



# THE FREE STATE FOUNDATION

A Free Market Think Tank for Maryland.....Because Ideas Matter

***Perspectives from FSF Scholars***  
***September 26, 2014***  
***Vol. 9, No. 31***

**Intellectual Property Rights Under the Constitution's Rule of Law**

**by**

**Randolph J. May \* and Seth L. Cooper \*\***

Today, the rule of law is all but universally recognized as a fundamental attribute of a free and just society. A “government of laws, not of men” places important limits on government power in order to ensure the protection of individual rights. And a proper understanding of fundamental rule of law precepts plays an important role in securing Intellectual Property (IP) rights.

American constitutionalism supplies the basic conditions for America's unique conception of the rule of law – designed to ensure the protection of life, liberty, and property. Intellectual property is a form of property expressly provided for under the Constitution. In theory and in practice, intellectual property is readily conformable to the key components of the rule of law and American constitutionalism, such as according due process and equal protection and protecting vested rights. When IP's critics argue otherwise, including some who otherwise consider themselves respectful of private property rights, they disregard or misunderstand fundamental elements of American constitutionalism and the rule of law.

Typically, the rule of law is characterized in terms of its basic precepts. That is, the rule of law is: (1) a system of binding rules; (2) of sufficient clarity, predictability, and equal applicability; (3) adopted by a valid governing authority; and (4) applied by an independent authority.

---

**The Free State Foundation**  
**P.O. Box 60680, Potomac, MD 20859**  
**[info@freestatefoundation.org](mailto:info@freestatefoundation.org)**  
**[www.freestatefoundation.org](http://www.freestatefoundation.org)**

The building blocks to the rule of law in the American constitutional order were in significant part provided by political philosophers of classical liberalism such as John Locke and Baron de Montesquieu. Prominent jurists of the British common law tradition, including Lord Coke and William Blackstone, similarly informed early American thinking.

America's distinctive contributions to the concept of the rule of law emerged amidst the American Revolution. These contributions found practical application in early state constitutions, such as the Massachusetts Constitution of 1780. Late 18th Century American political writers, including the authors of the *Federalist Papers* also explored rule of law implications flowing from a constitutional republican form of government. And many of those early American insights supplied a critical part of the U.S. Constitution's political backdrop.

American constitutionalism thereby supplies the basic conditions for America's unique conception of rule of law. Stated succinctly, key components of American constitutionalism include: (1) a written constitution that constitutes the fundamental law of the land; (2) representative government established by democratic elections; (3) division of government authority through the separation of powers and federalism; (4) an enumeration of protected individual rights; and (5) judicial review by an independent judiciary. These key components provide the institutional context for the application of the rule of law.

These key components of American constitutionalism are also applied in light of the classical liberal conception of the basic purpose of government: protecting individual rights of person and property according to equal justice under law.

Copyrights and patents are expressly included in the U.S. Constitution, the supreme law of the land. As the Article I, Section 8 IP Clause states, Congress has the power "to promote the progress of science and useful arts, by securing, for a limited time, to authors and inventors, the exclusive right to their respective writings and discoveries." Copyrights and patents are therefore unique types of property that the Constitution designates for protection.

Under the Constitution, IP rights are secured and subject to revision by democratically elected representatives. The Constitution designates Congress as the valid authority for adopting legislation to secure IP rights to authors and inventors. Therefore, it is the constitutional duty of Congress to define the scope of protected IP rights according to generally applicable laws.

Whether laws passed by Congress adhere to the rule of law depend on the particular details of such legislation. But at a general level, the IP Clause embodies at least two important limiting principles. First, the IP Clause secures rights to particular writings or discoveries of individual authors and inventors, respectively. It confers no general trade franchise monopolies to entire sectors or segments of trade or commerce. Rather, other authors or inventors are at liberty to employ their own efforts to create and secure IP rights in their own respective writings or inventions. Second, the IP Clause secures rights to particular writings or discoveries only "for a limited time." Setting copyright and patent protection terms of years provides important certainty and predictability to IP rights-holders, IP licensees, and others.

