Arostegui & Bottomley, *Privy Council and Scire Facias 1700–1883: An Addendum to the Brief for H. Tomás Gómez-Arostegui and Sean Bottomley As Amici Curiae in Support of Neither Party* 14–22 (Nov. 6, 2017) (<http://ssrn.com/abstract=3054989>) (describing, among other cases, Board of Ordnance v. Wilkinson, PC2/123 (1779) (revoking a patent after patentee refused to litigate in a law court) and Board of Ordnance v. Parr, PC1/3919 (1810) (in which the attorney general conceded that proceeding in a law court was the “usual manner” and directed the petitioner to the courts, though he suggested that recourse in the Privy Council might be available if there is a “very pressing and imminent” public danger)); cf. *Oil States Energy Servs.*, 138 S. Ct. at 1383 (Gorsuch, J., dissenting) (“In the end, these cases do very little to support the Court’s holding. At most, they suggest that the Privy Council might have possessed some residual power

courts nor parliament asserted that a general right exists to exclusivity in one's invention. To the contrary, they claimed that there exists a baseline freedom for all to manufacture, and they simply limited the reasons for which the crown could curtail that freedom.

The closest that Blackstone came to including so-called intellectual property in his property framework occurs in his discussion of the various ways by which individuals can acquire legal title. He discusses, for example, the right of the king's grantees to hunt game as falling in the category of "prerogative property."⁸¹ Likewise, Blackstone writes that an heir has a property "by custom" to his ancestor's "monument or tombstone in a church."⁸² As if searching for a place to discuss the practice, Blackstone ambivalently discusses copyrights and patents in the chapter on "Title by Occupancy," writing:

There is still another species of property, which, (if it subsists by the common law,) being grounded on labour and invention, is more properly reducible to the head of occupancy than any other. . . . And this is the right which an author may be supposed to have in his own original literary composition. . . . [Here, Blackstone summarizes the history and content of copyrights.] But whatever inherent copyright might have been supposed to subsist by the common law, the statute 8 Anne, c. 19...hath now declared that the author and his assigns shall have the sole liberty of printing and reprinting his works for the term of fourteen years, *and no longer* . . . and a similar privilege is extended to the inventors of prints and engravings, for the term of eight-and-twenty years, by the statutes. . . . All which parliamentary protections appear to have been suggested by the exception in the statute of monopolies, 21 Jac. I. c. 3, which allows a royal *patent* of privilege to be granted for fourteen years to any inventor of a new manufacture, for the sole working or making of the same; by virtue

to revoke patents to address wartime necessities. Equally, they might serve only as more unfortunate evidence of the maxim that in time of war, the laws fall silent. But whatever they do, these cases do not come close to proving that patent disputes were routinely permitted to proceed outside a court of law.") (citation omitted).

⁸¹ II BLACKSTONE, *supra* note 31, at 410.

⁸² *Id.* at 428-29.

whereof it is held that a temporary property therein becomes vested in the king's patentee.⁸³

To borrow the analysis of another commentator, "Blackstone's use of the words 'privilege' and 'allows' further indicates that the Crown issued patents as privileges at its own discretion, rather than under obligation of Natural Law."⁸⁴ All told, Blackstone's entire characterization of what is now called intellectual property differs considerably from the natural right of property that he earlier described as one of the three core private rights.

Of particular importance, one must also note the mechanical difficulty, so to speak, of mapping the English law concept of letters patent onto America's constitutional framework. As described, under the English system, letters patent were a method by which a specific actor (the King or Queen) exercised a wide range of powers. It should not shock anyone that locating the power to issue letters patent in the American system is a fraught, if not non-sensical task. First of all, the office of the monarch does not neatly correspond to a particular office or department in the

⁸³ *Id.* at 405-07 (citations omitted). The case Blackstone cites for this last proposition actually involved what would now be called a trade secret claim and mentions patents only as a contrast in a brief dictum. *Jenks v. Holford* (1682) 28 Eng. Rep. 311, 1 Vern. 62. Later commentaries on Blackstone continued to debate the status of copyrights and patents. Christian's edition from the 1790s added:

Whether the productions of the mind could communicate a right of property or of exclusive enjoyment in reason and nature, and, if such a moral right existed, whether it was recognised and supported by the common law of England, and whether the common law was intended to be restrained by the statute of queen Anne, are questions upon which the learning and talents of the highest legal characters in this kingdom have been powerfully and zealously exerted.

These questions were finally so determined that an author has no right at present beyond the limits fixed by the statute; but, as that determination was contrary to the opinion of lord Mansfield, the learned commentator, and several other judges, every person may still be permitted to indulge his own opinion upon the propriety of it without incurring the imputation of arrogance.

II BLACKSTONE, *supra* note 31, at 407 n.13.

Regarding Patents, Chitty's edition from the 1820s added, "When the crown, on behalf of the public, grants letters-patent, the grantee thereby enters into a contract with the crown, in the benefit of which contract the public are participators. Under certain restrictions, affording a reasonable recompense [in the form of a limited exclusivity period] to the grantee, the use of his invention, improvement, and employment of capital is communicated to the public ..." *Id.* at n.15.

⁸⁴ Justin Burnam, *Patents in the Political Branches*, 16 GEO. J.L. & PUB. POL'Y 559, 578 (2018).

American system. The division of governmental power into legislative, executive, and judicial branches never truly existed in England, and the division of power between governments of differing levels of locality did not exist in England, either, where federalism remains informal, at best.

Consequently, some of the powers historically exercised by way of letters patent now lie, in America, with the President (appointing judges)⁸⁵ while others lay with Congress (establishing political offices).⁸⁶ Others still, are exercised at the state level (creating municipal boundaries and cities) or are forbidden entirely (granting titles of nobility).⁸⁷ All this is to say, the original significance of letters patent—a means by which the king conducted royal business—is largely lost in the United States’ constitutional system. Therefore, although the words patent and letters patent are still used in American law for certain public documents, such as invention patents and so-called “land patents,” the use of those terms is essentially vestigial and the result of historic association with specific functions.

Outside of inventions, the most common usage of patents in modern American law is in reference to “patented” land. Letters patent for land are documents that attest to the original and permanent conveyance of public land, in fee simple title, to a private party.⁸⁸ Patented land comes with the sovereign’s guarantee of the title, ownership, and interest, for in issuing the patent, the sovereign does not merely assign title and interest but also attests to the title’s validity.⁸⁹ Thus, it is simply the vehicle for transfer of public land and comes with the government’s added assurance that it is valid.⁹⁰ Notably, land patentees do not have any more or fewer property rights than do owners who acquired fee simple title to their lands from a

⁸⁵ U.S. CONST. art. II, §2.

⁸⁶ *Id.*

⁸⁷ *Id.* art. I, §§9 and 10.

⁸⁸ 52A Cal. Jur. 3d Publicly Owned Lands § 61 (2023) (citing *Murphy v. Burch*, 205 P.3d 289 (Cal. 2009)); *see also* *Gardner v. County of Sonoma*, 62 P.3d 103 (2003).

⁸⁹ *United States v. Shumway*, 199 F.3d 1093, 1096 (9th Cir. 1999) (“A ‘patent’ ‘is the conveyance by which the [federal government] passes its title to portions of the public domain.’ A patent does not merely pass title, like a deed, but operates as an official declaration of title which is, with limited exceptions, unassailable and not rebuttable.”) (footnote omitted) (citing *Smelting Co. v. Kemp*, 104 U.S. 636, 640-641 (1881)).

⁹⁰ *See id.*; *see also* Paul L. Wright and Thomas E. Muth, *Land Patents: Are They an Escape from Foreclosure*, 36 DRAKE L. REV. 561, 562 (1986) (“A land patent is simply a document of title proving that a parcel of land is no longer publicly owned, but is now privately owned.”).

private party.⁹¹ Congress has, for example, issued land patents with easements⁹² and reservations for minerals.⁹³

What does the existence of land patents mean for invention patents? Probably not a whole lot. One might try to argue that the fact land patents convey fee simple title in real property indicates that invention patents convey similarly strong property rights. But there is a fundamental difference between the two. An invention patent has the effect of creating a right that did not exist by establishing a right in a new invention. In contrast, the right to the piece of land was already in existence but merely held by the sovereign. Thus, a land patent is merely the conveyance of a right that already existed,⁹⁴ in contrast to the creation of an entirely new right. The term “patent” is used in both contexts because the functions were historically carried out by the king by means of so-called letters patent.⁹⁵ In neither case, however, is the use of the term “patent” determinative of the scope or nature of the included rights.⁹⁶

Recognizing this longstanding distinction between patents for land and inventions, Justice Thomas recently cautioned his colleagues in a dissent in the *Teva* case to “not blithely extend the rules governing the construction of deeds to their even more distant cousins, invention patents.”⁹⁷ Borrowing Holdsworth’s terminology, he continued in a footnote, “Notwithstanding a movement to recognize a ‘core’ property right in inventions, the English common law placed

⁹¹ See, e.g., *Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93, 99 (2014) (“The patent conveyed to the Brandts fee simple title to the land ‘with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto said claimants, their successors and assigns, forever.’”).

⁹² *Id.* at 104-06 (“When the United States patented the Fox Park parcel to Brandt’s parents in 1976, it conveyed fee simple title to that land, ‘subject to those rights for railroad purposes’ that had been granted to the LHP & P [Railway Company]. The United States did not reserve to itself any interest in the right of way in that patent. Under [Supreme Court precedent], the railroad thus had an easement in its right of way over land owned by the Brandts When the [railroad’s successor company] abandoned the right of way in 2004, the easement referred to in the Brandt [land] patent terminated.”).

⁹³ Stock Raising Homestead Act of 1916, Pub. L. No. 64-290, ch. 9, 39 Stat. 862, 862-63 (codified as amended at 43 U.S.C. §§291-302); Jean Feriancek, *Mineral Reservations in Federal Patents*, 19 NAT. RES. & ENV’T 58 (2005).

⁹⁴ *Id.*

⁹⁵ See *supra* text accompanying notes 59-69.

⁹⁶ *Id.*

⁹⁷ *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 344 (2015) (Thomas, J., dissenting).

patents squarely in the ... category ... [of] franchises that ‘depend upon express legislation,’ and ‘hath [their] essence by positive municipal law.’”⁹⁸ The *Teva* case involved the question of whether the Federal Circuit should be allowed to review a trial court’s patent claim construction determination using a *de novo* standard or only for clear error.⁹⁹ In clipping the Federal Circuit’s wings, the majority’s decision reflected a deep and abiding mistrust of the Federal Circuit evidenced across a wide swath of recent Supreme Court decisions.¹⁰⁰ The dissent may have been less inclined to strike down the Federal Circuit. Regardless, the dissent’s foray into the history of invention patents and their distinction from land patents is a reminder that invention patents are something other than core, private rights as understood at the Nation’s founding.

B. *Original Meaning of the Compensation Clause*

Reinforcing the dissimilarity between patents and private property is the fact that the Compensation Clause likely was originally understood extremely narrowly. As noted, congressional debates and state ratifying conventions seem almost to ignore the clause.¹⁰¹ Nonetheless, even if its ratifiers were silent as to its content, accounts of its author’s ideological agenda do, if nothing else, account for the clause’s spirit. The historical narrative advanced by Professor Treanor and later by Professor Amar emphasizes Madison’s efforts to push a transition from republican ideology to liberalism.¹⁰² In broad strokes, republicanism viewed society as an organic whole, trusted legislatures to pursue the collective good, and prioritized the cultivation of virtue even at the expense of individuals’ free pursuit of self-interest.¹⁰³ Liberalism, by contrast, saw society as atomistic and emphasized the need for safeguards to protect individual rights (including property) from

⁹⁸ *Id.* at n.2 (citing 7 W. Holdsworth, A HISTORY OF ENGLISH LAW 479, n.7, 480, & n.4, 497 (1926)).

⁹⁹ *See id.* at 322.

¹⁰⁰ *See generally* Robin Feldman, *Coming of Age for the Federal Circuit*, 18 GREEN BAG 2D 27 (2014).

¹⁰¹ *See supra* note 3; *infra* text accompanying note 102.

¹⁰² Amar, THE BILL OF RIGHTS, *supra* note 45, at 77-80; William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 708-12 (1985).

¹⁰³ GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 46-90 (2d. ed. 1998). For a discussion of the views on property of each ideology’s leading thinker (Thomas Jefferson and James Madison), *see* Stanley Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & ECON. 467 (1976), especially at 481-84.

a tyrannical majority.¹⁰⁴ Madison, a liberal, likely appended the Compensation Clause to a series of provisions proposed by many of the states, as a way of sneaking in what he saw as a safeguard against populist abuse.¹⁰⁵

At this point, it is once again prudent to distinguish between the clause's operation and reach. One may be tempted to say, "Aha, so the Compensation Clause is a counter-majoritarian check designed to protect individuals from the popular will. The Compensation Clause, thus, protects patent holders." This argument, appealing as it may be, is obviously flawed in so far as it fails to address the clause's scope. The Compensation Clause does protect individuals from the government, but surely not everything is included in the group of things that trigger just compensation when taken by the government to satisfy the common good. By that reasoning, taxpayers would be entitled to compensation in the exact amount that they pay the government.¹⁰⁶ Their property, after all, has been taken to serve the common good. Without a sense of scope, the Compensation Clause loses its meaning. More important, the many limitations in the clause's language—the property referenced is "private property," the type of use that is problematic is "public use," the compensation owed is "just compensation"—eliminate the possibility of such a facile analysis.

Historical context offers some clues as to the possible scope of the Compensation Clause, revealing that the founding generation likely had a relatively narrow conception of the compensation requirement. Prior to the Revolution, no colonial charter required just compensation when private property was taken for public use.¹⁰⁷ Though it was never required, legislatures confiscating developed land at times compensated the landowners or allowed a jury to award compensation, and only Massachusetts' legislature awarded compensation for the taking of

¹⁰⁴ Joyce Appleby, *Liberalism and the American Revolution* 49 NEW ENG. QUARTERLY 3 (1976).

¹⁰⁵ Amar, *THE BILL OF RIGHTS*, *supra* note 45, at 78 ("Far more dramatic support for the clever-bundling hypothesis comes from the fact that unlike every other clause in the First Congress's proposed Bill, the just-compensation restriction was not put forth in any form by any of the state ratifying conventions.").

¹⁰⁶ See generally Peñalver, *supra* note 2 (arguing that the minority view that the Compensation Clause imposes substantial limits on taxation "flew in the face of settled constitutional orthodoxy, which since the founding era has understood the state's power to tax as being virtually plenary").

¹⁰⁷ William Michael Treanor, *The Original Understanding of the Takings Clause*, Environmental Policy Project, Georgetown Law Center (2010).

unimproved land.¹⁰⁸ Critically, compensation in these early instances was awarded at the legislature's discretion.¹⁰⁹

Some individual state constitutions provided compensation for government takings in the early decades after the nation's founding, without any language indicating the intended scope of the provisions.¹¹⁰ Implementation of these provisions never extended beyond the physical occupation or confiscation of real and personal property.¹¹¹ These circumstances have led scholars to believe that the Compensation Clause was originally intended and understood as extremely narrow with respect to which rights it protected as well as what constituted a taking.¹¹² St. George Tucker's early commentary posits that it was specifically intended to address the impressment of supplies for the army. It was not until 1828 that anyone even raised the notion that the compensation principle applied

¹⁰⁸ Treanor, *supra* note 102, at 695; *but see* James W. Ely, Jr., "That Due Satisfaction May Be Made:" *The Fifth Amendment and the Origins of the Compensation Principle*, 36 AM. J. LEGAL HIST. 1, 3-17 (disputing Treanor's analysis).

