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Intellectual Property: Patents as Property for the Takings

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Introduction

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

Few academics dare to even attempt to explain just how the Takings Clause ended up in the Constitution. Judges encounter continual difficulty in formulating consistent principles for applying it. The text of the amendment itself only adds to the mystery by raising the question of why a substantive protection of property rights is grouped together with a string of criminal-procedure rules.

None of this would be of interest beyond arcane academic inquiry if the issue were not arising in a critical modern context. As Congress has contemplated various patent-law reforms in recent decades, the specter of the Fifth Amendment looms on the horizon.[3] What regulatory power does Congress have with regard to patented inventions, and is that power hampered by the Fifth Amendment's requirement to provide just compensation? Most important, the Supreme Court has quietly flagged the question of whether patents constitute private property under the Fifth Amendment's Takings

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[1] Excerpted and adapted from Robin Feldman, *Patents as Property for the Takings*, 12 N.Y.U. J. INTELL. PROP & ENT. L. 198 (2023).

[2] U.S. CONST. amend. V. Although some scholars refer to it as the "Compensation Clause," I use the more colloquial term "Takings Clause" in this Chapter.

[3] The ideas in this Chapter were published a few months before pharmaceutical companies and others filed nine lawsuits against the federal government to challenge the constitutionality of the Medicare negotiation provisions in the Inflation Reduction Act. Most of the suits alleged a taking under the Fifth Amendment.

Clause, suggesting that the Court may turn to the issue in the near future.[4]

Conventionally, commentators and judges break down the clause into different components, each of which has generated a voluminous body of caselaw and corresponding scholarly inquiry. One is the question of whether something has been "taken" to begin with. Another is the scope of the "public use" requirement, which is often treated as an outright prohibition against takings for "private use." Yet another is the meaning of what constitutes "just compensation."

Despite a voluminous amount of writing related to the Takings Clause, judges and scholars alike have largely, although not entirely, neglected the underlying question of which rights it protects in the first place. The Constitution's own text treats the question in the same manner. The term "property" makes only three other appearances in the Constitution, and each is in a procedural context.[5] The Constitution presupposes the existence of "private property" as a legal category with independent meaning. Put differently, the term "private property" referenced in the Takings Clause does not emanate from constitutional authority; rather, the Constitution assumes its existence and protects it.

This Chapter seeks to bridge the gap in the literature by addressing whether patents are "private property" within the meaning of the Takings Clause. Several recent scholars, using discrete interpretive methods, have argued that it does.[6] In contrast, I offer the first comprehensive analysis—considering historical,

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

[5] The Constitution mentions property only three other times. U.S. CONST. art. IV, § 3 (placing in Congress the power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"); *id.* amend. V (barring Congress from "depriv[ing]" any person "of life, liberty, or property, without due process of law"); *id*. amend. XIV, § 1 (barring states from "depriv[ing] any person of life, liberty, or property, without due process of law").

[6] *See, e.g.*, Adam Mossoff, *Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause*, 87 B.U. L. REV. 689 (2007) (using a historical argument).

textual, structural, logical, and precedential indicators—to demonstrate that patents do not constitute private property under the Takings Clause.

The Legal Case Against Patents as Private Property Under the Takings Clause

I start with history. The Anglo-American legal tradition, both before and after the Founding Era, embraced a particularized definition of property. Property attached to things in the physical realm—either land (something one could touch but not pick up and move) or chattel (physical items that were moveable, such as goods and paper money).

The Anglo-American tradition also drew a longstanding distinction between private and public rights. Private rights were thought of as those that existed prior to the state (life, liberty, and property—again, with property being tied to tangible items). Public rights were those that the state brought into existence by the action of law. These included rights created by discretionary grants from policymakers, such as patents.[7]

Thus, private property was tied to tangible items and fundamentally different from socially constructed rights. The limited historical evidence that exists suggests the Takings Clause was originally intended and understood narrowly to cover only core private property, namely, direct physical deprivations or occupations of land and chattels.

