The Public Franchise Tradition as a Limit on Patent Takings

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A longstanding debate exists over whether patents are forms of “private property” that the Takings Clause protects. Recently, in a different context, the Supreme Court stated that a patent is a specific form of property: a public franchise. Several scholars have argued that the public franchise characterization means patents are not protected by the Takings Clause at all. This Article identifies another potential implication of the public franchise framing. It argues that even if patents are viewed as protected by the Takings Clause, the public franchise framing suggests that the scope of that protection should be quite narrow.

To explore implications of the public franchise framing for patent takings, this Article analyzes case law from the nineteenth and early twentieth centuries about constitutional protections for public franchises. These cases reveal several key principles that can be used to define the scope of property interests in public franchises and to evaluate regulations that affect them. Under the public franchise model, public franchises are limited by ex ante conditions, strictly construed, and distinguished from physical property. The result is that the government has broad discretion to regulate in ways that affect public franchises without implicating constitutionally protected property interests or incurring financial liability.

This Article then examines how courts could apply the public franchise model to evaluate patent takings claims. It argues that using the model would provide a set of clearer guidelines than the modern regulatory takings doctrine and would be normatively desirable. Under the public franchise model, almost all patent takings claims could be dismissed. For example, it clearly disposes of recent claims that the Medicare Drug Price Negotiation Program is a taking of pharmaceutical companies’ patents.