¹⁰⁹ Ely, *supra* note 108, at 4-17 (providing examples of colonial and early American practice of eminent domain and compensation).

¹¹⁰ Vermont was the first state to constitutionalize a just compensation requirement. *See* Treanor, *supra* note 102, at 702-03 (explaining that Vermont's early political tendencies and its Constitution of 1777 were heavily influenced by New York's frequent attempts to expropriate from landowners lands granted by New Hampshire and that Vermont's conflicts with New York made it one of the most liberal states in terms of protecting individual rights against the legislatures, and even it paid compensation only for land seizures). Massachusetts, bitterly divided on the questions of debt collection and loyalist property, included a just compensation clause in its 1780 Constitution, and the 1787 Northwest Ordinance, motivated by a fear that future legislatures would revoke prior land grants, included one as well. *Id.* at 706-07 (citing Mass. Const. of 1780, part I, art. X and Northwest Ordinance of 1787, art. 2).

¹¹¹ *Gedney v. Tewksbury*, 3 Mass. 307 (1807) (taking of privately owned land for public road); *Perry v. Wilson*, 7 Mass. 393 (1811) (taking of lumber for a canal project).

¹¹² Treanor, *supra* note 102, at 710-11, observes:

[T]he clause would explicitly bar the uncompensated taking by the national government of chattel and real property; this bar was the same one that had earlier been imposed in Vermont, Massachusetts, and the Northwest Territories. Although a broader reading would not do violence to the text, the reading suggested here is fairly narrow in terms of legal consequences. Madison seems to have taken a rather limited view of what legal rights such a clause created: He intended the clause to apply only to direct, physical taking of property by the federal government. Contemporaneous observers also viewed the Fifth Amendment in this way: It applied only to the federal government, it concerned direct takings of property, and did not for example, bar the federal government from interfering in contracts.

to incorporeal rights.¹¹³ In short, what evidence exists as to the original intention and understanding of the Takings Clause indicates that it should be read not as a broad rights protection but, to the contrary, as a narrow protection against the confiscation of land and chattels, certainly exclusive of intangible rights such as patents.¹¹⁴ This understanding is consistent with the broader theoretical constructs of the time. The conceptualization of rights when the Compensation Clause was drafted in the late 18th century divided rights into core, private rights—consisting of tangible items such as land and chattel—and public rights arising from an action of the government. The “private property” referenced in the Compensation Clause falls squarely within the first category, and in no way would have been understood as encompassing something as intangible as a patent.

II

THE LANGUAGE ITSELF: TEXTUAL & STRUCTURAL ANALYSIS

Beyond the dusty writings of centuries-old jurists and politicians, the Constitution, itself, is no less clear in its exclusion of patents from the category of private property. Thus, this Part addresses the written Constitution’s text and structure in order to establish the status of invention patents according to the document. This Part begins by parsing the language of Article I’s Patent and Copyright Clause. Reading its text alone and in context, it highlights the Constitution’s presumption that knowledge is freely useable by all, and it documents the utilitarian objective for patent law.

¹¹³ *Id.* at 711 n.98; *Enfield Toll Bridge Co. v. Connecticut River Co.*, 7 Conn. 28, 52 (Conn. 1828) (Dagget, J., concurring). See discussion *infra* Section III.A, concerning compensation claims for incorporeal rights.

¹¹⁴ John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1253-57 (1996) (using colonial land use regulation to argue against regulatory takings doctrine); Bernard Schwartz, *Takings Clause—“Poor Relation” No More?*, 47 OKLA. L. REV. 417, 418-19 (1994) (presenting an originalist argument that the Takings Clause was meant to cover only direct, physical takings); William Michael Treanor, *The Original Understanding of the Takings Clause and The Political Process*, 95 COLUM. L. REV. 782, 783 (1998) (“While the evidence of original intent is limited, it clearly indicates that the Takings Clause was intended to apply only to physical takings.”). *But see* Gold, *supra* note 10, at 182 (arguing that a theory limiting the Compensation Clause to direct, physical takings is not supported by historical evidence from the ratification period). Because it argues that patents are not the “kind of thing” that the Compensation Clause contemplates, this article need not take a position as to whether regulatory takings claims are entirely unfounded or whether the diminution of value theory, now enshrined in caselaw, has any historical basis. For present purposes, the question of “what is a taking” matters only to the extent that informs the question of “what cannot be taken without compensation.”

Section B considers the Constitution’s organization and allocation of power. It discredits the possibility of patents being private property by showing that the theory generates the untenable implications of restricting Congress’s discretionary powers. Section B then explains how the Patent and Copyright Clause’s enumeration in Article I, Section 8 is evidence that patents are not private property in the constitutional sense. Finally, this Part addresses the text and legislative history of 35 U.S.C. §261, a provision of the 1952 Patent Act, in order to dismiss the possibility that Congress sought to “propertize” patents to the point of extending Compensation Clause protection to them.

A. Constitutional Text—The Patent Clause

Article I, Section 8 empowers Congress to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]”¹¹⁵ As a shorthand, this Section will refer to that clause of Article I, Section 8 as the Patent Clause, rather than the Patent and Copyright Clause. Moreover, one should note that in historic context, “Science and useful Arts” did not have the meaning one might expect in a modern context. Science actually referred to copyrights and useful arts referred to patents.¹¹⁶

On its face, the Patent Clause loudly conveys its premise and its purpose. First and foremost, in giving Congress the power to hand out patents only for limited times and limited purposes, the Constitution’s text strongly suggests that knowledge is presumptively in the public domain. The underlying assumption is that, in the absence of a government grant of exclusivity, existing knowledge is freely useable by all.¹¹⁷

The dichotomy between rights in an invention, granted by Congress, and private property rights is bolstered by the fact that the clause, itself, restricts the nature of the right that Congress may hand out as secured for “limited Times.” As a starting point, rights in land and chattel are not so naturally limited, but usually

¹¹⁵ U.S. CONST. ART. I, §8.

¹¹⁶ See L. Ray Patterson, *Understanding the Copyright Clause*, 47 J. COPYRIGHT SOC’Y U.S.A. 365, 367 & n.6 (2000).

¹¹⁷ See *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 9 (1966) (“The grant of an exclusive right to an invention was the creation of society—at odds with the inherent free nature of disclosed ideas . . .”).

exist in permanence. The contrast with core property rights such as land is further evidenced by the limiting rationale in the Constitution's language. The Constitution empowers Congress to grant patents for a specific purpose, that is, "to promote the Progress of . . . useful Arts." Although other countries' intellectual property laws are less consistently utilitarian,¹¹⁸ from the Founding to the present, the "incentive rationale" for patents has been, with some equivocation in the late 19th and early 20th century,¹¹⁹ a position of consensus in the Anglo-American tradition.¹²⁰

In contrast, one scholar who advocates for the patents-as-property theory, focuses on the Patent Clause's use of the term "securing." Referencing dicta from the 1878 Court of Claims case of *McKeever v. U.S.*,¹²¹ Mossoff points to the securing language as evidence that the drafters viewed patents and copyrights as

¹¹⁸ Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 CHI. L. REV. 411, 415-16 & n.18 (1983) (contrasting the Anglo-American reliance on the "incentive rationale" with "continental systems," which prioritize creators' rights, at least in the case of copyrights, "out of respect for the labors of the individual artist.").

¹¹⁹ See discussion *infra* Sections III.B., III.C. (evaluating the emergence of the patents-as-property theory in the late 19th and early 20th centuries).

¹²⁰ See, e.g., Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in 13 THE WRITINGS OF THOMAS JEFFERSON 326, 334-35 (Albert Ellery Bergh ed., 1905) (declaring that the "embarrassment of an exclusive patent" is justified only because these "monopolies of invention" serve the "benefit of society"); I WILLIAM C. ROBINSON, THE LAW OF PATENTS FOR USEFUL INVENTIONS §38 (1890) (seminal patent treatise of the late 1800s explaining that, "[t]he duty which the state owes to the people to obtain for them, at the earliest moment, the practical use of every valuable invention in the industrial arts is . . . a higher and more imperative duty than which it owes to the inventor"); *Woodbridge v. United States*, 263 U.S. 50, 55 (1923) ("The purpose of the clause of the Constitution concerning patents is in terms to promote the progress of science and the useful arts and the plan adopted by Congress in exercise of the power has been to give one who makes a useful discovery or invention a monopoly in the making, use and vending of it for a limited number of years Congress relies for the public benefit to be derived from the invention during the monopoly on the natural motive for gain in the patentee to exploit his invention and to make, use, and vend it or its product or to permit others to do so, for profit."); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the [patent and copyright] clause . . . is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"); Baird, *supra* note 118, at 415 ("Individuals are given a limited property right, not so much because they are morally deserving, but because providing them with such a right is thought necessary to induce them to produce the work in the first instance.").

¹²¹ *McKeever v. U.S.*, 14 Ct. Cl. 396 (1878). See *infra* Section III.B. As explained below, both property takings and patent infringement are claims "sounding in tort." Because the Court of Claims' jurisdiction did not extend to tort cases against the government until the 20th century, *McKeever*'s strict legal holding was necessarily limited to its finding of an implied contract violation.

“core” private rights and not discretionary grants conferred for policy reasons.¹²² Put differently, he suggests that the drafters intended for Congress’s role to be that of protecting a pre-existing, fundamental right.

That argument requires reading what is undeniably a grant of legislative power as a restriction on it. To justify such an interpretation, one would have to read Section 8 not as giving Congress power to grant a benefit, but rather as directing Congress to protect an existing right and limiting Congress’ ability to encroach on that pre-existing right. In other words, it does not merely claim a limitation to the extent of the enumeration; it entails that the Clause is prohibitory like those found in Article I, Section 9.¹²³ It requires quite a stretching exercise to read such an interpretation into the constitutional language that begins with “Congress shall have Power . . . to promote the Progress of Science and useful Arts.”

Looking at the Clause’s origin in the Constitutional Convention, little can be concluded from the choice of the term, “secure.” The Patent and Copyright Clause appears to have been conceived on August 18th, 1787, towards the end of the Philadelphia Convention, flowing from proposals from both James Madison and Charles Pinckney.¹²⁴ On that day, James Madison offered several proposals to be added to the powers of the “General Legislature,” including: “To secure to literary authors their copyrights for a limited time” and “To encourage by premiums & provisions, the advancement of useful knowledge and discoveries.”¹²⁵ On the same day, Charles Pinckney advanced proposals of his own, including:

“To establish seminaries for the promotion of literature and the arts & sciences”

¹²² Mossoff, *Mistaken Patent Classification*, *supra* note 43, at 2599; *McKeever*, 14 Ct. Cl. at 420-21 (“The language of the Constitution, on the contrary, confers upon Congress the power of ‘securing’ ‘to inventors the exclusive right to their’ ‘discoveries.’ Congress are not empowered to grant to inventors a favor, but to secure to them a right. And the term ‘to secure a right’ by no possible implication carries with it the opposite power of destroying the right in whole or in part by appropriating it to the purposes of government without complying with that other condition of the Constitution, the making of ‘just compensation.’”) (emphasis omitted).

¹²³ U.S. CONST., art. I, §8.

¹²⁴ Karl Fenning, *The Origin of the Patent and Copyright Clause of the Constitution*, 11 J. PAT. OFF. SOC’Y 438, 441 (1929).

¹²⁵ II THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 324-25 (Max Farrand ed., 1911) [hereinafter 1787 FEDERAL CONVENTION RECORDS].

“To grant charters of incorporation”

“To grant patents for useful inventions”

“To secure to Authors exclusive rights for a certain time”

“To secure the payment of the public debt”

“To secure all creditors under the New Constitution from a violation of the public faith when pledged by the authority of the Legislature” [and]

“To grant letters of mark and reprisal”¹²⁶

Neither Madison’s nor Pinckney’s proposals, as recorded, suggest either that the word “secure” indicated a fundamental right, pre-existing government or that patents were so conceived. Pinckney’s proposals used the word “secure” to refer to payments of the public debt, as well as to paying creditors. Neither would have been conceived as pre-existing, fundamental rights.¹²⁷ Moreover, neither one of their proposals used the term “secure” in relation to patents; Pinckney’s used “grant” for patents, also using “grant” in referencing charters of incorporation, and Madison simply wrote “to encourage by premiums and provisions.” None of that language suggests a natural or pre-existing right of inventors to patents. Only with copyrights did both Madison and Pinckney use the term “secure,” and both proposals referred to a limited time, with Madison saying, “a limited time” and Pinckney saying, “a certain time.” As described above,¹²⁸ a time-limited right is inconsistent with the notion of pre-existing or natural rights. There is simply no evidence that the drafters associated the word “secure” with fundamental rights, and the fact that one of the Patent Clause’s architects introduced the proposal along with one to “secure the payment of the public debt” indicates just the opposite.

The convention adopted in substance both Pinckney’s and Madison’s proposals.¹²⁹ On September 5th, the “Committee on Postponed Parts,” also known as the “Brearley Committee”—which was tasked with formulating language for the outstanding provisions that the Convention had assented to, but had yet to finalize—reported to the Convention several draft clauses, including the language

¹²⁶ *Id.* at 325-26. According to Farrand, the latter two were likely among a group of proposals suggested by Elbridge Gerry, John Rutledge, and George Mason. *Id.* at n.4.

¹²⁷ See *supra* text accompanying notes 37-41.

¹²⁸ See *supra* text accompanying notes 117-120.

¹²⁹ II 1787 FEDERAL CONVENTION RECORDS, *supra* note 125, at 324-25.

of what is now the Patent and Copyright Clause.¹³⁰ That language merged the patent and copyright language of Pinckney's and Madison's approved provisions, as well as their utilitarian ambition of promoting artistic and scientific progress, resulting in the familiar Article I language, "Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Despite the melding of the patent and copyright language and the use of "secure" for both, neither Pinckney nor Madison discussed or objected to the language, although they had much to say on other portions of the Brearley Committee's drafting.

The reason why "secure" was used in connection with copyrights and "grant" with patents is probably reduceable to the difference between the operation of copyright and patent statutes. Since Parliament passed the first copyright law, the Statute of Anne, in 1710, copyright laws to this day have made copyrights generate automatically upon the creation of a creative work.¹³¹ Patent laws, by contrast, have always required some kind of grant before a legally enforceable right exists. Both forms of protection are based in statutes, and the two statutes simply operate differently. The delegates at Philadelphia would have had these differing approaches in mind and may have (correctly) anticipated that American laws would not depart from this model.

One could speculate—as the patents-as-property argument would require—that the Brearley Committee somehow were persuaded that patents and copyright both were pre-existing fundamental rights, that the Committee used the term "secure" to indicate that conclusion (despite also making those rights time-limited), and that Madison and Pinckney were convinced of the truth of this position, thereby choosing not to object. Or ...one could speculate that Madison and Pinckney attached little significance to the words "secure" and "grant," and,

¹³⁰ *Id.* at 505; David S. Schwartz, *Recovering the Lost General Welfare Clause*, 63 WM. & MARY L. REV. 857, 912 (2021). On the Brearley Committee's role in the convention, *see id.*; CALVIN C. JILLSON, CONSTITUTION MAKING: CONFLICT AND CONSENSUS IN THE FEDERAL CONVENTION OF 1787 169-70 (1988), ProQuest (ebook).

