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

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Conventional wisdom maintains that early courts never protected patents as constitutional private property under the Takings Clause. In examining long-forgotten judicial opinions and legislative records, this Article reveals that this is a profoundly mistaken historical claim. Nineteenth-century courts, securing to inventors the fruits of their labors, enthusiastically applied the Takings Clause to patents, and Congress explicitly codified this jurisprudence in the early twentieth century. It is perplexing that this historical development in both constitutional law and patent law has become obscured to modern courts and scholars. This Article thus concludes with a possible answer to this conundrum, drawing upon the intellectual history of property theory: Ultimately, the eclipse of the nineteenth-century patent takings jurisprudence may be an unintended consequence of the legal realists' radical transformation of property theory at the turn of the last century.

This intellectual history is important because it exposes the pervasive misunderstanding of the history concerning two significant constitutional provisions – the Takings Clause and the Copyright and Patent Clause. Courts

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and scholars can no longer rely on the conventional wisdom to conclude that patents are not protected under the Takings Clause, or that this issue is novel and uncertain. Doctrinally, this Article also uncovers a venerable jurisprudence grappling with the constitutional limits on what jurists used to refer to as the unauthorized “pirating” of patented inventions by government officials. In a regulatory takings case, in particular, such long-standing doctrine is highly relevant in defining the scope of the constitutional security afforded to a property right today. As patented drugs and other inventions are increasingly the subject of regulations, this Article establishes that the constitutional and policy issues inherent in these governmental actions are not new. Courts have long embraced patents as constitutional private property.

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 Modern takings and intellectual property scholarship 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.

¹ U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

² See, e.g., DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 233 (2002) (stating that “[t]he application of the Takings Clause to intellectual property – trademarks, copyrights and patents – has not yet been seriously tested in the courts”); Thomas F. Cotter, *Do Federal Uses of Intellectual Property Implicate the Fifth Amendment?*, 50 FLA. L. REV. 529, 529 (1998) (positing that “the law of takings with regard to intellectual property can only be characterized as a muddle”); 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) (per curiam), *rehearing en banc denied*, 464 F.3d 1335 (Fed. Cir. 2006). In a separate case, the Court of Federal Claims came to a similar conclusion eight years earlier. See *De Graffenried v. United States*, 29 Fed. Cl. 384 (1998) (holding that patents are not secured under the Takings Clause).

⁴ *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 739 (2002) (invoking standard from the 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 Article 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 Article 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, this Article 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 mistaken about the historical protection of patents as constitutional private property? This Article concludes with some observations on how this conundrum arose, suggesting that it 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 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 how modern courts and scholars have understood 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 Article builds on my earlier work, in which I discuss the evolution of patent rights at common

⁵ See *infra* notes 47-51 and accompanying text.

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

⁷ See discussion *infra* Part III.

⁸ See *infra* notes 139-43 and accompanying text.

⁹ See *infra* notes 144-47 and accompanying text.

¹⁰ See *infra* notes 150-62 and accompanying text.

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

Yet the evidence presented here is not a mere historical or academic curiosity. This Article establishes that modern courts and scholars have been relying on incorrect historical claims to justify their decisions and policy prescriptions. 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

¹¹ See generally Adam Mossoff, *Rethinking the Development of Patents: An Intellectual History, 1550-1800*, 52 HASTINGS L.J. 1255 (2001) [hereinafter Mossoff, *Rethinking the Development of Patents*]; Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Historical Context*, 92 CORNELL L. REV. 953 (2007) [hereinafter Mossoff, *Reevaluating the Patent “Privilege”*].

¹² Since takings scholars focus almost exclusively on land, this Article 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 brief chapter in a recently published book, but they focus entirely on very recent case law. DANA & MERRILL, *supra* note 2, at 228-53. Thus, takings scholars should find this Article 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 discussion *infra* Part II.

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).

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

threatened to suspend Bayer's patent on Cipro in order to cheaply obtain vast quantities of the antibiotic that best treats anthrax.¹⁵ 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.¹⁶

In addressing these issues today, courts and scholars justify their conclusions on the basis of mistaken historical authority, and this Article 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 Article is relevant to the continuing debates over the nature of patent rights – revealing a substantial nineteenth-century jurisprudence applying the Takings Clause to patents that has become eclipsed to modern courts and scholars.

I. 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,¹⁷ and currently there is a vibrant debate among scholars and jurists as to whether the recent expansion in these property rights is unprecedented, unjustified, or both.¹⁸ 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

¹⁵ See Jill Carroll & Ron Winslow, *Bayer Agrees To Slash Price 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”).

¹⁶ See, e.g., *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. 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).

¹⁷ See, e.g., 35 U.S.C. § 261 (2000) (“[P]atents shall have the attributes of personal property.”); *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 730 (2002) (stating that a patent “is a property right”); *Fla. Prepaid*, 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,” but rather “[a] patent is property”).

¹⁸ See *infra* notes 47-51 and accompanying text.

are entitled to protection under the Takings Clause and others disagree.¹⁹ Complicating the issue, a federal statute (28 U.S.C. § 1498) 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.”²⁰ Since the early twentieth century, courts have recognized this statutory requirement as executing the eminent domain power of the federal government,²¹ which tacitly acknowledges that patents are property rights accorded constitutional protection under the Takings Clause.

Perhaps this was the reason why the Supreme Court held in 2002 in *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*²² that patent rights constitute “the legitimate expectations of inventors in their property.”²³ In saying this, the *Festo* Court 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

¹⁹ Compare *Festo Corp.*, 535 U.S. at 739 (explaining that patent rights constitute “the legitimate expectations of inventors in their property,” invoking a standard from regulatory takings doctrine) with *Zoltek Corp. v. United States*, 442 F.3d 1345, 1352 (Fed. Cir. 2006) (per curiam) (rejecting claim that patents are secured under the Takings Clause), *rehearing en banc denied*, 464 F.3d 1335 (Fed. Cir. 2006).

²⁰ 28 U.S.C. § 1498(a) (2000).

²¹ See, e.g., *Crozier v. Fried. Krupp Aktiengesellschaft*, 224 U.S. 290, 307 (1912) (holding that a suit under the predecessor statute to § 1498(a) provides all the 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 for a suit under § 1498.”); *Carter-Wallace, Inc. v. United States*, 449 F.2d 1374, 1390 (Ct. Cl. 1971) (Nichols, J., concurring) (assessing a claim under § 1498 as a claim “to recover just compensation for a taking under the power of Eminent Domain”); *Irving Air Chute Co. v. United States*, 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.”).

²² 535 U.S. 722 (2002).

²³ *Id.* at 739.

²⁴ See *Penn Cent. Transp. Co. v. New York City*, 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.

expectations” on par with 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 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 § 1498, which mandates payment to patentees following unauthorized uses by the government, revealed that these statutory rights were not previously secured under the Constitution.²⁹ As the court put it: “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 § 1498.³⁰

²⁶ This conclusion finds additional support in the *Festo* Court’s scolding of 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.* Here, the Court was referring to its holding in *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17 (1997), that nineteenth- and early twentieth-century infringement doctrines survived Congress’s enactment of the 1952 Patent Act, ch. 950, 66 Stat. 792. *See Warner-Jenkinson*, 520 U.S. at 26. 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 I, Section 8. *See infra* notes 59–63 and accompanying text (discussing *McClurg v. Kingsland*, 42 U.S. (1 How.) 202 (1843)).

²⁷ 442 F.3d 1345 (Fed. Cir. 2006) (per curiam), *rehearing en banc denied*, 464 F.3d 1335 (Fed. Cir. 2006).

²⁸ *Id.* at 1352.

²⁹ *Zoltek* raised a Fifth Amendment claim because part of the alleged infringement by the government occurred in a foreign jurisdiction, and thus the government was immunized from liability under § 1498(c). *Id.* at 1349.

³⁰ *Id.* 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. *See id.* at 1370 (Dyk, J., concurring).