American constitutionalism's framework for enforcement of IP rights against infringement before an impartial court of law is also structurally consonant with rule of law precepts. Aggrieved IP rights holders or executive branch law enforcement authorized to enforce IP rights against infringements are required to prove their cases with evidence before impartial tribunals applying statutes, judicial precedents, or terms of enforceable contracts. And congressional statutes and trial court decisions regarding IP rights are subject to review by independent federal circuit courts of appeal and the U.S. Supreme Court.

There are some especially important rule of law implications resulting from IP's status as a constitutionally-protected property right. For instance, "due process of law" requirements attach to IP rights. These requirements include protections from legislative deprivations of property interests in copyrights and patents and the guarantee of regular procedures governing individualized proceedings before independent tribunals.

The "equal protection of the law" is a rule of law precept that also has important implications for securing IP rights. Equal protections include the requirement that all property interests in copyright and patents should be treated alike except for those IP rights holders who are differently situated according to a valid public purpose. A related implication is that IP rights should not be subject to discriminatory treatment compared to tangible forms of property rights. Arbitrary classifications are prohibited and reasoned explanations are required to justify differential treatment.

The most basic rule of law implication of the Takings Clause's limits regarding IP rights includes a substantive guarantee that IP rights' holders be justly compensated for lost profits resulting from government takings of copyrights or patents. An additional implication of the Takings Clause for IP protection is the right to challenge the genuineness of any claimed "public use" before an independent court of law. And finally, vested rights protections recognized for all other property rights should apply where courts of law render judgments regarding those IP rights. For most purposes, IP rights vest through operation of copyright and patent statutes.

Whether or the extent to which contemporary legal doctrines or procedures meet the rigors of the rule of law depends on particularized analysis. What is important is that American constitutionalism supplies a basis for critiquing IP law and policy and for keeping them in conformance with the rule of law.

Therefore, many of today's IP critics are mistaken in regarding IP rights as somehow an aberration from the basic principles of American constitutionalism. At their core, IP rights readily fit within American constitutionalism's framework for the rule of law. Copyrights and patents are specific types of property that the U.S. Constitution was established to protect under law. A disregard for IP rights constitutes an indifference – whether unwitting or not – to principles of American constitutionalism and the rule of law. And such indifference inevitably erodes respect not only for IP rights, but for all property rights.

## The Rule of Law in the American Constitutional Order

In *The Rule of Law in America*, Professor Ronald Cass characterized the “core conception of the rule of law” as “government of laws, not of men.” Cass and other scholars typically define rule of law in terms of some basic precepts. That is, the rule of law is: (1) a system of binding rules; (2) of sufficient clarity, predictability, and equal applicability; (3) adopted by a valid governing authority; and (4) applied by an independent authority. Professor Richard A. Epstein has similarly described the rule of law as:

[T]he basic principles of fairness and due process that govern the application of power in both the public and the private spheres. The rule of law requires that all disputes — whether among private parties or among the state and private parties — be tried before neutral judges, under rules that are known and articulated in advance. Every party must have notice of the charge against him and an opportunity to be heard in response; each governing rule must be consistent with all the others, so that no person is forced to violate one legal requirement in order to satisfy a second. In the United States, our respect for such principles has made our economy the world's strongest, and our citizens the world's freest.

Taken together, these basic precepts comprise a formalistic definition of the rule of law. By this understanding, the rule of law is a system of procedures to coordinate and limit government action – but not as a system designed to protect any substantive rights as such. However, American constitutionalism contains a core set of individual rights that a government under laws is designed to protect. Protection of individual property rights is perhaps the central end of American constitutionalism. As will be seen, IP is a form of constitutionally-protected property. IP therefore fits within the central aim of government under the Constitution.