¹³¹ An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned, 8 Ann. c. 21 (1710) (commonly known as the Statute of Anne); Copyright Act of 1790, Pub. L. 1-15 (1790) (modeled closely after the Statute of Anne); Copyright Act of 1976, Pub. L. 94-553 (1976).

therefore, saw nothing to comment on when the Brearley Committee delivered their draft of that section. Either, of course, would be speculation, but one would think that if the Committee's decision to use "secure" with patents instead of Pinckney's "grant" represented a meaningful shift, there would have been at least some discussion. Unlike the Committee's other draft clauses, many of which were debated and amended, the Patent and Copyright Clause was approved apparently without a word of debate or second thought.¹³² Thus, the clearer and simpler approach is to maintain focus on the actual text and context of the Patent Clause, itself, which demonstrate that patents and copyrights are limited-time franchises, for a limited purpose, related to the public good.

B. Constitutional Structure

1. The Lesser Power

Attempting to classify patents as Fifth Amendment-protected private property would raise even more obvious constitutional flags. The first is the notion of the greater power including the lesser power. Putting aside the Compensation Clause's words or their meaning, it would make no sense for those words to apply to patents given that the nature of the power is such that Congress could decide not to create patent rights in the first place.

Specifically, Article I, Section 8 of the Constitution begins with the language, "Congress shall have Power" and then goes on to list many things Congress is given the power to do, including "To lay and collect Taxes, Duties, Imposts and Excises . . . To borrow Money on the credit of the United States . . . [and] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."¹³³ The language does not direct that Congress *must* do any of the things listed in Article I, Section 8.¹³⁴ For example, the Constitution cannot mean that Congress

¹³² II 1787 FEDERAL CONVENTION RECORDS, *supra* note 125, at 505, 509 (recording the Convention's assent to the Committee's Patent and Copyright Clause in both the Convention Journal and Madison's notes).

¹³³ U.S. CONST., art I, §8.

¹³⁴ One should note that the Constitution used directive language when it intended to tie Congress' hands in a particular manner. *Compare id.* art. I, §4 ("The Congress *shall assemble* at least once in every Year . . ."); *id.* art. I, §5 ("Each House *shall be the Judge* of the Elections, Returns and Qualifications of its own Members . . ."); *id.* art. I, §6 ("The Senators and Representatives *shall receive* a Compensation for their Services, to be ascertained by Law. . ."); and *id.* art. IV, §4 ("The United States *shall guarantee* to every State

is required to borrow money or required to collect taxes and excises. Surely if Congress wanted to operate without borrowing money or to have no duties on imported goods, Congress could so choose, just as it could have chosen not to create a patent system.

The greater right to do something or not to do something contains within it the lesser right to do so in a limited manner. These cannot simply be light switch powers, that Congress can exercise only by choosing to turn them on or off. In other words, it would make no sense to conclude that Congress, with all of its power over patent law, cannot paint with a finer brush. Of course, Congress cannot violate other constitutional provisions, such as the Equal Footing doctrine, Due Process Clause, or Equal Protection Clause, in the exercise of this power. And the doctrine of Unconstitutional Conditions would remain.¹³⁵ But where the condition does not prejudice a different constitutional right or principle and, instead, merely circumscribes a privilege that Congress does not have to grant in the first place, logic compels against forcing Congress to choose between granting a broader privilege than it wishes to or none at all.¹³⁶

For example, Congress could choose to declare a tax holiday during a pandemic. The very fact that an inventor needs to apply for a patent before acquiring any legal rights is a condition in the same way. The Fifth Amendment's Compensation Clause could not logically apply automatically to a type of right that is discretionary in the first place.

in this Union a Republican Form of Government, and *shall protect* each of them against invasion . . ."); *with id.* art. I, §8 ("The Congress *shall have Power To* . . ."). In other words, the Framers knew how to be directive when they wished, a pathway not chosen for Article I, Section 8.

¹³⁵ For an overview of the doctrine, see, e.g., *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960). A general formulation of the unconstitutional conditions doctrine is as follows: "When a government entity conditions the receipt of a benefit on a person's agreement to give up a constitutional right, it violates the Constitution in the same way as if it had denied the right in the first instance." Christopher M. Kieser, *What We Have Here Is A Failure to Compensate: The Case for A Federal Damages Remedy in Koontz*, "Failed Exactions," 40 WM. & MARY ENV'T. L. & POL'Y REV. 163, 165 (2015).

¹³⁶ Because an unconstitutional conditions counterargument is tempting wherever conditions exist, it is worth pausing, here, to clarify which conditions are and are not constitutional. Under the strongest formulation of the unconstitutional conditions argument, a condition is unconstitutional, *per se*, whenever the terms of the condition would be unconstitutional standing alone (i.e., not attached to a benefit). Brooks R. Fudenberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 UCLA L. REV. 371, 390 (1995) (defining the *per se* rule as, "Any restriction that would be unconstitutional, if it were not attached to a benefit, remains unconstitutional when it is attached to a benefit."). Despite this being obviously

2. *Surrendering Control*

If patents are private property for purposes of the Compensation Clause, it would also follow, to the argument's detriment, that patents are private property for other purposes. It almost goes without saying that the argument that patents are private property under the Compensation Clause is predicated on patents' actually being private property. Yet, treating them as such in other respects reveals just how misguided this position would be.

Treating patents as private property would suggest that the states could tax patents just as they tax real estate—not just taxing licensing income on the patents or the sale of the patents, but taxing the patent asset itself. In theory, there would be no limit to states' ability to tax patents—at a different rate from all other forms of property, if they please. To be sure, the Constitution almost certainly prohibits these kinds of state assaults on federal initiatives. At the surface level, the Dormant Commerce Clause and federal preemption would likely render unenforceable any state's attempt to tinker with the patent system as they tinker with property. But state regulation of patents is not merely restricted by federalism principles more than regulations of other rights are. Whereas federal courts generally defer to states'

fatally overbroad—it would, as Fudenberg points out, prohibit the government from requiring mailmen, as a condition of employment, to sacrifice some political speech in order to focus on their work—conditions that allegedly “take” patent rights are still in the clear. Conditions that patentees, for example, not sue certain infringers or seek certain remedies could not be unconstitutional in the first place, for the right at stake is born of and baked into the statutes that create them. It would be a different story if patentees were required to take a religious test or testify against themselves in criminal cases. But since there is no stand-alone constitutional right to a patent (or to its value or associated privileges), it is perfectly acceptable for Congress to attach strings that narrow the rights it affirmatively confers. Consider the difference between conditioning medical license renewal on the candidate's not donating to political campaigns and conditioning renewal on the candidate's submitting an application on time and paying a fee. Though the government is free to deny the benefit in its entirety, the former action may be unconstitutional. However, one cannot, without assuming the conclusion, argue that the latter is not acceptable. This is so because, as with the narrowing of patent rights, there is no base-line entitlement to that which the government asks the beneficiary (or would-be beneficiary) to give up.

definitions of property,¹³⁷ states are entirely left out of the process of defining, burdening, expanding, or contracting patent rights.¹³⁸

Similarly, accepting the patents-as-property theory would require Congress to surrender control over patent law to the courts in addition to the states. Rules about private property (doctrines like adverse possession, laches, and equitable tolling) are typically made by judges in a common law fashion.¹³⁹ For the reasons discussed above, courts and scholars have rightly affirmed that establishing unique systems for enforcing and adjudicating patent rights is within Congress's purview.¹⁴⁰ Indeed, the judges and scholars behind those decisions explicitly point to the structural and historical differences between patents and property.¹⁴¹ To group them together, now, would either pull the rug out from much of America's patent regime or else require adopting the doubtful position that patents are private

¹³⁷ See, e.g., *Aquilino v. United States*, 363 U.S. 509, 512-13 (1960) ("The threshold question in this case, as in all cases where the Federal Government asserts its tax lien, is whether and to what extent the taxpayer had 'property' or 'rights to property' to which the tax lien could attach. In answering that question, both federal and state courts must look to state law, for it has long been the rule that 'in the application of a federal revenue act, state law controls in determining the nature of the legal interest which the taxpayer had in the property sought to be reached by the statute.'"); *id.* at 513 n.3 ("It is suggested that the definition of the taxpayer's property interests should be governed by federal law, although supplying the content of this nebulous body of federal law would apparently be left for future decisions. We think that this approach is unsound because it ignores the long-established role that the States have played in creating property interests and places upon the courts the task of attempting to ascertain a taxpayer's property rights under an undefined rule of federal law. It would indeed be anomalous to say that the taxpayer's 'property and rights to property' included property in which, under the relevant state law, he had no property interest at all.").

¹³⁸ See Feldman, *Federalism*, *supra* note 44, at 32 ("[T]he role of the states [in patent law] has been relegated to little more than the curtailment of active fraud ... resulting in a positive chokehold on any state activity.").

¹³⁹ Mossoff, *Mistaken Patent Classification*, *supra* note 43, at 2597 ("entails rights and duties defined, secured, and adjudicated by courts in classic common law doctrines like contract, tort, and property.").

¹⁴⁰ See Nelson, *supra* note 20, at 594 ("The disposition of public rights still does not trigger the same need for judicial involvement as the disposition of private rights that have vested in individuals, and Congress can authorize nonjudicial adjudication of the statutory privileges that it itself creates to a far greater extent than it can authorize nonjudicial adjudication of traditional rights..."); *Oil States Energy Servs.*, 138 S. Ct. at 1374 ("[G]ranting patents is one of 'the constitutional functions' that can be carried out by 'the executive or legislative departments' without 'judicial determination.'" (citing *Crowell v. Benson*, 285 U.S. 22, 50-51 (1932))).

¹⁴¹ See, e.g., Nelson, *supra* note 20, at 594-95 ("[I]t had been common for Congress to give the President or other executive officials broad authority to make certain kinds of decision [including over] ... patents [but] these delegations did not intersect much with core private rights"); *Oil States Energy Servs.*, 138 S. Ct. at 1373 ("This Court has recognized, and the parties do not dispute, that the decision to grant a patent is a matter involving public rights—specifically, the grant of a public franchise.").

property *only* for purposes of the Compensation Clause. On the one hand, the origin of patents indicates that they are not private property. And on the same hand, the dubious implications of treating them as such counsel against doing so. The very nature of patents as creatures of federal statutory law reveals unavoidable categorical differences between patents and private property.

3. *Enumeration in Art. I, §8*

Underscoring each of the above observations concerning the text of the Patent Clause is the very fact that the clause exists. That is, the enumeration of a power to issue patents indicates an assumption on the part of the clause's authors that there was no natural right to property in one's invention. The Constitution never says, Congress shall grant (or even secure, for that matter) life, liberty, or property. Those were assumed to be rights that exist prior to, and independent of, the government. If patents were grouped as part of life, liberty, or property, why would the Framers have felt the need to write that the government had the power to grant patents and leave the other ones out? From another perspective, even if one is the first inventor, one does not have any rights at all without obtaining a patent through the prescribed process from the government. The federal government being one of limited and enumerated powers, it follows that listed powers would not exist in the absence of being listed.

In general, it falls on the states to safeguard life, liberty, and property.¹⁴² The Constitution does list many of Article I's powers specifically to shift powers from the state governments to the federal government, such as coining money and setting up post offices. One might, as a stretch, argue that the Constitution was intended to shift patents from the state to the federal government, even though it was part of life, liberty, and property. If that were true, however, it would require concluding that the Framers somehow chose to treat patents as different from every other recognized private right, and that somehow, patents were either more important or more vulnerable than life, liberty, land, or chattel.

¹⁴² This is so because the state governments, as the 10th Amendment reminds, retain the general powers of government not delegated exclusively to the federal government. *See* U.S. CONST., amend. X. They, unlike the federal government, bear the primary responsibility for safeguarding the core private rights of life, liberty, and property. The ratification of the 14th Amendment did effect important changes in the Constitution's federalism structures, especially in the way of protecting and enforcing individual rights. However, for this to affect the status of patents as non-private rights under the Constitution, it would need to be independently true that patents were (or were thought of) as private rights.

Moreover, when the Constitution wants to protect life, liberty, and property from states that have conflicting laws, it does so in another place, Article IV, specifically Sections 1 and 2. These clauses are, to use later-Chief Justice Chase's wording, "Clauses of Compact."¹⁴³ Those sections of Article IV secure citizens of the several states in their life, liberty, and property by anticipating and settling differential treatment by state laws. Article IV shows that the Framers had a mechanism—and a location in the Constitution—for defining rules by which interstate conflicts could be overcome and interstate justice could be applied, particularly in regards to life, liberty, and property.¹⁴⁴ Article IV, Sections 1 and 2 functioned more as a "treaty"¹⁴⁵ to harmonize both public and private rights across the several states. If the Framers intended for the Patent Clause to fulfill that goal, it would have been included in Article IV, as with every other kind of property. One would not have needed to call Patents out, and especially not in Article I, of all places.

Turning this constitutional feature on its head, one commentator, relying heavily on the *McKeever* court's analysis, has argued that the Patent Clause's location is evidence of a unique status that patents hold in American Law.¹⁴⁶ The theory is based on the fact that patent rights were traditionally conferred by the executive (if the monarch can be pigeon-holed into that category), whereas in America, the power lies with the legislature. In the former, the Crown issued patents by way of Royal Prerogative, whereas in the United States, the executive has almost no say in patent law.¹⁴⁷ The shift from the executive to the legislature, so the theory

¹⁴³ Salmon P. Chase, Speech of Salmon P. Chase in the Case of the Colored Woman, Matilda, Who was Brought Before the Court of Common Pleas of Hamilton County, Ohio, by Writ of Habeas Corpus, 19 (Mar. 11, 1837).

¹⁴⁴ *Id.* at 22 ("Aware of this, the framers of the constitution annexed to this first clause, a second, specially providing that congress might 'prescribe, by general laws, the manner in which such acts, records, and proceedings [of other states] shall be proved, and the effect thereof.'"); see also Randy E. Barnett, *From Antislavery Lawyer to Chief Justice: The Remarkable but Forgotten Career of Salmon P. Chase*, 63 CASE W. RES. L. REV. 653, 659-61 (2013).

¹⁴⁵ See Chase, *supra* note 143, at 19 ("[One] object [of the constitution] was to adjust and settle certain matters of right and duty, between the states and between the citizens of different states, by permanent stipulations having the force and effect of a treaty.").

¹⁴⁶ Mossoff, *Patents*, *supra* note 20, at 706 (summarizing *McKeever*, 14 Ct. Cl. at 420).