The canon prohibiting courts from construing statutes in a manner that makes them superfluous militates in favor of this conclusion. *See* 1A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 25:2 (6th ed., 2002 rev.) (stating that “[n]o statute is intended by the legislature to be wholly superfluous”); *see also* *Supervisor of Assessments v. Southgate Harbor*, 369 A.2d 1053, 1055 (Md. 1977) (recognizing as “a hornbook rule of statutory construction” that “a statute is to be read so that no word, clause, sentence or phrase shall be rendered surplusage, superfluous, meaningless, or nugatory”). However, the

Further highlighting the courts' ambivalence on the patent takings issue, Judge Plager dissented from the original panel decision in *Zoltek* and Judge Newman dissented from the Federal Circuit's denial of *Zoltek*'s petition for en banc review. Both Judge Plager and Judge Newman argued vociferously that patents should be secured under the Takings Clause. They drew this conclusion, in part, given the classification of patents as "property."³¹ Judge Plager agreed, however, with the conventional wisdom that the question of whether "an owner of a United States patent [may] bring a cause of action under the Fifth Amendment to the 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 And while Judge Newman cited several nineteenth-century judicial statements that patents were "property," she nonetheless concluded that the justification for securing patents as constitutional "private property" is based only on twentieth-century federal legislation and case law.³³ Amazingly, even the jurists who advocate for securing patents as constitutional private property are unaware of the nineteenth-century jurisprudence directly addressing this vital constitutional issue.

The limited scholarship on patent takings concludes that *Zoltek* is on firmer historical ground than either *Festo* or the dissenting opinions by Judge Plager and Judge Newman.³⁴ Some scholars have explored normative frameworks for

actual reasons for Congress adopting the predecessor statute to § 1498 indicate that this would be an improper application of this canon. *See infra* notes 124-35 and accompanying text (discussing how 1910 predecessor statute to § 1498 was intended merely to ratify pre-existing case law).

³¹ *Zoltek Corp. v. United States*, 464 F.3d 1335, 1336 (Fed. Cir. 2006) (Newman, J., dissenting); *Zoltek*, 442 F.3d at 1374 (Plager, J., dissenting).

³² *Zoltek*, 442 F.3d at 1370-71 (Plager, J., dissenting) (footnote omitted).

³³ *Zoltek*, 464 F.3d at 1336 (Newman, J., dissenting) ("Almost a century of precedent has implemented the right of patentees to the remedies afforded to private property taken for public use. There is no basis today to reject this principle." (emphasis added)).

³⁴ Most takings scholars neglect patents in favor of the land and chattels that dominate modern takings jurisprudence. *See supra* note 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 47-51.

Surprisingly, many of the extant articles discussing patent takings (either directly or at least in part) are recently published student comments addressing modern developments in case law. *See, e.g.*, J. Nicholas Bunch, Note, *Takings, Judicial Takings, and Patent Law*, 83 TEX. L. REV. 1747 (2005); Gordon Klancnik, Note, *A Proposal To Resolve Infringement Induced by Government Fiat*, 70 GEO. WASH. L. REV. 806 (2002); Daniel J. Melman, Comment, *Patently Wrong: A Critical Analysis of Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 74 ST. JOHN'S L. REV. 875 (2000); Kurt E. Springmann, Note, *The Impact of Seminole on Intellectual Property Infringement by State Actors: The Interaction of Article I, Article III, the Eleventh Amendment, and the Fourteenth Amendment*, 29 ARIZ. ST. L.J. 889 (1997); Robert C. Wilmoth, Note, *Toward a Congruent*

applying the Takings Clause to patents and other intellectual property rights.³⁵ Yet the conventional wisdom maintains that there are no instances of such constitutional protection afforded to patents in the early historical record.

Recently, Thomas Cotter seemingly corrected the conventional wisdom by highlighting a brief discussion of patent takings in 1881 in the Supreme Court's opinion in *James v. Campbell*.³⁶ However, Cotter mistakenly claims that this was the *first* discussion of patent takings in the historical record, and he further 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."³⁷ In fact, there is now some confusion among scholars on whether the reference to patent takings in *James* was dicta or an essential part of its decision.³⁸ (Cotter is right that the reference was dicta).³⁹

Despite this confusion, though, the few scholars who have written about the *James* Court's patent takings dicta agree with Cotter's mistaken historical claim that this was the first and only historical case to address this issue, and as such they maintain that the patent takings issue remains "an unsettled

and Proportional Patent Law: Redressing State Patent Infringement After Florida Prepaid v. College Savings Bank, 55 SMU L. REV. 519 (2002).

³⁵ 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, at 532-33; Shubha Ghosh, *Patents and the Regulatory State: Rethinking the Patent Bargain Metaphor after Eldred*, 19 BERKELEY TECH. L.J. 1315 (2004); Paul J. Heald & Michael L. Wells, *Remedies for the Misappropriation of Intellectual Property by State and Municipal Governments Before and After Seminole Tribe: The Eleventh Amendment and Other Immunity Doctrines*, 55 WASH. & LEE L. REV. 849 (1998); Roberta Rosenthal Kwall, *Governmental Use of Copyrighted Property: The Sovereign's Prerogative*, 67 TEX. L. REV. 685 (1989).

³⁶ 104 U.S. 356, 358 (1881).

³⁷ Cotter, *supra* note 2, at 541-43 (claiming that *James* is "the first of these decisions" in which the Court considered patents takings). This same mistaken historical claim is reiterated in Cotter's follow-on scholarship on patent takings. See Christina Bohannon & Thomas F. Cotter, *When the State Steals Ideas: Is the Abrogation of State Sovereign Immunity from Federal Infringement Claims Constitutional in Light of Seminole Tribe?*, 67 FORDHAM L. REV. 1435, 1462 & n.177 (1999).

³⁸ See Heald & Wells, *supra* note 35, at 857 (referring to the patent takings statements in *James* as part of the Court's holding). Other scholars have repeated Heald and Wells's mistaken claim that the patent takings discussion in *James* was part of its decision. See, e.g., Richard V. Adkisson, *Intellectual Property & Eminent Domain: If Ever the Twain Shall Meet*, 36 J. ECON. ISSUES 41, 46 (2002) (citing Heald and Wells for the claim that the *James* Court "ruled for the inventor . . . that patents could not be appropriated without just compensation").

³⁹ See *infra* note 105 and accompanying text (discussing why the patent takings statements in *James* were dicta).

question.”⁴⁰ For instance, takings scholars Thomas Merrill and David Dana agree with Cotter and other intellectual property scholars that the “application of the Takings Clause to intellectual property – trademarks, copyrights and patents – has not yet been seriously tested in the courts.”⁴¹ With respect to patents, a recent article asks: “Does the Takings Clause apply to patents? Unsurprisingly, there is no clear answer.”⁴²

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 the implicit treatment by the courts.”⁴³ 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.*⁴⁴ that trade secrets are “private property” secured under the Takings Clause.⁴⁵ 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.⁴⁶

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 that the historical record is inconclusive or contrary to the notion that patents are constitutional private property. Relying on a historical claim that patents and copyrights were

⁴⁰ Wilmoth, *supra* note 34, at 564; *cf.* Heald & Wells, *supra* note 35, at 857 (stating that there is “scarce case law on the subject,” and asserting that *James* is insufficient by itself to establish a strong claim that intellectual property is constitutional private property).

⁴¹ DANA & MERRILL, *supra* note 2, at 233. Interestingly, they cite *James* in their discussion of patent takings. *Id.*

⁴² Bunch, *supra* note 34, at 1752.

⁴³ Cahoy, *supra* note 35, at 678; *see also* Bethards, *supra* note 35, at 85-88 (describing compensated takings of contracts, goodwill, and trade secrets as the bases for applying the 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”).

⁴⁴ 467 U.S. 986 (1984).

