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PATENTS AS CONSTITUTIONAL PRIVATE PROPERTY:
THE HISTORICAL PROTECTION OF PATENTS UNDER THE TAKINGS CLAUSE

Adam Mossoff*

I. INTRODUCTION

Patents are property. The question that haunts scholars and courts today is whether patents also are constitutional private property, falling within the ambit of protections afforded to “private property” under the Takings Clause.¹ Scholarship in both takings and intellectual property concludes that this question is novel, and its answer uncertain.² Courts agree that the issue is ambiguous, at best. As recently as March 2006, the Court of Appeals for the Federal Circuit held that patents are not secured under the Takings Clause.³ Several years earlier, though, the U.S. Supreme Court seemed to suggest otherwise.⁴ Regardless of whether courts and scholars believe the Takings Clause should apply to patents as a normative matter, they are unanimous in their view of the constitutional history: No nineteenth-century court held that the Takings Clause applies to patents.

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¹ U.S. CONST. amend. V (“nor shall private property be taken for public use, without just compensation”).

² See, e.g., Thomas F. Cotter, *Do Federal Uses of Intellectual Property Implicate the Fifth Amendment?*, 50 FLA. L. REV. 529, 529 (1998) (noting that “the law of takings with regard to intellectual property can only be characterized as a muddle”); DAVID A. DANA & THOMAS W. MERRILL, *PROPERTY: TAKINGS* 233 (2002) (stating that the “application of the Takings Clause to intellectual property—trademarks, copyrights and patents—has not yet been seriously tested in the courts”); 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) (claiming that applying the Takings Clause to “intellectual property or intangible property would occur only through analogy”).

³ See *Zoltek Corp. v. United States*, 442 F.3d 1345 (Fed. Cir. 2006). In a separate case, the Court of Federal Claims came to a similar conclusion eight years earlier. See *Da Graffenreid v. United States*, 29 Fed. Cl. 384, 386-89 (1998) (holding that patents are not secured under the Takings Clause).

⁴ See *Festo Corp.*, 535 U.S. at 739 (invoking standard from regulatory takings doctrine that patent rights constitute “the legitimate expectations of inventors in their property”).

This historical claim is profoundly mistaken. In three parts, this Essay will uncover long-forgotten, nineteenth-century jurisprudence in the Supreme Court and in lower federal courts, showing that jurists once enthusiastically held that patents were protected under the Takings Clause. First, this Essay will survey the views of modern courts and scholars, who seem to agree in a rare case of unanimity that the historical record reflects no instance of a federal court holding that the Takings Clause applies to patents. For many intellectual property scholars, in particular, this historical claim is important, as it forms an important basis of their critiques of modern, expansive patent practices.⁵ Second, it will identify the logical progression in nineteenth-century constitutional jurisprudence leading to the famous 1878 *McKeever's Case*,⁶ which held that patents were secured under the Takings Clause. The juxtaposition of these historical facts and the modern misunderstanding of them raises an intriguing question: Why are courts and scholars today so wrong about the historical protection of patents as constitutional private property? This Essay concludes with some observations on how this conundrum arose, which may be an unintended consequence of the legal realists' radical transformation of property theory at the turn of the last century.

This intellectual history reveals that modern courts and scholars have overlooked significant constitutional jurisprudence given fundamental differences in how courts and scholars have conceptualized both property and patent rights. At the turn of the twentieth century, the legal realists rejected the natural rights conception of property as securing the exclusive rights to acquire, use and dispose of one's possessions, which was the leading property theory in the eighteenth and nineteenth centuries.⁷ The realists redefined property as securing principally the

⁵ See *infra* notes 42-46 and accompanying text.

⁶ *McKeever v. United States*, 14 Ct. Cl. 396 (1878).

⁷ See *infra* Part IV.

right to exclude, which is the dominant conception of property today.⁸ This radical transformation in property theory necessarily affected how courts and scholars conceptualized other types of property, such as the intangible property in a patent, which is also now defined as securing only the right to exclude.⁹ This, in turn, impacted the ability of courts and scholars to understand how patents rights were defined and secured in the nineteenth century, when property rights were more broadly conceived as securing exclusive use rights.¹⁰

It is important to bear in mind the scope of my thesis. This Essay builds on my earlier work, in which I discuss the evolution of patent rights at common law and in the early American Republic,¹¹ but here I explain only the historical protection of patents as constitutional private property. Takings scholars should find this Essay relevant to how they have framed their analyses of takings doctrine—they have missed much of the early constitutional protection of *intangible* property¹²—but this Essay does not seek to resolve their debates concerning the historical application of the Takings Clause as such.¹³ Furthermore, the normative question of whether patents *should* be secured as property rights, or whether patents *should* be secured as

⁸ See *infra* notes 120-124 and accompanying text.

⁹ See *infra* notes 125-128 and accompanying text.

¹⁰ See *infra* notes 131-142 and accompanying text.

¹¹ See Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Historical Context*, 92 CORNELL L. REV. (forthcoming 2007); Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1650-1800*, 52 HASTINGS L. J. 1255 (2001).

¹² Since takings scholars focus almost exclusively on land, this Essay exposes a substantial gap in their scholarship. See, e.g., John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099 (2000); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); Jed Rubenfeld, *Usings*, 102 Yale L. J. 1077, 1077-1110 (1993). In fact, there is no discussion of patent takings in two prominent monographs on takings. See BRUCE A. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977); RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985). Professors Tom Merrill and David Dana do address takings of “intangible rights” in a very brief chapter in their more recently published text, but they focus entirely on very recent case law. See DANA & MERRILL, *supra* note 2, at 228-53. Thus, takings scholars should find this Essay relevant insofar as it reveals that courts have long embraced *intangible property* as falling within the definition of “private property” secured under the Takings Clause. See *infra* Part III.

¹³ Compare Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549 (2003) (claiming that early courts used natural rights theory to create a pre-twentieth-century regulatory takings doctrine) with William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995) (proposing that early courts provided almost no protection under state or federal takings clauses to property that was negatively affected by governmental regulations).

private property under the Takings Clause, cannot be answered by history alone,¹⁴ and could not be addressed sufficiently in a brief essay in any case.

Yet the evidence presented here is not a mere historical or academic curiosity. This history establishes that courts and scholars have been relying on incorrect historical claims to justify their decisions and policy prescriptions today.¹⁵ This is significant, because patented drugs and other inventions are increasingly the subject of regulations, and thus the constitutional security in these legal entitlements is a particularly salient issue in our public policy debates. Following September 11, 2001, for instance, the federal government threatened to suspend Bayer's Cipro patent in order to obtain cheaply vast quantities of the antibiotic that best treats anthrax.¹⁶ Given the status of patents as property, these and other state actions raise questions concerning the constitutional limitations imposed on the government vis-à-vis the patents it grants to inventors.¹⁷

In addressing these issues, courts and scholars unanimously justify their conclusions on the basis of mistaken historical authority, and this Essay establishes that this reliance is no longer defensible. There needs to be a fresh review of the constitutional and policy issues implicated in a patent takings case. In this respect, this Essay is relevant to the continuing debates over the nature of patent rights today—revealing a substantial nineteenth-century jurisprudence applying the Takings Clause to patents that has become eclipsed to modern courts and scholars.

¹⁴ Cf. *Georgia v. Randolph*, 126 S. Ct. 1515, 1528 (2006) (Stevens, J., concurring) (noting in Fourth Amendment case that constitutional law history is “usually relevant but not necessarily dispositive” in deciding cases today).

¹⁵ See generally *infra* Part II.

¹⁶ See Jill Carroll & Ron Winslow, *Bayer To Slash Price U.S. Pays for Cipro Drug*, WALL ST. J., Oct. 25, 2001, at A3 (“The agreement [between Bayer and the U.S. government] comes after a high-stakes threat by Tommy Thompson, HHS secretary, to break Bayer’s patent for Cipro if he didn’t get the price he wanted.”); Shankar Vedantam, *Cipro Is Not the Only Pill That Fights Anthrax*, WASH. POST, Oct. 17, 2001, at A20 (reporting that Senator Charles E. Schumer “issued a public appeal that the government suspend Bayer’s patents and allow generic companies to add to the supply”).

¹⁷ See, e.g., *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 642 (1999) (holding that patents are property interests secured under the Due Process Clause of the Fourteenth Amendment in a case involving a state’s unauthorized use of a patented invention).

II. MODERN MYOPIA: NO PATENTS UNDER THE TAKINGS CLAUSE

It is intriguing that modern courts and scholars believe that patents have never been secured as constitutional private property. It is beyond cavil that patents are property rights,¹⁸ and currently there is a vibrant debate among scholars and jurists whether the recent expansion in these property rights is unprecedented, unjustified, or both.¹⁹ Given this debate, one might expect the relevant historical jurisprudence to be mined for its doctrinal or policy analyses refuting or supporting the arguments proffered by the relevant players today. Yet, despite this sharp policy divide, everyone believes that patents were never secured as constitutional private property in the nineteenth century.

This history might be relevant if only because courts seem schizophrenic in their decisions today. As a doctrinal matter, some courts suggest that patents are entitled to protection under the Takings Clause and others disagree.²⁰ Complicating the issue, a federal statute mandates that the government pay “reasonable and entire compensation” whenever “an invention . . . covered by a patent of the United States is used or manufactured by or for the United States.”²¹ Courts have long recognized this statutory requirement as executing the eminent domain power of the federal government,²² which tacitly acknowledges that patents are property rights accorded constitutional protection under the Takings Clause.

¹⁸ See 35 U.S.C. § 261 (“patents shall have the attributes of personal property”); *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 730 (2002) (noting that a patent “is a property right”); *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. at 642 (“Patents . . . have long been considered a species of property.”); *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 186-87 (1933) (explaining that “a patent is not, accurately speaking, a monopoly,” rather a “patent is property”).

¹⁹ See *infra* notes 42-46 and accompanying text.

²⁰ Compare *Festo Corp.*, 535 U.S. at 739 (noting that patent rights constitute “the legitimate expectations of inventors in their property,” invoking standard from regulatory takings doctrine) with *Zoltek*, 442 F.3d at 1352 (rejecting claim that patents are secured under the Takings Clause).

²¹ 28 U.S.C. § 1498(a) (1998).