¹⁴⁷ *Id.* (arguing that the shift from Crown to Congress "suggested [the Framers] viewed patents as important property rights secured by the people's representatives, not as a special grant issued by the prerogative of the Executive.").

goes, is an indication that the Framers recognized that their conception of patent rights as natural, non-discretionary rights differed from English law.¹⁴⁸

Although the decision to place control over patents in Congress instead of the President (if that were the Constitution's motive at all) would certainly be noteworthy, it would by no means justify the natural rights conclusion. The Constitution confers many powers in Congress that the Crown exercised in England, but this says nothing about the nature of the powers. In England, coining money,¹⁴⁹ taxing,¹⁵⁰ establishing courts,¹⁵¹ and declaring war were all within the King's power.¹⁵² All of these powers were given to Congress in Article I, but that doesn't mean things like coining money and establishing courts were somehow natural rights or core, property rights.¹⁵³ In other words, one cannot make the leap to core private rights solely from a formerly monarchical power's being given to Congress. Article I and the powers therein are simply the

¹⁴⁸ *Id.* (citing *McKeever*, 14 Ct. Cl. at 420 (“[The Framers] had a clear apprehension of the English law, on the one hand, and a just conception, on the other, of what one of the commentators on the Constitution has termed ‘a natural right to the fruits of mental labor.’ Instead of placing our patent system upon the English foundation of executive favor and conferring that prerogative of the Crown upon the President, they transferred all authority to the legislative department of the government (the department which regulates rights), by placing it among the specially enumerated powers of Congress.”)).

¹⁴⁹ Phyllis Lachs, *Advise and Consent: Parliament and Foreign Policy Under the Later Stuarts*, 7 ALBION 41, 52 (1975).

¹⁵⁰ Edward Ames & Richard Rapp, *The Birth and Death of Taxes: A Hypothesis*, 37 J. ECON. HIST. 161, 163-64 (1977).

¹⁵¹ III BLACKSTONE, *supra* note 31, at 76.

¹⁵² Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1032 n.166 (2011).

¹⁵³ Referring to the Patent and Copyright Clause Madison wrote:

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provisions for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.

THE FEDERALIST NO. 43 (James Madison). The most natural reading of Madison's exposition is that the reason for including patents in Article I was to shift the power from the states to the federal government. Madison, himself, seems to assume at once patents' utility and naturality, for in his mind, they coincided. Whether or not he overstated the common law-ization of copyrights or improperly extended the assumption to patents, it is clear that patent-power resides in Congress for purposes of coordination. Any uncertainty on Madison's part regarding the nature of copyrights and patents may very well be a reflection of the uncertainty expressed by Blackstone (whom Madison likely read). See *supra* text accompanying notes 81-83.

product of republicanism—the desire to place lawmaking power in a legislature accountable to the People—and federalism—the desire to place powers in the national government while leaving others to the states.

The erroneous Crown-to-Congress theory reflects a profound misunderstanding of the Constitution’s implementation of federalism and separation of powers. Neither concept even existed in the English government. In this case, to equate the King (who exercised significant legislative and judicial authority) to the Executive is to project the outline of uniquely American principles onto institutions to which they cannot apply. The inference misses the fact that Article I, and really the entire Constitution, should not be read merely as horizontally reallocating the various powers of the English government; it must be read as responding to shortcomings of both the English monarchy and the Articles of Confederation. Quite simply, the “Crown-to-Congress” theory requires taking the Constitution out of its historic context.

C. §261: What it Does Not Mean

Part I of this article—which discussed the difference between private property rights and public ones, including patents—leaves open the question of Congress’s ability to create a property right and, specifically, to make it private or “core.” Even if the Constitution did not treat patents as core, private rights, could a later Congress change that viewpoint, transforming the nature of patents from a public—that is, government created—right to a core, private right within the constitutional framework? Again, the federal government creates all manner of property-like rights, from welfare benefits to radio broadcast licenses, resource extraction rights in federal land leases to hunting rights in Indian treaties. The strength of these rights, so to speak, the conditions and recourses associated with them are, by virtue of their origin in the political process, baked into whatever source of law gives them legal force, be it a treaty, statute, or contract. Thus, for the bearer of any congressionally created right who claims Compensation Clause protection for that right, the threshold question is whether the right Congress created is private.

Whether and to what extent Congress may even create a private right is a deceptively difficult question. On the one hand, there are obviously instances in which Congress *hands out* private property rights. Any time the federal government issues fee simple title to land to a private person, Congress grants private property

rights. And when the land is in a federal territory, there must be a federal statute at the source of whatever property laws and courts give it force. On the other hand, one could argue that any relevant statutes do not *create* the property rights but merely take a right, which arises naturally or in common law, and transfer it. Moreover, if Congress can create private property rights in, say, an exclusive broadcast license, the license's issuance might, by way of the compensation requirement, run into limits on Congress's ability to bind future Congresses.

Again, the mixed statutory and common law nature of most rights presents a problem for allowing the origin test to be entirely dispositive of a right's status as public or private. But given that, in the case of patents, constitutional origin weighs so decisively against recognition as a private right, a claim to the contrary should bear the burden of proving that Congress, in creating or amending the Patent Act, transformed their nature in a manner intended to carry the stronger protections of private property rights. And, because there is a constitutional right to compensation, to privatize the right would entail not just a waiver of sovereign immunity but an irrevocable one—a one-way ratchet, so to speak. So, even if one were to concede that a discretionary federal benefit could be constitutional private property if Congress desires, Congress's intention to "privatize" a right should not be lightly inferred.

Supposing, *arguendo*, that Congress can create private property rights, attaching to them the protections of the Compensation Clause, evidence that Congress sought to do so with patents at any point is underwhelming. Aside from the odd congressional report in which an author may speak of patents as if the Constitution offers them as much protection as it does land,¹⁵⁴ the only text codified in law that vaguely supports the proposition that Congress created a private

¹⁵⁴ The only one which has direct implications for present purposes is H. Rep. No. 61-1288 (1910), discussed *infra* Section III.C. The report summarizes amendments to the Tucker Act that establish a statutory cause of action for patent holders when the government infringes on a patent (now codified as 28 U.S.C. §1498). It is difficult to avoid the conclusion that the report's author believed that the Compensation Clause protected patents. Importantly, however, the legislation he discussed concerned a waiver of sovereign immunity rather than the nature and pedigree of the patent rights allegedly infringed by the government. See H.R. 24649, 61st Cong. (1910) (bill discussed in H. Rep. No. 61-1288 (1910) related to patent holders' rights against the government). See David R. Lipson, *We're Not Under Title 35 Anymore: Patent Litigation Against the United States Under 28 USC § 1498 (a)*, 33(1) PUBLIC CONTRACT L.J. 243, 244-46 (2003) (explaining the difference between patent holders' rights against the government versus against private parties).

property right in patents is in 35 U.S.C. §261, which became law with the Patent Act of 1952.

The first sentence of 35 U.S.C. §261 reads, “Subject to the provisions of this title, patents shall have the attributes of personal property.” Presumably, personal property is used here, in the same way it is ordinarily used in law, as synonymous with chattel.¹⁵⁵ One should note at the outset that the statute uses the term “personal property,” rather than the Compensation Clause’s term, “private property.” Nevertheless, the fact that private property often encompasses some forms of personal property¹⁵⁶ might lead one to think (with the help of much interpretive leg-work) that Congress, by transitivity, affixed the protections of the Compensation Clause to patents because the protections of private property are among the “attributes” of personal property. Mechanically, the argument seems to hold water, but it requires disconnecting its key premise, the first sentence of §261, from the rest of patent law and from reality.

One could engage in many forms of speculation about the import of those words. Perhaps the sentence supports the notion that Congress neither thought of nor intended patents to actually be personal property. After all, why would Congress give them merely *the attributes* of personal property if Congress intended to transform them fully into personal property or to declare their existence as such. It is as if by saying that they are *like* personal property, Congress differentiated them from things that *are* personal property. On the other hand, if one of the *attributes* of personal property is Compensation Clause protection, then it should not matter whether patents are or are not personal property; they would have that attribute. And, of course, the latter view glosses over the difference between §261’s words, “personal property,” and the Compensation Clause’s words, “private property.”

Making sense of “shall have the attributes of personal property” is actually quite easy. All one needs to do is view the sentence in light of the rest of §261. The section, enacted with the title, “Ownership and Assignment,” deals with ownership

¹⁵⁵ Personal property/chattel are typically defined in the negative as property rights not attached to real estate. *Personal Property*, BLACK’S LAW DICTIONARY (8th ed. 2004) (“Any movable or intangible thing that is subject to ownership and not classified as real property.”).

¹⁵⁶ *Horne v. Department of Agriculture*, 576 U.S. 350, 358 (2015) (“[The Fifth Amendment] protects ‘private property’ without any distinction between [real and personal property].”).

and assignment. The first sentence may, therefore, be given a reasonable meaning in light of the remainder of the section within which it resides. And it makes perfect sense to treat it as specifying that, *for purposes of ownership and assignment*, patents behave like personal property. The statute indicates, for example, that patents may be inherited in a will, form the res of a trust, and be bought and sold as other assets.¹⁵⁷ Further, it may entail that other state and federal law governing ownership and transfer of assets (say, federal tax law or states' contract law) would operate on patents as if they were automobiles. Earlier versions of the text that was eventually enacted corroborate this reading further. Simply put, §261 makes the most sense when read not as adding to or strengthening the rights conferred by a patent but simply as commodifying them so that the process of owning and transferring them can be accomplished through modern legal mechanisms. And, of course, the fact that Congress felt the need to insert that language in the first place suggests patents are not private property, or they would already enjoy all of those attributes.

The scant pre-enactment history of §261, if it reveals anything, only reinforces this conclusion. What is now 35 U.S.C. §261 first appeared in the law with the passage of the 1952 Patent Act, a major overhaul of patent law. Two prior drafts of the law contained similar but not identical provisions. The first bill, introduced in 1950, read, "Subject to the provisions of this title, patents shall be protected as and have the applicable rights of other property, and the rules of law applicable to the ownership and devolution of personal property generally shall apply to patents as they apply to other intangible property."¹⁵⁸ The following year, a revised bill was introduced, stating, "Subject to the provisions of this title, patents shall have the applicable rights of personal property."¹⁵⁹ Both of these bills died in the House, but the House judiciary committee did hold a hearing on the 1951 bill in which the personal property language was discussed.

¹⁵⁷ Cf. *Minerva Surgical, Inc. v. Hologic, Inc.*, 141 S. Ct. 2298, 2308-09 (2021) (in deciding whether to apply the equitable doctrine of assignor estoppel, the majority discusses how patents may be bought and sold).

¹⁵⁸ H.R. 9133, 81st Cong. § 211 (1950).

¹⁵⁹ *Patent Law Codification and Revision: Hearings before Subcomm. No. 3 of the Comm. on the Judiciary, First Session on H.R. 3760*, 82nd Cong. 13 (1951).

The hearing featured calls by witnesses to strengthen and weaken the language. Arguing against patents “hav[ing] the applicable rights of personal property,” a representative for the Department of Defense said,

Although patents have always been recognized as property, they have not been recognized as personal property but as having the attributes of several kinds of property. The opinion in *Solomons v. United States* (21 Ct. Clms. 479), points out wherein patents are a novelty in the law, certain respects wherein they differ from personal property, and certain similarities thereof to real property. It is not considered desirable to discard over a century of law relating to patent property and replace it with the rules of personal property.¹⁶⁰

On the other side, the patent lawyers testifying before the committee mostly urged for a stronger proprietary right. One testimony reads:

The first sentence seems to imply that in some degree, patents are not personal property. This is certainly contrary to the general conception and to the holdings of the courts up to this point.

Of course, if they are not to be considered property, that fact should be clearly stated as it would furnish a basis for the refusal to return them on personal property tax returns. On the other hand, if we follow the presently accepted theory, this sentence should be revised so as not to cast any doubt upon the fact that they are property.¹⁶¹

Another testimony seems to think that patents are property but that the law does not sufficiently recognize them in that manner:

I believe that it should be put into the statute appropriately the thought that a valid patent is property and not a monopoly. A valid patent must have as a basis creation of something new which did not exist before. Analogous to the building up of valuable property by hydraulic dredging, for example, to fill in swampland along a river, lake, bay, or the like, such

¹⁶⁰ *Id.* at 79.

¹⁶¹ *Id.* at 212.

property when created should belong to the creator. There is no question ever raised as to monopoly when real estate is created. But somehow through false propaganda it is the belief of many - and in the many are several of the judges who pass upon patents - that an owner of a patent is to be treated as any other monopolist.¹⁶²

As explained above, patent law really changed only in relation to ownership and interest, including taxation. For example, when the IRS places a lien on a taxpayer's property interests, §261 allows the lien to attach to patents, because for tax purposes, the patent is essentially just a valuable asset. One might speculate that the law's author had one of several possible motives, the most likely of which was probably to simply avoid contentious wording, but any conclusion drawn from this legislative history is almost certain to be highly tenuous. To that end, extra inferences as to §261's import are dubious. As proof that Congress meant to make patents subject to the Compensation Clause, §261's text and history fall far short of any reasonable standard of evidence of congressional intent.

III

JUDICIAL INTERPRETATIONS

The history of relevant judicial interpretations with respect to patents breaks down into four parts. Section A of this Part establishes the landscape by discussing similarly pled compensation claims for public rights other than patents. Although courts typically take the meaning and existence of "private property" for granted, in the few cases that directly present the question, courts have consistently affirmed that the rights protected by the Compensation Clause are those "inhering in the citizen's relation[ship] to the *physical thing*...."¹⁶³

Turning then to the earliest patent-specific compensation cases, Section B analyzes a cluster of late-19th century cases in which patent holders sued the government for patent infringement in the then-newly established Court of Claims. Section B concludes that none of these cases, though they sometimes allude to the question, offers authoritative holdings on the question of whether the Compensation Clause protects patents. Section C discusses the history and

¹⁶² *Id.* at 189.

¹⁶³ *United States v. General Motors*, 323 U.S. 373, 378 (1945) (emphasis added).

consequences of a 1910 law that provided a statutory cause of action for government infringement and thereby obviated the constitutional question of whether the government might be liable for patent infringement for nearly a century. These sections demonstrate that no authoritative holding controlled the question until far more recently. Accordingly, Section D evaluates the most recent and applicable cases that have, once more, broached the idea of patents as private property. To their credit, they weigh decisively against extending Compensation Clause protection to patents.

At the outset, one should note that the non-rivalrous nature of patents frustrates the comparison of patents to physical property in the Compensation Clause context. To illustrate the point, if I “take” your land or your cow, you do not have them and cannot use them. In contrast, if I infringe your patent by making, using, or selling your invention, you can still use your invention, and your ability to exclude others is unchanged. It is for this reason that the majority of cases dealt with in this Part do not, strictly speaking, involve the taking of a patent but the use thereof. In cases of government infringement, the patent holder retains her legal interest as to the rest of the world. It is as if the infringing government actor, by “taking a license,” is taking the equivalent of an easement without condemning the property. It is only in the current century that patent holders raised Compensation Clause claims related to “full-stop” takings of patents. In these cases, patent holders who unsuccessfully objected to patent law’s *inter partes* review (IPR) process did lose their entire “title,” and there is a clear difference between the government’s taking or transferring title to property and destroying the title altogether. The revocation of a patent is more like declaring the invention’s status to be as it was before the errant patent was granted than it is to a “taking for public use.” The government’s taking ownership of a patent would really be more like a law requiring all members of the public to obtain a government-issued license to manufacture the invention, but such a requirement, when enforced by the government, hardly feels like a patent. The result of this disjunction is that in many of the claims for patent takings, it is not clear that a taking actually occurred.