⁴⁵ *See, e.g.*, DANA & MERRILL, *supra* note 2, at 236 (stating that “*Ruckelshaus v. Monsanto Co.* is the leading modern precedent”); Bunch, *supra* note 34, at 1752-53 (commenting that the characteristics of trade secrets identified by the *Monsanto* Court as justifying treating these entitlements as “property” under the Takings Clause are equally true for patents); Cahoy, *supra* note 35, at 681 (stating that “[i]f there is any 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 (describing *Monsanto* as “the only recent United States Supreme Court case dealing with an alleged taking of intellectual property”); *see also* Zoltek Corp. v. United States, 464 F.3d 1335, 1338 (Fed. Cir. 2006) (Newman, J., dissenting) (citing *Ruckelshaus* as supporting her belief that patents are secured under the Takings Clause).

⁴⁶ Bunch, *supra* note 34, at 1753; *cf.* Heald & Wells, *supra* note 35, at 861 (“If trade secrets are property for the purposes of Fifth Amendment Takings Clause analysis, then copyrights and trademarks certainly are as well.”).

special, limited monopoly grants in the early American Republic,⁴⁷ scholars today condemn recent expansions in intellectual property rights,⁴⁸ which they refer to as “proptertizing” intellectual property.⁴⁹ They 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 “proptertization” of intellectual property doctrines.⁵⁰ Thus, a traditional legal historian recently noted the historical claim in intellectual property scholars’ lamenting “the

⁴⁷ See, e.g., 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); Tyler T. Ochoa & Mark Rose, *The Anti-Monopoly Origins of the Patent & Copyright Clause*, 84 J. PAT. & TRADEMARK OFF. SOC’Y 909, 919 (2002) (arguing generally that patents and copyrights were viewed by early Americans as limited monopolies); see also *Eldred v. Ashcroft*, 537 U.S. 186, 246 (2003) (Breyer, J., dissenting) (castigating the *Eldred* majority for ignoring the views of Madison, Jefferson “and others in the founding generation, [who] warned against the dangers of monopolies” in granting copyrights and patents).

⁴⁸ See, e.g., *Diamond v. Diehr*, 450 U.S. 175 (1981) (holding that computer programs are patentable subject matter); *Diamond v. Chakrabarty*, 447 U.S. 303 (1980) (holding that a genetically engineered bacteria is patentable subject matter); *State St. Bank & Trust Co. v. Signature Fin. Group, Inc.*, 149 F.3d 1368 (Fed. Cir. 1998) (holding that business methods are patentable subject matter).

⁴⁹ 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 ‘proptertization’ 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) (book review) (concluding after a survey of increasing intellectual property protections that “the ‘proptertization’ 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, 398 (1989) (describing and critiquing the “more proprietary and anti-dissemination attitude toward information than that which the law has previously displayed”).

⁵⁰ See, e.g., Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331, 1343 (2004) (commenting on 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 proptertization and an alternative to intellectual property”); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1033 (2005) (stating that “[t]he idea of proptertization begins with a fundamental shift in the terminology of intellectual property law,” as “only recently has the term ‘intellectual property’ come into vogue”); Lemley, *supra* note 49, at 895-904 (discussing the analytical and legal implications of using “property rhetoric” in intellectual property policy debates).

‘proPERTIZATION’ of the field,” in which the “expansive language of property rights has displaced the traditional discourse of limited monopoly.”⁵¹

This general 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 common law rights in land or chattels. Thus, the *Festo* Court’s allusion that patents are constitutional private property, or the similar arguments by Judge Plager and Judge Newman in their *Zoltek* dissents, is unprecedented, at least as a matter of constitutional doctrine and historical practice. Although the *Festo* Court, Judge Plager, and Judge Newman may disagree with their critics as a matter of normative policy, they would likely 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, Judges Plager and Newman would have benefited from invoking the long-standing nineteenth-century cases supporting their arguments. This Article 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.

II. 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;”⁵² and second, a property owner must have the ability to bring the government into court as a defendant.⁵³ 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.

⁵¹ Morton J. Horwitz, *Conceptualizing the Right of Access to Technology*, 79 WASH. L. REV. 105, 114 (2004) (discussing the work of William Fisher).

⁵² U.S. CONST. amend. V.

⁵³ This jurisdictional requirement is fundamental to the judicial enforcement of many constitutional rights. See, e.g., 42 U.S.C. § 1983 (2000) (providing a right to sue for “the deprivation of any rights, privileges, or immunities secured by the Constitution and laws”). However, the Supreme Court has since held that the Takings Clause is a self-executing constitutional provision, and thus this second jurisdictional requirement has been mooted. See *Jacobs v. United States*, 290 U.S. 13 (1933).

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.

With respect to the first requirement – the identification of patents as property – nineteenth-century case law dating back to the antebellum period unequivocally classified patents as property rights. As I have explained elsewhere, early Congresses and courts identified patents as *property*, and invoked natural-rights justifications for property in defining and adjudicating patent rights.⁵⁴ Moreover, as a doctrinal matter, courts throughout the early to mid-nineteenth century 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.⁵⁵ Substantively and rhetorically, nineteenth-century courts believed that patents were a species of property.⁵⁶

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. For instance, antebellum courts defined the legal rights secured under monopoly franchises as *property*, but they nevertheless denied franchisees' claims to constitutional protection when the government interfered with their property rights.⁵⁷ They also limited constitutional protections afforded to traditional, tangible private property deemed to be “affected with the public interest.”⁵⁸ Identifying patents as

⁵⁴ See generally Mossoff, *Reevaluating the Patent “Privilege,”* *supra* note 11.

⁵⁵ *Id.* at 992-98.

⁵⁶ *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) (No. 7,495), *rev'd on other grounds*, 91 U.S. (1 Otto) 171 (1875) (explaining 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) (stating 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. 5,280) (recognizing that “an invention is, within the contemplation of the patent laws, a species of property”).

⁵⁷ See, e.g., *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837) (rejecting a bridge franchisee’s argument that Massachusetts’ granting of another bridge franchise over the same river was a violation of its constitutionally secured property and contract rights); cf. *Brown v. Barry*, 3 U.S. (3 Dall.) 365, 367 (1797) (stating the canon applied in *Charles River Bridge* that a monopoly grant obtained by a legislative “act . . . being in derogation of the common law, is to be taken strictly”).

⁵⁸ *Munn v. Illinois*, 94 U.S. 113, 126 (1876) (quoting Matthew Hale, *A Treatise in Three Parts*, in 1 A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 1, 78 (Francis Hargrave ed., Dublin 1787). Although the plaintiff property owner relied on the Fourteenth Amendment, and the Court’s decision was limited to this particular claim, Chief Justice

property was necessary in securing these legal entitlements under the Takings Clause, but it was not sufficient.

In 1843 in *McClurg v. Kingsland*,⁵⁹ 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. 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."⁶⁰ 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."⁶¹ In sum, a patent issued under now-repealed statutes vested property rights in an inventor,⁶² so that "the patent must therefore stand as if the [now-repealed] acts . . . remained in force."⁶³

In defending the vested property rights in patents, Justice Baldwin relied on the "well-established principles of this court,"⁶⁴ citing only the Court's earlier decision in *Society for the Propagation of the Gospel in Foreign Parts v. Town of New Haven*.⁶⁵ 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."⁶⁶ 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."⁶⁷ In relying on such "well-

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.

⁵⁹ 42 U.S. (1 How.) 202 (1843).

⁶⁰ *Id.* at 206.

⁶¹ *Id.* (emphasis added); *see also In re Fultz*, 9 F. Cas. 998, 1001 (C.C.D.C. 1853) (No. 5,156) (discussing the repeal of provisions of the 1836 Patent Act by the 1839 Patent Act, and explaining 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").