²² See, e.g., *Crozier v. Fried Krupp Aktiengesellschaft*, 224 U.S. 290 (1912) (holding that suit under predecessor statute to § 1498(a) provides all requirements necessary to sustain the statute as an exercise of the federal government’s eminent domain power); *Decca Ltd. v. United States*, 544 F.2d 1070, 1082 (Ct. Cl. 1976) (“It is [the government’s] taking of a license, without compensation, that is, under an eminent domain theory, the basis

Perhaps this was the reason why the Supreme Court held in 2002 in *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.* that patent rights constitute “the legitimate expectations of inventors in their property.”²³ This applied to patents one of the contemporary standards securing tangible property rights under the Takings Clause.²⁴ As further evidence that the *Festo* Court had takings doctrine on its mind, it warned the Federal Circuit that it must neither “disrupt” nor “risk destroying” these “settled expectations” in exercising its exclusive jurisdiction in deciding patent appeals.²⁵ Although *Festo* was a patent infringement case, not a takings case, it seemed to establish an important constitutional claim: Patent rights represent “legitimate expectations” on par with tangible property rights in land and chattels already secured under the Takings Clause of the Constitution.²⁶

This conclusion, of course, is far too superficial and easy, and most agree that the status of patents as constitutional private property is far from clear. The Federal Circuit’s split decision

for a suit under § 1498.”); *Carter-Wallace, Inc. v. United States*, 449 F.2d 1374, 1390-91 (Ct. Cl. 1971) (Nichols, J., concurring) (assessing claim under § 1498 as a claim “to recover just compensation for a taking under the power of Eminent Domain”); *Irving Air Chute Co. v. U.S.*, 93 F. Supp. 633, 635 (Ct. Cl. 1950) (“The Government urges, rightly, that 28 U.S.C.A. § 1498, is in effect, an eminent domain statute, which entitles the Government to manufacture or use a patented article becoming liable to pay compensation to the owner of the patent.”).

²³ *Festo Corp.*, 535 U.S. at 739.

²⁴ In regulatory takings cases, a court must assess, among other factors, whether a regulation or government action interferes with the property owner’s settled expectations in the exclusive use of his property. *See Penn Central Trans. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (identifying “investment-backed expectations” as a factor in assessing whether a government regulation results in a compensable taking of property under the Takings Clause).

²⁵ *Festo Corp.*, 535 U.S. at 739. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1034 (1992) (recognizing in the context of regulatory takings doctrine that a property-owner’s “reasonable expectations must be understood in light of the whole of our legal tradition”).

²⁶ This conclusion finds additional support in the particular legal issue before the *Festo* Court, which scolded the Federal Circuit for abrogating a long-standing patent infringement concept known as the doctrine of equivalents. The Court concluded that the Federal Circuit “ignored the guidance of *Warner-Jenkinson*, which instructed that courts must be cautious before adopting changes that disrupt the settled expectations of the inventing community.” *Id.* at 739. Here, the Court was referring to its holding in *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.* that nineteenth- and early-twentieth-century infringement doctrines survived Congress’s enactment of the 1952 Patent Act, Pub. L. No. 82-593, 66 Stat. 792, rejecting explicitly an argument to the contrary. *See Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 26 (1996). Thus, *Warner-Jenkinson* and *Festo* established that the expectations inherent in the patent since the nineteenth century are implicitly secured as constitutional private property, although Congress is free to negate these expectations prospectively under its plenary power to define the nature of the “exclusive Right” secured under Article 1, § 8. *See infra* notes 53-58 and accompanying text (discussing *McClurg v. Kingsland*).

in March 2006 in *Zoltek Corp. v. United States*²⁷ best illustrates the confusion on this issue. In *Zoltek*, the Federal Circuit refused to apply the Takings Clause to patents, noting that “patent rights are a creature of federal law.”²⁸ As such, patentees have only those rights expressly provided by Congress, and the federal statute authorizing payment to patentees following unauthorized uses by the government revealed that these statutory rights were not previously secured under the Constitution.²⁹ *Zoltek* pointed out the obvious implication in Congress adopting a statute that secures substantive rights within the scope of a constitutional provision: “Had Congress intended to clarify the dimensions of the patent rights as property interests under the Fifth Amendment, there would have been no need for the new and limited sovereign immunity waiver” in a statute requiring payment of compensation for unauthorized governmental uses of patents.³⁰

Further highlighting the courts’ ambivalence on the patent takings issue, Judge Plager’s dissent in *Zoltek* argued vociferously that patents should be secured under the Takings Clause. He drew this conclusion, in part, given the classification of patents as “property.”³¹ He agreed, however, with the conventional wisdom today that the question of whether “an owner of a United States patent [may] bring a cause of action under the Fifth Amendment to the

²⁷ 442 F.3d 1345 (Fed. Cir. 2006).

²⁸ *Id.* at 1352.

²⁹ See *supra* note 21 and accompanying text (quoting § 1498). *Zoltek* raised a Fifth Amendment claim because part of the alleged infringement by the government occurred in a foreign jurisdiction, and thus was immunized from liability under § 1498(c). *Zoltek*, 445 F.3d at 1349.

³⁰ *Zoltek*, 445 F.3d at 1352. In a concurring opinion, Judge Dyk reiterated this argument from the majority *per curiam* opinion in almost identical language, stating that “[p]atent rights are creatures of federal statute,” and that the statutory framework of rights and remedies provided to patentees precludes applying the Takings Clause to patents. *Id.* at 1370.

The canon prohibiting courts from construing statutes in a manner that makes them superfluous militates in favor of this conclusion. See 1A SINGER, SUTHERLAND’S STATUTES AND STATUTORY CONSTRUCTION § 25:2 (noting that “[n]o statute is intended by the legislature to be wholly superfluous”); Supervisor Assessments of Anne Arundel County v. Southgate Harbor, 369 A.2d 1053, 1055 (Md. 1977) (noting “that a hornbook rule of statutory construction is that . . . a statute is to be read so that no word, clause, sentence or phrase shall be rendered surplusage, superfluous, meaningless, or nugatory”).

³¹ *Zoltek*, 442 F.3d at 1374 (Plager, J. dissenting). See *supra* note 18 and accompanying text (noting property status of patents per statute and case law).

Constitution against the United States for a ‘taking’ as all other owners of property rights may . . . has never been addressed directly by this or any other court.”³² Amazingly, even advocates for securing patents as constitutional private property are unaware of the nineteenth-century jurisprudence addressing this vital constitutional issue.

The limited scholarship on patent takings concludes that *Zoltek* is on firmer historical ground than either *Festo* or Judge Plager.³³ Although some scholars have explored normative frameworks for applying the Takings Clause to patents and other intellectual property rights,³⁴ the few who have written on this topic agree that there are no instances of such constitutional protection afforded to patents in the early historical record. In one of the only articles directly addressing this history, Thomas Cotter mistakenly points out that the Court first discussed the patent takings issue in 1881, but he notes that it is difficult “to take at face value the Court’s characterization . . . of unauthorized government uses of patents as takings” because such statements were “only dicta.”³⁵ Property scholars, Thomas Merrill and David Dana, agree that the “application of the Takings Clause to intellectual property—trademarks, copyrights and patents—has not yet been seriously tested in the courts.”³⁶ With respect to patents, a recent article asks: “Does the Takings Clause apply to patents? Unsurprisingly, there is no clear answer.”³⁷

³² *Zoltek*, 442 F.3d at 1371 (Plager, J., dissenting).

³³ Most takings scholars neglect patents in favor of the land and chattels that dominate modern takings jurisprudence, see *supra* notes 12 and accompanying text. Many intellectual property scholars neglect the Takings Clause because they prefer to define patents as something other than property, see *infra* notes 44-46.

³⁴ See Matthew S. Bethards, *Condemning a Patent: Taking Intellectual Property by Eminent Domain*, 32 AIPLA Q. J. 81 (2004); Daniel R. Cahoy, *Patent Fences and Constitutional Fence Posts: Property Barriers to Pharmaceutical Importation*, 15 FORDHAM INTELL. PROP., MEDIA & ENT. L. J. 623 (2005); Cotter, *supra* note 2; Shubha Ghosh, *Patents and the Regulatory State: Rethinking the Patent Bargain Metaphor after Eldred*, 19 BERKELEY TECH. L.J. 1315 (2004); Roberta Rosenthal Kwall, *Governmental Use of Copyrighted Property: The Sovereign’s Prerogative*, 67 TEX. L. REV. 685 (1989).

³⁵ Cotter, *supra* note 2, at 543.

³⁶ DANA & MERRILL, *supra* note 2, at 233.

³⁷ J. Nicholas Bunch, Note, *Takings, Judicial Takings, and Patent Law*, 83 TEX. L. REV. 1747, 1752 (2005).

Some scholars believe that the Takings Clause might be applicable to patents, but that this can only be “derived through analogies to tangible property as well as implicit treatment by the courts.”³⁸ If the Takings Clause is applicable to patents, the argument typically goes, then it is only by virtue of extending the Supreme Court’s 1984 decision in *Ruckelshaus v. Monsanto Co.*³⁹ that trade secrets are “private property” secured under the Takings Clause.⁴⁰ The reasoning is relatively straightforward: If trade secrets are constitutional private property, then, all things being equal, “the same goes for patents” because both are forms of intellectual property.⁴¹

Broader intellectual property scholarship—critical of the expansive protections afforded to patents, copyrights and other intellectual property rights today—takes a similar tack in suggesting the history is inconclusive or contrary to securing patents as constitutional private property. Relying on a historical claim that patents and copyrights were special, limited monopoly grants in the early American Republic,⁴² scholars today condemn recent expansions in intellectual property rights,⁴³ which they refer to as “propertizing” intellectual property.⁴⁴ They

³⁸ Cahoy, *supra* note 34, at 678; *see also* Bethards, *supra* note 34, at 85-88 (describing modern takings of contracts, goodwill and trade secrets as basis for applying Takings Clause to patents); Ghosh, *supra* note 2, at 667 (claiming that applying the Takings Clause to “intellectual property or intangible property would occur only through analogy”).

³⁹ 467 U.S. 986 (1984).

⁴⁰ *See, e.g.*, Bunch, *supra* note 37, at 1752-53 (noting that the characteristics of trade secrets identified by the *Monsanto* Court that justified treating these entitlements as “property” under the Takings Clause are equally true for patents); Cahoy, *supra* note 34, at 681 (noting that “[i]f there was an argument to be made for the application of a regulatory takings scheme [to patents], it would likely be based in the Supreme Court’s rather curious decision in *Ruckelshaus v. Monsanto*”); Cotter, *supra* note 2, at 537 (noting that *Monsanto* is “the only recent United State Supreme Court case dealing with an alleged taking of intellectual property”); DANA & MERRILL, *supra* note 2, at 236 (stating that “*Ruckelshaus v. Monsanto Co.* is the leading modern precedent”).

⁴¹ Bunch, *supra* note 37, at 1753.

⁴² *See, e.g.*, Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Copyright and Patent Clause*, 84 J. PAT. & TRADEMARK OFF. SOC’Y 909 (2002) (arguing generally that patents and copyrights were viewed by early Americans as limited monopolies); LAWRENCE LESSIG, *THE FUTURE OF IDEAS* 58-59, 94-96 (2001) (claiming that early Americans viewed patents and copyrights as special, limited monopolies); SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS* 23-24 (2001) (maintaining that early Americans viewed patents and copyrights as “a necessary evil” in that these monopolies provided limited incentives). *See also* *Eldred v. Ashcroft*, 537 U.S. 186, 246 (2003) (Breyer, J. dissenting) (castigating *Eldred* majority for ignoring views of Madison, Jefferson “and others in the founding generation, [who] warned against the dangers of monopolies” in granting copyrights and patents).

