

# The Constitutional Protection of Intellectual Property

*Adam Mossoff*

## KEY TAKEAWAYS

Sources from the Founding Era, as well as 19th-century court decisions and additional documents, confirm that intellectual property rights are property.

The Supreme Court and lower federal courts in the 19th century protected intellectual property rights as property under the Constitution.

Despite its lack of reference to long-standing precedents, the Court in recent decades has protected intellectual property rights under the Constitution and must continue to do so.

Intellectual property has been a key part of American exceptionalism—the unique commitment in our political and legal institutions to natural rights and the rule of law as secured by a government of limited powers.<sup>1</sup> When the Framers authorized Congress to secure patents and copyrights in the United States Constitution, it was unprecedented. No country’s founding document had done this before. As other intellectual property rights—such as trademarks and trade secrets—evolved in the 19th century, they too were secured by the unique American approach to securing all property rights in legal institutions governed by the rule of law.<sup>2</sup>

The First Congress immediately enacted the first patent and copyright laws in 1790. As these and subsequent statutes were interpreted and enforced by the courts, innovators and creators were provided reliable and effective property

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rights in the fruits of their productive labors. These intellectual property rights spurred the explosive growth in the U.S. innovation economy from the 19th century through today.<sup>3</sup> By the end of the 19th century, U.S. institutions and legal rules securing patents as property rights in technological innovations had become the “gold standard” for the rest of the world.<sup>4</sup>

These intellectual property rights and their well-established protection under the Constitution have become controversial in recent years. Although the Supreme Court of the United States has consistently identified intellectual property rights as “property” under the Due Process Clauses and the Takings Clause in numerous cases reaching back to the 19th century, lower federal courts today have become confused. Some have even denied this constitutional proposition.<sup>5</sup>

In the Supreme Court’s 2019 decision in *Oil States v. Greene’s Energy*, Justices Clarence Thomas and Neil Gorsuch took strongly opposing sides on the question of whether patents are private property rights to which courts apply the constitutional doctrines of the separation of powers and the Seventh Amendment’s guarantee of a trial by jury.<sup>6</sup> Lawyers and commentators also contest whether intellectual property is secured as “property” under the Constitution—and sometimes the same conservative thought leader has taken up both sides of the debate.<sup>7</sup> Professor Richard Epstein, a legal luminary, recently weighed in on the issue, arguing for the strong constitutional protection of intellectual property rights.<sup>8</sup>

This *Legal Memorandum* explains how intellectual property rights have long been secured as property rights under the Constitution. It first reviews the constitutional text and original public meaning of the Copyright and Patent Clause. It then details the numerous federal court decisions from the 19th century that have secured patents and other intellectual property rights as “property” under the Due Process and Takings Clauses of the Constitution. It concludes by identifying how the modern Supreme Court has consistently followed these precedents, even if it has occasionally forgotten them or not cited them directly.

## The Constitution and Intellectual Property Rights

Given the success of the Constitution in establishing the longest-running republican form of government with limited powers expressly set forth in a written document, people today may not fully appreciate the achievement represented by the Copyright and Patent Clause. In the powers expressly delegated to Congress, the Framers provided that Congress can “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.”<sup>9</sup>

In addition to the powers delegated to Congress to create an Army and a Navy, to create federal trial courts to resolve legal disputes, and to declare war, Congress was authorized to enact federal laws to secure exclusive rights to inventors and authors. This was the first time in human history that a country’s founding document authorized the protection of patents and copyrights.

Moreover, this is the only constitutional provision in the original 1787 Constitution—before the ratification of the Bill of Rights in 1791—in which one finds the word “right.” Consistent with the understanding at the time that the role of the government is to define and secure *individual rights*,<sup>10</sup> Congress is authorized here to secure a right of individual inventors and authors.

The protection of copyrights and patents was not original to the United States, and it has become standard fare among judges and commentators to observe that the modern copyright and patent systems arose out of legal regimes in England in the 17th and 18th centuries.<sup>11</sup> For patents in particular, one often finds judges and scholars reciting a now-standard script that patent rights were born of royal monopoly privileges granted by the English Crown to manufacturers and businesspersons and that the birth of the modern patent system is found in the Statute of Monopolies, enacted by Parliament in 1624 to limit this royal prerogative power.<sup>12</sup> This history is correct, but it is equally true that just as the U.S. “implemented innovative structural and substantive changes in its new political and legal institutions” after the American Revolution, the patent system authorized in the Constitution and implemented with the first Patent Act of 1790 “represented the same fundamental break from the English patent system as other U.S. political and legal institutions.”<sup>13</sup>

In addition to several differences in legal details, such as the U.S. requiring that only inventors receive patents and providing for the protection of process patents, a fundamental distinction was created between the property rights secured in U.S. patents and the personal privileges in English patents.<sup>14</sup> This key difference was well recognized by U.S. courts in the 19th century.