⁶² *See, e.g., Gayler 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" by obtaining a patent); *Evans v. Jordan*, 8 F. Cas. 872, 873-74 (C.C.D. Va. 1813) (No. 4,564) (Marshall, Circuit Justice) (explaining that an inventor has an "inchoate property which [is] vested by the discovery" and which is ultimately "perfected by the patent").

⁶³ *McClurg*, 42 U.S. at 206.

⁶⁴ *Id.*

⁶⁵ 21 U.S. (8 Wheat.) 464 (1823).

⁶⁶ *Id.* at 493.

⁶⁷ *Id.* at 494.

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 with *United States v. Burns*,⁶⁸ in which the Court affirmed the Court of Claims’ decision to award damages to 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.⁶⁹ 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.⁷⁰ In representing the United States, the Solicitor General argued that the “government may have acted tortiously in making [the invention] under the patent when it had no right by contract to do so. But for relief against such action, Congress is the body to

⁶⁸ 79 U.S. (12 Wall.) 246 (1870). 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 the *Burns* Court concluded that 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. The Civil War not only pitted brother against brother, as the old saying goes, but also patentee against assignee.

⁶⁹ See Act of Feb. 24, 1855, ch. 122, 10 Stat. 612 (1855).

⁷⁰ According to 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, express or implied, with the government of the United States.” *Id.* § 1, 10 Stat. at 612. 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, 10-11 (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’ jurisdiction over patents). Notably, this procedural fiction was not only applied to patentees, 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).

address.”⁷¹ The Supreme Court summarily rejected this argument. Consistent with *McClurg*, the *Burns* Court concluded that “the government cannot, after the patent is issued, make use of the improvement any more than a private individual, without license of the inventor *or making compensation to him*.”⁷²

Six years later in *Cammeyer v. Newton*,⁷³ 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.⁷⁴ 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 thus recognized that it had to address the defendants’ immunity claim as a “[p]reliminary” procedural matter “[b]efore comparing the patented machine with the apparatus used by” the defendants in the substantive infringement analysis.⁷⁵ In so doing, the Court soundly rejected the defendants’ immunity argument, stating pointedly that “[a]gents of the public have no more right to take such private property than other individuals.”⁷⁶ Citing *Burns*, the *Cammeyer* Court declared that “[p]rivate property, the Constitution provides, shall not be taken for public use without just compensation,”⁷⁷ which it held applicable to patentees suffering an “invasion of the private rights of individuals.”⁷⁸

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*,⁷⁹ 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,

⁷¹ *Burns*, 79 U.S. at 251.

⁷² *Id.* at 252 (emphasis added).

⁷³ 94 U.S. 225 (1876).

⁷⁴ *Id.* at 226-27. 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 226-30.

⁷⁵ *Id.* at 234.

⁷⁶ *Id.* at 234-35.

⁷⁷ *Id.* at 234.

⁷⁸ *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.

⁷⁹ *McKeever v. United States* (*McKeever’s Case*), 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, 531 (1901); *see also* *United States v. Buffalo Pitts Co.*, 234 U.S. 228, 233 (1914) (citing *McKeever* with a similar remark that it was “affirmed by this court”).

alleging an unconstitutional taking of his property without compensation.⁸⁰ McKeever claimed that the U.S. War Department manufactured and used two of his patented inventions without his authorization.⁸¹ The government repeated its defense from *Cammeyer*, claiming sovereign immunity and arguing that patents, as special grants of legal privileges *from* the government, did not apply *against* the government.⁸² Relying explicitly on *Cammeyer*, *Burns*, and *McClurg*, the *McKeever* court rejected this argument and firmly placed patents within the scope of private property rights secured under the Takings Clause.⁸³

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.⁸⁴ The court noted that England remained wedded to the view of a patent as “a grant” issuing solely from “royal favor,” and therefore it “shall not exclude a use[] by the Crown.”⁸⁵ 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”).⁸⁶

⁸⁰ See *McKeever*, 14 Ct. Cl. at 416-17. Given the formal pleading requirements for plaintiff property owners filing takings claims in the Court of Claims, McKeever was forced to argue the legal fiction of an “implied contract” in his complaint. *Id.*; see also *supra* note 70 (explaining how landowners and patentees suing the government for a taking in the Court of Claims had to claim an “implied contract” due to Congress’s use of imprecise language in the Court of Claims’ 1855 enabling legislation).

⁸¹ 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 retrieving this ammunition in the field. He obtained two patents in 1873 for this invention. *McKeever*, 14 Ct. Cl. at 397.

⁸² See *id.* at 417-20 (discussing English political history and case law establishing that the Crown was privileged in using patented inventions without authorization).

⁸³ See *id.* at 422 (citing *McClurg*, *Burns*, and *Cammeyer*).

⁸⁴ *Id.* at 417-18. This was an uncontroversial historical observation. See, e.g., *Morton v. N.Y. 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 practice of granting manufacturing monopolies).

⁸⁵ *McKeever*, 14 Ct. Cl. at 420.

⁸⁶ *Id.*; see U.S. CONST. art. I, § 8 (“The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”).

The *McKeever* court first analyzed the text of the Copyright and Patent Clause as evidence of this fundamental distinction in patent law between the English Crown's *personal* privilege and the American *property* right.⁸⁷ The court explained that the language in this constitutional provision – the use of the terms “right” and “exclusive,” the absence of the term “patent,” and the absence of any express reservation in favor of the government – established that the property rights secured in an American patent were not on the same legal footing as the personal privileges secured by the English Crown.⁸⁸ This conclusion was further buttressed by the fact that the Framers empowered Congress, not the Executive, to secure an inventor's rights – placing this constitutional provision in Article I, not in Article II – which suggested they viewed patents as important property rights secured by the people's representatives, not as a special grant issued by the prerogative of the Executive.⁸⁹ Although the Framers did not state 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.’”⁹⁰

Invoking this classic formulation of the natural right to property,⁹¹ the *McKeever* court then canvassed the federal government's interpretation of the Copyright and Patent Clause in the century since the Founding Era, finding again that patents protected important property rights, not special grants of personal privilege. 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 “forbid the assumption that this government has ever sought to appropriate the property of

⁸⁷ See *McKeever*, 14 Ct. Cl. at 420-21; 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 “incorporeal chattel” or “personal estate” secured under the U.S. patent laws).

⁸⁸ *McKeever*, 14 Ct. Cl. at 421.

⁸⁹ *Id.* at 420.

⁹⁰ *Id.* Judge Nott did not provide a citation for this quote, but he was likely paraphrasing from a recently published treatise. See THEODORE D. WOOLSEY ET AL., *THE FIRST CENTURY OF THE REPUBLIC: A REVIEW OF AMERICAN PROGRESS* 443 (New York, Harper & Bros. 1876) (discussing how inventors are given “some control over the reproduction of the fruits of mental labor” on the basis of “public policy” and “the natural right of property, by authority of which they might, if they chose, keep what they produce themselves instead of disseminating it”).

⁹¹ See, e.g., *Vanhome'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.”).

the inventor.”⁹² The *McKeever* court expressly cited *Cammeyer*, *Burns*, 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.⁹³

But *McKeever* seemed to blithely sweep under the rug a fundamental difference between patents secured under federal statute and traditional, tangible property rights secured at common law. This difference in doctrinal provenance – statute versus common law – would seem to suggest that patents were insufficiently similar to traditional property rights to justify their protection under the Takings Clause. *McKeever*’s failure to acknowledge this point, let alone address it, raises the specter that its reasoning was more the result of hyperbolic rhetoric and late-nineteenth-century 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.⁹⁴ 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.⁹⁵ Other federal officials defended themselves against takings claims by invoking this distinction explicitly, such as in *Campbell v. James*,⁹⁶ 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.⁹⁷ 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

⁹² *McKeever*, 14 Ct. Cl. at 421; see also Mossoff, *Reevaluating the Patent “Privilege,”* *supra* note 11, at 992-98 (discussing how antebellum and mid-nineteenth-century courts treated patents as property rights both procedurally and substantively).