⁴³ *See, e.g.*, *Independent Ink, Inc. v. Illinois Tool Works, Inc.*, 126 S. Ct. 1462 (2006) (rejecting per se rule in applying antitrust tying doctrine to patentees); *Diamond v. Diehr*, 450 U.S. 175 (1981) (holding that computer

also criticize the use of “property rhetoric” in intellectual property doctrines today, which they consider both a novel practice and a contributing factor in the “propertization” of intellectual property doctrines.⁴⁵ Thus, a traditional legal historian recently noted the historical claim in intellectual property scholars’ lamenting “the ‘propertization’ of the field,” in which the “expansive language of property rights has displaced the traditional discourse of limited monopoly.”⁴⁶

This broader historical claim in intellectual property scholarship supports the more specific historical arguments at the patent-takings nexus. Simply put, if patents were traditionally defined as limited monopoly privileges, then nineteenth-century courts would not have extended constitutional protection to them, as property rights on par with traditional rights in land or chattels. Thus, the suggestions by *Festo* and Judge Plager that this constitutional protection should be extended to patents today is unprecedented, at least as a matter of constitutional doctrine and historical practice. Although *Festo* and Judge Plager may disagree with this

programs are patentable subject matter); *Diamond v. Chakrabarty*, 447 U.S. 303, 308-09 (1980) (holding that a genetically engineered bacteria “plainly qualifies as patentable subject matter”); *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*, 149 F.3d 1368 (Fed. Cir. 1998) (holding business methods are patentable subject matter).

⁴⁴ See, e.g., Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L. J. 1, 1 (2004) (declaring that “[o]ne of the most revolutionary legal changes in the past generation has been the ‘propertization’ of intellectual property,” in which such rights are viewed as “absolute property” and the “duration and scope of rights expand without limit”); Mark A. Lemley, *Romantic Authorship and the Rhetoric of Property*, 75 TEX. L. REV. 873, 902 (1997) (concluding after a survey of increasing intellectual property protections that “the ‘propertization’ of intellectual property is a very bad idea”); see also Pamela Samuelson, *Information as Property: Do Ruckelshaus and Carpenter Signal a Changing Direction in Intellectual Property Law?*, 38 CATH. U. L. REV. 365 (1989) (describing and critiquing the “more proprietarian and anti-dissemination attitude toward information than that which the law has previously displayed”).

⁴⁵ See, e.g., Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1033 (2005) (noting that “idea of propertization begins with a fundamental shift in the terminology of intellectual property law,” which includes the term “intellectual property” as “only recently has the term “intellectual property come into vogue”); Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1343 (2004) (noting how it is “fashionable today” among intellectual property scholars to believe that “the public domain stands in opposition to intellectual property—that the public domain is a bulwark against propertization and an alternative to intellectual property”); Lemley, *supra* note 44, at 895-904 (discussing the analytical and legal implications of using “property rhetoric” in intellectual property policy debates).

⁴⁶ Morton J. Horwitz, *Conceptualizing the Right Of Access to Technology*, 79 WASH. L. REV. 105, 115 (2004) (discussing the work of William Fisher).

argument as a matter of normative policy, they would concur with their critics on this descriptive claim: Patents have never been secured under the Takings Clause.

It is unusual that a substantial historical development in constitutional law involving two provisions of the Constitution—the Takings Clause and the Copyright and Patent Clause—has been eclipsed so dramatically in modern jurisprudence and scholarship. Adding to the mystery, there is nothing to suggest that this is intentional. In fact, Judge Plager and the *Festo* Court would have benefited from invoking the long-standing nineteenth-century cases supporting their arguments. This Essay will conclude with some observations as to how this situation arose, but first it will explicate the substantial nineteenth-century jurisprudence addressing the issue of patent takings, reaching as far back as antebellum Supreme Court decisions.

III. THE HISTORY OF PATENTS AS CONSTITUTIONAL PRIVATE PROPERTY

Nineteenth-century courts concluded that patents were constitutional private property based on a logical development in both patent and constitutional law. As a doctrinal matter, courts need two constitutional predicates to secure rights under the Takings Clause: First, courts must classify the legal entitlement as “property,” because the Takings Clause secures only “private property,” and, second, a property owner must have the ability to bring the government into court as a defendant.⁴⁷ Perhaps unsurprisingly, the conclusion in the late nineteenth century that the Takings Clause protected patents was based on a jurisprudence that first focused on these two constitutional requirements. Unfortunately, this jurisprudence has been lost to courts and scholars today. Thus, it is necessary to recount this historical progression in long-forgotten case law in order to understand the justification for this constitutional proposition.

⁴⁷ This jurisdictional requirement is fundamental to the judicial enforcement of all constitutional rights. *See, e.g.*, 42 U.S.C. § 1983 (2006) (providing right to sue for “the deprivation of any rights, privileges, or immunities secured by the Constitution and laws”).

With respect to the first requirement—the identification of patents as property—antebellum case law unequivocally classified patents as property rights. As I have explained elsewhere, Congress and courts identified patents as *property* and invoked natural-rights justifications for property in defining and adjudicating patent rights.⁴⁸ Moreover, as a doctrinal matter, antebellum courts explicitly relied on *real property* case law, and often invoked property concepts, such as trespass and the inchoate-choate right distinction, in adjudicating patent cases.⁴⁹ Substantively and rhetorically, nineteenth-century courts believed that patents were a species of property.⁵⁰

Yet constitutional scholars know that merely classifying a legal entitlement as *property* is insufficient by itself to justify its constitutional protection. This was as true in the nineteenth century as it is today. Antebellum courts defined the legal rights secured under monopoly franchises as *property*, for instance, but they nevertheless denied franchisees’ claims to constitutional protection when the government interfered with their property rights.⁵¹ They also limited constitutional protections afforded to traditional, tangible private property deemed to be

⁴⁸ See generally Mossoff, *Who Cares What Thomas Jefferson Thought About Patents?*, *supra* note 11.

⁴⁹ *Id.*

⁵⁰ *Id.* See, e.g., *Allen v. New York*, 1 F. Cas. 506, 508 (C.C.S.D. N.Y. 1879) (No. 232) (noting that “the [patent] right is a species of property”); *Ball v. Withington*, 2 F. Cas. 556, 557 (C.C.S.D. Ohio 1874) (No. 815) (noting that patents are a “species of property”); *Jones v. Sewall*, 13 F. Cas. 1017, 1020 (C.C.D. Me. 1873), *rev’d on other grounds*, 91 U.S. (1 Otto) 171 (1875) (noting that “[i]nventions lawfully secured by letters patent are the property of the inventors, and as such . . . are as much entitled to legal protection as any other species of property”); *Carew v. Boston Elastic Fabric Co.*, 5 F. Cas. 56, 57 (C.C.D. Mass. 1871) (No. 2,398) (explaining that “the rights conferred by the patent law, being property, have the incidents of property”); *Gay v. Cornell*, 10 F. Cas. 110, 112 (C.C.S.D.N.Y. 1849) (No. 5,260) (recognizing that “an invention is, within the contemplation of the patent laws, a species of property”).

⁵¹ See, e.g., *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837) (rejecting a bridge franchisee’s argument that Massachusetts’s granting another bridge franchise over the same river was a violation of constitutional takings and contract rights). Cf. *Brown v. Barry*, 3 U.S. (3 Dall.) 365, 367 (1797) (Elsworth, C.J.) (stating canon that a legislative “act . . . being in derogation of the common law, is to be taken strictly”); 3 NORMAN J. SINGER, *SUTHERLAND’S STATUTES AND STATUTORY CONSTRUCTION* § 61:1 (6th ed. 1997) (“Statutes which impose duties or burdens or establish rights or provide benefits which were not recognized by the common law have frequently been held subject to strict, or restrictive, interpretation.”)

“affected with the public interest.”⁵² Thus, identifying patents as *property* was necessary in securing these legal entitlements under the Takings Clause, but it was not sufficient.

In 1843 in *McClurg v. Kingsland*,⁵³ the Supreme Court began laying the groundwork for applying the Takings Clause to the property rights secured in patents, as distinguished from monopoly franchises and other similarly limited property rights. Although not a takings case, the *McClurg* Court held that Congress could not *retroactively* limit property rights that had been secured in now-repealed patent statutes.⁵⁴ Justice Baldwin’s opinion for the unanimous Court acknowledged that “the powers of Congress to legislate upon the subject of patents is plenary by the terms of the Constitution.”⁵⁵ Nonetheless, he concluded that “a repeal [of a patent statute] can have no effect to impair the *right of property* then existing in a patentee, or his assignee, according to the well-established principles of this court.”⁵⁶ In sum, a patent issued under now-repealed statutes vested property rights in an inventor,⁵⁷ so that “the patent must therefore stand as if the [now-repealed] acts . . . remained in force.”⁵⁸

In defending the vested property rights in patents, Justice Baldwin relied on the “well established principles of this court,”⁵⁹ citing only the Court’s earlier decision in *The Society for*

⁵² *Munn v. Illinois*, 94 U.S. (4 Otto) 113, 126 (1876) (quoting Lord Chief Justice Matthew Hale, *De Portibus Maris*, 1 Harg. Law Tracts 78). Although the plaintiff property owner relied on the Fourteenth Amendment and the Court’s decision was limited to this particular claim, Chief Justice Waite referenced the Takings Clause in his decision. *See id.* at 125. Thus, *Munn* is an example of the general proposition that legal property rights are neither universally nor absolutely secured under the Constitution.

⁵³ 42 U.S. (1 How.) 202 (1843).

⁵⁴ *Id.* at 206.

⁵⁵ *Id.*

⁵⁶ *Id.* (emphasis added). *Cf.* *In re Fultz*, 9 F. Cas. 998, 999 (C.C.D.C. 1853) (No. 5,156) (discussing repeal of provisions of 1836 Patent Act by 1839 Patent Act and noting that there is “nothing in the repealing act of 1839 which takes away or impairs [the patentee’s] right; on the contrary, there is every reason to infer that it was intended to be saved and secured to the fullest extent”).

⁵⁷ *See, e.g., Gaylor v. Wilder*, 51 U.S. (10 How.) 477, 493 (1850) (recognizing that an inventor is “vested by law with an inchoate right . . . which he may perfect and make absolute” in obtaining a patent); *Evans v. Jordan*, 8 F. Cas. 872, 873-74 (C.C.D. Va. 1813) (No. 4,564) (Marshall, Circuit Justice) (noting that an inventor has an “inchoate property which [is] vested by the discovery” and which is ultimately “perfected by the patent”).

⁵⁸ *McClurg*, 42 U.S. at 206.

⁵⁹ *Id.*

the Propagation of the Gospel in Foreign Parts v. Town of New Haven.⁶⁰ Significantly, *Society* addressed neither takings nor patents; it adjudicated the status of property rights in land after the Revolutionary War. In this case, the Court held that “the termination of a treaty cannot divest rights of property already vested under it.”⁶¹ A contrary rule, declared the unanimous *Society* Court, “would overturn the best established doctrines of law, and sap the very foundation on which property rests.”⁶² In relying on such “well established principles” set forth in *Society*, the *McClurg* Court directly linked patents with traditional property rights as a matter of legal and constitutional doctrine.