In *McKeever v. United States*, a patent owner sued the U.S. government in the Court of Claims when the U.S. Army purchased and used his patented cartridge boxes without authorization.<sup>15</sup> The Court of Claims was created in 1855 by Congress pursuant to its authority to create courts as set forth in

the same constitutional section in which Congress is authorized to secure copyrights and patents.<sup>16</sup> In the Court of Claims, identified today as the Court of Federal Claims, citizens were able to assert legal claims against the federal government for violations of their private rights, such as breaches of contracts, or their constitutional rights, such as claims for unauthorized and uncompensated takings of property.<sup>17</sup>

In his lawsuit against the federal government, Samuel McKeever claimed that the U.S. Army had committed an unconstitutional taking of his property—his patent—without paying him.<sup>18</sup> In brief, he claimed constitutional protection for his patents under the Takings Clause in the Fifth Amendment.<sup>19</sup> In defending its actions, the federal government argued that patents, as grants from the federal government (the Patent Office), could be used freely by the government without permission or payment. For authority, the government relied on English court decisions that the Crown retained a privilege in using patented inventions without authorization or payment.<sup>20</sup>

In reviewing the federal government’s argument that patents are special privileges, in which it claimed the benefit of the maxim “what the government giveth, the government can take away,” the *McKeever* court engaged in now-classic textualist and original public-meaning analysis.

*First*, the *McKeever* court analyzed the text of the Copyright and Patent Clause to understand whether the Framers adopted in the Constitution the English Crown’s personal privilege and thus incorporated the limitations of this personal privilege, such as its being unenforceable against the sovereign if the sovereign used the patent without authorization. The court noted that the plain text of the Copyright and Patent Clause—the use of the terms “right” and “exclusive,” the absence of the English legal term “patent,” and the absence of an express reservation in favor of the federal government—evidenced a fundamental break between English and U.S. patents. In other words, the property right in a U.S. patent issued by the federal government is fundamentally different from the personal privilege in an English patent bestowed by the Crown.<sup>21</sup>

*Second*, the *McKeever* court added to this textual analysis of the Copyright and Patent Clause by identifying the structural constitutional differences in the creation of patent rights by the U.S. and English authorities. In England, patents were issued by the prerogative of the Crown (the analog to the U.S. Executive), and this discretionary royal power was limited only by the Statute of Monopolies. Against this well-known English law and practice, the Framers placed the Copyright and Patent Clause in Article I, not in Article II—empowering Congress, not the Executive, to secure an inventor’s rights through duly enacted patent statutes. Thus,

the Framers evidently considered patents to be property rights secured by the people's representatives in Congress and not as special grants issued by the discretionary powers of the Executive.<sup>22</sup> The *McKeever* court concluded that the Framers “had a clear apprehension of the English law, on the one hand, and a just conception, on the other, of what one of the commentators on the Constitution has termed ‘a natural right to the fruits of mental labor.’”<sup>23</sup>

The principle that an innovator or creator has “a natural right to the fruits of mental labor” represents the classic Lockean or natural rights justification for property.<sup>24</sup> Although scholars and lawyers have long debated the role of natural rights philosophy in the historical development and justification of intellectual property rights, the influence of natural rights philosophy on patent and copyright law in the Founding Era and in the 19th century is undeniable.<sup>25</sup>

Commentary by Framers about the moral and legal status of patents and copyrights is almost nonexistent. The Constitutional Convention adopted the Copyright and Patent Clause on September 5, 1787. According to Madison's notes, the “clause was agreed to nem. con” (without debate).<sup>26</sup>

There were, of course, many contemporaneous statements and official governmental acts that inform our understanding of what people thought about patents and copyrights in the Founding Era. Before the Constitutional Convention in 1787, many states had enacted statutes that secured copyrights, and several states expressly stated in these statutes the Lockean principle that “there [is] no property more peculiarly a man's own than that which is produced by the labour of his mind.”<sup>27</sup>

In his famous *Commentaries on the Laws of England*, Sir William Blackstone wrote that “the right, which an author may be supposed to have in his own original literary compositions” is a “species of property” because it is “grounded on labour and invention.”<sup>28</sup> In this same section, he discussed both the common law development of copyright and statutory protection of copyright in the Statute of Anne (1709).<sup>29</sup> Blackstone further noted the similarities of the Statute of Anne to the Statute of Monopolies (1624), which allowed a “royal patent of privilege to be granted...by virtue whereof a temporary property becomes vested in the patentee.”<sup>30</sup>

Commentators in the U.S. embraced the property justification for patents and copyrights, shedding the vestiges of royal monopoly privileges that still influenced the English approach to patent law. For instance, in his influential 1803 U.S. edition of Blackstone's *Commentaries*, St. George Tucker summarily rejected arguments that the Copyright and Patent Clause permitted the government “to establish trading companies.”<sup>31</sup> Tucker noted

that “nothing could be more fallacious” because “such monopolies” were “incompatible” with a constitutional provision that authorized only securing an “exclusive right” for “authors and inventors.”<sup>32</sup>

In his equally influential *Commentaries on American Law*, Chancellor James Kent classified copyrights and patents under the section title “Original Acquisition by Intellectual Labor.”<sup>33</sup> Although his famous treatise was published in 1826, Kent was a lawyer who worked with Alexander Hamilton and was involved in the political and legal debates in New York in the 1780s and 1790s. In his *Commentaries*, Kent explained that “literary property” is a form of “property acquired by one’s own act and power.”<sup>34</sup> Both authors and inventors, he explained, “should enjoy the pecuniary profits resulting from mental as well as bodily labor.”<sup>35</sup>

This is the intellectual context that informs James Madison’s relatively brief discussion of the Copyright and Patent Clause in *Federalist* No. 43.<sup>36</sup> This is the most extensive public statement by a Framers on the nature of patents and copyrights and deserves close attention.