⁹³ *McKeever*, 14 Ct. Cl. at 422. 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 Hunt, Davis, and Drake contested only the damages set by Judge Nott for the government’s unauthorized use of *McKeever*’s patented cartridge box. See *id.* at 431 (Hunt, J., concurring); *id.* at 431-34 (Davis, J., dissenting).

⁹⁴ *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).

⁹⁵ See *Cammeyer v. Newton*, 94 U.S. 225, 234-35 (1876); *McKeever*, 14 Ct. Cl. at 420.

⁹⁶ 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).

⁹⁷ *James*, 104 U.S. at 382-83 (holding that the reissued patent was “inoperative and void”).

were not enforceable against agents of the federal government in a federal court.⁹⁸

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 case law in summarizing the legal status of patents: "The property in a patented invention stands the same as other property, in this respect."⁹⁹ 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.¹⁰⁰

The ease with which *Cammeyer*, *Campbell*, and *McKeever* consistently and unequivocally held 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.¹⁰¹ 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 lower 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."¹⁰² The evolution from *Society* and *McClurg*, through *Burns*, *Cammeyer*, *McKeever*, and *Campbell*, appears 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.

⁹⁸ See *Campbell*, 4 F. Cas. at 1172.

⁹⁹ *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 a 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").

¹⁰⁰ *Campbell*, 4 F. Cas. at 1172.

¹⁰¹ See *James*, 104 U.S. at 382-83.

¹⁰² *Id.* at 358.

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 mused in his *James* opinion “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.¹⁰³

Admittedly, it is possible that *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.¹⁰⁴ 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 cited *Burns* and *Cammeyer* 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.”¹⁰⁵ 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 and without any consideration of the substantial precedent directly on point.¹⁰⁶ In the end, though, Justice Bradley’s unprecedented musings succeeded in muddying the waters, and subsequent cases surprisingly relied on his 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, disregarding or simply missing the substantial pre-*James* precedent directly addressing this important constitutional issue.¹⁰⁷

¹⁰³ *Id.* at 359.

¹⁰⁴ *Id.* (citing *Carr v. United States*, 98 U.S. 433 (1878)).

¹⁰⁵ *Id.*

¹⁰⁶ Professor Cotter makes this same point, but for different effect. He accepts Justice Bradley’s musings about patents and the Takings Clause at face value, and thus he too misses all of the pre-*James* jurisprudence. Consequently, 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 Cotter, *supra* note 2, at 543.

¹⁰⁷ 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*);

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 otherwise, such as Judge Blatchford's allusion in 1869 that the U.S. government retained an implied reservation to use a patent.¹⁰⁸ 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 right to make for itself and use the patented invention without the consent of the patentee."¹⁰⁹ 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,"¹¹⁰ 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.¹¹¹

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 Supreme Court established that patents were property rights on par with tangible property rights.¹¹² 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.¹¹³ This evolution reached its climax in *McKeever* and *Campbell*, in which both courts held that patents were constitutional private property secured under the Takings Clause.¹¹⁴ 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.¹¹⁵ Aside from *Campbell's* reversal on patent validity grounds, none of these nineteenth-century decisions have been

Schillinger v. United States, 155 U.S. 163 (1894) (holding, without any acknowledgement of *Burns*, *Cammeyer*, or *McKeever*, that patentees were precluded from suing under the Takings Clause); *Crozier v. Fried. Krupp Aktiengesellschaft*, 224 U.S. 290 (1912) (following the *Schillinger* holding and citing only cases decided after *James*).

¹⁰⁸ *Heaton v. Quintard*, 11 F. Cas. 1008, 1009 (C.C.S.D.N.Y. 1869) (No. 6,311).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (citing *Feathers v. The Queen*, 12 Law T., N.S. 114 (1865)).

¹¹¹ See *supra* notes 84-93 and accompanying text.

¹¹² See *supra* notes 59-67 and accompanying text.

¹¹³ See *supra* notes 68-78 and accompanying text.

¹¹⁴ See *supra* notes 79-93, 96-100 and accompanying text.

¹¹⁵ See *supra* notes 102-07 and accompanying text.

reversed or limited in subsequent years.¹¹⁶ 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 Article will conclude with some observations as to how this situation might have come to pass as a matter of intellectual history.

III. PATENTS, PROPERTY AND CONSTITUTIONAL PRIVATE PROPERTY – PAST AND PRESENT

The nineteenth-century jurisprudence discussed in this Article 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 repeatedly cited to *McKeever*, *McClurg*, and the other nineteenth-century decisions. *McKeever*, in particular, is often cited for procedural issues or for the portion of its decision addressing how courts should compute damages for patent infringement.¹¹⁷ Yet, despite this obvious awareness of the *McKeever* opinion, its substantial discussion applying the Takings Clause to patents has gone completely unnoticed in all modern judicial decisions, as well as in modern takings and patent scholarship. 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.¹¹⁸ Enacted in 1887, the Tucker Act did not address patents

¹¹⁶ 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).

¹¹⁷ *See, e.g.*, *United States v. Buffalo Pitts Co.*, 234 U.S. 228, 233 (1914) (citing *McKeever* for proposition that patentees may sue the government for unauthorized uses); *Bethlehem Steel Co. v. United States*, 42 Ct. Cl. 365, 376 (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 States*, 72 Ct. Cl. 707, 714 (1931); 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. INTEL. PROP. L. 389, 409-10 (1995); *see also* Amy L. Landers, *Let the Games Begin: Incentives to Innovation in the New Economy of Intellectual Property Law*, 46 SANTA CLARA L. REV. 307, 317 (2006).

¹¹⁸ Act of Mar. 3, 1887, ch. 359, 24 Stat. 505 (codified as amended in 28 U.S.C. §§ 1491-1509 (2000 & Supp. IV 2004)).

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).¹¹⁹ 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.¹²⁰ In the early twentieth century, Congress twice amended the Tucker Act to provide specifically for the right of patentees to sue the government in the Court of Claims for unauthorized uses of their property.¹²¹ 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.¹²² The Tucker Act holds sway over modern courts and scholars, leading them away from rediscovering the relevant historical jurisprudence on patents as constitutional private property.¹²³

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.”¹²⁴ 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.¹²⁵ 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

¹¹⁹ *Id.*

¹²⁰ See *supra* note 70 and accompanying text.

¹²¹ Act of July 1, 1918, ch. 114, 40 Stat. 704, 705 (1918) (codified as amended in 28 U.S.C. § 1498 (2000)); Act of June 26, 1910, ch. 423, 36 Stat. 851, 851-52 (1910) (codified as amended in 28 U.S.C. § 1498 (2000)); see also *supra* notes 20-21 and accompanying text (discussing 28 U.S.C. § 1498 and its application by the courts).

¹²² See *supra* notes 27-30 and accompanying text.

¹²³ See, e.g., *Zoltek Corp. v. United States*, 464 F.3d 1335, 1337 (Fed. Cir. 2006) (Newman, J., dissenting) (stating that, prior to the 1910 patent-related amendments to the Tucker Act, “although patents were property, the only remedy for governmental infringement was by appeal to Congress”); Lavenue, *supra* note 117, at 395-96 (stating that before the Tucker Act, there was little patentees could do “when the government converted [their] intellectual property”).

¹²⁴ H.R. REP. NO. 61-1288, at 3 (1910).

¹²⁵ See *id.* at 1-4.

liability.”¹²⁶ 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 legislation was based in some procedural questions concerning how patentees could sue the government for unauthorized uses of their property, revealing the extent to which Justice Baldwin’s musings in *James*¹²⁷ – and in its progeny, such as *Schillinger*, *Crozier*, and others¹²⁸ – caused chaos in patent takings doctrine. Under the 1855 enabling legislation creating the Court of Claims, patentees had recourse to this court for a takings claim only by asserting an “implied contract” with the government,¹²⁹ and the 1910 congressional debates reveal that such legal fictions were losing their appeal by the turn of the twentieth century.¹³⁰ (Interestingly, patentees were not the only property owners required to employ such legal fictions under the 1855 enabling legislation. Landowners also had to assert the legal fiction of an “implied contract” to sue the government in the Court of Claims for a taking of their property.¹³¹) The only other means of remuneration for unauthorized governmental uses of patented inventions was through private acts of legislation, a device, the congressmen noted, proving less and less certain in the modern age.¹³²

¹²⁶ 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.