American constitutionalism supplies the basic conditions for a unique conception of rule of law. As constitutional historian Herman Belz has explained, “American constitutionalism insists on fidelity to the text of the written fundamental law.” That is, “[w]hen we refer to the United States Constitution, as fundamental law, we mean that it sets the standards by which political and governmental legitimacy are evaluated and determined.” The Constitution “expresses the deliberate will of the people under the rule of law, and it is required for the preservation of individual liberty and social freedom in self-governing political communities.”

America’s constitutional conception of the rule of law was supplied in no small part by classical liberal political theorists. In his *Second Treatise of Government* (1690), Locke deemed the establishment of government by consent necessary to supply a neutral umpire and enforcer to resolve disputes that inevitably arise when people in society come into conflict over their rights of life, liberty, and property:

And thus all private judgment of every particular member being excluded, the community comes to be umpire, by settled standing rules, indifferent, and the same to all parties; and by men having authority from the community, for the execution of those rules, decides all the differences that may happen between any

members of that society concerning any matter of right; and punishes those offences which any member hath committed against the society, with such penalties as the law has established.

For Locke, only a government acting according to law could act with the impartiality required to protect the individual rights of the governed. “Absolute arbitrary power, or governing without settled standing laws,” according to Locke, is contrary to the ends of society and government “to preserve their lives, liberties and fortunes, and by stated rules of right and property to secure their peace and quiet.” Exercise of government power by established laws ensures “that both the people may know their duty, and be safe and secure within the limits of the law; and the rulers too kept within their bounds.”

Montesquieu added to early American understandings of the rule of law through his emphasis on the separation of powers and the unique role of an independent judiciary. In Book IX of his *Spirit of the Laws* (1748), Montesquieu described the separation of legislative, executive, and judicial powers as a means for holding government accountable to laws and safeguarding against arbitrary exercises of power:

There would be an end of everything, were the same man or the same body, whether of the nobles or of the people to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.

With an eye toward the British common law, Montesquieu also emphasized an independent judiciary’s role in protecting individual rights according to law.

[T]here is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be subject to arbitrary control; for the judge would then be legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

For that matter, the British common law – a body of judicial precedents applying constitutional and rule of law principles – also influenced Americans in the late 18th Century. Adjudication of disputes over rights of private property in courts of law figured central in that tradition. The administration of justice, in turn, depended upon judicial independence. The independence of the judiciary was therefore another critical facet of constitutionalism that Americans received through the British common law tradition.

America’s distinctive contributions to the concept of the rule of law came to the fore amidst the American Revolution. Constitutional conditions for applying the rule of law were interwoven into the *Declaration of Independence* (1776). They figure prominently among the “history of repeated injuries and usurpations” by the King of Britain that impelled the Colonies’ separation. Among the Declaration’s charges “submitted to a candid world”:

He has refused his Assent to Laws, the most wholesome and necessary for the public good;

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers;

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries;

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation;

For imposing Taxes on us without our Consent;

For depriving us in many cases, of the benefits of Trial by Jury  
For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments; [and]

For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

The rule of law found practical application in early state constitutions. Perhaps the paradigmatic example of early state constitutionalism supplying the groundwork for a uniquely American application of rule of law principles is the Massachusetts Constitution of 1780. Principally drafted by John Adams, the Massachusetts Constitution of 1780 set out the basic purpose of government in protecting rights, including property rights. It provides a basic constitutional framework for protecting rights “to the end it may be a government of laws and not of men.” Among its provisions:

[Article I] All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness;

[Article IX] All elections ought to be free; and all the inhabitants of this Commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments;

[Article X] Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws;

[Article XI] Every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and

without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws;

[Article XII] [N]o subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate; but by the judgment of his peers, or the law of the land; [and]

[Article XXX] In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

Along with early American state papers such as the Declaration and state constitutions, late 18th Century American political writers also explored rule of law implications flowing from constitutional republican form of government. These early American insights into constitutionalism and the rule of law were core components of the intellectual backdrop of the U.S. Constitution.