A. *Takings Claims for Other Public Rights*

The backdrop against which these cases contemplate patent takings is, although minimal, clear and important. As the introduction mentioned, courts typically take “private property” for granted when evaluating takings claims but

are periodically faced with a Compensation Clause claim over an “unusual” type of property right. In such cases, courts are usually quick to remind plaintiffs that the Fifth Amendment is concerned with rights attaching to physical things. Accordingly, this Section identifies cases in which compensation is sought for intangible, “property-like” rights. It finds no doctrinal basis that can be naturally extended to justify requiring compensation for patents.

The earliest cases that have potential relevance are a group of decisions concerning states’ ability to undo exclusive franchises. Most involve a state’s granting of an exclusive franchise to one corporation and the state’s subsequent grant of a franchise to another, thereby cutting into the revenue expected by the first. These cases, one should keep in mind, directly involve neither patents nor the federal Constitution’s Compensation Clause,¹⁶⁴ but they are an important source in terms of relevant constitutional principles. The most famous of these is *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*.¹⁶⁵ Notwithstanding Justice Story’s powerful dissent focused on the impairment of contracts, the Court firmly declared:

[T]he object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed, that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade, and are essential to the comfort, convenience and prosperity of the people. A state ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished. And when a corporation alleges, that a state has surrendered, for seventy years, its power of improvement and public accommodation, in a great and important line of travel, along

¹⁶⁴ See Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 268 & n.4 (1988) (noting that, prior to the Fourteenth Amendment’s incorporation of the Fifth Amendment, the Fifth Amendment’s protections applied only to the federal government (*Barron v. Baltimore*) and that takings claims against states, therefore, had to rest on other provisions of law, such as the Contract Clause of Article I, Section 10).

¹⁶⁵ See generally *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837).

which a vast number of its citizens must daily pass, the community have a right to insist, in the language of this court, above quoted, ‘that its abandonment ought not to be presumed, in a case, in which the deliberate purpose of the state to abandon it does not appear.’¹⁶⁶

In a few cases, state judges found that revocation of franchises constitutes a taking under state law, as opposed to federal law, sometimes referring to the franchise as intangible property and requiring compensation.¹⁶⁷ Even in the early 19th century, notable dissenters fought the dominant view that there could be “no taking without a touching.”¹⁶⁸ Because the Compensation Clause did not operate against states, takings claims for intangible property rarely arose in federal court. And critically, when they did, they were of an altogether different posture. In *West River Bridge Company v. Dix*, for example, the Supreme Court allowed the state to take a bridge by eminent domain and specifically left it to the state to determine what compensation was required under state law.¹⁶⁹ One might read *West River Bridge* as evidence of the proprietary nature of franchises within eminent domain law (assuming also that all franchises are the same for eminent domain purposes), but that conclusion misses the point. The federal constitutional question in *West River Bridge* was whether the state could seize a franchise for the public good without running afoul of the Contract Clause. Centering the case around that question, the unequivocal takeaway is that public benefits awarded by the state are presumably subordinate to subsequent actions taken in the name of the public good. Later, where a bridge franchisee claimed that the Secretary of War’s subsequent order to alter the bridge’s clearance level revoked the franchise, the Supreme Court rejected the franchisee’s claim to Fifth Amendment compensation.¹⁷⁰

Other cases involving intangibles are even clearer. The Supreme Court, for example, has held that the value of grazing permits does not constitute a

¹⁶⁶ *Id.* at 547-48 (quoting *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514 (1830) (allowing the state to tax a bank that it earlier chartered)).

¹⁶⁷ See, e.g., *Enfield Toll Bridge*, 17 Conn. at 59-61; *Proprietors of Piscataqua Bridge v. New-Hampshire Bridge*, 7 N.H. 35, 66-67 (1834).

¹⁶⁸ William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 601-02 (1972).

¹⁶⁹ *West River Bridge Co. v. Dix*, 47 U.S. 507, 546-49 (1848) (“Nor [is the taking of the bridge franchise] void because the compensation was too small to the corporation,—as it was assessed in conformity to law . . .”).

¹⁷⁰ *Louisville Bridge Co. v. United States*, 242 U.S. 409, 421 (1917).

property interests for which the Fifth Amendment requires compensation.¹⁷¹ The Federal Circuit has reached similar holdings with respect to fishing licenses.¹⁷² In determining that a fishing license is not property, the Federal Circuit, in dicta, observed an “absence of crucial indicia of a property right,”¹⁷³ including exclusive use, irrevocability, and transferability. The same features describe patents: They can be revoked after issuance, and they do not guarantee a right to use.¹⁷⁴ Section 261 blesses the transfer of patents, but none dispute that Congress can make patents non-transferable. Compensation Clause cases for intangible rights are difficult to find—this fact is, itself, quite telling—and comparisons to things like telephone numbers¹⁷⁵ and broadcast licenses¹⁷⁶ reveal a clear difference between physical property and intangibles. The Supreme Court has recognized that even benefits that receive Due Process Clause protection may be excluded from Compensation Clause protection.¹⁷⁷ Hard questions exist where the asserted right is tied to land,¹⁷⁸ but a common strand running through the caselaw is that the Compensation Clause does not require compensation for “sovereign created value.”¹⁷⁹

At one point, the Supreme Court attempted to simplify the property aspect of compensation law. In the 1984 case of *Ruckelshaus v. Monsanto*, the Supreme

¹⁷¹ *United States v. Fuller*, 409 U.S. 488, 493 (1973) (“We hold that the Fifth Amendment does not require the Government to pay for that element of value based on the use of respondents’ fee lands in combination with the Government’s permit lands.”).

¹⁷² *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1374 (Fed. Cir. 2004) (“We conclude that American Pelagic did not and could not possess a property interest in its fishery permits and authorization letter.”); *Conti v. United States*, 291 F.3d 1334, 1342 (Fed. Cir. 2002) (“[T]he permit bestowed a revocable license, instead of a property right.”).

¹⁷³ *Conti*, 291 F.3d at 1342.

¹⁷⁴ ROBIN FELDMAN, *RETHINKING PATENT LAW* 49, 65 (Harvard Univ. Press 2012).

¹⁷⁵ See generally Susan Eisenberg, Note, *Intangible Takings*, 60 VAND. L. REV. 667, 670 (2007) (discussing the Red Cross’s attempt to take a telephone number from another company in the aftermath of Hurricane Katrina).

¹⁷⁶ 47 U.S.C. § 312 (empowering the FCC to revoke broadcast licenses for a range of reasons, including “conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application”).

¹⁷⁷ *Bowen v. Gilliard*, 483 U.S. 587, 603-06 (1987).

¹⁷⁸ See, e.g., *Bldg. Owners & Managers Ass’n Int’l v. F.C.C.*, 254 F.3d 89, 99 (D.C. Cir. 2001) (ruling that the FCC’s prohibition of restrictions on direct-to-home broadcasts for leased property did not constitute a *per se* taking); Dave Owen, *Taking Groundwater*, 91 WASH. U.L. REV. 253, 281 (2013) (“Nevertheless, the American groundwater/takings cases provide little support for arguments against treating water rights as constitutional property. Many cases clearly state that groundwater use rights qualify as constitutional property and are protected by the takings doctrine.”).

¹⁷⁹ JACQUES B. GELIN & DAVID W. MILLER, *THE FEDERAL LAW OF EMINENT DOMAIN* 49-55 (1982).

Court held that trade secrets are protected by the Compensation Clause because, in the Court's view, Missouri's state law recognized trade secrets as private property.¹⁸⁰ At that time, trade secrets were entirely a matter of state law; the federal Defend Trade Secrets Act would not materialize for another 32 years. Reiterating a sentence that originally appeared in a Due Process case, the court wrote, "[W]e are mindful of the basic axiom that "[p]roperty interests ...are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."''¹⁸¹

Monsanto has been subject to considerable criticism.¹⁸² In particular, the Court's attempt to avoid defining private property by tying it to existing legal categories creates thorny practical and theoretical problems. Can states impede congressional will just by declaring something private property? Can states avoid the Compensation Clause by declaring something not private property? Can the federal government so avoid by crossing a border and violating a trade secret in a jurisdiction that does not recognize it as private property? The underlying assumption that independent sources of law can define constitutional property is fatally flawed, even when applied to the sort of procedural due process cases in which it originated.¹⁸³

Even if one assumes that *Monsanto* is correct, differences between trade secrets and patents counsels heavily against extending *Monsanto*'s tenuous holding to patents. As a preliminary matter, the public nature of patents makes for an especially awkward comparison to trade secrets in the context of *Monsanto*'s facts. The decision involved a regulation requiring pesticide makers to disclose their ingredients and safety information. Patents are necessarily public, so *Monsanto*'s requirement that the government compensate when it forces trade

¹⁸⁰ *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 (1984).

¹⁸¹ *Id.* at 1001 (citing *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972))).

¹⁸² *See, e.g., Merrill, supra* note 13, at 939-42.

¹⁸³ *Id.* at 922-26 (explaining how reliance on independent sources of law leads to a "positivist trap" and what other scholars have dubbed "procedural nihilism"). Simple reliance on state law definitions of property has caused similar complications in other areas of law, such as taxation. *See, e.g., United States v. Craft*, 535 U.S. 274 (2002) (holding that, despite the general practice of looking to state law to define a delinquent taxpayer's property, the state law fiction of property ownership by an entirety cannot prevent a tax lien from attaching to an entireties property).

secret information to be made public requires significant twisting to apply to patents.

More fundamentally, no “independent source” “creates” or “defines” patents as private property as state law supposedly did with trade secrets. As Section II.C. demonstrated, federal statutory law gives patents certain property-like qualities for the limited purpose of establishing ownership and transfer rules, but the kind of “existing rules or understandings” that *Monsanto* searches for do not treat patents as private property. In short, little doctrinal basis exists outside the realm of patents for extending to them Compensation Clause protection.

In its search for a private property right, *Monsanto* also factors in a problematic litmus test frequently employed in Compensation Clause debates: whether the government interferes with “investment-backed expectations.”¹⁸⁴ The irrelevance of investment-backed expectations is particularly prominent in the case of regulatory rights. A company can invest a fortune in plans to market a drug or build a dam, expecting to clear the regulatory hurdles, but if it does not garner approval, perhaps because regulations changed, the company is out of luck. Conversely, if the government condemns land inherited from a long lost relative, the absence of investment-backed expectations does not weaken the heir’s claim.

Consider the 2013 *Myriad* case which held that naturally occurring DNA segments do not constitute patentable subject matter. In response to arguments that overturning the patent in the case would “disturb the reliance interests of patent holders,” the Justices noted that “reliance interests arising from PTO determinations, insofar as they are relevant, are better directed to Congress.”¹⁸⁵ This point is critical for understanding the hornets’ nest that the government would

¹⁸⁴ *Monsanto*, 467 U.S. at 1005 (“Among those factors [determining whether a government action effects a taking] are: ‘the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.’”) (quoting *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980)).

¹⁸⁵ *See Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576, 594 n.7 (2013) (citing *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66, 92 (2012) (“We need not determine here whether, from a policy perspective, increased protection ... is desirable.”)); *see also Mayo*, 566 U.S. at 92 (again referencing the role of Congress and explaining that, “we must hesitate before departing from established general legal rules lest a new protective rule that seems to suit the needs of one field produce unforeseen results in another. And we must recognize the role of Congress in crafting more finely tailored rules where necessary.”).

be stuck in if patents constituted private property subject to the Compensation Clause, particularly with a concept such as “investment-backed expectations.” Changes in regulations, interpretations of those regulations, and even changes to the Patent Act itself would be met with an avalanche of patent holders claiming their Fifth Amendment right to just compensation for having violated their investment-backed expectations in property.

B. 19th Century Caselaw

In the late 19th century, courts considered several cases involving alleged patent infringement by the government. These cases contain a fair bit of language discussing patents as equivalent to property rights and, in one instance, allude to the Fifth Amendment’s Compensation Clause. These cases do not apply the Fifth Amendment’s Compensation Clause; therefore, the vague references to that clause or use of the term private property cannot serve as precedent for the meaning of “private property” for the purposes of the Compensation Clause. In other words, using those cases as precedent would improperly rely on dicta. Nevertheless, the broad language is worth noting, if nothing less than as indication of the thinking of some jurists a century after ratification of the Compensation Clause.

The context of these 19th century cases is complicated by the convoluted history of sovereign immunity. Until the 20th century, Congress had not waived the United States’ sovereign immunity from infringement suits.¹⁸⁶ Rather, throughout the 19th century, Congress permitted individuals to bring certain types of suits, most notably contract claims, against the government, and vested adjudicatory power in those cases in the Court of Claims. Tort claims were excluded from the Court of Claims’ jurisdiction, and the 1887 Tucker Act, which expanded and clarified the court’s jurisdiction, reaffirmed that the United States maintained its immunity to tort suits.¹⁸⁷ Further, at this time, the Supreme Court had not yet held that the Compensation Clause is self-executing. That is, it was believed at the time that takings claims required independent waivers of sovereign immunity on top

¹⁸⁶ See Christopher J. Morten & Charles Duan, *Who’s Afraid of Section 1498? A Case for Government Patent Use in Pandemics and Other National Crises*, 23 YALE J.L. & TECH. 1, 13 (2020) (“[T]he baseline situation [prior to legislation enacted in 1910] was that no remedy was available at all in view of sovereign immunity, and § 1498’s predecessor [i.e., the 1910 enactment] expanded patent protection by offering a new, albeit partial, remedy for government use.”).

¹⁸⁷ Tucker Act, ch. 359, Stat. 505 (1887) (codified at 28 U.S.C. § 1491).

of the Compensation Clause.¹⁸⁸ In other words, the government would have to waive sovereign immunity for a claim that its infringement of a particular patent constituted a taking. And even if it did, the issue of which courts would have jurisdiction to hear the case would depend on the terms of the waiver statute or, alternatively, on whether the claim alleged breach of a government contract and thus could be heard in the Court of Claims. The result is that decisions rendered by the Court of Claims necessarily could not speak to Fifth Amendment Takings, and the Supreme Court's opinions were limited to considering the Court of Claims' jurisdiction.

The first such case, decided in 1870, was *United States v. Burns*.¹⁸⁹ Upholding the damages awarded by the newly constituted Court of Claims, the Supreme Court wrote, "[T]he government cannot, after the patent is issued, make use of the improvement any more than a private individual, without license of the inventor or making compensation to him."¹⁹⁰ Proponents of the patents-as-property theory unsurprisingly point to this case as evidence of a compensation requirement, but tying it to the Fifth Amendment overlooks what the case is really about. The award given to Burns arises, as a matter of law, from the violation of a contract with the United States. Although the contract was "nothing more . . . than a license from [patentee] to the government to manufacture [the invention]," the Court is clear that the Burns' claim arises not from infringement (let alone "taking") but from a breach of contract.¹⁹¹

¹⁸⁸ The Clause was not completely toothless until then. Injunctive relief was available, and it was generally accepted that, despite the absence of a judicial remedy, the clause required legislatures to provide compensation when it took private property. See Joshua D. Hawley, *The Beginning of the End? Horne v. Department of Agriculture and the Future of Williamson County*, 2012 CATO SUP. CT. REV. 245, 256-57. Additionally, cases could sometimes be brought against individual officers for improper takings. See, e.g., *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851). Only in the mid-20th century did the Supreme Court change course and begin interpreting the Compensation Clause as self-executing. See *Jacobs v. United States*, 290 U.S. 13 (1933) (holding that no implied contract was necessary and that a takings claim rested upon the Constitution, not the Tucker Act). Now, it is believed that the Constitution provides the cause of action and the Tucker Act's role in takings claims is merely to declare which court has jurisdiction.