¹²⁷ See *supra* notes 103-06 and accompanying text.

¹²⁸ See *supra* note 107 and accompanying text.

¹²⁹ See *supra* note 70 and accompanying text.

¹³⁰ See 45 CONG. REC. 8780 (reporting a colloquy between Representatives 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 (describing past reliance by patentees on express or implied contract claims in suing the government in the Court of Claims).

In *Schillinger v. United States*, the majority and dissenting Justices specifically clashed over the nature of the “implied contract” claim, as used by patentees. See 155 U.S. 163, 172 (1894); *id.* at 175-76 (Harlan, J., dissenting). 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.” *Id.* at 175-76 (Harlan, J., dissenting). In other words, an implied contract claim was a legal fiction used by the courts to overcome the jurisdictional limitations created by the 1855 enabling legislation. See *supra* note 70. This was a point lost on courts in the post-*James* era.

¹³¹ See, e.g., *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 656-57 (1884).

¹³² See 45 CONG. REC. 8758 (statement of Rep. Graham) (noting that patentees “stand knocking at the doors of Congress vainly seeking justice for twenty, thirty, or fifty years”); *id.* at 8767 (statement of Rep. Goldfogle) (opposing the bill, but agreeing with its

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 patentees could seek redress for “piracy” by the state.¹³³ Throughout the congressional debates, congressmen repeatedly referenced the nineteenth-century jurisprudence applying the Takings Clause to patents as evidence that the Court of Claims was supposed to secure this vital property right under the Constitution.¹³⁴ Thus, it is somewhat startling that modern courts and patent scholars, who regularly cite to these congressional records, seem to miss these omnipresent references to the nineteenth-century jurisprudence on patent takings.¹³⁵

Although initially appealing as an answer to our conundrum, the Tucker Act ultimately leaves us with even more questions. When the *Zoltek* court cited to the Tucker Act and its legislative history, as well as when patent and takings scholars have similarly cited to this legislation, they should have discovered the substantial references to 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?

One possible answer is that the issue is not doctrinal, but rather conceptual. In other words, courts and scholars have interpreted the Tucker Act in a particular way because it fits better with their modern conception of property, which is quite distinct from the conception of property in the nineteenth century. Although this is certainly not the only reason, one explanation for the

proponents 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” by patentees).

¹³³ *Id.* at 8783 (statement of 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 the genius”); *id.* at 8758 (statement of 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 162 (citing nineteenth-century cases in which infringers were called “pirates”).

¹³⁴ Representative Dalzell, for instance, declared at one point 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. 8780. Representative Dalzell went on to quote at length from *Cammeyer, James, and Palmer*. *Id.*

Later in the debate, Representative Olmsted would repeat the same point: “Other individuals have been awarded the 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.

¹³⁵ *See, e.g., Zoltek Corp. v. United States*, 442 F.3d 1345, 1351 (Fed. Cir. 2006) (citing the committee report for the 1910 amendment); Daniel R. Cahoy, *Treating the Legal Side Effects of Cipro®: A Reevaluation of Compensation Rules for Government Takings of Patent Rights*, 40 AM. BUS. L.J. 125, 144-45 (2002) (discussing 1910 and 1918 amendments and citing their legislative history); Lavenue, *supra* note 117, at 411 (discussing 1910 amendment and citing its legislative history).

eclipse of the nineteenth-century jurisprudence on patents as constitutional private property is that it resulted from the intellectual history on property that divides the nineteenth from the twentieth century.¹³⁶

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,¹³⁷ and in law, Legal Realism soon reigned supreme.¹³⁸ This political and legal sea change affected many legal doctrines, especially property.¹³⁹ Following Wesley Hohfeld's re-conceptualization of legal rights as comprising analytically distinct, social relationships,¹⁴⁰ legal realists redefined property as a set of "social relations,"¹⁴¹ which later courts and

¹³⁶ See Mossoff, *Rethinking the Development of Patents*, *supra* note 11, at 1257 ("The validity or significance of constitutional, social, economic or institutional analyses of legal history is not in doubt; intellectual history is not exclusive of these other approaches to historical analysis.").

¹³⁷ See, e.g., HERBERT CROLY, *THE PROMISE OF AMERICAN LIFE* (1909); FRANK J. GOODNOW, *POLITICS AND ADMINISTRATION* (1900); WOODROW WILSON, *THE NEW FREEDOM* (1913).

¹³⁸ See, e.g., *AMERICAN LEGAL REALISM* (William W. Fisher III et al. eds., 1993); NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 65-159 (1995); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 688-89 (2d ed. 1985); Brian Leiter, *American Legal Realism*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 50 (Martin P. Golding & William A. Edmundson eds., 2005); Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986)).

¹³⁹ See GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970*, at 311-51 (1997); Claeys, *supra* note 13, at 1604-44; Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 737-39 (1998) [hereinafter Merrill, *Right to Exclude*]; Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 364-66 (2001). See generally 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).

¹⁴⁰ See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) [hereinafter Hohfeld, *Fundamental Legal Conceptions*]; Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

¹⁴¹ 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) (stating that "[t]he word 'property' is used in this Restatement to denote legal relations between persons with respect to a thing"); Wallace H. Hamilton & Irene Till, *Property*, in 12 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 528, 528 (Edwin R.A. Seligman & Alvin Johnson eds., 1934) (defining "property" as "a euphonious collocation 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 140, 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").

scholars phrased as a “bundle of rights.”¹⁴² 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.¹⁴³

This revolution impacted intellectual property as well.¹⁴⁴ Ultimately, patents were defined solely as securing the right to exclude.¹⁴⁵ Courts and scholars have justified the patent’s right to exclude on the grounds that it provides an incentive to invent,¹⁴⁶ which achieves social utility by advancing the constitutional purpose in promoting the useful arts.¹⁴⁷

In the nineteenth century, some courts and commentators presaged this modern, post-legal realist view of patents,¹⁴⁸ but they did not reflect the

¹⁴² See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (referring to “the bundle of rights that are commonly characterized as property”); ACKERMAN, *supra* note 12, at 26-29 (discussing the “scientific” analysis of property as a “bundle” of rights).

¹⁴³ See, e.g., *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) (“The hallmark of a protected property interest is the right to exclude others.”); *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, *Right to Exclude*, *supra* note 139, 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*.”).

¹⁴⁴ See Mossoff, *supra* note 139, at 413-27 (discussing the impact of legal realists’ reconceptualization of property on myriad intellectual property doctrines).

¹⁴⁵ See 35 U.S.C. § 154(a)(1) (2000) (stating that a patent secures “the right to exclude others from making, using, offering for sale, or selling the invention”); *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1548 (Fed. Cir. 1983) (“[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.”); *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.’”); see also 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” the patented invention); 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 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.”); F. Scott Kieff & Troy A. Paredes, *The Basics Matter: At the Periphery of Intellectual Property*, 73 GEO. WASH. L. REV. 174, 198 (2004) (explaining that “patents only give a right to exclude” and that any “right to use is derived from sources external to IP law”).

¹⁴⁶ 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 (1977).

¹⁴⁷ 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).