Beginning in the early 1870s, the Court built on these antebellum decisions and laid the groundwork for satisfying the second requirement for securing patents as constitutional private property—establishing a patentee’s right to sue the government for an unauthorized use of a patent as a taking of private property. The process began in *United States v. Burns*,⁶³ in which the Court reversed the Court of Claims’ dismissal of a lawsuit brought by a patentee for an unauthorized governmental use of his patented invention. Congress created the Court of Claims in 1855, providing a venue for citizens to sue the government for breach of their contract or property rights.⁶⁴ Accordingly, if patentees could sue for violations of their property rights by the federal government, then they could bring suit only in the Court of Claims.⁶⁵ Relying on

⁶⁰ 21 U.S. (8 Wheat.) 464 (1823).

⁶¹ *Id.* at 494.

⁶² *Id.*

⁶³ 79 U.S. (12 Wall.) 246 (1870).

⁶⁴ *See* An Act to Establish a Court for the Investigation of Claims against the United States, ch. 92, 10 Stat. 612 (1855).

⁶⁵ According to § 1 of its enabling statute, the Court of Claims could hear “all claims founded upon any law of congress or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States” *Id.* This provision ultimately forced courts to exploit “implied contract” as a legal fiction by which a patentee could sue the government for unauthorized uses, because courts construed “law of congress” as referring to a specific statutory authorization for payment of damages by the government. *See* *Great Falls Mfg. Co. v. Garland*, 124 U.S. 581, 598-99 (1888); *Pitcher v. United States*, 1 Ct. Cl. 7 (1863). Moreover, this jurisdictional statute did not provide for recovery for a tort, such as patent infringement. *See* *James v. Campbell*, 104 U.S. 356, 358-59 (1881); *see also* *Cotter*, *supra* note 2, at 543-44 (discussing this aspect of the Court of Claims’

McClurg, the *Burns* Court summarily concluded that the Court of Claims had jurisdiction to hear claims filed against the federal government for unauthorized uses of patents.⁶⁶

Six years later in *Cammeyer v. Newton*,⁶⁷ the Supreme Court considered the question of whether federal officials were immunized from a claim for infringement under the patent statutes when they used patented inventions without the patentee's permission.⁶⁸ The *Cammeyer* defendants were federal officials who defended their actions, in part, by claiming sovereign immunity from infringement claims because they acted within the scope of their official authority. The *Cammeyer* Court ultimately held that the device used by the defendants did not infringe the patent, but in *dicta* the Court soundly rejected the defendants' immunity claim, stating pointedly that "[a]gents of the public have no more right to take such private property than other individuals."⁶⁹ Citing *Burns*, the *Cammeyer* Court declared that "[p]rivate property, the Constitution provides, shall not be taken for public use without just compensation,"⁷⁰ which it held applicable to patentees suffering an "invasion of the private rights of individuals."⁷¹

jurisdiction over patents). Notably, this procedural fiction was not applied to patentees only, as the Supreme Court also invoked the fiction of an "implied contract" in establishing the Court of Claims' jurisdiction over takings claims concerning real property. *See* *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 656-57 (1884).

⁶⁶ *Id.* at 253-54 (citing *McClurg*). This is an interesting case that arose, in part, from circumstances surrounding the Civil War. *Burns* brought suit in the Court of Claims after the federal government refused to pay royalties to him, as an assignee under a contract for the manufacture and use of a patented tent. The contract was executed in 1858 between the original patentee, H.H. Sibley, and the U.S. government. Shortly thereafter, Sibley assigned one-half interest to *Burns*. At that time, Sibley and *Burns* were both Majors in the U.S. Army. When the Civil War commenced two years later, Major Sibley resigned his commission and joined the Confederacy, and thus he lost his right to claim his one-half royalties under his patent "by reason of his disloyalty." *Id.* at 254. Major *Burns*, however, was permitted to prosecute his claim for his one-half royalties, because "he remained true to his allegiance and served in the army of the Union." *Id.* at 248. Thus, the Civil War not only pitted brother against brother, as the old saying goes, but also patentee against assignee.

⁶⁷ 94 U.S. (4 Otto) 225 (1876).

⁶⁸ In this case, *Cammeyer* was an assignee of a patented device for dredging waterways, which federal agents used with neither his permission nor a license. *Id.* at 226.

⁶⁹ *Id.* at 234-35.

⁷⁰ *Id.* at 234.

⁷¹ *Id.* at 235. Justice Clifford signaled in the first paragraph of his opinion that this would be his conclusion on this issue when he wrote that "an invention so secured [under the patent statutes] is property in the holder of the patent, and that as such the right of the holder is as much entitled to protection as any other property." *Id.* at 226.

The nascent takings principles expressed in *Burns*, *Cammeyer* and *McClurg* came to fruition in the famous and oft-cited takings decision in *McKeever's Case*,⁷² which squarely addressed the question of whether the Takings Clause secured patents as private property, requiring just compensation upon an unauthorized use by the government. Similar to *Cammeyer*, the plaintiff-patentee, Samuel McKeever, sued the U.S. government in the Court of Claims, alleging an unconstitutional taking of his property without compensation. McKeever claimed that the U.S. War Department manufactured and used two of his patented inventions without his authorization.⁷³ The government also repeated its defense from *Cammeyer* by claiming sovereign immunity, arguing that patents, as special grants of legal privileges *from* the government, did not apply *against* the government.⁷⁴ Relying on the earlier cases, the *McKeever* court rejected this argument and firmly placed patents within the scope of private property rights secured under the Takings Clause.

The *McKeever* court agreed with the government that patents—representing the “property in the mind-work of the inventor”—were not protected at common law, and that their origin was found in the English Crown’s royal prerogative to grant manufacturing monopolies.⁷⁵ It noted that England remained wedded to the view of a patent as “a grant” issuing solely from “royal

⁷² *McKeever v. United States*, 14 Ct. Cl. 396 (1878). There appears to be no formal record of an appeal to the Supreme Court, but twenty-three years later, Justice McKenna would cite *McKeever* with the remark, “affirmed on appeal by this court.” *Russell v. United States*, 182 U.S. 516, 532 (1901). *See also* *United States v. Buffalo Pitts Co.*, 234 U.S. 228, 233 (1914) (citing *McKeever* with similar remark that it was “affirmed by this court”).

⁷³ McKeever was a Lieutenant in the U.S. Army, and he had invented a new cartridge box that aided soldiers in carrying more ammunition and in better retrieving this ammunition in the field. He obtained two patents in 1873 for this invention. *Id.* at 397.

⁷⁴ *Id.* at 416-17 (citing English case law holding that the Crown was privileged in using patented inventions without authorization).

⁷⁵ *Id.* at 417-19. This was an uncontroversial, historical observation. *See* *Morton v. New York Eye Infirmary*, 17 F. Cas. 879, 881 (C.C.S.D.N.Y. 1862) (No. 9,865) (noting that “[a]t common law an inventor has no exclusive right to his invention or discovery”); *Motte v. Bennett*, 17 F. Cas. 909, 913-14 (C.C.D.S.C. 1849) (No. 9,884) (Wayne, Circuit Justice) (discussing history of patents as “privileges and monopolies” granted by “the kings of England”); *see also* Mossoff, *Rethinking the Development of Patents*, *supra* note 11, at 1259-76 (describing progenitor of modern patent system in English Crown’s practicing of granting manufacturing monopolies).

favor,” and therefore it “shall not exclude a use[] by the Crown.”⁷⁶ But this was not the law in the now-independent United States of America. Contrary to the English patent practice, the *McKeever* court pointed out, American patents secured the “mind-work which we term inventions,” as specifically authorized under the Copyright and Patent Clause in the Constitution (what the court referred to as “our organic law”).⁷⁷ This resulted in substantial differences between the English Crown’s patent privileges and American patent rights, such as the absence of the term “patent” in the Constitution, the use of the terms “right” and “exclusive” in the Constitution, as well as the absence of an express reservation in favor of the government in the constitutional provision that empowered Congress, not the Executive, to secure an inventor’s rights.⁷⁸ Although the Founders did not express their reasons for securing patents in the Constitution, the *McKeever* court concluded that they “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.’”⁷⁹

Invoking the classic formulation of the natural right to property,⁸⁰ the *McKeever* court further found that this “natural right to the fruits of mental labor” was inherent in the federal government’s interpretation of the Copyright and Patent Clause since the Founding Era. Accordingly, Congress’s enactment of the patent statutes, the Executive’s use of patented articles via “express contracts,” and the Judiciary’s interpretation of these statutes and contracts all

⁷⁶ *McKeever*, 14 Ct. Cl. at 420.

⁷⁷ *Id.*; see U.S. CONST. art. I, § 8 (“The Congress shall have Power . . . To promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

⁷⁸ See *id.* at 421.

⁷⁹ *Id.* at 420. Judge Nott did not provide a citation for the quote, but he was likely paraphrasing from a recently published treatise. See THEODORE D. WOOLSEY ET AL., *THE FIRST CENTURY OF THE AMERICAN REPUBLIC* 443 (1876) (discussing how inventors are given “some control over the reproductions of the fruits of mental labor . . . in addition to the natural right to property”).

⁸⁰ See, e.g., *Vanhorne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (1795) (Patterson, J.) (“[T]he right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. . . . No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry.”).

“forbid the assumption that this government has ever sought to appropriate the property of the inventor.”⁸¹ In its opinion, *McKeever* repeatedly cited *Burns*, *Cammeyer*, and *McClurg*—Supreme Court authority establishing the necessary predicates for the *McKeever* court to conclude that the Takings Clause secured patents as constitutional private property.⁸²

But *McKeever* seemed to blithely sweep under the rug a fundamental difference between the patents secured under federal statute and the traditional, tangible property rights secured at common law. This difference in doctrinal provenance—statute versus common law—might have suggested that patents were insufficiently similar to traditional property rights to justify their protection under the Takings Clause. *McKeever*’s failure to address this point, let alone even acknowledge it, raised the specter that its reasoning was more the result of hyperbolic rhetoric and late-nineteenth judicial formalism than of substantive patent and constitutional doctrine.

In fact, this distinction between statutory and common-law property was well known in the nineteenth century, and the Supreme Court placed its imprimatur on it in an 1834 copyright case.⁸³ Federal officials also invoked this distinction in the patent context. At a minimum, it was implicit in both *Cammeyer* and *McKeever*, in which the government defended its actions by equating patent rights created under federal statute with patent privileges granted by the English Crown. Other federal officials defended themselves against takings claims by invoking this

⁸¹ *Id.*; see also *Belding v. Turner*, 3 F. Cas. 84, 85 (C.C.D. Conn. 1871) (No. 1,243) (distinguishing the “personal privilege” granted in an English patent from the “personal chattel” or “personal estate” secured under U.S. patent law).