The utility of this power [to secure copyrights and patents] will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provisions for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.<sup>37</sup>

The “right of common law” was a property right,<sup>38</sup> and the justification for securing this property right for authors also justified “with equal reason” securing this property right for inventors. As Blackstone, Kent, and others established, people have the right to the fruits of their productive labors. Just as Locke recognized that the public good and public happiness was served by the protection of the rights to life, liberty, and property, Madison equally recognized in the protection of patents and copyrights that “[t]he public good fully coincides in both cases with the claims of individuals.” Ultimately, the most efficient way to protect these intellectual property rights, which due to their nature as intangible property rights were immediately used in interstate commerce, was to make their legal protection the obligation of the national government.

Madison recognized in *Federalist* No. 43 that copyrights and patents are property rights. In 1792, Madison further confirmed his view that property rights apply to things other than tangible goods. Writing in a newspaper

essay titled “Property,” Madison explained that the concept of property “embraces every thing to which a man may attach a value and have a right.”<sup>39</sup> Thus, Madison wrote, “a man has property in his opinions,” and “he may be equally said to have a property in his rights.”<sup>40</sup>

There was, of course, another Founder who expressed skepticism about patents: Thomas Jefferson. Jefferson wrote an oft-quoted letter in 1813 to an inventor, Isaac McPherson, in which he stated that “inventions...cannot in nature, be a subject of property” and that patents are an “embarrassment” as “monopolies” granted only “according to the will and convenience of society.”<sup>41</sup> This letter has been quoted often by the modern Supreme Court and by many academics and lawyers who take a skeptical view of intellectual property rights.<sup>42</sup>

Several important facts need to be kept in mind when assessing Jefferson’s remarks about patents in this famous 1813 letter to McPherson.

- In this letter, Jefferson rejects not only a natural right in inventions, but also a natural right in property rights in land in civil society. He remarks a few lines earlier from the oft-quoted passage about patent rights that “no individual has, of natural right, a separate property in an acre of land” and that “Stable ownership is the gift of social law” in land and in all other assets.<sup>43</sup> (Notably, this is never quoted by the patent skeptics who quote from this letter.<sup>44</sup>) Thus, Jefferson’s critique of patents in this letter is only one dimension of his belief in 1813 that there are no natural property rights in any assets secured under law in civil society, whether land or patents.
- Jefferson vacillated between positive and negative views about patents, so his 1813 letter does not even represent his own settled views on the subject.<sup>45</sup>
- Jefferson was a Founder and in his role as Secretary of State helped draft some of the early patent statutes,<sup>46</sup> but he was not a Framers. Jefferson served in the Continental Congress that produced the Declaration of Independence, which he drafted, but he did not attend the Constitutional Convention in Philadelphia in 1787 that produced the Constitution; he was serving as the U.S. ambassador to France at the time. Thus, in assessing the original public meaning of the Copyright and Patent Clause, Jefferson’s musings in a letter in 1813 on the nature of patents must always be viewed in light of the public writings by Madison (a Framers) and the public writings on the Constitution or intellectual property law by contemporaneous jurists and scholars such as St. George Tucker and Chancellor Kent.

In sum, the original public understanding of patents and copyrights in the Founding Era is overwhelmingly that these were property rights secured to inventors and authors. Even President George Washington displayed in his actions a deep respect for patent rights. While serving as the first U.S. President in 1790, Washington purchased a license to use Oliver Evans' patent (the third U.S. patent) on a new production process that he installed at his mill at Mount Vernon.<sup>47</sup> President Washington's deeds and Madison's words speak volumes about the original understanding of patents and copyrights in the Founding Era: They were property rights and deserved the same legal and constitutional protections afforded all other property rights.

## Intellectual Property Secured Under the Constitution by 19th-Century Courts

Consistent with the text of the Copyright and Patent Clause and the general intellectual context of the Founding Era, 19th-century courts broadly secured intellectual property rights as constitutional property rights. Again, the *McKeever* court in 1878 noted the significance of the federal government's own practices since 1790, which further confirmed that patents are "property" secured under the Takings Clause, as opposed to the federal government's argument in that case that U.S. patents were the same as "a grant" in an English patent issued by "royal favor" that did "not exclude a use[] by the Crown."<sup>48</sup> Accordingly, the *McKeever* court surveyed Congress's enactment of multiple patent statutes since the first Patent Act of 1790, the "express contract[s]" entered into by federal officials in the executive branch in using patents, and the judiciary's interpretation and enforcement of these statutes and contracts. When combined with its textual and structural constitutional analysis, the *McKeever* court concluded that these all "forbid the assumption that this government has ever sought to appropriate the property of the inventor."<sup>49</sup>