For their part, the authors of the *Federalist Papers* described the extent to which the U.S. Constitution embodied these rule of law implications and constitutional principles, namely: necessity of a written constitution, separation of powers, federalism, representative elections, and an independent judiciary. Perhaps the best summation of these principles appears in a passage from *Federalist* No. 12:

The science of politics, ... like most other sciences, has received great improvement. The efficacy of various principles is now well understood, which were either not known at all or imperfectly known to the ancients. The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior; the representation of the people in the legislature by deputies of their own election: these are wholly new discoveries or have made their principal progress toward perfection in modern times. They are means, and powerful means, by which the excellences of republican government may be retained and its imperfections lessened or avoided.

In expounding those same principles, *The Federalist Papers* also addressed the necessity that laws be of general application, reasonably clear, and knowable in advance. As James Madison, writing as Publius, explained in *Federalist* No. 62:

It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what

the law is to-day, can guess what it will be to-morrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?

While the *Federalist* advocated against the enumeration of specific individual rights (No. 84), in the first session of the First Congress, James Madison introduced – and the Congress proposed to the states – what became the Bill of Rights. Protections for individual rights under the rule of law, including rights of private property, received their strongest subsequent enhancement through the ratification of the Fourteenth Amendment.

In sum, the key components of American constitutionalism include: (1) a written constitution that constitutes the fundamental law of the land; (2) representative government by democratic elections; (3) division of government authority through the separation of powers and federalism; (4) an enumeration of protected individual rights; and (5) judicial review by an independent judiciary. These key components of constitutionalism are designed to fulfill the basic end of government: protecting individual rights of person and property.

### **IP's Consonance with American Constitutionalism and the Rule of Law**

Since copyright and patent are expressly included in the Constitution, the contours of IP rights are subject to the rule of law. Indeed, in both theory and practice, IP is readily conformable to rule of law norms in the American constitutional order.

The U.S. Constitution designates Congress as the valid authority for adopting legislation to secure IP rights to authors and inventors. It is therefore the constitutional duty of Congress to define the scope of protected IP rights according to generally applicable laws.

Whether laws passed by Congress adhere to the rule of law depend on the particular details of such legislation. But at a general level, the IP Clause embodies at least two important limiting principles. First, the IP Clause secures rights to particular writings or discoveries of individual authors and inventors, respectively. It confers no general trade franchise monopolies to entire sectors or segments of trade or commerce. Rather, other authors or inventors are at liberty to employ their own efforts to create and secure IP rights in their own respective writings or inventions. Second, the IP Clause secures rights to particular writings or discoveries only “for a limited time.” Setting copyright and patent protection terms of years provides important certainty and predictability to IP rights-holders, IP licensees, and others.

American constitutionalism's framework for enforcement of IP rights against infringement before an impartial court of law is also structurally consonant with rule of law precepts. Aggrieved IP rights holders or executive branch law enforcement authorized to enforce IP rights against infringements are required to prove their cases with evidence before impartial tribunals applying statutes, judicial precedents, or terms of enforceable contracts. And congressional statutes and trial court decisions regarding IP rights are subject to review by independent federal circuit courts of appeal and the U.S. Supreme Court.

## **Rule of Law Implications of IP as a Constitutionally-Protected Property Right**

According to Professor Herman Belz, a noted constitutional historian, Abraham Lincoln held to a “two-track” view in understanding the Constitution and addressing constitutional controversies. Explained Belz: “The first and more familiar track involved legalistic arguments from the text of the Constitution. The second involved more broadly political arguments concerning the relationship between the Union, the Constitution, and the nature of republican government.” Whereas more technical and lawyerly arguments and principles occupied the first track, broader political-philosophical arguments and principles comprised the second track.