⁸² Notably, a concurrence by Judge Hunt and a dissent by Judge Davis, joined by Chief Judge Drake, all left untouched Judge Nott’s disquisition on the nature of American patents as constitutional private property. Instead, judges Davis, Drake, and Nott contested only the damages set by Judge Nott for the government’s use of *McKeever*’s patented cartridge box. See *McKeever*, 14 Ct. Cl. at 431-34.

⁸³ See *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 660-61 (1834) (holding that patents are not secured as common law rights and are merely statutory rights created by Congress under the authority granted to it under the Constitution).

distinction explicitly, in cases like *Campbell v. James*,⁸⁴ decided soon after *McKeever*. In *Campbell*, U.S. postal officials defended their unauthorized use of a patented device for postmarking and canceling hand-stamps by asserting several claims, including a challenge to the patent's validity that the Supreme Court ultimately found compelling.⁸⁵ Significantly for our purposes, the defendants also claimed that they were immune from suit because patent rights were created by federal statutes adopted and enforced by the federal government, and thus such legal rights were not enforceable against agents of the federal government in a federal court.⁸⁶

The *Campbell* court found the defendants' sovereign immunity argument wanting in much the same manner as the *McKeever* court did. Although there is no evidence that the *Campbell* court was aware of the *McKeever* decision, *Campbell* relied on the same jurisprudence in summarizing the legal status of patents: "The property in a patented invention stands the same as other property."⁸⁷ By itself, of course, this proposition does not refute defendants' claim to sovereign immunity, but the *Campbell* court quickly drew the logical implication of this observation:

[The patent] was granted by express law of congress, pursuant to the constitution, without which it could not exist. But, all property is upheld by law, either expressly or impliedly enacted or adopted, all of which is the law of the land, the same as the statutes upholding patents are. This property, like all other private property recognized by law, is exempt from being taken for public use without just compensation, by the supreme law of the land.⁸⁸

⁸⁴ 4 F. Cas. 1168 (C.C.S.D.N.Y. 1879) (No. 2,361), *rev'd on other grounds*, James v. Campbell, 104 U.S. 356 (1881) (holding that reissued patent at issue in this infringement action was invalid).

⁸⁵ *James*, 104 U.S. at 382-83 (holding that the reissued patent was "inoperative and void").

⁸⁶ *Campbell*, 4 F. Cas. at 1172.

⁸⁷ *Id.* (citing *Burns and Cammeyer*). *Cf.* Carr v. Rice, 5 F. Cas. 140, 146 (C.C.S.D.N.Y. 1856) (No. 2,440) (charging jury that the first inventor has prior title to any subsequent inventors and that "[p]atent interests are not distinguishable, in this respect, from other kinds of property").

⁸⁸ *Campbell*, 4 F. Cas. at 1172.

The ease by which the *McKeever* and *Campbell* courts concluded that patents were constitutional private property reveals the extent to which this proposition was well grounded in the constitutional and patent jurisprudence at that time.

But this is not the end of the story. The defendants appealed the *Campbell* court's decision in favor of the patentee, and they ultimately succeeded in convincing the Supreme Court that the patent at issue in the lawsuit was invalid.⁸⁹ Since the Supreme Court resolved *James v. Campbell* on the issue of the patent's validity, it addressed only as *dicta* whether patents were secured under the Takings Clause. Here, the *James* Court agreed with the Circuit Court, stating "we have no doubt" that the "exclusive property in the patented invention . . . cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land"⁹⁰ The evolution from *Society* and *McClurg*, through *Burns*, *Cammeyer*, *McKeever*, and *Campbell*, seemed to reach its apogee in *James*. With the Supreme Court's imprimatur, the conclusion seemed clear that patents were secured as constitutional private property under the Takings Clause.

Yet *James* ultimately sowed doubt where *McKeever* and *Campbell* had found clarity. Although *James* acknowledged that patents are property within the ambit of the Takings Clause, it proceeded to undermine the second requirement for securing patents under the Constitution—questioning whether there was a federal court authorized to rule on this constitutional claim by a patentee. Apparently forgetting the Court's own prior decisions on this issue, Justice Bradley's opinion in *James* mused "whether such an action can be sustained" given the absence of a statute granting jurisdiction to a federal court to hear a takings claim by a patentee.⁹¹

⁸⁹ See *supra* note 85 and accompanying text.

⁹⁰ *James*, 104 U.S. at 358.

⁹¹ *Id.* at 359.

Admittedly, it is possible that in saying this *James* implicitly reversed the earlier cases, but the full context of Justice Bradley's remarks belies this suggestion. First, it is revealing that Justice Bradley cited only a single case in support of this observation; it was not even a patent case, but rather one involving an estoppel defense in a land dispute.⁹² It is unlikely that the *James* Court intended to overrule *McKeever*, *Cammeyer*, *Burns*, or *McClurg* when it acted as if this jurisprudence, reaching back to the antebellum era, did not even exist. In fact, the absence of any references to *McKeever*, *Cammeyer*, *Burns*, or *McClurg* is striking, particularly given that the Circuit Court repeatedly cited these cases in the decision on appeal.

Second, and more significant, Justice Bradley's musings were only *dicta*, as the Court ended its brief discussion of the takings issue by noting that "the conclusion which we have reached in this case does not render it necessary to decide this question."⁹³ Perhaps the Justices did not feel compelled to review the Court's own precedents on this constitutional issue given that it was unnecessary to decide the case before them. In any event, it is difficult to argue that these remarks were intended to overrule the prior patent-takings jurisprudence when they were made in *dicta*.⁹⁴ In the end, though, Justice Baldwin's unprecedented musings succeeded in muddying the waters, and subsequent cases improperly relied on this *obiter dicta*, treating it as part of the holding of *James*. The result was a spat of Supreme Court cases that called into question the right of patentees to sue under the Takings Clause, and disregarded or simply missed the pre-*James* precedent directly on point.⁹⁵

⁹² *Id.* at 359 (citing *Carr v. United States*, 98 U.S. (8 Otto) 433 (1878)).

⁹³ *Id.*

⁹⁴ Professor Cotter makes this same point, but for different effect. He accepts Justice Baldwin's musings about patents and the Takings Clause at face value, and thus he too misses all of the pre-*James* jurisprudence. Thus, he mistakenly questions the doctrinal significance of *James* as setting forth any basis for patentees to claim a taking upon an unauthorized use by the government. *See supra* note 35 and accompanying text.

⁹⁵ *See, e.g.*, *Palmer v. United States*, 128 U.S. 262 (1888) (holding that patentees could not sue except on the basis of a contract with the government, citing only *Burns*); *Schillinger v. United States*, 155 U.S. 163 (1894) (holding, without any acknowledgement of *Burns*, *Cammeyer*, or *McKeever*, that patentees were precluded from

Of course, it is important to recognize that nineteenth-century jurisprudence was not monolithic in favor of securing patents under the Takings Clause. There are some decisions that suggested that this should not be the case, such as Judge Blatchford's allusion in 1869 that the U.S. government retained an implied reservation to use a patent.⁹⁶ As in *James*, these remarks were not necessary to resolve the case, as Judge Blatchford recognized that he did "not intend . . . to intimate an opinion as to whether the government is or is not excluded from the [patentee's] right to make for itself and use the patented invention."⁹⁷ He did, however, reveal his personal view on the matter by referencing a recently decided English case holding that British patents were a "sole privilege" granted by "the crown,"⁹⁸ suggesting that American patentees stood on equal legal footing as English patentees when faced with unauthorized governmental uses of their inventions. Notably, *McKeever* recognized this distinction between English royal privileges and American property rights as one of the principal differences between U.S. and British patent law, concluding that American patents were secured under the Takings Clause.⁹⁹

Notwithstanding Judge Blatchford's minority view that patents were special grants of privilege, the substance of nineteenth-century patent law followed the logical progression necessary to secure patents under the Takings Clause. In antebellum cases, such as *McClurg*, the Court established that patents were property rights on par with tangible property rights. On the basis of this doctrinal classification, the Court recognized in *Burns* and *Cammeyer* that the Court of Claims had jurisdiction to hear a patentee's claim for unauthorized uses by the government. This evolution reached its climax in *McKeever* and *Campbell*, in which both courts held that

suing under the Takings Clause); *Crozier v. Fried Krupp Aktiengesellschaft*, 224 U.S. 290 (1912) (repeating *Schillinger* holding and citing only cases decided after *James*).

⁹⁶ *Heaton v. Quintard*, 11 F. Cas. 1008, 1009 (C.C.S.D.N.Y. 1869) (No. 6,311).

⁹⁷ *Id.*

⁹⁸ *Id.* (citing *Feathers v. The Queen*, 12 Law T., N.S. 114 (1865)).

⁹⁹ See *supra* notes 75-81 and accompanying text.

patents were constitutional private property secured under the Takings Clause. Although the *James* Court muddied these clear waters when it forgot its own case law on the jurisdictional issue, it still recognized that patents were property rights within the scope of the Takings Clause. Aside from *Campbell's* reversal on patent validity grounds, none of these nineteenth-century decisions have been reversed or limited in subsequent years.¹⁰⁰ The nineteenth-century jurisprudence was quite clear: Patents were private property rights secured under the Constitution.

Somehow this constitutional proposition is now long forgotten, resulting in courts and scholars today treating the issue as one that is relatively novel and vague. This raises an interesting question: Why has the historical protection of patents as constitutional private property become a forgotten legal artifact? Although answering this question in its entirety would require an article in its own right, this Essay will conclude with some observations as to how this situation might have come to pass as a matter of intellectual history.

IV. PATENTS, PROPERTY AND CONSTITUTIONAL PRIVATE PROPERTY—PAST AND PRESENT

The nineteenth-century jurisprudence discussed in this Essay has not been purposefully buried or neglected due to a nefarious conspiracy by modern anti-property scholars and jurists. The cases are easily found through standard legal research; in fact, twentieth-century courts and scholars have relied repeatedly on these decisions, especially *McKeever*, which is frequently cited for procedural issues or for the portion of its decision addressing how courts should compute damages for patent infringement.¹⁰¹ Yet the substantial discussion in *McKeever* directly

¹⁰⁰ In fact, some of these cases are very much alive and in play in contemporary intellectual property disputes. As recently as 2003, Supreme Court Justices argued extensively over the scope of the *McClurg* holding in adjudicating a challenge to the 1998 Copyright Term Extension Act. *See Eldred v. Ashcroft*, 537 U.S. 186 (2003).

¹⁰¹ *See, e.g., Buffalo Pitts Co.*, 234 U.S. at 233 (citing *McKeever* for proposition that patentees may sue the government for unauthorized uses); *Bethlehem Steel Co. v. United States*, 42 Ct. Cl. 365 (1907) (same). Courts and scholars, however, mostly rely on *McKeever* for its decision concerning how patent-infringement damages should be assessed by courts on an implied-in-fact contract theory. *See, e.g., International Harvester Co. of America v. United*

applying the Takings Clause to patents, as well as its supporting case law, has gone completely unnoticed in all modern judicial and scholarly references to this important case. What explains how this nineteenth-century jurisprudence applying the Takings Clause to patents has fallen into such disrepute in the modern era?