In reaching its conclusion that McKeever's patent was "property" secured under the Takings Clause of the Fifth Amendment—prohibiting the U.S. Army's use of his patented cartridge boxes without payment of just compensation—the *McKeever* court was not writing on a blank slate. It repeatedly cited and relied on numerous decisions throughout the 19th century by the Supreme Court and lower federal courts that patents are protected as "property" under the Constitution. This is likely the reason why, after the federal government's appeal of the decision, the Supreme Court summarily affirmed the *McKeever* court in which "no opinion was delivered or report made."<sup>50</sup>

Beginning in the early 19th century, federal courts consistently recognized that patents are property rights. In 1813, Chief Justice John Marshall referred to a pre-patented invention as an “inchoate and indefeasible property.”<sup>51</sup> This “inchoate property which [is] vested by the discovery,”<sup>52</sup> Marshall explained, is “perfected by the patent.”<sup>53</sup> It was the “constitution and law, taken together, [that gave] to the inventor, from the moment of invention, an inchoate property therein, which is completed by suing out a patent”<sup>54</sup> (i.e., applying for and receiving a patent). Thus, from the beginning, federal judges were applying to inventors and to patent law the same conceptual and moral framework, established by the common law and natural rights philosophy, that first possession provides a landowner with an *inchoate right* that is *perfected* by securing a legal title.<sup>55</sup>

Federal courts repeatedly and consistently recognized patents as property rights as distinguished from personal grants of privilege or monopoly grants in public franchises. In doing so, they applied to patents the same concepts, doctrines, and normative rhetoric that had long been used by common law courts in securing property rights in land and other tangible goods. Federal courts identified a patent as a “title”<sup>56</sup> and infringement of this title as “trespass.”<sup>57</sup> They even classified multiple owners of a patent as “tenants in common” (a legal term of art from traditional, common law property rights in land).<sup>58</sup> Since first inventors obtained their patents through intellectual labors equivalent to the productive labors that justified property rights in farms and other resources, Justice Joseph Story and other Justices and judges embraced property rhetoric, often accusing patent infringers of committing *piracy*.<sup>59</sup>

Justice Levi Woodbury explained in 1845 that “we protect intellectual property, the labors of the mind...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.”<sup>60</sup> A few years earlier, Justice John McLean similarly stated in another patent case that “a man should be secured in the fruits of his ingenuity and labor” and that it was thus “difficult to draw a distinction between the fruits of mental and physical labor.”<sup>61</sup>

Such sentiments were not limited to the judiciary. Daniel Webster, the famous Antebellum Era Congressman and Senator known as the Great Orator, supported legislation in 1824 that extended U.S. patents to inventors who were not U.S. citizens:

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.<sup>62</sup>

The Supreme Court first recognized and secured the protection of patents as property rights under the Constitution in 1843. In *McClurg v. Kingsland*, the Court ruled unanimously that the Constitution prohibits Congress from retroactively abrogating the property rights vested in issued patents.<sup>63</sup> The Court held that “a repeal [of a patent statute] can have no effect to impair the right of property then existing in a patentee.”<sup>64</sup> A patent issued to an inventor is a vested property right, and “the patent must therefore stand” even if Congress later repeals the specific statute under which the patent originally issued.<sup>65</sup>

In confirming the constitutional protection of vested property rights, the *McClurg* Court relied on the “well-established principles of this court,” citing only its earlier decision in *The Society for the Propagation of the Gospel in Foreign Parts v. Town of New Haven*.<sup>66</sup> *Society* was not a patent case; rather, it addressed the status of property rights in land under the treaty that concluded the Revolutionary War. In that case, the Court held that “the termination of a treaty cannot divest rights of property already vested under it.”<sup>67</sup> 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.”<sup>68</sup> In relying on such “well established principles” set forth in *Society*, the *McClurg* Court linked patents directly to classic, common law property rights in land as deserving of constitutional protection.

Beginning in the 1870s, the Supreme Court further built on *McClurg* and the many other early 19th-century court decisions that patents are property rights by expressly ruling that a patent owner is protected under the Takings Clause against the government’s unauthorized use of the patent. In *United States v. Burns* (1870), the Supreme Court affirmed a trial court decision that a patent owner was owed just compensation for the unauthorized use of his patented tent by the U.S. Army.<sup>69</sup> As it had similarly argued in *McKeever*, the federal government argued in *Burns* that it was immune from legal claims by patent owners.<sup>70</sup> The *Burns* Court summarily rejected this argument, stating bluntly 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.”<sup>71</sup>

Six years later in *Cammeyer v. Newton* (1876), the Supreme Court directly considered the issue of whether federal officials were immune from a claim of infringement when they used a patented invention without authorization.<sup>72</sup> The defendants in that case were federal officials who claimed sovereign immunity from patent infringement lawsuits for uses of patents within the scope of their public employment.<sup>73</sup> As in *Burns*, the Supreme