¹⁴⁸ See, e.g., *Bloomer v. McQuewan*, 55 U.S. (14 How.) 539, 549 (1852) (explaining that patents represent only a “right to exclude” others from this special “franchise” grant); *Am. Hide & Leather Splitting & Dressing Mach. Co. v. Am. Tool & Mach. Co.*, 1 F. Cas. 647,

dominant view of patents as property.¹⁴⁹ The first four patent statutes defined patents as property in substantive terms – as the exclusive rights to make, use and dispose of one’s invention.¹⁵⁰ Nineteenth-century courts also defined patents as express legal titles by which “inventors shall exclusively enjoy, for a limited season, the fruits of their inventions,” by “authorizing them alone to manufacture, sell, or practice what they have invented.”¹⁵¹ It was this conception of patents that linked them conceptually with other tangible property entitlements.¹⁵² In this way, courts sought to secure a patentee’s

651 (C.C.D. Mass. 1870) (No. 302) (stating that a patent is based only in “a statutory right, a public grant of a monopoly”); Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in 13 THE WRITINGS OF THOMAS JEFFERSON 326, 334-35 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905) (declaring that the “embarrassment of an exclusive patent” was justified only because these “monopolies of invention” served the “benefit of society”).

¹⁴⁹ See generally Mossoff, *Reevaluating the Patent “Privilege,” supra* note 11 (surveying nineteenth-century case law, treatises, and commentary on the nature of patents as property).

¹⁵⁰ See Patent Act of 1870, ch. 230, § 22, 16 Stat. 198, 201 (repealed 1952) (providing that “every patent shall contain a short title or description of the invention or discovery, correctly indicating its nature and design, and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the said invention or discovery throughout the United States and the Territories thereof”); Patent Act of 1836, ch. 357, § 11, 5 Stat. 117, 121 (repealed 1870) (providing that “every patent shall be assignable in law” and that this “conveyance of the exclusive right under any patent, to make and use, and to grant to others to make and use, the thing patented” must be recorded in the Patent Office); Patent Act of 1793, ch. 11, § 1, 1 Stat. 318, 321 (repealed 1836) (providing that a patent secures “the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, the said invention or discovery”); Patent Act of 1790, ch. 7, § 1, 1 Stat. 109, 110 (repealed 1793) (providing that a patent secures “the sole and exclusive right and liberty of making, constructing, using and vending to others to be used, the said invention or discovery”).

¹⁵¹ *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.N.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) (explaining 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) (explaining that a plaintiff-patentee must “be prepared to maintain his title, in relation to the question of original discovery”).

¹⁵² See, e.g., *McKeon v. Bisbee*, 9 Cal. 137, 143 (1858) (“Property is the exclusive right of possessing, enjoying, and disposing of a thing.”); *Eaton v. Boston, Concord & Montreal R.R.*, 51 N.H. 504, 511 (1872) (“Property is the right of any person to possess, use, enjoy, and dispose of a thing.” (quoting *Wynehamer v. People*, 13 N.Y. 378, 433 (1856))); *In re Flintham*, 11 Serg. & Rawle 16, 24 (Pa. 1823) (“Property without the power of use and disposition is an empty sound.”); WILLIAM BLACKSTONE, 1 COMMENTARIES *138 (“The third absolute right . . . is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions . . .”); STEPHEN MARTIN LEAKE & A.E. RANDALL, AN ELEMENTARY DIGEST OF THE LAW OF PROPERTY IN LAND 1 (2d ed. 1909) (“Rights to things, *jura in rem*,

“substantive rights” – the “right to manufacture, the right to sell, and the right to use” the patented invention.¹⁵³ 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.¹⁵⁴

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.¹⁵⁵

Patents certainly served the complementary policy of promoting scientific progress,¹⁵⁶ but patent law was not shielded from the influence exerted on

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.”); *see also* Mossoff, *supra* note 139, at 403-39 (discussing the substantive conception of property that was dominant in the nineteenth century and which encompassed the possessory rights of acquisition, use, and disposal).

¹⁵³ *Adams v. Burke*, 84 U.S. 453, 456 (1873).

¹⁵⁴ *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 v. Ferry*, 18 F. Cas. 979, 983 (C.C.E.D. Mich. 1857) (No. 10,662) (“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) (stating that “a man should be secured in the fruits of his ingenuity and labor,” and that “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”).

¹⁵⁵ 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.

¹⁵⁶ *Cf. Eldred v. Ashcroft*, 537 U.S. 186, 212 n.18 (2003) (emphasizing in copyright law the historical “complementary” relationship between the dual policies of rewarding labor and promoting the progress of new creative works).

nineteenth-century legal doctrines generally by the natural rights conception of property.¹⁵⁷

For these reasons, it was common for nineteenth-century courts to draw doctrinal and policy connections between traditional, tangible property rights and patents.¹⁵⁸ 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.¹⁵⁹ 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."¹⁶⁰ 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.¹⁶¹ Nineteenth-century federal courts, such as in *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 "piracy"¹⁶² – then the patentee should have the same right to sue for satisfaction under the Takings Clause.

¹⁵⁷ See generally Claeys, *supra* note 13; Mossoff, *supra* note 139, at 427-38; Mossoff, *Reevaluating the Patent "Privilege," supra* note 11.

¹⁵⁸ See *supra* notes 54-56 and accompanying text.

¹⁵⁹ *Campbell v. James*, 4 F. Cas. 1168, 1172 (C.C.S.D.N.Y. 1879) (No. 2,361) (citing *Burns* and *Cammeyer*).

¹⁶⁰ *Hovey v. Henry*, 12 F. Cas. 603, 604 (C.C.D. Mass. 1846) (No. 6,742). A year earlier, 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, . . . [as] 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 was the first time an American court used the phrase "intellectual property" in a patent law decision. See Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. CAL. L. REV. 993, 1006 & n.39 (2006).

¹⁶¹ See, e.g., *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 181 (1871) (holding that "where 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. Trustees of Newburgh*, 2 Johns. Ch. 162, 165 (N.Y. Ch. 1816) (Kent, Chancellor) (holding that 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).

¹⁶² See, e.g., *Am. 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 the 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. Cent. R.*

This connection between tangible property and patents is evident only insofar as one enters the conceptually distinct world of the nineteenth century, which operated within a different analytical framework in adjudicating both patent and property rights. This suggests an answer to the question posed at the very beginning of this Article: Why are modern courts and scholars so consistently 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 necessarily violate a patentee's constitutional private property under the Takings Clause. This tendency is evident not only in patent law, but also in the takings jurisprudence that has developed in the land cases that have dominated the Court's docket in the past few decades. In these cases, the Court has followed modern property theory lockstep, focusing on the *right to exclude* as the primary right in the bundle of rights that it secures as constitutional private property.¹⁶³ In the world of tangible property rights, the right to exclude is breached by a trespass – a physical dispossession from one's land.¹⁶⁴ Accordingly, the Court consistently uses *dispossession* as evidence for a breach of the right to exclude, which is

Co., 10 F. Cas. 664, 667 (C.C.D.N.J. 1853) (No. 5,563) (Grier, Circuit Justice) (stating that the defendant, who had made minor variations in the plaintiff's patented product, was "pirating the plaintiff's invention"); *Moody v. Fiske*, 17 F. Cas. 655, 656-57 (C.C.D. 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 the 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").

¹⁶³ *See, e.g., Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) ("The hallmark of a protected property interest is the right to exclude others."); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (declaring that right to exclude is the essential right in a protected property interest); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (stating that the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property").

¹⁶⁴ *See Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 159 (Wis. 1997) (explaining that the "landowner's interest in protecting his or her land from trespass" derives from the fact that the "right to exclude others" is an essential property right); JESSE DUKEMINIER ET AL., *PROPERTY* 86 (6th ed. 2006) ("The law of trespass . . . protects the right to exclude . . ."); JOSEPH WILLIAM SINGER, *INTRODUCTION TO PROPERTY* 27 (2001) ("The interest protected by trespass law is the interest in exclusive possession of the premises, meaning the right to occupy the property and to exclude others from entering or occupying the property.").

now the analytical fulcrum for determining a compensable taking by the government, either directly through a condemnation or physical invasion¹⁶⁵ or indirectly through a regulation that results in something equivalent to dispossession.¹⁶⁶

Given its status as intellectual property, a patent is nonrivalrous and nonexhaustive in nature.¹⁶⁷ The government's unauthorized use of a patented invention, therefore, lacks the *physical dispossession* that triggers a compensable taking of land.¹⁶⁸ From the perspective of land-based takings doctrine, the government's 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.¹⁶⁹

What then could a patentee claim as a taking when the government uses a patented invention without authorization? A patentee could only claim some

¹⁶⁵ See *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).