An easy doctrinal answer is that Congress mooted this jurisprudence with the Tucker Act.¹⁰² The Tucker Act, enacted in 1887, did not address patents specifically; it granted general jurisdiction to the Court of Claims to hear “[a]ll claims founded upon the Constitution of the United States or any law of Congress” (with a few listed exceptions).¹⁰³ This confirms that there was widespread concern in the late nineteenth century that the Court of Claims’ 1855 enabling legislation fell short of establishing jurisdiction over cases concerning constitutional violations of property and contract rights.¹⁰⁴ In the early twentieth century, Congress twice amended the Tucker Act to provide specifically for the right of patentees to sue the government for unauthorized uses of their property in the Court of Claims.¹⁰⁵ This suggests that patentees lacked constitutional security for their property until Congress enacted these patent-specific provisions. The Federal Circuit ran with this doctrinal explanation in its recent decision in *Zoltek*, relying on the Tucker Act to deny securing patents under the Takings Clause.¹⁰⁶ The Tucker Act holds

States, 72 Ct. Cl. 707, 714 (1931); Amy L. Landers, *Let the Games Begin: Incentives to Innovation in the New Economy of Intellectual Property*, 46 SANTA CLARA L. REV. 307, 317 (2006); Lionel Marks Lavenue, *Patent Infringement Against the United States and Government Contractors under 28 U.S.C. § 1498 in the United States Court of Federal Claims*, 2 J. INTELL. PROP. L. 389, 409-10 (1995).

¹⁰² An act to provide for the bringing of suits against the Government of the United States, ch. 359, 24 Stat. 505 (1887) (primarily codified as amended in 28 U.S.C. §§ 1491-1509 (2000 & Supp. II 2002)).

¹⁰³ 24 Stat. 505, 505.

¹⁰⁴ See *supra* note 64 and accompanying text.

¹⁰⁵ See An Act making appropriations for the naval service for the fiscal year ending June thirteenth, nineteen hundred and nineteen, and for other purposes, ch. 114, 40 Stat. 704, 705 (1918); An Act to provide additional protection for owners of patents of the United States, and for other purposes, ch. 423, 36 Stat. 851 (1910). These amendments have been codified in § 1498. See also *supra* notes 21-22 and accompanying text (discussing § 1498 and its application by the courts).

¹⁰⁶ See *supra* notes 27-30 and accompanying text (discussing *Zoltek*’s reliance on Tucker Act to reach its decision that patents are not entitled to constitutional protection under the Takings Clause).

sway over modern courts and scholars, leading them away from rediscovering the relevant historical jurisprudence on patents as constitutional private property.¹⁰⁷

Yet, once this nineteenth-century jurisprudence has been rediscovered, the Tucker Act loses its explanatory power. In fact, this legislation raises more questions than it answers, because the committee report for the 1910 patent-related amendment to the Tucker Act expressly states that the federal government was using patents without authorization “in flat violation of [the Takings Clause] and the decisions of the Supreme Court.”¹⁰⁸ In support of this claim, the committee repeatedly cited and quoted from these nineteenth-century decisions, such as *Cammeyer* and *Burns*, as well as *McKeever* and others.¹⁰⁹ In the extensive and far-ranging congressional debates, the amendment’s sponsor, Representative Currier, emphasized that the legislation “does not create any liability; it simply gives a remedy upon an existing liability.”¹¹⁰ Ultimately, Congress intended the patent-related amendments to the Tucker Act to *ratify* the nineteenth-century jurisprudence establishing that patents were constitutional private property.

Why then enact a patent-related amendment to the Tucker Act in 1910? It appears that this provision was based in some procedural questions concerning how patentees sued the government for unauthorized uses of their property, revealing the extent to which Justice Baldwin’s musings in *James* caused chaos in patent takings doctrine.¹¹¹ Under the 1855 enabling legislation creating the Court of Claims, patentees had recourse to the courts for a takings claim only by asserting an “implied contract” with the government,¹¹² and the congressional debates

¹⁰⁷ See, e.g., Lavenue, *supra* note 101, at 395-96 (stating that before the Tucker Act there was little patentees could do “when the government converted [their] intellectual property”).

¹⁰⁸ See H.R. REP. NO. 61-1288, at 3 (1910).

¹⁰⁹ See *id.* at 1-4 (1910) (discussing *McClurg*, *Burns*, *Cammeyer*, *McKeever*, and *James*).

¹¹⁰ 45 CONG. REC. 8755, 8756 (1910). Later in the debate, Representative Lenroot responded to a criticism of the amendment that it “creates a favored class” by stating that “this bill giv[es] a remedy for a right that does exist.” *Id.* at 8770.

¹¹¹ See *supra* notes 91-95 and accompanying text.

¹¹² See *supra* note 65 and accompanying text.

reveal that this legal fiction appeared to have lost its force by the turn of the twentieth century.¹¹³ The only other means of remuneration for unauthorized governmental uses of patented inventions was through private acts of legislation, a device, the congressmen noted, was proving less and less certain in the modern age.¹¹⁴ There was little doubt, though, among the congressmen supporting the 1910 patent bill that the Court of Claims was supposed to have been the venue in which patents were secured against piracy by the state,¹¹⁵ as established by the nineteenth-century jurisprudence applying the Takings Clause to patents.¹¹⁶ In fact, the omnipresence of this nineteenth-century jurisprudence in this legislative history is somewhat startling given the eclipse of this jurisprudence in modern court decisions and scholarship today that cite to these same congressional records.¹¹⁷

¹¹³ See 45 CONG. REC. at 8780 (reporting colloquy between Reps. Dalzell and Mann on the difficulties in defining an “implied contract,” as distinguished from an express contract or a straightforward violation of a property right); H.R. REP. No. 61-1288, at 3 (noting past reliance by patentees on express or implied contract claims in suing in Court of Claims).

In 1894 in *Schillinger v. United States*, the majority and dissenting Justices specifically clashed over the nature of the “implied contract” claim, as used by patentees. After surveying some of the relevant case law, the dissent accused the majority of failing to recognize that an implied contract claim permitted a patentee to sue “for the value of specific property taken for public use by a government officer . . . even if the taking was originally without the consent of the owner.” 155 U.S. at 175-76 (Harlan, J., dissenting). In other words, a claim for implied contract was a legal fiction used by the courts to overcome the jurisdictional limitations created by the 1855 enabling legislation. See *supra* note 65. This was a point lost on courts in the post-*James* era.

¹¹⁴ See 45 CONG. REC. at 8758 (Statement by Rep. Graham) (noting that patentees “stand knocking at the doors of Congress vainly seeking justice for twenty, thirty or fifty years”); *id.* at 8760 (Statement by Rep. Goldfogle) (reporting that the “work is too great in this House, and you do not get the time within the brief period that Congress meets to consider each and every claim before the committee [on claims]”).

¹¹⁵ See *id.* at 8783 (Statement by Rep. Burke) (claiming that nothing could “justify this great Government in leading in a practice of piracy in patents, in invading the rights and despoiling the property of genius”); *id.* at 8758 (Statement by Rep. Graham) (“It is a bill to require the United States Government to live up to the eighth commandment, ‘Thou shalt not steal.’ What right have they to steal a man’s patent?”). See also *infra* note 142 (citing nineteenth-century cases in which infringers were called “pirates”).

¹¹⁶ In the debates over the 1910 amendment to the Tucker Act, Representative Dalzell declared that “we all know, that in the framing of the law which gives jurisdiction to the Court of Claims there was no intent to preserve to the United States a right to infringe a patent by failing to provide in the law for a remedy for the infringement of that patent.” 45 CONG. REC. at 8780. Representative Dalzell went on to quote at length from *Cammeyer*, *James*, and *Palmer*. *Id.*

Later in the debate, Representative Olmstead would repeat the same point: “Other individuals have the same right to go into the Court of Claims and recover their indebtedness from the Government, and I see no reason why the owner of the patent should not have the same privilege, where his patent is taken without his consent.” *Id.* at 8781-82.

¹¹⁷ See, e.g., *Zoltek*, 442 F.3d at 1351 (“The legislative history of the 1910 Act confirms that the statute augmented the Court of Claims’ Tucker Act jurisdiction by providing jurisdiction over the tort of patent

Although initially appealing as an answer to our conundrum, the Tucker Act ultimately leaves us with even more questions. The *Zoltek* judges, as well as patent and takings scholars, could have investigated the provenance of Tucker Act, as they have with many other statutes. Through the congressional records, they easily could have discovered the pre-*James* jurisprudence applying the Takings Clause to patents. How is it possible that they have missed this jurisprudence both in the case reporters and in the numerous quotes and cites in the legislative history to the Tucker Act?

Another possible answer is that the issue is not doctrinal, but rather conceptual. In other words, courts and scholars rely on the Tucker Act because it fits better with their modern conception of property, which is quite distinct from the conception of property at work in the nineteenth century. Although this is certainly not the only reason, one explanation for the eclipse of the nineteenth-century jurisprudence on patents as constitutional private property is that it results from the intellectual history on property that divides the nineteenth from the twentieth century.

As scholars have recognized, the turn of the twentieth century brought with it a revolution in both political and legal theory. In politics, Progressivism came into vogue,¹¹⁸ and in law, Legal Realism soon reigned supreme.¹¹⁹ This political and legal sea change affected many

infringement. See H.R.Rep. No. 61-1288 at 3 (1910.); Lavenue, *supra* note 101, at 411 (discussing 1910 amendment and citing its legislative history).

¹¹⁸ See, e.g., HERBERT CROLY, *THE PROMISE OF AMERICAN LIFE* (1909); FRANK J. GOODNOW, *POLITICS AND ADMINISTRATION* (John A. Rohr ed., 2003) (1900); WOODROW WILSON, *THE NEW FREEDOM* (William E. Leuchtenburg ed., 1961) (1918).

¹¹⁹ See, e.g., NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 65-159 (1995); LAURENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 688-89 (2d ed. 1985); WILLIAM W. FISHER III ET AL., *AMERICAN LEGAL REALISM* (1993); Brian Leiter, *American Legal Realism*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 50 (2005); Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986)).

legal doctrines, especially property.¹²⁰ Following Wesley Hohfeld’s reconceptualization of legal rights as comprising analytically distinct, social relationships,¹²¹ legal realists redefined property as a set of “social relations,”¹²² which later courts and scholars phrased as a “bundle of rights.”¹²³ Ultimately, if property reflects a bundle of socially-contingent rights, then the most essential right within this bundle must be the *right to exclude* others in society, a conclusion embraced by many courts and scholars without question today.¹²⁴

This revolution impacted intellectual property as well.¹²⁵ Ultimately, patents were defined solely as securing the right to exclude.¹²⁶ Courts and scholars have justified the patent’s

¹²⁰ See generally GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970*, at 311-51 (1997); Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 *YALE L. J.* 357, 364-66 (2001); Thomas W. Merrill, *Property and the Right to Exclude*, 77 *NEB. L. REV.* 730, 737-39 (1998); Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 *ARIZ. L. REV.* 371 (2003); Laura S. Underkuffler, *On Property: An Essay*, 100 *YALE L. J.* 127 (1990).