Court again unanimously rejected this argument, stating that “[a]gents of the public have no more right to take such private property [in a patent] than other individuals.”<sup>74</sup> Expressly invoking the Takings Clause, the Court reminded the defendants that “[p]rivate property, the Constitution provides, shall not be taken for public use without just compensation.”<sup>75</sup> Thus, the *Cammeyer* Court held that patent owners are protected as any other property owners are against an “invasion of the private rights of individuals” and cited *Burns* as “conclusive support for this proposition.”<sup>76</sup>

These foundational 19th-century precedents—*McClurg*, *Burns*, *Cammeyer*, *McKeever*, and others—all remain good law. None of them has been narrowed or overruled.<sup>77</sup>

Some commentators and courts have therefore been confused by the Supreme Court’s recent decision in *Oil States v. Greene’s Energy* (2018).<sup>78</sup> In that case, Oil States sued Greene’s Energy for patent infringement. In addition to challenging the validity of Oil States’ patent in court, Greene’s Energy petitioned the Patent Trial and Appeal Board (PTAB) to cancel Oil States’ patent for failing the statutory requirements for the U.S. Patent and Trademark Office (USPTO) to issue a valid patent. The PTAB is an administrative tribunal created by Congress in the America Invents Act of 2011 to review and cancel mistakenly issued patents that violate one of the requirements in the patent statutes for the USPTO to grant a patent. The PTAB canceled Oil States’ patent given new information that it was not new (novel, in patent parlance), and Oil States appealed the PTAB ruling. Oil States argued that the PTAB violated its Seventh Amendment right to a jury trial when the PTAB, an administrative tribunal comprising officials, canceled its patent.

The Supreme Court ruled in *Oil States* that the PTAB did not violate a patent owner’s Seventh Amendment right to a jury trial in canceling its patent. The *Oil States* Court did not reach the Seventh Amendment issue because the Court held that patents are “public rights” or “public franchises.”<sup>79</sup> In Justice Clarence Thomas’s opinion, the Seventh Amendment did not apply to the PTAB’s cancellation of patents as it was adjudicating solely the application of the statutory requirements for valid patents as “public rights” as defined by Congress and not a vested private property right. Justice Gorsuch dissented, joined by Chief Justice John Roberts, maintaining that the text of the Copyright and Patent Clause, its original understanding, and the early patent statutes and their judicial interpretation established that, once a patent was granted, it was a vested private property right subject to all of the constitutional protections afforded to all such vested rights.<sup>80</sup>

The *Oil States* Court limited its holding that patents are “public rights” only to “the determination to grant a patent”<sup>81</sup> by the USPTO and the substantively similar decision to revoke an issued patent according to these patentability requirements set forth by Congress in the patent statutes.<sup>82</sup> The specific decisions by the courts in *McClurg*, *Burns*, *Cammeyer*, and *McKever* were not addressed by the *Oil States* Court. In fact, the *Oil States* Court expressly stated 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.”<sup>83</sup>

This section has focused primarily on the 19th-century court decisions securing patents as “property” under the Constitution, and these constitutional principles apply equally to copyrights. The Framers and other Founding Era jurists and officials discussed in the prior section all justified copyrights as property rights according to the natural rights principle that one should be secured in the fruits of one’s productive labors.<sup>84</sup> Nineteenth-century courts continued to acknowledge this foundational moral and legal justification for copyrights. In 1841, Justice Story stated that copyright is “private property” that should be protected against “piracy.”<sup>85</sup> In 1879, the Supreme Court explicitly recognized that Congress is authorized under the Copyright and Patent Clause to secure “the fruits of intellectual labor” in both copyrights and patents.<sup>86</sup>

The overwhelming weight of authorities from the Founding Era through the 19th century is that patents and copyrights are property rights and that they are protected as property rights under the Constitution. Today, some courts are confused about this well-established constitutional proposition. Some lawyers and academics sow further confusion by quoting out-of-context statements by Founders, a few outlier court decisions, or some courts using loose language in decisions in referring to patents as “monopolies.”

Others have interpreted the many judicial and other official references to patents as “privileges” in the historical record, believing that this means that patents were not property rights deserving of constitutional protection. Again, this is deeply mistaken.<sup>87</sup> As used here, a “privilege” is a legal term of art; for instance, the Constitution expressly secures citizens’ “Privileges and Immunities.”<sup>88</sup> In this context, a “privilege” means a *civil right*—in other words, a right expressly secured by statute or in the Constitution, such as due process rights, jury trial rights, the right against self-incrimination, and many others.<sup>89</sup> These civil rights—privileges—receive constitutional protection too; thus, the Supreme Court held in *Cammeyer* that patents are secured under the Takings Clause because they are “as much entitled to protection as any other property, during the term for which the franchise or the exclusive right or privilege is granted.”<sup>90</sup>

## Intellectual Property Reaffirmed as Constitutional Property by the Modern Supreme Court

In multiple decisions over the past several decades, the modern Supreme Court has recognized that intellectual property rights are “property” under the Due Process and Takings Clauses. Surprisingly, it has reached this conclusion without citations to or discussions of the many 19th-century decisions or Founding Era sources that already reached this conclusion. This suggests how commonsensical this basic proposition of constitutional law is.