Previous sections primarily explored how IP rights fit within broader political-philosophical themes regarding the rule of law in American constitutionalism. However, rule of law precepts embodied in the Constitution have important implications regarding legal protections for IP rights. While not providing systematic exploration of the subject, this section offers a few basic implications for the protection of IP rights under the rule of law in America’s constitutional order.

Certain generalized rule of law implications stemming from IP’s status as constitutionally-protected property rights can be ascertained from a handful of especially relevant constitutional clauses. The following basic rule of law implications regarding IP should bind or otherwise guide all branches of government policymaking and implementation.

### **Due Process of Law**

Like other property rights, those rightfully possessing IP rights should not be deprived of those rights without “due process of law,” as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution.

As Law Professors Nathan Chapman and Michael McConnell have observed, “[d]ue process of law’ is the oldest phrase and the oldest idea in our Constitution.” “Fundamentally, it was about securing the rule of law,” they explain “only secondarily about notice and the opportunity to be heard.” Professors Chapman and McConnell’s scholarship reiterates the original understanding of due process as the conceptual embodiment of the separation of powers. This “due process as separation of powers” logic is evident, for example, in Justice Curtis’s analysis of the Fifth Amendment Due Process Clause’s meaning in *Murray's Lessee v. Hoboken Land & Improvement Co.* (1856):

The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative, as well as on the executive and judicial, powers of the government, and cannot be so construed as to leave Congress free to make any process "due process of law," by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself to see

whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.

That is, while due process doesn't impose any particular requirements on the legislative process, it does restrict the contents of legislation that affects rights of property, such as IP. Further, the particular procedural requirements due to property rights holders should, at minimum, include those ascertained when "tested by the common and statute law of England prior to the emigration of our ancestors, and by the laws of many of the States at the time of the adoption of this amendment," as well as by "legislative construction of the Constitution, commencing so early in the government ... continued throughout its existence, and repeatedly acted on by the judiciary and the executive." While acknowledging these examinations of precedent produce exceptions, Justice Curtis cited Sir Edward Coke's *Institutes* in observing that "'due process of law' generally implies and includes *actor* [plaintiff], *reus* [defendant], *judex* [judge], regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings."

Thus, the rule of law implications of "due process of law" for IP rights include protections from legislative deprivations of property interests in copyrights and patents embodied in regular procedures that must be adhered to as part of individualized proceedings before independent courts of law.

### **Equal Protection of the Laws**

Holders of IP rights are constitutionally guaranteed "the equal protection of the laws" through the Fourteenth Amendment – and, according to Supreme Court precedent, by implication through the Fifth Amendment. While the scope of equal protection is debated, it is widely held that, at minimum, all persons should enjoy equal protection of the same rights protected by the Civil Rights Act of 1866, to wit:

To make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property ... and shall be subject to like punishment, pains and penalties, and to none other...

Justice Stephen Field similarly expressed the implications of the Equal Protection Clause in *Barbier v. Connolly* (1885):

[E]qual protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness, and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement

of contracts; that no impediment should be interposed to the pursuits of anyone, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses... Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.

The rule of law implications of “equal protection of the laws” for IP rights include the requirement that all property interests in copyright and patents should be treated alike – except for IP rights holders who are differently situated according to a valid public purpose. A related implication is that IP rights should not be subject to discriminatory treatment compared to tangible forms of property rights; arbitrary classifications are prohibited and reasoned explanations are required to justify differential treatment.

### **No Takings for Public Use without Just Compensation**

Describing the Fifth Amendment Takings Clause’s requirement that “private property shall not be taken for public use without just compensation,” Justice Joseph Story declared in his *Commentaries on the Constitution of the United States* (1833) that:

This is an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, in a free government, almost all other rights would become utterly worthless, if the government possessed an uncontrollable power over the private fortune of every citizen. One of the fundamental objects of every good government must be the due administration of justice; and how vain it would be to speak of such an administration, when all property is subject to the will or caprice of the legislature, and the rulers.