¹²¹ See Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *YALE L. J.* 710 (1917); Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L. J.* 16 (1913).

¹²² Felix S. Cohen, *Dialogue on Private Property*, 9 *RUTGERS L. REV.* 357, 361-63 (1954). See also RESTATEMENT (FIRST) OF PROPERTY ch. 1, introductory cmt. (1936) (noting that “[t]he word ‘property’ is used in this Restatement to denote legal relations between persons with respect to a thing”); Wallace Hamilton, *Property*, 11 *ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 528 (1937) (defining “property” as “a euphonious collection of letters which serves as a general term for the miscellany of equities that persons hold in the commonwealth.”); Hohfeld, *Fundamental Legal Conceptions*, *supra* note 121, at 743 (explaining that “the supposed single right *in rem* . . . really involves as many separate and distinct ‘right-duty’ relations as there are persons subject to a duty”).

¹²³ See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (discussing the right to exclude as “one of the most essential sticks in the bundle of rights that are commonly characterized as property”); ACKERMAN, *supra* note 12, at 26-29 (1977) (discussing the “scientific” analysis of property as a “bundle” of rights).

¹²⁴ See, e.g., *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) (“The hallmark of a protected property interest is the right to exclude others.”); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) (referring to property as “bundle” of rights with emphasis on right to exclude); *Kaiser Aetna*, 444 U.S. at 176 (stating that the right to exclude is “one of the most essential sticks in the bundle of rights that are commonly characterized as property”); Merrill, *Property and the Right to Exclude*, *supra* note 123, at 730 (“[T]he right to exclude others is more than just ‘one of the most essential’ constituents of property—it is the *sine qua non*.”).

¹²⁵ See generally Mossoff, *supra* note 120, at 413-27 (discussing impact of legal realists’ reconceptualization of property on myriad intellectual property doctrines).

¹²⁶ See 35 U.S.C. § 154 (stating that a patent secures “the right to exclude others from making, using, offering for sale, or selling the invention”); *Carl Schenck, A.G. v. Nortron Corp.*, 713 F.2d 782, 786 n.3 (Fed. Cir. 1983) (“The patent right is but the right to exclude others, the very definition of ‘property.’”); *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1548 (Fed. Cir. 1983) (recognizing that “a patent is a form of property right, and the right to exclude recognized in a patent is but the essence of the concept of property”); see also Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 *VA. L. REV.* 1575, 1665 (2003) (remarking that “the patent right to exclude has been regarded as a nearly absolute property rule”); Frank H. Easterbrook, *Intellectual Property is Still*

right to exclude on the grounds that it provides an incentive to invent,¹²⁷ which achieves social utility by advancing the constitutional purpose in promoting the useful arts.¹²⁸

In the nineteenth century, some courts and commentators presaged this modern, post-legal realist view of patents,¹²⁹ but they did not necessarily reflect the dominant view of patents as property.¹³⁰ Nineteenth-century courts also defined patents as express legal titles by which “inventors shall exclusively enjoy, for a limited time, the fruits of their inventions,” by “authorizing them alone to manufacture, sell, or practice what they have invented.”¹³¹ It was this conception of patents that linked them conceptually with other tangible property entitlements.¹³²

Property, 13 HARV. J.L. & PUB. POL’Y 108, 109 (1990) (“Patents give a right to exclude, just as the law of trespass does with real property.”); FRANK Y. GLADNEY, RESTRAINTS OF TRADE IN PATENTED ARTICLES 18 (1910) (describing the “patent law right” as solely the right to “exclude others from making, using and selling”); F. Scott Kieff & Troy A. Paredes, *The Basics Matter: At The Periphery of Intellectual Property Law*, 73 GEO. WASH. L. REV. 174, 198 (2004) (noting that “patents only give a right to exclude” and that any “right to use is derived from sources external to IP law”).

¹²⁷ See, e.g., Rebecca S. Eisenberg, *Patents and the Progress of Science: Exclusive Rights and Experimental Use*, 56 U. CHI. L. REV. 1017, 1024-28 (1989); Edmund W. Kitch, *The Nature and Function of the Patent System*, 20 J. L. & ECON. 265, 285 (1977).

¹²⁸ See, e.g., *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146-47 (1989); *Graham v. John Deere Co.*, 383 U.S. 1, 5-6 (1966).

¹²⁹ See, e.g., *Bloomer v. McQuewan*, 55 U.S. (14 How.) 539, 549 (1852) (noting that patents represent only a “right to exclude” others from this special “franchise” grant); *American Hide & Leather Splitting & Dressing Mach. Co. v. American Tool & Mach. Co.*, 1 F. Cas. 647, 651 (C.C.D. Mass. 1870) (No. 302) (noting that a patent is based only in “a statutory right, a public grant of a monopoly”); Thomas Jefferson, Letter to Isaac McPherson (Aug. 13, 1813), in 13 THE WRITINGS OF THOMAS JEFFERSON 334-35 (A.A. Lipscomb ed., 1903) (declaring that the “embarrassment of an exclusive patent” was justified only because these “monopolies of invention” served the “benefit of society”).

¹³⁰ See generally Mossoff, *Who Cares What Thomas Jefferson Thought About Patents?*, *supra* note 11 (surveying nineteenth-century case law, treatises, and commentary on the nature of patents as property).

¹³¹ *Clark Patent Steam & Fire Regulator Co. v. Copeland*, 5 F. Cas. 987, 988 (C.C.S.D.N.Y. 1862) (No. 2,866); see also *Birdsall v. McDonald*, 3 F. Cas. 441, 444 (C.C.D. Ohio 1874) (No. 1,434) (“Inventors are a meritorious class of men. . . . Their patents are their title deeds, and they should be construed in a fair and liberal spirit. . . .”); *Earth Closet Co. v. Fenner*, 8 F. Cas. 261, 263 (C.C.D.R.I. 1871) (No. 4,249) (noting that a “patent is prima facie proof of title”); *Evans v. Kremer*, 8 F. Cas. 874, 875 (C.C.D. Pa. 1816) (No. 4,565) (noting that a plaintiff-patentee must “be prepared to maintain his title, in relation to the question of original discovery”).

¹³² See, e.g., *Eaton v. Boston C. & M. R.R.*, 51 N.H. 504, 511 (1872) (“Property is the right of any person to possess, use, enjoy, and dispose of a thing.”); *McKeon v. Bisbee*, 9 Cal. 137, 142 (1858) (“Property is the exclusive right of possessing, enjoying, and disposing of a thing.”); *Appeal of Flintham*, 11 Serg. & Rawle 16 (Pa. 1823) (“property, without the power of use and disposition, is an empty sound”); STEPHEN MARTIN LEAKE, LAW OF PROPERTY IN LAND 2 (1874) (“Rights to things, *jura in rem*, have for their subject some material thing, as land or goods, which the owner may use or dispose of in any manner he pleases within the limits prescribed by the terms of his right.”); 1 BLACKSTONE COMMENTARIES *134 (“The third absolute right . . . is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions . . .”). See also Mossoff, *supra* note 120, at 403-439

In this way, courts sought to secure a patentee’s “substantive rights”—the “right to manufacture, the right to sell, and the right to use”¹³³ the patented invention. In sum, the patent was the legal means for inventors to reap what they had sown—because invention “requires mind, ingenuity, labor, time, and expense” in researching and developing a new idea that succeeds in both practical application and in the marketplace.¹³⁴

This nineteenth-century conception of patents as serving to reward labor and remunerate the expense of inventive activities reflected a more substantive conception of property dominant at that time. It was a moral concept and legal right predicated on the labor-based theories of the natural rights philosophers. As Daniel Webster declared in the House of Representatives in 1824:

And at this time of day, and before this Assembly, . . . he need not argue that the right of the inventor is a high property; it is the fruit of his mind—it belongs to him more than any other property—he does not inherit it—he takes it by no man’s gift—it peculiarly belongs to him, and he ought to be protected in the enjoyment of it.¹³⁵

Patents certainly served the complementary policy in promoting scientific progress,¹³⁶ but patent law was not shielded from the influence exerted on nineteenth-century legal doctrines generally by the natural rights conception of property.¹³⁷

(discussing substantive conception of property comprising the possessory rights of acquisition, use, and disposal that was dominant in nineteenth century).

¹³³ *Adams v. Burke*, 84 U.S. 453, 456 (1873).

¹³⁴ *Buck v. Hermance*, 4 F. Cas. 550, 555 (C.C.N.D. N.Y. 1849) (No. 2,082) (Nelson, Circuit Justice). *See also Birdsall*, 3 F. Cas. at 444 (“Patent laws are founded on the policy of giving to [inventors] remuneration for the fruits, enjoyed by others, of their labor and their genius.”); *Page*, 18 F. Cas. at 983 (“The exclusive privilege is not conferred merely as a reward of genius, and for the encouragement of useful inventions and improvements in arts and manufactures, but also embraces the public benefit.”); *Brooks v. Bicknell*, 4 F. Cas. 247, 251 (C.C.D. Ohio 1843) (No. 1,944) (McLean, Circuit Justice) (noting as “the spirit or policy of the patent law” that “a man should be secured in the fruits of his ingenuity and labor,” which “is a sound maxim of the common law [and] it seems difficult to draw a distinction between the fruits of mental and physical labor”); *Blanchard v. Sprague*, 3 F. Cas. 648, 650 (C.C.D. Mass. 1839) (No. 1,518) (Story, Circuit Justice) (explaining that patents are no longer regarded in England or America as monopolies, but rather “[p]atents for inventions are now treated as a just reward to ingenious men, and as highly beneficial to the public”).

¹³⁵ 41 ANNALS OF CONG. 934 (1824). Webster’s primary interlocutor in this House debate was Representative Buchanan, who agreed with Webster that the law should “protect the just rights of patentees” by securing “the property which an inventor has in that which is the product of his own genius.” *Id.* at 936.

¹³⁶ *Cf. Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2005) (emphasizing in copyright law the historical “complementary” relationship between the dual policies in rewarding labor and promoting the progress of new creative works).

For these reasons, it was common for nineteenth-century courts to draw doctrinal and policy connections between traditional, tangible property rights and patents.¹³⁸ The *Campbell* court’s declaration in the late 1870s that the “property in a patented invention stands the same as other property” was hardly a novel or controversial claim.¹³⁹ As early as 1846, juries were instructed in patent infringement trials that “[a]n inventor holds a property in his invention by as good a title as the farmer holds his farm and flock.”¹⁴⁰ If the government trespassed on a farm or confiscated a farmer’s flock of geese, then the property-owner could sue under the relevant state or federal constitutional provision.¹⁴¹ Nineteenth-century federal courts, such as *Burns*, *Cammeyer*, *McKeever*, and *Campbell*, embraced the logical application of such reasoning to patents: If the federal government trespassed on a patentee’s property through the unauthorized use of a patented invention—if the government committed piracy¹⁴²—then the patentee should have the same right to sue for satisfaction under the Takings Clause.