¹⁸⁹ *United States v. Burns*, 79 U.S. (12 Wall.) 246 (1870).

¹⁹⁰ *Id.* at 252.

¹⁹¹ *Id.* at 252-53.

The next case in this group is *Cammeyer v. Newton*, decided in 1876 as a claim of infringement against government engineers.¹⁹² Later courts might have recognized a sovereign or qualified immunity defense, but the Court determined that Newton was as any other infringer.¹⁹³ In dicta, the *Cammeyer* Court both used the term “private property”¹⁹⁴ and tipped its hat to the Fifth Amendment’s Compensation Clause:

Public employment is no defence to the employé for having converted the private property of another to the public use without his consent and without just compensation. Private property, the Constitution provides, shall not be taken for public use without just compensation[.]¹⁹⁵

Critically, this language appears in the context of evaluating an individual’s claim to immunity. Despite the Court’s linguistic forays, the case presented a pure infringement claim. The government was not a party to the case, and the public treasury was never in jeopardy. As such, the language is dicta expressed in a context that did not implicate the question and cannot be read as precedent for interpreting the Compensation Clause’s “private property” language. Further undermining the usefulness of the case, the *Cammeyer* Court ultimately found that the government did not violate the patent and that no infringement occurred.

The third case is *McKeever v. U.S.*, handed down in 1878.¹⁹⁶ The case involved the government’s use of a patented improvement and was decided in the Court of Claims. Cases of this vintage provide a variety of additional information in the material before the court’s official opinion. One should note at the outset that the claimant’s own attorney explained that this is not a Fifth Amendment takings

¹⁹² *Cammeyer v. Newton*, 94 U.S. 225 (1876).

¹⁹³ *Cammeyer*, 94 U.S. at 234 (citing *Mitchell*, 54 U.S. at 126).

¹⁹⁴ *Cammeyer*, 94 U.S. at 234-35 (noting that, “Agents of the public have no more right to take such private property than other individuals under that provision, as it contains no exception warranting any such invasion of the private rights of individuals. Conclusive support to that proposition is found in a recent decision of this court, in which it is held that the government cannot, after the patent is issued, make use of the improvement any more than a private individual, without license of the inventor or making him compensation.”).

¹⁹⁵ *Id.* at 234.

¹⁹⁶ *McKeever*, 14 Ct. Cl. at 396.

case, but a contract case.¹⁹⁷ The attorney was, indeed, correct and sets the stage for understanding that the court wandered off into a fair amount of dicta in the case. The *McKeever* court outlined in a fair bit of detail the history of patent law. Its account of patents' origins in England is largely consistent with the current academic consensus. Namely, it finds that patents do not originate in common law and historically did not represent property rights.¹⁹⁸ Contrary to the evidence given above, however, the *McKeever* opinion goes on to claim that patents took on a different form in the United States. Patents, the Court of Claims posits, are indeed property in spite of the English history being to the contrary.¹⁹⁹

For the reasons articulated above, the discussion contradicts the historical and structural evidence against patents' being property for purposes of the Compensation Clause. Most important, the discussion was pure dicta. One must recall that if *McKeever* had raised a takings claim, the Court of Claims would have found that it had no jurisdiction, and Mr. McKeever would have gone home empty handed. Both property takings and patent infringement were claims "sounding in tort," for which the Government had not waived its immunity.

Without a waiver of sovereign immunity, McKeever was forced to argue in a tortuous manner that the government used his invention with his *implied* consent and that this was simply a contract case.²⁰⁰ And of course, if the government used the invention with McKeever's consent, there could be no "taking" involved under any framing of the case. Thus, when the court ultimately found that an implied contract existed and awarded McKeever royalties, it necessarily held that no Fifth Amendment Taking occurred. This is confirmed by the fact that the Court's damages calculation is not based on "just compensation" but instead on "the fair and reasonable value of a license." Stretching this ruling to support the patents-as-

¹⁹⁷ See *id.* at 416 (attorney for the claimant section prior to start of opinion noting that, "[e]ven if this were merely a case of the taking of private property for public use, and not, as it in fact is, a case of implied contract resting on the use of private property, with the authority of the owner, the action would be sustained").

¹⁹⁸ *Id.* at 417-18 ("But the common law, which dealt with things tangible and material, did not recognize property in the mind-work of the inventor, and no English statute attached the legal quality of a right to an invention or created a remedy for the protection of the inventor.").

¹⁹⁹ See *supra* Sections II.A., II.B.3. (discussing and rejecting the arguments put forth by *McKeever*).

²⁰⁰ See *McKeever*, 14 Ct. Cl. at 416 (arguing that his "invention was not used without his consent. It was used with his consent. There is no tort in the case. It is not a case of a waiver of tort and implied contract, but it is, from first to last, an implied contract, and nothing else.").

property theory is awkward at the very least and, in all likelihood, twists its dicta in a way that contradicts its very holding.

The issue arose once more in *James v. Campbell*, reaching the Supreme Court in 1881.²⁰¹ Once again in dicta, Justice Bradley contrasted the American and British patent systems on the matter of the government's reserved right to use a patent. Reiterating the rights language that was associated with patents in the late 19th century, he wrote that the government had no more right to violate a validly issued patent than did anyone else.²⁰² The opinion goes on to speculate, contra *McKeever*, that the United States never authorized a suit against it for the infringement of patents.²⁰³ In the end, though, the *James* Court avoided the jurisdictional question and rejected the plaintiff's claims on the narrower grounds that no valid patent claim was actually used.²⁰⁴

²⁰¹ *James v. Campbell*, 104 U.S. 356 (1881).

²⁰² *Id.* at 358 (“The United States has no such prerogative as that which is claimed by the sovereigns of England, by which it can reserve to itself, either expressly or by implication, a superior dominion and use in that which it grants by letters-patent to those who entitle themselves to such grants. The government of the United States, as well as the citizen, is subject to the Constitution; and when it grants a patent the grantee is entitled to it as a matter of right, and does not receive it, as was originally supposed to be the case in England, as a matter of grace and favor.”).

²⁰³ *Id.* at 358-59:

But the mode of obtaining compensation from the United States for the use of an invention, where such use has not been by the consent of the patentee, has never been specifically provided for by any statute. The most proper forum for such a claim is the Court of Claims, if that court has the requisite jurisdiction. As its jurisdiction does not extend to torts, there might be some difficulty, as the law now stands, in prosecuting in that court a claim for the unauthorized use of a patented invention; although where the tort is waived, and the claim is placed upon the footing of an implied contract, we understand that the court has in several recent instances entertained the jurisdiction. It is true, it overruled such a claim on the original patent in this case, presented in 1867; but, according to more recent holdings, it would properly now take cognizance of the case. The question of its jurisdiction has never been presented for the consideration of this court, and it would be premature for us to determine it now. If the jurisdiction of the Court of Claims should not be finally sustained, the only remedy against the United States, until Congress enlarges the jurisdiction of that court, would be to apply to Congress itself. The course adopted in the present case, of instituting an action against a public officer, who acts only for and in behalf of the government, is open to serious objections. We doubt very much whether such an action can be sustained. It is substantially a suit against the United States itself, which cannot be maintained under the guise of a suit against its officers and agents except in the manner provided by law.

²⁰⁴ *Id.* at 383.

In short, none of the four cases during this era can serve as precedent for the question of whether patents constitute property for the purposes of the Fifth Amendment's Compensation Clause. The various expressions of dicta do show, however, that the issue was on the minds of some jurists during this period, although it remained unaddressed.

After the 1887 Tucker Act²⁰⁵ clarified the extent of Congress's waiver of sovereign immunity and the Court of Claims' jurisdiction, the issue of unlicensed government use re-emerged. Following the Act's passage, two claims for payment for government use of patented inventions led to two different conclusions, one sustained and one denied.²⁰⁶ Once again, without a waiver of sovereign immunity, the cases turned on whether the government had entered into a contract and whether that contract had been breached. Thus, one cannot use these cases either for the proposition that patents were treated as property under the Compensation Clause or that they were not. These analyses asked solely whether Congress provided a cause of action for ordinary infringement claims in which the defendant happened to be the government.

C. §1498 and its Interpretation

Congress largely silenced the debate in 1910 when it amended the Tucker Act to provide patent holders with a statutory cause of action for unlicensed government use of patents. That section was re-codified in 1948 as 28 U.S.C. §1498 and is often referred to by the section number. The new provision stated that whenever a patented invention shall "be used by the United States without license of the owner thereof or lawful right to use the same, such owner may recover reasonable compensation for such use by suit in the court of claims."²⁰⁷

²⁰⁵ Tucker Act, *supra* note 187.

²⁰⁶ Compare *Schillinger v. United States* 155 U.S. 163, 170 (1894) (jurisdiction denied for lack of consent to be sued), with *United States v. Palmer*, 128 U.S. 262, 269 (1888) (claim sustained under contract theory).

²⁰⁷ Pub. L. No. 61-305, ch. 423, 36 Stat. 851 (1910) (later codified as amended at 28 U.S.C. §1498). As amended, §1498(a) begins, "Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the United States Court of Federal Claims for the recovery of his reasonable and entire compensation for such use and manufacture."

The impact of the amendment is still disputed, and a few aspects of the debate are worth addressing here. Proponents of the patents-as-property theory interpret the 1910 Amendment as follows:²⁰⁸ Since the takings clause was believed to be non-self-executing in 1910, a waiver of sovereign immunity was necessary for patent owners to collect their constitutionally promised just compensation. Providing that remedy for an existing injury is the purpose of the amendment, they argue, not creating a new right. In support of this view, they point to the report for the House Committee on Patents,²⁰⁹ which explicitly claims that the amendment provides a remedy for Fifth Amendment Takings Claims as well as to statements by members of Congress²¹⁰ arguing that the amendment created no new claims but merely provided recourse for existing legal interests.

There are differences of opinion concerning the extent to which legislative history is relevant in interpreting legislation.²¹¹ However, the language of §1498 itself undermines any interpretation flowing from the piece of legislative history. The section treats patents as *unlike* private property under the Compensation Clause in that while the Compensation Clause provides just compensation, §1498 provides a different term “reasonable and entire compensation for the use.” In addition, §1498 applies to the “use of property,” rather than to a taking of the entire invention. This is understood as akin to the taking of a license, rather than

²⁰⁸ Mossoff, *Patents*, *supra* note 20, at 711-14 (citing H.R. REP. NO. 61-1288 (1910) and statements by members of Congress in arguing that the 1910 Amendment was meant to remedy the existing harm of patent takings, which, like other property takings, had previously been addressable only by claiming governmental breach of an “implied contract”); Justin Torres, *The Government Giveth, and the Government Taketh Away: Patents, Takings, and 28 USC Sec. 1498*, 63 NYU ANN. SURV. AM. L. 315, 328-29 (2007) (citing H.R. REP. NO. 61-1288 and the statements of multiple members of Congress in arguing that the 1910 Amendment was an attempt by Congress to consent to suit by patent owners for Fifth Amendment takings); Bradley M. Taub, Note, *Why Bother Calling Patents Property? The Government’s Path to License Any Patent and Maybe Pay for It*, 6 J. MARSHALL REV. INTELL. PROP. L. 151, 158-59 (2006) (“Not until the Act of 1910 did patent owners gain practical protection from government takings, allowing them to abandon the tenuous and largely unsuccessful implied contract argument.”).

²⁰⁹ See Torres, *supra* note 208, at 328 n.59, 330 n.68 (citing H.R. Rep. No. 61-1288 (1910)); Mossoff, *Patents*, *supra* note 20, at 712 n.124, 713 n.130 (citing H.R. Rep. No. 61-1288 (1910)).

²¹⁰ See Torres, *supra* note 208, at 329 n.61, 330 n.67 (citing statements by members of Congress); Mossoff, *Patents*, *supra* note 20, at 714 nn.133, 134 (citing statements by members of Congress).

²¹¹ See generally SCALIA, *supra* note 29, at 29-37; Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1834 (1998) (“Legislative intent is a meaningless concept, because intentions cannot coherently be attributed to collective bodies.”); cf. Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427 (2004).

the entire property. One can see all of these contrasts at play in judicial decisions applying §1498. Courts applying §1498 have awarded compensation such as a 10%²¹² royalty or a 7.5%²¹³ royalty, amounts that are a far cry from the “just compensation” one would receive for land taken by the government to build a federal highway or provisions taken by the army.

The legislative history does indicate that some at the time believed that the Compensation Clause protected patents. Nonetheless, when Congress recodified Chapter 28 of the U.S. Code in 1948—after the Supreme Court had determined that the Compensation Clause is self-executing²¹⁴—it placed the cause of action for takings claims in the Court of Claims a mere stone’s throw away from §1498 in §1491. Since §1491 establishes an all-encompassing cause of action for uncompensated takings, §1498 would be superfluous as a provision to enable the Compensation Clause. Operating under the assumption that Congress knows what it is doing and would not enact superfluous legislation, the simultaneous codification of §§1491 and 1498 in 1948 precludes the possibility that §1498 is a mere vestige of a time when remedies for uncompensated takings required waivers of sovereign immunity. A Compensation-Clause-reading of §1498 makes patents *unlike* traditional forms of property, all of which are covered by §1491’s catch-all cause of action for claims “founded . . . upon the Constitution.”

Thus, a more natural reading of §1498 is that it closes the awkward gap left by *Schillinger* and *Palmer* by which the requirement of an implied contract allows patent holders to recover damages against the government only if they can prove that they allowed the government to use their inventions. As the Supreme Court explained, shortly after the 1910 Amendment was enacted, “[The Law] intended alone to provide for the discrepancy resulting from the divergence between the right in one case to sue on an implied contract and the non-existence of a right to sue in another.”²¹⁵ It offered similar reasoning in *Crozier v. Fried. Krupp Aktiengesellschaft*, writing, “[The statute] adds to the right to sue the United States

²¹² *Tektronix, Inc. v. United States*, 552 F.2d 343 (Ct. Cl. 1977), *opinion modified on denial of reh’g*, 557 F.2d 265 (Ct. Cl. 1977).

²¹³ *Decca Ltd. v. United States*, 640 F.2d 1156 (Ct. Cl. 1980).

²¹⁴ *See Jacobs*, 290 U.S. at 16.

²¹⁵ *William Cramp & Sons Ship & Engine Bldg. Co. v. Int’l Curtis Marine Turbine Co.*, 246 U.S. 28, 41 (1918).

in the court of claims already conferred when contract relations exist, the right to sue even although no element of contract is present.”²¹⁶

The best conclusion that can be drawn from the various strands of dicta and the isolated committee language is that the issue of providing Compensation Clause coverage for patent holders was on the minds of some jurists and legislators in the late 19th and early 20th century. Those yearnings were never consummated. Moreover, their impetus may simply have been an attempt to find a compensation pathway for wronged patent holders in the morass created by the treatment of sovereign immunity at the time. With a statutory cause of action that allowed patent owners to recover when the government infringed on their patents, the constitutional question of whether the Fifth Amendment required compensation in those cases was largely avoided, and the scattered discussion faded away for some time.²¹⁷

D. *Modern Caselaw*

In spite of §1498, the question once again found its way into the courtroom, this time more directly. A small number of recent cases have forced the question back to the surface, and notwithstanding the musings of the late 19th century, judges in the Court of Federal Claims, the Federal Circuit, and the Supreme Court all have either held that patents are *not* private property for purposes of the Fifth Amendment’s Compensation Clause or have sidestepped the question.