In modern times, the Supreme Court has not definitively opined on the application of the Takings Clause to IP. However, there is nothing in the text, structure, or logic of the Constitution to suggest the Clause’s non-applicability to IP. Rather, IP’s consonance with American constitutionalism and the express inclusion in the IP Clause in the Constitution makes the Takings Clause’s application to IP rights a straightforward matter.

Further, law professor Adam Mossoff’s scholarship has shed important light on “The Historical Protection of Patents Under the Takings Clause.” That history includes *McKeever v. U.S.* (1878), wherein the Supreme Court concluded that the Takings Clause secured patents as constitutionally-protected private property. Accordingly, the most basic rule of law implications of the Takings Clause’s limits regarding IP rights includes a guarantee that IP rights’ holders be justly compensated for lost profits resulting from government takings of copyrights or patents.

Moreover, it seems difficult to conceive of legitimate “public uses” of individual IP rights resulting from government taking. For instance, laws seeking to turn protected copyrights and patents over to the public domain appear contrary to any straightforward understanding of public use. Thus, another obvious implication of the Takings Clause for IP protection is the right to challenge the genuineness of any alleged “public use” before an independent court of law.

### Vested Rights

The Constitution also implies protection of vested rights in property – including IP – from infringement by arbitrary retroactive laws. Vested property rights arise from constitutional requirements of due process, limits on takings, prohibitions on laws impairing obligations of contracts, and prohibitions on *ex post facto* laws. The vesting of rights is also rooted in the logic of private property and basic rule of law precepts.

Where rights secured under the laws vest, they are protected from subsequent attempts by government to retroactively undo the law and legal expectations that secured those rights. A classic formulation of the vested rights doctrine was given by the Supreme Court in *McCullough v. Virginia* (1898). In that case the Court observed: “It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.”

To be sure, where IP rights are in dispute in particular instances, those same vested rights protections recognized for all property rights should apply where courts of law render judgments regarding those IP rights. As Professor Mossoff’s scholarship in constitutional history reminds us, in *McClurg v. Kingsland* (1843) the Supreme Court concluded that “Congress could not *retroactively* limit property rights that had been secured in now-repealed patent statutes.” With equal reason, those same vested rights protections should protect copyrights from congressional repeals of earlier copyright statutes.

But as a general matter, court judgments should be unnecessary to secure vested IP rights. Rather, for most purposes, IP rights should vest through operation of copyright and patent statutes. Those laws specify the terms by which authors or inventors are secured rights to the proceeds of their respective writings or inventions. As Chief Justice John Marshall observed in his opinion for the Circuit Court in *Evans v. Jordan* (1813), an inventor possesses an “inchoate property which [is] vested by the discovery” and “perfected by the patent.” The Supreme Court made a similar observation about the vesting of patents by law in *Gayler v. Wilder* (1850). Even at common law, authors had a recognized property right in their unpublished manuscripts, giving authors the basis for copyright protection even prior to publication. And the same logic regarding vested property rights as applied to inventions also applies to copyright post-publication.

\*

\*

\*

Whether or the extent to which contemporary legal doctrines or procedures derived from modern congressional legislation or judicial precedents meet the rigors of the rule of law depends on particularized analysis. But one need not delve far into the intricacies of how all of the

Constitution's specific clauses and modern jurisprudence protect IP rights in order to grasp the foregoing basic rule of law implications of recognizing copyright and patents as private property. Of course, any legal institution or public policy may be liable to stray from its proper foundations. What is important is that American constitutionalism supplies a basis for critiquing IP law and policy and for keeping them in alignment with the rule of law.

## **Conclusion**

American constitutionalism supplies the basic conditions for America's unique conception of rule of law – designed to ensure the protection of life, liberty, and property. Copyrights and patents are special types of property that the U.S. Constitution was established to protect under law. In theory and in practice, IP is readily conformable to the key components of American constitutionalism and to the rule of law. And American constitutionalism supplies a basis for critiquing IP law and policy and for keeping them in conformance with the rule of law.