¹³⁷ See generally Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549 (2003); Mossoff, *Who Cares What Thomas Jefferson Thought About Patents?*, *supra* note 11; Mossoff, *supra* note 120, at 427-38.

¹³⁸ See *supra* notes 48-50 and accompanying text.

¹³⁹ *Campbell*, 4 F. Cas. 1172 (citing *Burns* and *Cammeyer*).

¹⁴⁰ *Hovey v. Henry*, 12 F. Cas. 603, 604 (C.C.D. Mass. 1846) (No. 6,742). A year earlier, Circuit Justice Woodbury would embrace this same justification for classifying patents as property:

“[A] liberal construction is to be given to a patent, and inventors sustained, if practicable, . . . only in this way can we protect intellectual property, the labors of the mind, productions and interests as much a man’s own, and as much the fruit of his honest industry, as the wheat he cultivates, or the flocks he rears.”

Davoll v. Brown, 7 F. Cas. 197, 199 (C.C.D. Mass. 1845) (No. 3,662). This is the first time the phrase “intellectual property” appears in the extant historical record.

¹⁴¹ See, e.g., *Pumpelly v. Green Bay & Miss. Canal Co.*, 80 U.S. (13 Wall.) 166, 180-81 (1871) (holding that “real estate is actually invaded by superinduced additions of water, earth, sand, or other material . . . so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution”); *Gardner v. Newburgh*, 2 Johns. Ch. 162, 165 (N.Y. Ch. 1816) (Kent, Chancellor) (holding a riparian owner has a “right to the use and enjoyment of the stream of water” that requires just compensation if interfered with by the government).

¹⁴² Early courts often accused patent infringers of committing piracy. See, e.g., *American Diamond Rock Boring Co. v. Sullivan Mach. Co.*, 1 F. Cas. 641, 643 (C.C.S.D.N.Y. 1877) (No. 298) (recognizing that a mechanical equivalent “is a piracy of the principle, and a violation of the patent”); *Page v. Ferry*, 18 F. Cas. 979, 985 (C.C.E.D. Mich. 1857) (No. 10,662) (charging jury that if the defendant’s machine “obtained by mechanical equivalents [the same result as plaintiff-patentee’s invention], it would certainly constitute an infringement” because “it is a piracy of the principle”); *Goodyear v. Central R. Co. of N.J.*, 10 F. Cas. 664, 667 (C.C.D.N.J. 1853) (No. 5,563) (Grier, Circuit Justice) (noting that it is “evident that such person is pirating the plaintiff’s invention” when the defendant made only minor “variations” in plaintiff’s patented product); *Moody v. Fiske*, 17 F. Cas. 655, 656-57 (C.C.D.

This connection between tangible property and patents is evident only insofar as one enters the conceptually distinct world of the nineteenth century, which operated under a different conceptual framework in adjudicating both patent and property rights. This suggests an answer to the question posed at the very beginning of this Essay: Why are modern courts and scholars so completely wrong about the historical protection of patents as constitutional private property? The answer, at least in part, may be that they are unable to see the historical jurisprudence given the vast conceptual divide between the legal-realist twentieth century and the natural-rights nineteenth century.

In our post-legal realist world, scholars and courts have excluded from the legal definition of patents the use-rights necessary to conclude that unauthorized uses by the government violate a patentee's constitutional private property under the Takings Clause. The reasoning seems straightforward, especially for takings scholars. Given its status as intellectual property, a patent is nonrivalrous and nonexhaustive in nature.¹⁴³ The government's unauthorized use of a patented invention, therefore, lacks the *physical dispossession* that triggers a compensable taking of land, either directly through a condemnation or indirectly through a regulation that results in something equivalent to dispossession.¹⁴⁴ The government's

Mass. 1820) (No. 9,745) (Story, Circuit Justice) (referring repeatedly to infringers of both patents and copyrights as "pirates"). Cf. *Davis v. Palmer*, 7 F. Cas. 154, 159 (C.C.D. Va. 1827) (No. 3,645) (Marshall, Circuit Justice) (instructing jury that if "the imitator attempted to copy the [patented] model" and made an "almost imperceptible variation for the purpose of evading the right of the patentee," then "this may be considered as a fraud on the law"); *Dixon v. Moyer*, 7 F. Cas. 758, 759 (C.C.D. Pa. 1821) (No. 3,931) (Washington, Circuit Justice) (explaining that an attempt to make a "mere formal difference" between a patented device and an infringing copy is "a fraudulent evasion of the plaintiff's right").

¹⁴³ See, e.g., Burk & Lemley, *supra* note 126, at 1605 (noting that "information is a public good for which consumption is nonrivalrous—that is, one person's use of the information does not deprive others of the ability to use it"); Katherine J. Strandburg, *What Does the Public Get? Experimental Use and the Patent Bargain*, 2004 WIS. L. REV. 81, 104 (observing that "ideas are nonexcludable public goods"). This is not a modern insight. See Thomas Jefferson, Letter to Isaac McPherson (Aug. 13, 1813), in 13 THE WRITINGS OF THOMAS JEFFERSON 335 (A.A. Lipscomb ed., 1903) (noting that inventive ideas are like "the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation").

¹⁴⁴ Modern takings jurisprudence is mostly ad hoc and indeterminate, but the Court consistently uses dispossession as the real-world proxy for a breach of the right to exclude, which is the analytical fulcrum for

unauthorized use of a patented invention does not interfere with a patentee's own use of the invention, and, more importantly, the patentee can continue to exclude others from using it.

When the government uses a patented invention without authorization, a patentee would claim only *some* lost profits resulting from this governmental action. However, the Supreme Court has held, at least since the legal realists' heyday in the early twentieth century, that the loss of only some uses or profits almost never amount to a taking.¹⁴⁵ In rejecting a takings claim on the basis of lost profits in the use of tangible property, the twentieth-century Supreme Court has intoned that “loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim.”¹⁴⁶ It is these profits—the right to the fruits of one's labors—that a patentee would assert under a Takings Clause claim today.

According to our modern view of patents, which secures solely the right to exclude and nothing else, governmental interferences with uses of patents could not fall within the scope of “private property” secured under the Constitution. (What might be most surprising to patent scholars today is that this consistent with the Court's takings jurisprudence governing land and other tangible property interests.) Accordingly, if the government remunerates patentees for its

determining a compensable taking. *See, e.g.,* *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005) (“A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests.”); *Lucas*, 505 U.S. at 1017 (holding that a “total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation”); *Monsanto*, 467 U.S. at 1011 (holding that a regulation that discloses a trade secret is a taking because “the right to exclude others is central to the very definition of the property interest”); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434 (1982) (holding that any “permanent physical occupation of property” by the state is a taking).

¹⁴⁵ *See, e.g.,* *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) (holding that a local government moratorium on all development of land for 32 months is not a compensable taking); *Palazollo v. Rhode Island*, 533 U.S. 606, 630-31 (2001) (holding that a regulation that eliminated approximately 93% of the value of a land parcel is not a situation in which the government has deprived the owner of all economically beneficial uses); *Lucas*, 505 U.S. at 1027 (“It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers.”); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (Holmes, J.) (“Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”).

¹⁴⁶ *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (rejecting regulatory takings claim given federal prohibition on sale of eagle feathers).

own unauthorized uses, the government is not implementing a constitutional mandate under the Takings Clause. Rather, it is doing so at the sole policy discretion of Congress. As *Zoltek* reminded us in March 2006, patentees may claim compensation today only because Congress freely chose to add patents to the Tucker Act in 1910.¹⁴⁷

This analysis is not a definitive, comprehensive explanation on the intellectual history of patents and property, but it illuminates an important aspect of the jurisprudence that is often overlooked: The way that courts and scholars define legal rights affects their ability to identify and to understand relevant aspects of the historical record.¹⁴⁸ Courts sometimes recognize the import of this insight, such as when Federal Circuit Judge Timothy Dyk remarked in a patent infringement case a few years ago that “[p]atent law is not an island separated from the main body of American jurisprudence.”¹⁴⁹ Unfortunately, Judge Dyk overlooked this important principle when he joined the *Zoltek* majority in refusing to apply the Takings Clause to patents—based on his faulty understanding of the historical record.¹⁵⁰ *Zoltek*’s mistaken interpretation of the historical record confirms the truth of Judge Dyk’s earlier insight that patent law is not isolated from American jurisprudence. As this Part has shown, historical developments in American jurisprudence affect how courts and scholars understand the history of patent rights.

¹⁴⁷ See *supra* notes 27-30 and accompanying text.

¹⁴⁸ Cf. Merrill & Smith, *supra* note 120, at 360 (noting that their essay does not provide a “comprehensive survey of the history of the concept of property,” but it does “stress a single point” about the nature of property rights). Some more extensive treatment of these issues, directly or indirectly, can be found in the sources relied on in this Essay. See generally *supra* notes 11, 120, 137. See also Robert G. Bone, *A New Look At Trade Secret Law: Doctrine In Search Of Justification*, 86 CAL. L. REV. 241, 259 (1998) (noting in the context of trade secrets doctrine that its supporting theory in the nineteenth century “began to lose its grip, first with the rise of sociological jurisprudence, and then with the advent of legal realism in the early twentieth century”).

¹⁴⁹ *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GMBH v. Dana Corp.*, 383 F.3d 1337, 1351 (Fed. Cir. 2004) (en banc) (Dyk, J., concurring).

¹⁵⁰ See *supra* note 30 and accompanying text.

V. CONCLUSION

In its recent decision in *eBay v. MercExchange*, the Supreme Court emphasized that modern patent law jurisprudence should not depart from long-standing historical practices.¹⁵¹ *eBay* is important for many reasons, but not the least is that it highlights the degree to which modern patent policy debates are predicated on the history of patent law.¹⁵² Yet, despite this heavy emphasis on history by courts and scholars alike, there remain surprisingly resilient historical myths, and one of them is that patents were never secured as constitutional private property in the nineteenth century.

This Essay has revealed that this historical claim is mistaken, and that courts and scholars are relying on it to justify limiting the scope of constitutional protections afforded to patents today. Unfortunately, the modern conceptualization of patents as securing only the right to exclude has blinded modern courts and scholars to the extensive nineteenth-century jurisprudence that protected patents as constitutional private property. The result is confusion among courts, and inaccurate claims made in both patent and takings scholarship, that patents have never been secured under the Takings Clause. Courts and scholars can no longer rely on this mistaken historical authority. It is time to set the historical record straight, and to recognize that nineteenth-century courts applied the Takings Clause to patents, securing these intangible property rights as constitutional private property.

¹⁵¹ *eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837, 1839-40 (2006).

¹⁵² This is especially salient in Chief Justice Roberts's admonition in *eBay* that nineteenth-century jurisprudence is determinative in defining the scope of legal rights today. *Id.* at 1841-42 (Roberts, C.J., concurring).