In *Ruckelshaus v. Monsanto Company* (1984), the Supreme Court recognized that a trade secret is “property” under the Takings Clause, requiring payment of just compensation for unauthorized uses or disclosures by the government.<sup>91</sup> *Monsanto* is an important decision.

*First*, the Supreme Court expressly held that an intellectual property right—a trade secret—is protected under the Takings Clause of the Constitution. This is the only modern Supreme Court decision to address explicitly the question of the protection of intellectual property rights under the Takings Clause.

*Second*, the Supreme Court cited John Locke for the proposition that a trade secret is property because a trade secret arises from “labour and invention.”<sup>92</sup> Although the Court in *Monsanto* did not cite the cases discussed in the prior section, it is highly revealing that it still followed the long-standing practice of invoking Locke, the only philosopher that the modern Supreme Court has cited as authoritative precedent, to justify the legal and constitutional principle that intellectual property is property.<sup>93</sup>

Consistent with its ruling in *Monsanto*, the Supreme Court’s recent decisions have continued to reaffirm the constitutional rule that patents and copyrights are property rights secured under the Takings Clause and Due Process Clauses.

- Roughly 20 years ago, the Supreme Court held that patents are “property” under the Due Process Clause of the Fourteenth Amendment.<sup>94</sup>
- In 2015, the Court quoted an 1882 decision that “[a patent] confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser.”<sup>95</sup>

- Just last year, the Court recognized that “[c]opyrights are a form of property” under the Due Process Clause of the Fourteenth Amendment.<sup>96</sup>

## Conclusion

The Founding Era sources, as well as the overwhelming weight of 19th-century court decisions, official statements, and commentaries, confirm that intellectual property rights are property—both as a matter of basic legal doctrine and as a matter of constitutional principle. Yet the Supreme Court for some unknown reason seems to have forgotten or lost sight of its own decisions and other relevant authorities in interpreting and applying the constitutional protections afforded by the Due Process Clauses and the Takings Clause to intellectual property rights.

Despite this lack of reference to these long-standing precedents, it is notable that the Supreme Court has still consistently and repeatedly protected intellectual property rights under the Constitution. It should continue to do so, and the Supreme Court should give its modern decisions a firmer grounding in its own precedents and in the many historical sources from the Founding Era.

**Adam Mossoff** is Visiting Intellectual Property Fellow in the Edwin Meese III Center for Legal and Judicial Studies, of the Institute for Constitutional Government, at The Heritage Foundation, a Senior Fellow at the Hudson Institute, and Professor of Law in the Antonin Scalia Law School at George Mason University.