¹⁶⁶ Modern regulatory takings jurisprudence is highly indeterminate and "ad hoc." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). The Court, however, consistently uses *dispossession* as evidence for a breach of the right to exclude in determining whether a compensable regulatory taking has occurred. 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 v. S.C. Coastal Council*, 505 U.S. 1003, 1017 (1992) (holding that a "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation"); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984) (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"); *Penn Cent. Transp. Co.*, 438 U.S. at 124 (recognizing that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government").

¹⁶⁷ See, e.g., *Burk & Lemley*, *supra* note 145, at 1605 (stating 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 Letter from Thomas Jefferson to Isaac McPherson, *supra* note 148, at 334 (stating that inventive ideas are like "the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation").

¹⁶⁸ See *Heald & Wells*, *supra* note 35, at 868 ("Intellectual property is intangible, and therefore it is incapable of being physically possessed or taken away."); *Klancnik*, *supra* note 34, at 817 (recognizing that "a government mandate cannot amount to a *physical* taking of the patent because the government cannot occupy an intangible, legal construct the way it can physically occupy land").

¹⁶⁹ See *Wilmoth*, *supra* note 34, at 565 ("The State can put a patent to public use without eliminating the patentee's ability to use the patent himself. In such event, a patentee can still gather fruits of his labor, prevent nongovernmental competitors from infringing, or license or transfer his right to others.").

lost profits resulting from this governmental action. *Zoltek*, for instance, pursued financial remuneration – its reasonable royalty – for the government’s unauthorized use of its patented method for making composite fiber sheets used in aircraft construction.¹⁷⁰ 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 amounts to a taking.¹⁷¹ In rejecting a takings claim on the basis of lost profits in the use of tangible property, the 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.”¹⁷² It is these future profits – the right to the fruits of one’s labors – that a patentee would assert under a Takings Clause claim today. In fact, long before *Zoltek*, modern courts employed such reasoning in rejecting patent takings claims on the basis of lost profits.¹⁷³

According to our modern view of patents, which secures solely the right to exclude and nothing else, governmental interferences with commercial uses of patents could not fall within the scope of “private property” secured under the Constitution.¹⁷⁴ Accordingly, if the government remunerates patentees for its 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, which amended the Tucker Act in 1910 to include the government within the scope of the exclusive right that it already secured under the patent statutes.¹⁷⁵ In fact, Judge Dyk emphasized this point

¹⁷⁰ See *Zoltek Corp. v. United States*, 442 F.3d 1345, 1347-49 (Fed. Cir. 2006).

¹⁷¹ See, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002) (holding that a local government moratorium on all development of land for thirty-two months is not a compensable taking); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (holding that a regulation that eliminated approximately ninety-three percent of the value of a land parcel did not deprive 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.”); *Pa. 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.”).

¹⁷² *Andrus v. Allard*, 444 U.S. 51 (1979) (rejecting a regulatory takings claim on the basis of a federal prohibition on the sale of eagle feathers).

¹⁷³ See *Mosca v. United States*, 417 F.2d 1382, 1386 (Ct. Cl. 1969) (rejecting a patent takings claim on the basis that “[t]here is . . . grave doubt as to whether . . . earning profits in the future is property within the contemplation of the Fifth Amendment,” as it is already “well established that profits to be derived from a business conducted on property that it [sic] taken by the Government are not considered as [constitutional private] property”).

¹⁷⁴ What might be most surprising to patent scholars today is that this observation is consistent with the Court’s takings jurisprudence governing land and other tangible property interests.

¹⁷⁵ See *supra* notes 121, 124-34 and accompanying text.

repeatedly in his multiple concurrences in *Zoltek*.¹⁷⁶ The *Zoltek* decision stands as a stark reminder of how this conclusion seems almost inevitable within the mutually reinforcing frameworks of modern property theory and modern takings jurisprudence.¹⁷⁷

This analysis is not a definitive, comprehensive 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.¹⁷⁸ Courts sometimes recognize the import of this insight, at least in the abstract. For instance, Judge Dyk himself 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.”¹⁷⁹

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. In fact, in his *Zoltek* concurrence, Judge Dyk argued that “[p]atent rights are creatures of federal statute,” and thus Congress is free to provide whatever remedies it sees fit without constitutional limitation¹⁸⁰ – an argument explicitly rejected more than a century ago in *Burns*, *Cammeyer*, *McKeever*, and *Campbell*.¹⁸¹ Several months later, Judge Dyk repeated the same (historically mistaken) point in his concurrence to the Federal Circuit’s denial of *Zoltek*’s petition for rehearing en

¹⁷⁶ *Zoltek Corp. v. United States*, 464 F.3d 1335, 1339 (Fed. Cir. 2006) (Dyk, J., concurring); *Zoltek Corp. v. United States*, 442 F.3d 1345, 1367-70 (Fed. Cir. 2006) (Dyk, J., concurring).

¹⁷⁷ There is some evidence that the Court may at least be aware implicitly that the logic of its regulatory takings doctrine, as applied in land cases, leads inexorably to a conclusion that there could never be a taking of an intangible property right. See generally Eric R. Claeys, *The Penn Central Test and Tensions in Liberal Property Theory*, 30 HARV. ENVTL. L. REV. 339, 362-65 (2006) (examining differences between the Court’s treatment of takings of intangible interests, such as a trade secret or the right to devise, from its treatment of takings of land). Exploring such theoretical issues is beyond the scope of the current Article, but Professor Claeys and I hope to develop this insight in greater depth in a future project.

¹⁷⁸ The sources relied on in this Article provide, directly or indirectly, some more extensive treatment of these issues. See *supra* notes 11, 139, 157; see also Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, 86 CAL. L. REV. 241, 259 (1998) (observing an analogous trend in the context of trade secrets doctrine whereby 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”).

¹⁷⁹ *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GMBH v. Dana Corp.*, 383 F.3d 1337, 1351 (Fed. Cir. 2004) (en banc) (Dyk, J., concurring in part and dissenting in part).

¹⁸⁰ *Zoltek*, 442 F.3d at 1370 (Dyk, J., concurring).

¹⁸¹ See *supra* Part II.

banc.¹⁸² Why is Judge Dyk seemingly unaware of this long-standing jurisprudence that directly contradicts his claims concerning the constitutional status of patent property rights? Perhaps he misses it given that the analytical and normative framework employed by the courts in *Burns*, *Cammeyer*, *McKeever*, and *Campbell* are no longer cognizable to a modern jurist or scholar. As this Part has shown, historical developments in American jurisprudence may affect how courts and scholars understand the history of patent rights.

CONCLUSION

In its recent decision in *eBay v. MercExchange*,¹⁸³ the Supreme Court emphasized that modern patent law jurisprudence should not depart from long-standing historical practices.¹⁸⁴ *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.¹⁸⁵ 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 Article 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.

¹⁸² See *Zoltek Corp. v. United States*, 464 F.3d 1335, 1339 (Fed. Cir. 2006) (Dyk, J., concurring) (“This decided lack of interest by the Congress and the Supreme Court in creating a takings remedy is perhaps not surprising given the fact that patent rights are created only by federal statute . . .”).

¹⁸³ 126 S. Ct. 1837 (2006).

¹⁸⁴ *Id.* at 1839-40.

¹⁸⁵ This is especially salient in Chief Justice Roberts’ 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).