In this context, I now turn to the written Constitution's text and structure. Unlike its other three appearances in the Constitution,[8] the use of the word property in the Takings Clause is modified. Specifically, the Takings Clause is concerned not just with "property" but rather with "*private* property." The Takings Clause's text thus confirms its limited applicability to the core property rights defined by the Anglo-American tradition, rather

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[7] *See* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007) (discussing patents as public franchises in the context of constitutional conceptualizations of the public/private distinction); *see also* I WILLIAM BLACKSTONE, COMMENTARIES 141 (1765) (championing "the three great and primary rights, of personal security, personal liberty, and private property").

[8] *See supra* note 5.

than to a broader notion of property that might have included intangible property created by the state, like patents.

The Patent and Copyright Clause's particular enumeration in Article I, Section 8, in the context of other sections of Article I, provides further evidence that patents are not private property in the constitutional sense. Parsing the language of the Patent and Copyright Clause highlights both the Constitution's presumption that knowledge is freely useable by all and the utilitarian objective for patent law. Congress is permitted to grant patents for only a limited time and for the purpose of promoting the progress of science, not due to some inherent or moral right of authors. This language further undermines any suggestion that patents reflect some hypothetical private-property interest of the individual inventor. Further, under the general language of Article I, it would make no sense for the Takings Clause to apply to patents. The Constitution does not direct that Congress *must* do any of the things listed in Article I.[9] Just as Congress could choose to operate without borrowing money or to have no duties on imported goods, Congress could choose not to create a patent system.

The greater right to create contains within it the lesser right to impose limits on the creation. Thus, statutory conditions on patents, such as the condition that patentees not sue certain infringers or seek certain remedies, cannot be unconstitutional under the Takings Clause. Such conditions are born of and baked into the statutes that create the right in the first place. Of course, Congress cannot violate non-property provisions of the Constitution by, say, requiring patentees to take a religious test or testify against themselves in criminal cases. However, absent such a stand-alone constitutional right to a patent (or to its value or associated privileges), Congress may attach strings that circumscribe the property rights it affirmatively confers. This frees Congress from having to choose

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[9] The Constitution uses directive laguage elsewhere. *Compare id.* art. I, § 4 ("The Congress *shall assemble* at least once in every Year…"); *id.* art. I, § 5 ("Each House *shall be the Judge* of the Elections, Returns and Qualifications of its own Members…"); *id.* art. I, § 6 ("The Senators and Representatives *shall receive* a Compensation for their Services, to be ascertained by Law…"); and *id*. art. IV, § 4 ("The United States *shall guarantee* to every State in this Union a Republican Form of Government, and *shall protect* each of them against invasion…"); *with id.* art. I, § 8 ("The Congress *shall have Power To*…"). In other words, the Framers distinguished directives from discretionary authorizations.

between granting a broader privilege than it wishes to or none at all.

Accepting the patents-as-private-property theory would require Congress to surrender control over patent law to the courts and the states. Rules about private property (doctrines like adverse possession, laches, and equitable tolling) are typically made by judges in a common-law fashion. Courts and scholars have rightly affirmed that establishing unique systems for enforcing and adjudicating patent rights is within Congress's purview. To group them together, now, would either pull the rug out from much of America's patent regime or require adopting the doubtful position that patents are private property *only* for purposes of the Takings Clause.

There also is no evidence that Congress itself has deemed patents to be private property endowed with Takings Clause protection, if Congress even could constitutionally do so. To the contrary, the text and legislative history of the 1952 Patent Act refutes the possibility that Congress sought to "propertize" patents, at least not as far as extending the Takings Clause protection to them.

Caselaw also does not support Takings Clause applicability. Notwithstanding efforts by some actors to "propertize" patents around the turn of the 19th century, contemporary courts have rejected Takings Clause claims for patent takings. Despite suggestions to the contrary—in dicta made in the context of the nation's twisted sovereign immunity history in the late 19th and early 20th centuries—neither authoritative precedent nor binding legal rule has applied the Takings Clause to patents. In addition, the themes and strands that emerge from more recent caselaw weigh heavily against the patents-as-property theory. Judges in the Court of Federal Claims, the Federal Circuit, and the Supreme Court all have either held that patents are not private property for purposes of the Fifth Amendment's Takings Clause or have sidestepped the question. These decisions do not put an end to the debate altogether, but they are certainly a sign that the federal courts are moving in that direction.