## Endnotes

1. See Stephen Haber, *Innovation, Not Manna from Heaven* (Hoover Institution, Sep. 15, 2020), <https://www.hoover.org/research/innovation-not-manna-heaven>.
2. See Adam Mossoff, *Trademark as a Property Right*, 107 Kentucky L. J. 1 (2019).
3. See generally Jonathan M. Barnett, *Innovators, Firms, and Markets: The Organizational Logic of Intellectual Property* (Oxford University Press, 2020); Stephen Haber, *Patents and the Wealth of Nations*, 23 George Mason L. Rev. 811 (2016); B. Zorina Khan, *The Democratization of Invention: Patents and Copyrights in American Economic Development, 1790–1920* (Cambridge University Press, 2005).
4. See Adam Mossoff, *Institutional Design in Patent Law: Private Property Rights or Regulatory Entitlements*, 92 So. Cal. L. Rev. 921, 936–37 (2019).
5. See *Christy v. United States*, 141 Fed. Cl. 641, 658–59 (2019) (holding that Congress has not provided for protection of patents under the Takings Clause), *aff'd*, 971 F.3d 1332 (Fed. Cir. 2020).
6. *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365 (2018).
7. Compare Paul Clement, Viet Dinh & Jeffrey Harris, *The Constitutional and Historical Foundations of Copyright Protection* (Center for Individual Freedom, 2012), <https://cif.org/v/images/pdfs/constitutional-and-historical-foundations-of-copyright-protection.pdf> (“[I]t is well-established that copyrights and patents—like real property and chattels—are ‘property right[s]’ protected by the due process and just compensation clauses of the Constitution.” (quoting *Roth v. Pritikin*, 710 F.2d 934, 939 (2d Cir. 1983)) with Paul Clement, *Patent Rights vs. Property: The Framers’ Understanding of Patents* (High Tech Inventors Alliance, 2019), [https://static.wixstatic.com/ugd/a0a494\\_53e5dd5e9ccd42899ffe45ec608f6b80.pdf](https://static.wixstatic.com/ugd/a0a494_53e5dd5e9ccd42899ffe45ec608f6b80.pdf) (stating that “a patent is a form of government regulation”).
8. See Richard A. Epstein, *The Framers Protection of Strong Property Rights Under the Patent Clause*, Case Western L. Rev. (forthcoming 2021).
9. U.S. Const. art. I, § 8, cl. 8.
10. See C. Bradley Thompson, *America’s Revolutionary Mind: A Moral History of the American Revolution and the Declaration that Defined It 155–220* (Encounter Books, 2019).
11. See Mossoff, *supra* note 4, at 921.
12. *Id.*
13. *Id.* at 921–22.
14. See Adam Mossoff, *Who Cares What Thomas Jefferson Thought About Patents? Reevaluating the Patent “Privilege” in Historical Context*, 92 Cornell L. Rev. 953, 992 (2007) (detailing distinction recognized by 19th-century courts between “personal privilege” in English patent that was a “grant by the crown” and the “incorporeal chattel” in a “personal estate” in a U.S. patent issued to inventors).
15. See *McKeever v. United States*, 14 Ct. Cl. 396 (1878).
16. See Act of Feb. 24, 1855, ch. 122, 10 Stat. 612 (1855).
17. In the 1855 statute, the Court of Claims is authorized to 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. Unfortunately, the Supreme Court interpreted “law of Congress” in this statute to refer only to a specific statute authorizing a specific lawsuit. See *Great Falls Mfg. Co. v. Garland*, 124 U.S. 581, 598–99 (1888). As a result, all property owners asserting claims for uncompensated takings of their property were forced to rely on a legal fiction in their complaints: assertion of a breach of an “implied contract” between the property owner and the government. Patent owners alleged in their complaints a breach of an “implied contract” for an infringement or unconstitutional taking of their patents, just as landowners did for similar unconstitutional violations of their property rights by the government. See *United States v. Great Falls Mfg. Co.*, 112 U.S. 645, 656–57 (1884) (claim for taking of real property); *James v. Campbell*, 104 U.S. 356, 358–59 (1881) (claim for patent infringement).
18. *McKeever*, 14 Ct. Cl. at 397.
19. See U.S. Const. amend. V (“nor shall private property be taken for public use, without just compensation”).
20. *McKeever*, 14 Ct. Cl. at 417–418 (citing *Feather v. The Queen* (6 B. & S., Q. B., 257) and *Dixon v. The London Small Arms Company* (10 Law Rep., Q. B., 130, 1874–75; 1 Law Rep., Q. B. Div., 384, 1875–76; 1 Law Rep. appeal cases, 632, 1875–76)).
21. *McKeever*, 14 Ct. Cl. at 421.
22. *Id.*
23. *Id.* at 420.
24. See, e.g., *Vanhorne’s Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (1795) (Patterson, J.) (“[T]he right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man.... No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry.”).
25. See Mossoff, *supra* note 14, at 967–1004. See also Randolph J. May & Seth L. Cooper, *The Constitutional Foundations of Intellectual Property: A Natural Rights Perspective* (Carolina Academic Press, 2015); Clement, Dinh & Harris, *The Constitutional and Historical Foundations of Copyright Protection*, *supra* note 7.

26. 2 *The Records of the Federal Convention of 1787*, at 509–10 (Max Farrand ed., 1911).
27. *Copyright Enactments of the United States, 1783–1906*, at 14, 18–19 (Thorvald Solberg ed., rev. 2d ed. 1906) (quoting copyright statutes adopted in Massachusetts, New Hampshire, and Rhode Island).
28. 2 William Blackstone, *Commentaries on the Laws of England* \*405 (referring here for support to “Mr. Locke” and citing the *Second Treatise*).
29. For a thorough historical analysis of the evolution of copyright in the English common law courts and its status as a common law property right in the Founding Era, see H. Tomas Gomez-Arostegui, *Copyright at Common Law in 1774*, 47 Conn. L. Rev. 1 (2014).
30. 2 Blackstone, *supra* note 28, at \*407.
31. 1 St. George Tucker, *Blackstone’s Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia* 266 (1803) (appendix to vol. 1).
32. *Id.*
33. 2 James Kent, *Commentaries on American Law* 497 (O.W. Holmes, Jr. ed., 12th ed. 1873) (1826).
34. *Id.*
35. *Id.*
36. Surprisingly, Madison’s discussion of the Copyright and Patent Clause in *Federalist No. 43* is absent in a recent essay on the original meaning of the constitutional protection of patents. See Clement, *Patent Rights vs. Property*, *supra* note 7, although Clement does discuss other (non-public) writings by Madison; *id.* at 7.
37. *Federalist No. 43*, at 271–72 (Clinton Rossiter ed., 1961).
38. See Gomez-Arostegui, *supra* note 29. See also Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 Southern California L. Rev. 993 (2006).
39. James Madison, “Property,” *National Gazette*, Mar. 29, 1792, in James Madison, *Writings* 515 (Jack N. Rakove ed., 1999).
40. *Id.* In private correspondence with Jefferson, Madison referred to patents as “monopolies,” but he did not use this term in any of his public writings, such as in *Federalist No. 43*. See Mossoff, *supra* note 14, at 983–85 (noting that this disjunct confirms the public meaning that patents are property rights).
41. Thomas Jefferson, “Letter to Isaac McPherson,” Aug. 13, 1813, in 13 *Writings of Thomas Jefferson* 326, 333–35 (A.A. Lipscomb ed., 1903).
42. See Mossoff, *supra* note 14, at 959–67 (surveying extensive academic literature and Supreme Court cases quoting this letter). For a more recent quote of Jefferson’s 1813 letter in an essay arguing that patents were not property rights according to the Framers, see Clement, *Patents vs. Property Rights*, *supra* note 7, at 7–8.
43. Jefferson, *supra* note 41.
44. Professor Hughes also makes this observation, *supra* note 38, at 1029–30.
45. See Hughes, *supra* note 38, at 1026–34 (discussing Jefferson’s vacillation between skeptical and favorable views of patents).
46. See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 147–48 (1989).
47. Edward G. Lengel, *First Entrepreneur: How George Washington Built His—and the Nation’s—Prosperity* 159–60 (Da Capo Press, 2016).
48. *McKeever*, 14 Ct. Cl. at 420.
49. *Id.*
50. See *United States v. Palmer*, 128 U.S. 262, 267 (1888) (noting that *McKeever* was affirmed in which “no opinion was delivered or report made”). This statement is in the U.S. Reports, but it is not in the Supreme Court Reporter.
51. *Evans v. Jordan*, 8 F. Cas. 872, 873 (C.C.D. Va. 1813) (No. 4,564) (Marshall, Circuit Justice).
52. *Id.* at 874.
53. *Id.* at 873.
54. *Id.*
55. See William Blackstone, *Commentaries*, vol. 2, at \*311–12; see also *De La Croix v. Chamberlain*, 25 U.S. (12 Wheat.) 599, 600–01 (1827) (noting that “actual possession” established an “inchoate right, but not a perfect legal estate” that could support “an action of ejectment”).
56. See Mossoff, *supra* note 14, at 994 (identifying substantial number of 19th-century court opinions referring to patents as “title”).
57. See *id.* at 993 (identifying numerous cases referring to patents as titles).
58. See *id.* at 995.