The issue first reemerged in *Zoltek Corp. v. U.S.* (III), which brought the question to the Federal Circuit in 2006.²¹⁸ Patentholder Zoltek brought a claim

²¹⁶ *Crozier v. Fried. Krupp Aktiengesellschaft*, 224 U.S. 290, 304 (1912).

²¹⁷ A full telling of the story requires mention of one voice who, in the mid-20th century, appeared to cling to the patents-as-property theory. Judge Nichols of the Court of Claims and later the Federal Circuit authored a concurrence in *Carter-Wallace, Inc. v. U.S.*, 449 F.2d 1374 (Ct. Cl. 1971), a majority opinion in *Leesona Corp. v. United States*, 599 F.2d 958, 964 (Ct. Cl. 1979), and likely the per curiam opinion in *Decca Ltd. v. United States*, 544 F.2d 1070, 1082 (Ct. Cl. 1976), in which he expresses the view that §1498 is grounded in the Fifth Amendment. Because of the statutory cause of action, none of those cases reached holdings on the constitutional question. A strange footnote to this history is that Judge Nichols’ replacement on the Federal Circuit, Judge Newman, authored an opinion that appeared to apply *Penn Central*’s regulatory takings framework to a Due Process claim involving a patent. *Patlex Corp. v. Mossinghoff*, 758 F.2d 594 (Fed. Cir. 1985), *aff’d in part, rev’d on other grounds*, 771 F.2d 480 (Fed. Cir. 1985). Judge Newman also dissented from the Federal Circuit’s denial of rehearing *en banc* in *Zoltek*, discussed in the following paragraphs.

²¹⁸ *Zoltek Corp. v. United States*, 442 F.3d 1345 (Fed. Cir. 2006).

against the U.S. government regarding patented methods of manufacture used in making some components of America's F-22 fighter jets. These components were partially assembled in Japan, and subsection (c) of §1498 precludes claims that "arise in a foreign country." Thus, the Federal Circuit, affirming the lower court's decision, tossed out Zoltek's §1498 claims against the government. In the absence of a statutory cause of action, the Federal Circuit was forced to confront Zoltek's amended claims that the government's infringement was a taking under the Fifth Amendment.²¹⁹

Overturning the trial court's decision, the Federal Circuit held that government infringement was not a taking of private property. As a guiding light on the topic, however, the *Zoltek* opinion falls short, and even those who reject the patents-as-property theory acknowledge that the *Zoltek* Court's reasoning is somewhat lacking.²²⁰ *Zoltek*'s gravest flaw is that it seems to hang its hat on *Schillinger*. It writes, for example, "In *Schillinger v. United States*, the Supreme Court rejected an argument that a patentee could sue the government for patent infringement as a Fifth Amendment taking under the Tucker Act. *Schillinger* remains the law."²²¹ As the dissent correctly points out, however, *Schillinger*'s holding was about the Court of Claims' jurisdiction at the time.²²² Only later did the Supreme Court decide that the Court of Claims could hear constitutional claims at all.

Additionally, *Zoltek* relies too heavily on the argument that if patents are private property under the Compensation Clause, then §1498 would be superfluous. The opinion rightly points to the language in *Crozier* and *William Cramp*, which

²¹⁹ *Id.* at 1349 ("The government moved for partial summary judgment that Zoltek's § 1498(a) claims were barred by § 1498(c) because they arose in Japan. The trial court denied the motion. Although it agreed that § 1498(c) barred Zoltek's claims under § 1498(a), the trial court directed Zoltek to amend its complaint to allege a taking under the Fifth Amendment The trial court concluded that Zoltek could assert the infringement claims under 28 U.S.C. § 1491(a)(1) as a taking in violation of the Fifth Amendment The trial court certified its § 1498 analysis and its holding that Zoltek's patent infringement claims sounded in the Fifth Amendment, under § 1292(d)(2). Both parties timely sought permission to appeal. This court accepted the interlocutory appeals and has jurisdiction under 28 U.S.C. §§ 1292(c)(1) and 1295(a)(3).").

²²⁰ Davida Isaacs, *Not All Property Is Created Equal: Why Modern Courts Resist Applying the Takings Clause to Patents, and Why They Are Right to Do So*, 15 GEO. MASON L. REV. 1, 9-12 (2007) (outlining the flaws with *Zoltek* and summarizing its poor reception).

²²¹ *Zoltek*, 442 F.3d at 1350 (citations omitted).

²²² *Id.* at 1375.

interpret the 1910 Amendments as simply providing a remedy for infringement so that plaintiffs would not be excluded for lack of an implied contract. But to both points, it fails to mention that when the 1910 Amendment was enacted, the Compensation Clause was not believed to be self-executing, so under the Compensation Clause theory, it would not have been superfluous when first enacted.²²³ It is no surprise, then, that *Zoltek*'s logic comes under fire in the dissent, and many believed that Judge Newman's dissent from rehearing *en banc* would tee up the issue for the Supreme Court.²²⁴ Thus, while *Zoltek* achieved the correct result, it is possible that the Supreme Court could revisit its finding that government infringement does not give rise to a takings claim.

For its part, the Supreme Court has been mostly silent for several decades at this point. When given the opportunity in the 1990 case of *Eli Lilly and Co. v. Medtronic, Inc.* to speculate on the takings questions, the Supreme Court, per Justice Scalia, casually rejected a patent holder's argument. The patent holder had argued that the Court should find infringement in the use of patented devices for the purpose of developing and submitting data when seeking FDA approval for drugs "because of the 'serious constitutional question under the takings clause of the Fifth Amendment . . . [that would arise] if the statute is interpreted to authorize the infringing use of medical devices.'"²²⁵ Noting that the petitioner had not challenged the statute at issue on constitutional grounds, Justice Scalia referenced the argument in a footnote, but opined that, "we do not see how this consideration makes any difference" because the "serious constitutional question' (if it is that) is not avoided by petitioner's construction either."²²⁶

Subsequently, two relatively recent, high-profile rulings indicate that the Supreme Court is extremely wary of approaching the topic of applying the Compensation Clause to patents, or of allowing Congress or the lower courts to do so. The first is the 1999 case, *Florida Prepaid Postsecondary Education*

²²³ For an academic criticism of *Zoltek*, see Miller, *supra* note 24, at 20-21.

²²⁴ *Zoltek Patent Takings Rehearing Denied: No Fifth Amendment Protection*, PATENTLY JOBS (Mar. 27, 2023), https://patentlyo.com/jobs/2006/09/zoltek_patent_t.html; see also Alex Kozinski & James Burnham, *I Say Dissent, You Say Concurral*, 121 YALE L.J. ONLINE 601 (2012), <http://yalelawjournal.org/forum/i-say-dissent-you-say-concurral> (attributing the rise of dissents and their increasing importance at the Supreme Court to the growth of Circuit Courts and, hence, the increasing prevalence of outlier panels).

²²⁵ *Eli Lilly & Co. v. Medtronic, Inc.*, 496 U.S. 661, 678 n.7 (1990).

²²⁶ *Id.*

Expense Board v. College Savings Bank.²²⁷ That case involved a challenge to the Patent and Plant Variety Protection Remedy Clarification Act (Remedy Act), which sought to allow patent holders to sue state governments and instrumentalities for infringement.²²⁸

Prior to passage of the Remedy Act, the Federal Circuit held that patent holders could not sue states for patent infringement on the grounds that the patent laws contain no statement expressing Congress' intent to abrogate state sovereign immunity for these purposes.²²⁹ In response, Congress passed the Remedy Act to add the requisite language to the patent laws. In justifying Congress' power to enact the provision, the Senate Report noted that courts have continually recognized patents as property for the purposes of the Fourteenth Amendment's due process of law.²³⁰

The Report also brushed against the idea of patents as property for the Compensation Clause, noting cryptically that "the right to compensation exists" for patent infringement and citing to district court sovereign immunity cases discussing patents as property that cannot be taken without *just* compensation.²³¹ Following passage of the Remedy Act, a Florida state agency accused of patent infringement challenged the Act as unconstitutionally abrogating the state's

²²⁷ Fla. Prepaid Postsecondary Educ. Expense Bd. V. Coll. Sav. Bank, 527 U.S. 627 (1999).

²²⁸ Patent and Plant Variety Protection Remedy Clarification Act, §2(a)(1), Pub. L. No. 102-560 (1992) ("Section 271 of title 35, United States Code, is amended by adding at the end the following: '(h) As used in this section, the term "whoever" includes any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity)'). The modified part of the law defines patent infringement thus: "whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent." 35 U.S.C. §271(a).

²²⁹ See *Fla. Prepaid*, 527 U.S. at 631-632 (discussing the Remedy Act and citing *Chew v. California*, 893 F.2d. 331 (1990)). One should note that although Congress may have provided statutory provisions for patent holders to sue the federal government for patent infringement, those provisions do not apply to the states.

²³⁰ See *id.* at 637 (citing page 8 of the Senate Report, with footnotes omitted, as explaining that "[T]he bill is justified as an acceptable method of enforcing the provisions of the [F]ourteenth [A]mendment. The Court in *Lemelson v. Ampex Corp.* [, 372 F.Supp. 708 (N.D. Ill. 1974),] recognized that a patent is a form of property, holding that a right to compensation exists for patent infringement. Additionally, because courts have continually recognized patent rights as property, the [F]ourteenth [A]mendment prohibits a State from depriving a person of property without due process of law").

²³¹ See *id.*

Eleventh Amendment immunity. The Supreme Court agreed and found the Remedy Act unconstitutional.

Although substantial controversy exists regarding the Supreme Court's recent Eleventh Amendment cases,²³² which gave states significant immunity for violations of federal and constitutional law, the *Florida Prepaid* case reveals a few important things, even to skeptics of its outcome. First, the Justices went to great lengths to avoid the question of whether patents constitute property for the Compensation Clause. The opinion pointed out that although the United States intervened to support the Remedy Act's constitutionality on due process terms, the government declined to defend the Act under the Compensation Clause.²³³ Moreover, the Justices explained that consideration of the Compensation Clause as a basis for the Remedy Act was precluded, given that neither the language of the Remedy Act nor the reports of the bill contained any suggestion that the "Congress had in mind the Just Compensation Clause of the Fifth Amendment."²³⁴

One could argue that language brushing against the Compensation Clause might have provided an indication of such an intent, albeit vaguely and indirectly worded.²³⁵ After citing that language, however, the Justices directed the discussion

²³² John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 48 (1998) ("The dominant academic position asserts that the Eleventh Amendment limits only diversity jurisdiction, that it has no application in federal question cases, and that in constitutionalizing some form of state sovereign immunity, the Supreme Court has been on the wrong track these past 100 years." (citing Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1473-84 (1987); Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines* (pt. 1), 126 U. PA. L. REV. 515, 538-40 & 540 n.88 (1978); William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1271-75 (1989); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1060-63 (1983); and Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 39-51 (1988)). For academic appraisals of *Florida Prepaid*, see generally John E. Nowak, *The Gang of Five and the Second Coming of an Anti-Reconstruction Supreme Court*, 75 NOTRE DAME L. REV. 1091 (2000); David L. Shapiro, *The 1999 Trilogy: What is Good Federalism?*, 31 RUTGERS L.J. 753 (2000); Daan Braveman, *Enforcement of Federal Rights Against States: Alden and Federalism Non-Sense*, 49 AM. U. L. REV. 611 (2000).

²³³ See *Fla. Prepaid*, 527 U.S. at 642 ("The United States declines to defend the Act as based on the Just Compensation Clause").

²³⁴ See *Fla. Prepaid*, 527 U.S. at 642, n.7.

²³⁵ See *supra* text accompanying notes 230-231.

to the Due Process Clause, as if to gently remind both Congress and the lower courts that the Court's own opinions thus far relate only to due process.²³⁶

Stepping back from the opinion in the case, if the Constitution requires compensation for government infringement, patent holders should be able to sue states with or without the Remedy Act. The Fourteenth Amendment effectively overrode the Eleventh Amendment regarding takings by incorporating both the Fifth Amendment's prohibition as well as its waiver of immunity. The Supreme Court has held that state entities may be required to pay compensation for land takings (*Lucas v. S.C. Coastal Council*,²³⁷ for example), noting that the Fifth Amendment is "applicable to the States through the Fourteenth Amendment."²³⁸ Despite recent push-back from several Circuit Courts, the Supreme Court has explicitly rejected states' claims for Eleventh Amendment immunity to takings claims.²³⁹ If patents are private property for the purposes of the Compensation Clause, therefore, Congress would never have needed additional sovereign immunity abrogation language at all. Plaintiffs like College Savings could have gone forward with a Compensation Clause claim.

In addition to *Florida Prepaid*, a 2015 ruling in *Horne v. Department of Agriculture* concerned the constitutionality of a Department of Agriculture mandate for a raisin grower reserve.²⁴⁰ The case casually cited dicta from the 1881 *James v. Campbell* case to support the comment that "Nothing in the text or history of the Takings Clause, or our precedents, suggests that the rule is any different when it comes to appropriation of personal property."²⁴¹ As described above, the *James v. Campbell* Court avoided the jurisdictional question and rejected the plaintiff's claims on the narrower grounds that the government did not make use of any valid

²³⁶ See *Fla. Prepaid*, 527 U.S. at 637.

²³⁷ See, e.g., *Lucas*, 505 U.S. at 1030 ("When, however, a [state] regulation that declares 'off-limits' all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it."); *Palazzolo v. Rhode Island*, 533 U.S. 606, 627 (2001) ("The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation.").

²³⁸ *Palazzolo*, 533 U.S. at 617.

²³⁹ *First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., Cal.*, 482 U.S. 304, 314-16 & n.9 (1987); Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493, 494-95 (2006).

²⁴⁰ *Horne v. Department of Agriculture*, 576 U.S. 350 (2015).

²⁴¹ *Horne*, 576 U.S. at 358.

patent claim.²⁴² A few commentators speculated that *Horne* included patents as “personal property.”²⁴³ But as Masur and Mortara point out, “[T]he quotation in *Horne* looks a lot like the past descriptions of §1498 articulated by the Federal Circuit and Court of Claims: Patent infringement is described in terms of eminent domain or takings when that characterization is irrelevant to the resolution of the case at hand.”²⁴⁴ Indeed, when *Oil States Energy Services v. Greene’s Energy Group* brought the claim up in a patent context, the Supreme Court took a markedly different stance.

Oil States involved a number of constitutional challenges to patent law’s *inter partes* review process.²⁴⁵ A patent holder filed the case when the PTO invalidated its patent, after initially granting the patent. *Oil States*’ claims were based on Article III, the Seventh Amendment, and the Fifth Amendment’s Due Process and Compensation Clauses. Justice Thomas’s majority opinion emphasized that the court’s holding does not reach either of the Fifth Amendment claims.²⁴⁶ However, in evaluating the Article III challenge, the *Oil States* Court drew a clear line between land and chattels on the one hand and public rights such as patents on the other. Relying on the distinction between “public rights” and “private rights,” the opinion first reiterates that “Congress cannot ‘confer the Government’s ‘judicial Power’ on entities outside Article III,’” but that it has “significant latitude to assign adjudication of public rights to entities other than Article III courts.”²⁴⁷ Placing patents squarely in the latter category of *public rights*, Justice Thomas expounds on the notion that “the grant of a patent is a ‘matte[r] involving public rights’”:

Ab initio, the grant of a patent involves a matter “arising between the government and others.” As this Court has long recognized, the grant of a patent is a matter between “ ‘the public, who are the grantors, and ... the patentee.’ ” By “issuing patents,” the PTO “take[s] from the

²⁴² See *supra* text accompanying notes 201-204.