IP critics are therefore mistaken in regarding IP rights as an aberration from the basic principles of American constitutionalism. A disregard for IP rights constitutes an indifference – whether unwitting or not –for principles of American constitutionalism and the rule of law. Such indifference inevitably tends to erode respect not only for IP rights, but for all property rights.

\* Randolph J. May is President of the Free State Foundation, an independent, nonpartisan free market-oriented think tank located in Rockville, Maryland.

\*\* Seth L. Cooper is a Senior Fellow of the Free State Foundation.

## **Further Readings**

*Declaration of Independence* (1776).

John Locke, *Second Treatise of Government* (1689).

*Massachusetts Constitution of 1780*.

Baron de Montesquieu *The Spirit of the Laws* (1748).

Publius (Alexander Hamilton), *Federalist* No. 12 (1788).

Publius (James Madison), *Federalist* No. 62 (1788).

Joseph Story, *Commentaries on the Constitution of the United States* (1833).

# # #

Herman Belz, *Abraham Lincoln, Constitutionalism, and Equal Protection in the Civil War Era* (1998).

Herman Belz, *Constitutionalism and the Rule of Law in America* (2009).

Ronald A. Cass, *The Rule of Law in America* (2001).

Ronald A. Cass, "Property Rights Systems and the Rule of Law," *The Elgar Companion to Property Right Economics* (Enrico Colombatto, ed., 2003).

Nathan S. Chapman and Michael W. McConnell, "Due Process As Separation of Powers," 121 *Yale Law Journal* 1672 (2012).

Richard A. Epstein, *Design for Liberty: Private Property, Public Administration, and the Rule of Law* (2011).

Richard A. Epstein, "[Government by Waiver](#)," *National Affairs*, Issue Number 7 (Spring 2011).

Richard A. Epstein, "[The Perilous Position of the Rule of Law and the Administrative State](#)," *Perspectives from FSF Scholars*, Vol 8, No. 6 (February 28, 2013).

Adam Mossoff, "Patents as Constitutional Private Property: The Historical Protection of Patents Under the Takings Clause," 689 *Boston University Law Review* (2007).

Brian Z. Tamahana, *On the Rule of Law: History, Politics, Theory* (2004).

### **Earlier Papers in this Series of Intellectual Property Perspectives**

Randolph J. May and Seth L. Cooper, "[The Constitutional Foundations of Intellectual Property](#)," *Perspectives from FSF Scholars*, Vol. 8, No. 13 (2013).

Randolph J. May and Seth L. Cooper, "[Reasserting the Property Rights Source of IP](#)," *Perspectives from FSF Scholars*, Vol. 8, No. 17 (2013).

Randolph J. May and Seth L. Cooper, "[Literary Property: Copyright's Constitutional History and Its Meaning for Today](#)," *Perspectives from FSF Scholars*, Vol. 8, No. 19 (2013).

Randolph J. May and Seth L. Cooper, "[The Constitution's Approach to Copyright: Anti-Monopoly, Pro-Intellectual Property Rights](#)," *Perspectives from FSF Scholars*, Vol. 8, No. 20 (2013).

Randolph J. May and Seth L. Cooper, "[The 'Reason and Nature' of Intellectual Property: Copyright and Patent in \*The Federalist Papers\*](#)," *Perspectives from FSF Scholars*, Vol. 9, No. 4 (2014).

Randolph J. May and Seth L. Cooper, "[Constitutional Foundations of Copyright and Patent in the First Congress](#)," *Perspectives from FSF Scholars*, Vol. 9, No. 18 (2014).

Randolph J. May and Seth L. Cooper, "[Life, Liberty, and the Protection of Intellectual Property: Understanding IP in Light of Jeffersonian Principles](#)," *Perspectives from FSF Scholars*, Vol. 9, No. 25 (2014).