59. See *id.* (identifying numerous cases in which infringers are called pirates).
60. Davoll v. Brown, 7 F. Cas. 197, 199 (C.C.D. Mass. 1845).
61. Brooks v. Bicknell, 4 F. Cas. 247, 251 (C.C.D. Ohio 1843).
62. 41 Annals of Cong. 934 (1824).
63. McClurg v. Kingsland, 42 U.S. (1 How.) 202, 206 (1843).
64. *Id.*
65. *Id.*
66. 21 U.S. (8 Wheat.) 464 (1823).
67. *Id.* at 493.
68. *Id.* at 494.
69. United States v. Burns, 79 U.S. 246 (1870).
70. *Id.* at 251.
71. *Id.* at 252 (emphasis added).
72. Cammeyer v. Newton, 94 U.S. 225 (1876).
73. *Id.* at 234.
74. *Id.* at 234–35.
75. *Id.* at 234.
76. *Id.* at 235. After deciding this threshold issue of whether a patentee had a right to sue for just compensation under the Takings Clause, the *Cammeyer* Court then engaged in the legal analysis of whether the federal officials had in fact infringed Cammeyer’s patent by using the invention. Ultimately, it affirmed the lower court’s decision that the federal officials had not infringed the patent. See *Cammeyer*, 94 U.S. at 235–38.
77. See also Brady v. Atlantic Works, 3 F. Cas. 1190, 1192 (C.C.D. Mass. 1876) (Clifford, Circuit Justice), *rev’d on other grounds*, 107 U.S. 192 (1883) (“Inventions secured by letters-patent are property in the holder of the patent, and as such are as much entitled to protection as any other property.... Private property, the constitution provides, shall not be taken for public use without just compensation....”).
78. Oil States Energy Services, LLC v. Greene’s Energy Group, LLC, 138 S. Ct. 1365 (2018).
79. *Id.* at 1373–74.
80. *Id.* at 1380–86 (Gorsuch, J., dissenting).
81. *Id.* at 1374.
82. *Id.* at 1373–74.
83. *Id.* at 1379.
84. See *supra* notes 27–40 and accompanying text.
85. Folsom v. Marsh, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841).
86. The Trade-Mark Cases, 100 U.S. 82, 94 (1879).
87. See generally Mossoff, *supra* note 14.
88. See U.S. Const. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”). See also U.S. Const. amend. XIV, § 1, cl. 2 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”).
89. See Mossoff, *supra* note 14, at 969–77.
90. *Cammeyer*, 94 U.S. at 226.
91. Ruckelshaus v. Monsanto, 467 US 986 (1984).
92. *Id.* at 1003.
93. See Adam Mossoff, *Locke’s Labor Lost*, 9 U. Chi. L. Sch. Roundtable 155, 155 (2002).
94. Florida Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 642–43 (1999).
95. Horne v. U.S. Dept. of Agriculture, 135 S. Ct. 2419, 2427 (2015) (quoting James v. Campbell, 104 U.S. 356, 358 (1882)).
96. Allen v. Cooper, 140 S. Ct. 994, 1005 (2020).