²⁴³ See, e.g., Dolin & Manta, *supra* note 21, at 775.

²⁴⁴ Masur & Mortara, *supra* note 20, at 991-92.

²⁴⁵ *Oil States Energy Servs.*, 138 S. Ct. at 1370.

²⁴⁶ After explaining that, “[w]e emphasize the narrowness of our holding,” the Court went on to write a long paragraph listing a number of issues not addressed and ending with, “our decision should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause.” See *id.* at 1379.

²⁴⁷ *Oil States Energy Servs.*, 138 S. Ct. at 1372-73.

public rights of immense value, and bestow[s] them upon the patentee.” Specifically, patents are “public franchises” that the Government grants “to the inventors of new and useful improvements.” The franchise gives the patent owner “the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States.” That right “did not exist at common law.” Rather, it is a “creature of statute law.”²⁴⁸

Thus, the Court made absolutely clear its view that there is a strict, categorical difference between land/chattels as “core” private property rights and patents as public rights.²⁴⁹

In the brief time since the Supreme Court handed down its *Oil States* opinion, lower courts have already started to rightly apply its principles to Compensation Clause claims. Faced with essentially the same claim that the *Oil States* Court declined to address, the Court of Federal Claims held that invalidation during *inter partes* review did not constitute a Fifth Amendment taking in *Christy, Inc. v. United States*.²⁵⁰ Relying heavily on *Oil States*, the *Christy* court wrote, “In short, patents are public franchises, not private property. Because ‘[a] taking compensable under the Fifth Amendment inherently requires the existence of “private property,”’ patent rights are not cognizable property interests for Takings Clause purposes.”²⁵¹ The Federal Circuit supported this view in *Celgene Corp. v. Peter*²⁵² and *Golden v.*

²⁴⁸ *Id.* at 1373-74 (citations omitted).

²⁴⁹ Justice Gorsuch’s dissent, joined by Chief Justice Roberts, focuses on the extent of Article III’s judicial power. Rejecting Justice Thomas’s and Professor Nelson’s strict reliance on the public-private distinction for adjudication, Gorsuch claims that the Judicial Power cannot be shrunk from what courts decided at the founding. Dismissing the instances in which the Privy Council decided patent validity even after the founding, Gorsuch finds it sufficient that patent cases were primarily litigated in law courts to place patent validity in the ‘judicial power’ by the late 18th century. Thus, although Justice Gorsuch cites Mossoff extensively, a careful reading of Gorsuch’s opinion suggests that he dissents not because he necessarily believes patents are private property but because of how he defines and applies the judicial power. Indeed, to the extent Justice Gorsuch relies on practice at the time of the Founding, he might also object to the patents-as-property theory, because compensating for patent-takings was unheard of to the Framers.

²⁵⁰ *Christy, Inc. v. United States*, 141 Fed. Cl. 641 (2019).

²⁵¹ *Id.* at 660 (citations omitted).

²⁵² *Celgene Corp. v. Peter*, 931 F.3d 1342, 1358 (Fed. Cir. 2019). The parties in *Celgene* did not dispute whether patents are private property in general. In that case, the PTO defended the uncompensated invalidation of a patent through the IPR process on the narrower grounds that no property right ever exists in invalid patents and that patents have often been subject to some form of review. Therefore, its holding,

United States.²⁵³ *Celgene*'s conclusion is all the more important given that it acted retroactively on patents issued before the Congress set up the *inter partes* review process. Of course, these decisions may not put an end to the debate altogether, but they are certainly a sign that the federal courts are moving in that direction as the issue continues to bubble up in different contexts.

IV

THE NATURE OF THE BEAST

As described above, the history and theory of patents conceptualizes the patent system in purely utilitarian terms. We grant patents in this country for the benefit of the public, in the hopes that by taking what would ordinarily be free to all and dedicating it for a limited time to a few, science will progress, and this will redound to the benefit of society as a whole.²⁵⁴ That conceptualization stands in contrast to the core, private property rights embodied in the Fifth Amendment's Compensation Clause.

In thinking about patents, however, one must also consider the nature of the beast. Patents necessarily lack the certainty that we associate with private property such as land.²⁵⁵ Although the law may periodically argue over the emergence and boundaries of new forms of rights related to land—air rights, rights to light, etc.—society shares a basic conception of what a piece of land is. Patents, however, are entirely different. By definition, patents are granted only on those inventions that are new. For something that is new, society naturally lacks a shared understanding of it, something that will develop across time.

Not only do we lack a shared understanding at the time of the patent, the linguistic formulations that develop around those shared understandings have yet to emerge. Anyone who has ever tried to interpret a contract knows that language is subject to uncertainty. The uncertainties of language are exacerbated in the patent

strictly speaking, is limited to the proposition that no property interest exists in patents *that should not have been issued in the first place*.

²⁵³ *Golden v. United States*, 955 F.3d 981, 988-89 (Fed. Cir.), *cert. denied*, 141 S. Ct. 908 (2020), *reh'g denied*, 141 S. Ct. 2558 (2021) (following a similar reasoning to that in *Celgene Corp.*, 931 F.3d at 1358, described *supra* in note 252).

²⁵⁴ See Robin Feldman, *Intellectual Property Wrongs*, 18 STAN. J.L. BUS. & FIN. 250, 318 (2013).

²⁵⁵ The author has more fully explored the notions of the uncertainties of language and the lack of shared conception that bedevil patents. See FELDMAN, *RETHINKING PATENT LAW*, *supra* note 174, at 13-23.

context, however, where one is trying to describe something that, by definition, has not existed before. We use language, that was developed in relation to things that already exist, in a vain attempt to capture something that, by definition, has never existed. Moreover, across the 20 years of the patent term, entirely new inventions will arise. To determine whether the *new* invention can receive its own patent or whether use of the new invention would violate the existing patent, courts and the patent office will have to compare the linguistic formulation in the patent to the new invention, even though the new invention did not exist when the linguistic formulation was drafted.²⁵⁶ It is no surprise that patent litigation can turn on the meaning of the word “a.”²⁵⁷ Trying to subject patents—with all of the necessary uncertainties surrounding the boundaries and definition of each—to a Fifth Amendment compensation system that was born of the notion of government physically taking things that are tangible and specific, would create a muddy mess.

Patents, both in the 18th century and even more so today, are quintessential creatures of regulation. As the dean of antitrust law, Herbert Hovenkamp has noted, “Anyone who does not believe that the IP laws are a form of regulation has not read the [statutes] and the maze of technical rules promulgated under them.”²⁵⁸ Putting

²⁵⁶ In a fascinating exchange between majority and dissenting Justices in the 1966 case of *Brenner v. Manson*, both sides implicitly acknowledged the uncertainties inherent in the language of a patent. Arguing for the importance of the utility doctrine, the majority explained that:

Until the process claim has been reduced to production of a product shown to be useful, the metes and bounds of that monopoly are not capable of precise delineation. It may engross a vast, unknown, and perhaps unknowable area. Such a patent may confer power to block off whole areas of scientific development, without compensating benefit to the public.

Brenner v. Manson, 383 U.S. 519, 534 (1966) (footnote omitted). In response, the dissent argued:

I fail to see the relevance of these assertions . . . nor, in any event, does advance knowledge of a specific product use provide much safeguard on this score or fix ‘metes and bounds’ precisely since a hundred more uses may be found after a patent is granted . . .

Id. at 537 (Harlan, J., dissenting); see also Robert P. Merges & Richard R. Nelson, *On the Complex Economics of Patent Scope*, 90 COLUM. L. REV. 839, 840-41 (1990) (explaining that patent law interpretation principles and objective evidence leave considerable room for patent judges and patent office examiners to exercise discretion).

²⁵⁷ See *KCJ Corp. v. Kinetic Concepts, Inc.*, 223 F.3d 1351, 1357 (Fed. Cir. 2000) (determining as a matter of claim construction that the word “a” could be interpreted as plural because it carried the meaning of “one or more”).

²⁵⁸ Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 COLUM. BUS. L. REV. 335, 336 (2004).

aside the notion that regulatory systems deal in public rights, rather than private ones, nothing in this type of system sits comfortably with the notion of the private property rights in the Fifth Amendment.²⁵⁹

The implications of requiring just compensation for “patent takings” cannot be understated. When properly constructed, intellectual property rights have the potential to boost innovation and economic development, especially in high-income countries.²⁶⁰ But maximizing the benefits of the patent system requires careful balancing, accounting for such factors as the rate of information flow, the movement of technology to and from other countries, and, of course, the economic and political conditions that affect inventors’ return on R&D investment.²⁶¹ Increasingly, however, intellectual property regimes are becoming frustrated with abuse and exploitation, requiring regulators to modify the law in order to keep investment flowing to genuine innovation. Even benign or positive developments, such as the restructuring of the court system or the discovery of a new technology at the fringes of what is patentable (constructing RNA sequences, for example) compel continual updating in patent law.²⁶²

If, however, Courts began to apply the Compensation Clause to patents, many potentially valuable policy measures would be stymied, depriving the public of access to innovations. The chilling of adjustments to patent law would harm most

²⁵⁹ For additional discussions of the nature of patents as political constructs, see Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1072 (2005) (comparing patents to public welfare benefits). See also Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575 (2003).

²⁶⁰ See, e.g., Rod Falvey, Neil Foster & David Greenaway, *Intellectual Property Rights and Economic Growth*, 10 REV. DEV. ECON. 700 (2006); D.M. Gould & W.C. Gruben, *The Role of Intellectual Property Rights in Economic Growth*, 48 J. DEV. ECON. 323 (1996); Mark A. Thompson & Francis W. Rushing, *An Empirical Analysis of the Impact of Patent Protection on Economic Growth*, 21(2) J. ECON. DEV. 61, 61 (1996).

²⁶¹ Falvey, Foster & Greenway, *supra* note 260, at 700-02. For high-income countries, where most innovation occurs, IPRs are necessary to promote RD investment, but if they are too strong, IPRs may slow the spread of new information, causing society to miss out on potential further innovation that the new knowledge would have generated if more widely available. The correlation has been harder to establish for middle-income countries, which rely heavily on imitation, but in low-income countries that have not yet reached a threshold level of development, IPRs can have a positive impact on growth because they generate positive technology flows from developed countries.

²⁶² See also Burk & Lemley, *supra* note 259 (evaluating the impetus for industry-specific patent law revision).

patent holders, too. As the Justices noted in *Mayo*, “[p]atent protection is, after all, a two-edged sword. . . . [T]hat very exclusivity can impede the flow of information that might permit, indeed spur, invention [A] new protective rule that seems to suit the needs of one field produce unforeseen results in another.”²⁶³

Congress and the PTO may be less inclined to award patent rights and remedies if they fear that they could not rein them in should future patent holders abuse them.²⁶⁴ Furthermore, in addition to having a reliance interest in the exclusivity they acquire for their invention, most patent holders have reliance interests in certain components or processes being *non*-patent protected. This feature of patent law generates an asymmetry between compensation law, which provides remedies only for existing property, and the patent system, in which actors often rely on the non-existence of a patent.²⁶⁵

From a purely practical point of view, the Compensation Clause represents a serious burden to judges in cases involving patents. The Supreme Court’s takings doctrine is universally recognized as problematic.²⁶⁶ The Court has failed for a century to agree on a consistent principle, even under the most straightforward facts, that would indicate when a government action is a taking that requires compensation.²⁶⁷ And so, the greatest concern, doctrinally speaking, lies in

²⁶³ *Mayo*, 566 U.S. at 92.

²⁶⁴ See, e.g., Isaacs, *supra* note 220, at 3 (“Congress is considering changes to patent protection to remedy several perceived problems, including patent monopoly prices of many pharmaceuticals. If regulatory takings claims could arise from those changes, the government might hesitate to make socially valuable reforms, thus injuring the public. The injury is not limited to the public, however; such claims might also be detrimental to the preponderance of patentholders, because if Congress did not feel free to cancel an expansion of patent rights that had unintended consequences, it would be less likely to initially adopt such changes.”) (footnote omitted).

²⁶⁵ Masur & Mortara, *supra* note 20, at 987-88.

²⁶⁶ See, e.g., Peterson, *supra* note 10, at 1304 (“[I]t is difficult to imagine a body of case law in greater doctrinal and conceptual disarray [than the Court’s takings doctrine.]”); Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1552 (2003) (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978) (“[Takings law] has proved to be a problem of considerable difficulty.”)); James E. Krier, *The Takings-Puzzle Puzzle*, 38 WM. & MARY L. REV. 1143, 1143 (1997) (“[T]he law in [the regulatory takings] area is a bewildering mess.”).

²⁶⁷ See sources cited *supra* note 266; see also Danaya C. Wright, *Eminent Domain, Exactions, and Railbanking: Can Recreational Trails Survive the Court’s Fifth Amendment Takings Jurisprudence*, 26 COLUM. J. ENVTL. L. 399, 414 (2001) (discussing how Supreme Court jurisprudence related to when government regulations constitute takings started to become less clear following the 1922 decision in *Pennsylvania Coal v. Mahon*).

entangling patent law in the morass of takings law. If patents were private property under the Compensation Clause, then all of takings doctrine, with its convoluted, often contradictory tests, prongs, and factors, would apply to patents. This would include the doctrine of regulatory takings, in which regulatory actions that have the effect of depriving a property owner of all value in its property constitute takings under the Fifth Amendment for which the government must provide just compensation. Foisting the Fifth Amendment onto the patent system would create an endless nightmare for the government and the courts.

CONCLUSION

Regardless of the angle from which one views the question of whether patents constitute private property for the purposes of the Fifth Amendment's Compensation Clause, the answer remains a simple, no. Examining the history and theory of patents from the Nation's founding reveals that the conceptualization of rights at the time of the Constitution fell into the two categories of core, private rights that exist without the action of government (conceived narrowly as land and chattel or broadly as also including life and liberty) and public rights that arise from an action of government. In contrast to property in land and chattels, patents bear none of the key features historically associated with "core" private property rights but rather, embody rights arising from an action of government. Moreover, the patent system was designed in a utilitarian fashion, with limited rights, for limited times, and for the purpose of advancing the interests of society in the progress of science, not the interests of the individual inventor.

The historic and theoretic perspectives are strengthened by a textual and structural analysis of the language of the Patent Clause within the Constitution. These perspectives are echoed by modern caselaw, in which courts evaluating Compensation Clause claims for other public rights are quick to remind plaintiffs that the Fifth Amendment is concerned with rights attaching to physical things. Despite some scattered dicta in the context of the Nation's twisted sovereign immunity history in the late 19th and early 20th century, no direct precedent exists for considering patents as private property for the Fifth Amendment. Most important, the nature of patents as regulatory creatures imbued with imprecision and uncertainty—given the lack of shared understanding of something new and the limitations of language in describing that newness—suggests that grafting the Fifth Amendment onto the patent system would prove an endless nightmare for the

government and the courts. In short, patents have always existed outside the realm of the Fifth Amendment's Compensation Clause, and they should remain so.