The Public Franchise Tradition as a Limit on Patent Takings

Laura Dolbow

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Supreme Court Precedent

- ***Horne v. Dep't of Agriculture (2015)***
  - Private property dicta
  - Quoting dicta from *James v. Campbell* (1882)

- ***Oil States v. Greene Energy (2018)***
  - Patents are "public franchises"
  - Explicitly does not decide Takings Clause question

Federal Circuit Precedent

- **Government Patent Use**
  - *Golden v. United States* (2020)
  - No takings claims
  - Section 1498 provides exclusive remedy

- **Post-Grant Review Procedures**
  - *Celgene Corp v. Peter* (2019)
  - Takings claims rejected

Ongoing Debate

- The threshold question
  - Are patents private property?

- How to evaluate regulations
  - If so, how should courts determine if a regulation is a taking?

- Pending litigation
  - Medicare Drug Price Negotiation Program challenges

Research Question

Implications of framing patents as public franchises, if patents are viewed as protected by the Takings Clause
- Scope of the property interest
- How to evaluate regulations

Reviewed Supreme Court cases involving public franchises
- Nineteenth and early twentieth centuries
- Vested rights = property rights
- Two constitutional provisions:
  - Contract Clause
  - Takings Clause

Explore whether public franchise cases provide guidance for modern patent takings claims

What is a "Public Franchise"?

- Grant from legislature to exercise certain privileges

- Public functions, like building a public road or crossing a public river

- Granted companies permission to do things, like dig up city streets to build water pipes or gas lines
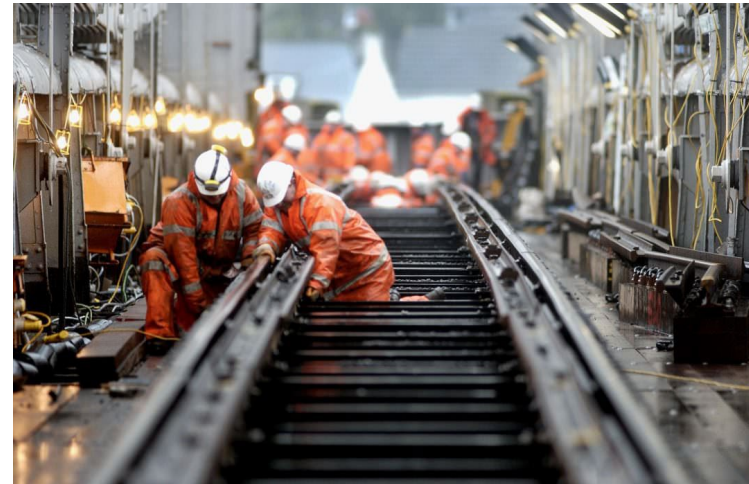
The Public Franchise Model

- Ex ante discretion

- Strict construction rule

- Distinguishing physical appropriation

- Broad zone of permissible regulation

Ex Ante Discretion

- Grants limited by conditions placed up front

    - Ex: Deadline to build railroad

- Rise of reservation clauses

   - Limited vested rights in public franchises

Strict Construction Rule

- Grants construed in favor of the public

- Express statement required for property protection

  - Ex: Charles River Bridge grant did not say "exclusive", so no right to be exclusive bridge in the area

  - Legislatures retained power to tax and impose price regulations when no express promise otherwise

Distinguishing Physical Appropriation

- Intangible grant distinct from underlying physical assets

  - Ex: No constitutional protection for bridge and railroad franchises, since legislature reserved power to revoke

  - Takings Clause would apply though if government physically appropriated bridge or railroad tracks

- Public utility rate regulation cases
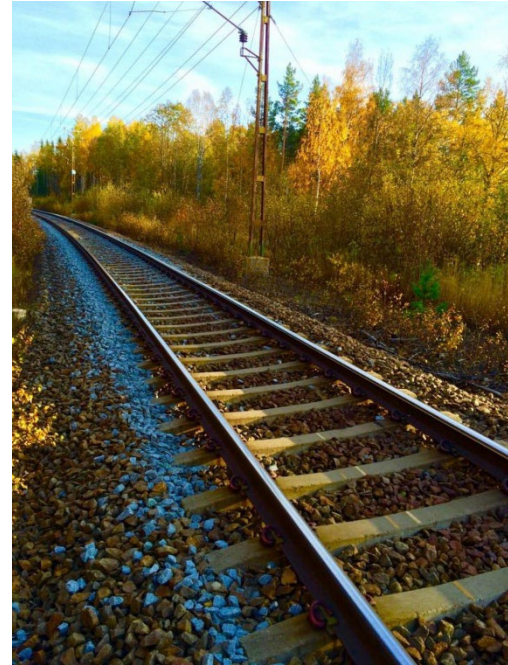
Broad Zone of Permissible Regulation

- Rejected many constitutional challenges

- Similar considerations to the *Penn Central* test

  - Character of government regulation

  - Investment-backed expectations

- Need for regulatory flexibility

  - Eminent domain dicta about continuing power despite Contract Clause protections

Guidance for Patent Takings Cases

- Similarities in context

    - Legislative grants, not natural rights

    - Exclusivity as a tool to encourage investment

- Similar policy goals

    - Balancing regulatory flexibility and entrenchment

Guidance for Patent Takings Cases

- Defining the property interest

    - Limited by ex ante conditions

    - Strictly construed

    - Distinguished from physical property

- Evaluating regulations

    - Apply *Penn Central* framework

    - Consider character of regulation and expectations

Applying the Public Franchise Model

- Regulations that do not affect vested rights could be categorically dismissed

    - Ex: Regulations of physical property, such as Medicare Drug Price Negotiation

    - Ex: Revocation of invalid patents

- Potential takings claims limited to contexts such as revocation of a valid patent

Assessing the Public Franchise Model

- Potential for clearer guidance

- Limited takings protection is good to preserve regulatory flexibility

- Limited takings protection also promotes democratic governance and fairness values

Questions?
Comments welcome!

Thank you!

laura.dolbow@colorado.edu