Pragmatic Implications

I now address what the patents-as-property theory puts at stake, namely, that aspects such as the regulatory structure and lack of

certainty with patents would mix with the Takings Clause's theory and doctrine like oil and water. Given that patents are embodied not in physical space but in technical words and drawings, the meaning and interpretation of a patent are fraught with uncertainty. To determine whether an invention can receive its own patent or whether use of a new invention would violate an existing patent, courts and the patent office have to compare the words in the patent to the new invention, even though the new invention did not exist when the patent was drafted. It is no surprise then that patent litigation can turn on the meaning of the word "a." Trying to subject patents—with all the necessary uncertainties surrounding the boundaries and definition of each—to a Fifth Amendment compensation system that was designed for governmental takings of things that are tangible and specific, would create a muddy mess.

In addition, application of the Takings Clause to patents will likely chill the very innovation that patent law exists to advance. When properly constructed, patent rights have the potential to boost innovation and economic development, especially in high-income countries. However, maximizing the benefits of the patent system in the face of changing scientific and legal environments requires revision and updating. Even positive developments, such as discovery of a new technology at the fringes of what is patentable, such as AI-assisted inventions, compel continual updating in patent law. If, however, courts begin to apply the Takings Clause to patents, adjustments to patent law will be chilled substantially. Such a result would harm innovation and potential patent holders by hamstringing Congress's ability to adjust to changing times.

Finally, from a purely practical point of view, the Takings Clause represents a serious burden to judges in cases involving patents. The Supreme Court's takings doctrine is universally recognized as problematic. The Court has failed for a century to agree on a consistent principle, even under the most straightforward facts, that would indicate when a government action is a taking that requires compensation. And so, the greatest concern, doctrinally speaking, lies in entangling patent law in the morass of takings law. If patents were private property under the Takings Clause, then all of takings doctrine, with its convoluted, often contradictory tests, prongs, and factors, would apply to patents. This morass includes the doctrine of regulatory takings, in which regulatory actions that have the effect of depriving a property owner of all value in its property constitute takings under the Fifth Amendment for which

the government must provide just compensation. Foisting the Takings Clause onto the patent system would create an endless nightmare for the government and the courts.

Conclusion

From every angle, patents do not constitute private property under the Fifth Amendment's Takings Clause. The history and theory of patents from the nation's founding reveal that the conceptualization of property at the time of the Constitution focused on tangible items, such as land and chattel, not intangible rights like patents. In addition, rights at the time of the Constitution fell into the two categories of core, private rights that existed independent of government (life, liberty, and property), and public rights conferred by an action of government. In contrast to property in land and chattels, patents bear none of the key features historically associated with "core" private property rights but rather embody rights arising from an action of government. Finally, the patent system was designed in a utilitarian fashion, with limited rights, for limited times, and for the purpose of advancing societal interests in the progress of science, rather than some hypothetical private-property interest of the individual inventor.

The historic and theoretic perspectives are strengthened by a textual and structural analysis of the language of the Patent Clause within the Constitution. These perspectives are echoed by modern caselaw, in which courts evaluating Takings Clause claims for other public rights are quick to remind plaintiffs that the Fifth Amendment is concerned with rights attaching to physical things. Despite some scattered dicta in the context of the Nation's twisted sovereign immunity history in the late 19th and early 20th centuries, no direct precedent exists for considering patents as private property for the Fifth Amendment. And the nature of patents as regulatory creatures imbued with imprecision and uncertainty means that grafting the Fifth Amendment onto the patent system would prove an endless nightmare for the government and the courts. In short, patents have always existed outside the realm of the Fifth Amendment's Takings Clause, and they should remain so.

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