

# Patent Rights vs. Property

The Framers' Understanding of Patents

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## INTRODUCTION

Patents are privileges created by the government, and the Constitution authorizes Congress to bestow them for one purpose only: “To promote the Progress of Science and useful Arts.” U.S. Const. art. I, §8, cl. 8. It is no accident that Congress’ power to create a patent system is the only one of its enumerated powers the Constitution expressly conditions on the promotion of a specific public purpose. That condition underscores what the Framers and their forebears well understood: patent rights are not natural rights, they do not come from the common law, and they have no basis in the tradition of property rights tracing back to John Locke. To the contrary, a patent is a form of government regulation that *restrains* members of the public in the exercise of their natural rights to liberty and property—rights that *do* come from nature and *are* protected by the common law. To grant a patent is thus to take rights of immense value from the public and transfer them to the patentee, in derogation of the property and liberty interests government is instituted to protect. It is a grave act, to be done, if at all, only after serious deliberation, and only for the utilitarian purpose of increasing the common stock of knowledge and the advantages of technology. Our Constitution makes clear that a patent system is not legitimate if it does not serve those public ends, or if it subordinates them to the private interest of patent holders.

The foregoing propositions were not controversial for many generations both before and after the Founding. Recently, however, a revisionist view has begun to gain currency. Partisans of this view invoke the rhetoric of natural rights to recast patents as forms of traditional property, and to insist that the government has a moral obligation to grant them freely and to protect them at whatever cost. This view is deeply misguided. It misunderstands the consensus position, which prevailed before and after the time of the Framing, that patent rights are not natural rights but instead are instruments of social and economic policy that *restrain* the right to free enterprise of

the public at large, and whose utility should be evaluated just like any other form of unnatural, government restraint on individual liberty. And it overlooks the many ways in which the patent system may fail to fulfill its constitutional mandate. The patent system must “promote the Progress of Science and useful Arts,” rather than the private advantage of inventors and speculators who do more to impede than to advance such progress. Particularly problematic are systemic flaws that lead the government to issue scores of patents that serve no legitimate end.

Fortunately, Congress and the courts have lately undertaken reforms that help restore the patent system to its rightful place in our constitutional order. These reforms include the system of inter partes review—a valuable process Congress recently created to help the government identify and revoke patents that never should have been granted in the first place—and the Supreme Court’s decision in *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006)—which correctly held that there is no justification for courts to give patent rights greater protection than traditional property rights when deciding whether to issue injunctions against alleged infringers. Rather than denounced, these developments should be celebrated, especially by conservatives who profess to believe in principles of limited government, market economics, traditional property rights, and individual liberty.

## **I. AS GOVERNMENT-CREATED PRIVILEGES, PATENT RIGHTS MUST BE DESIGNED TO SERVE THE COMMON GOOD.**

Patents can serve important purposes. They can provide incentives to stimulate innovation, helping to call forth inventions that might not otherwise come into being, to the benefit of the public at large. The American legal tradition attests to the utilitarian potential that patents hold. Indeed, as the Constitution itself recognizes, patents can serve as powerful tools “[t]o promote the Progress of Science and useful Arts.” U.S. Const. art. I, §8, cl. 8.

At the same time, the American legal tradition has always understood that patents do not enjoy the status of natural rights or common law rights. In fact, in many respects they exist in derogation of the common law, insofar as they operate as restraints on the natural right to free enterprise ordinarily enjoyed by the public at large. Thus, patents exist only by grace of Congress, and are protected only to the extent Congress has chosen to protect them. And the tradition makes equally clear—as reflected in the text of the Constitution itself—that Congress’ overriding obligation when structuring the patent system is to ensure that it best serves the interests of the public overall. The interests of patent holders are not to be regarded as ends in themselves; instead they are properly understood to be incidental and subordinate to the public good.

**A. Unlike Traditional Property Rights, Patents Are Privileges or Franchises that Have No Basis in Natural Law or the Common Law.**

Since the time of the Founding, the American government has sought to spur innovation by promising to issue patent rights to deserving members of the public. *See* Patent Act of 1790, 1 Stat. 109. Once issued, those rights confer a significant benefit on the patent holder—but they do so by restraining the rights to liberty and property that every other member of the public would enjoy by virtue of nature and the common law. When used properly, patents can leave everyone better off. Patents can accomplish that feat by giving legitimate innovators incentives to make risky, costly investments. When those risky investments bear fruit in the form of a useful invention, society as a whole profits, and the patent helps ensure that the inventor profits too—profits enough to keep innovating, and indeed, profits more than he would absent this special government-issued protection.

Patent rights can therefore be quite valuable in the hands of the inventor. Nevertheless, there was widespread consensus at the time of the Founding that patent rights and traditional

property rights are fundamentally different. Indeed, there was virtually no disagreement that patent rights are not vested by nature or the common law; instead, they are creatures of positive law whose scope, contours, and very existence depend on the will of Congress. The rhetoric employed in some quarters today—describing patents as sacred rights of property on a par with natural or common law rights—would have been immediately dismissed by the Framers as profoundly mistaken.

The founding generation inherited a legal tradition that employed a particular taxonomy to distinguish among different types of legal interests. This taxonomy “was absolutely central to American legal thought both at the time of the Founding and throughout the nineteenth century.” Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 566 (2007). For present purposes, the most crucial point is that not all legal interests held by individuals were thought to enjoy the same status. And the most important distinction was between “core” private rights to life, liberty, and property—which the “Lockean tradition associated with the natural rights that individuals would enjoy even in the absence of political society”—and “privileges” or “franchises,” which could resemble core private rights but “which public authorities had created purely for reasons of public policy and which had no counterpart in the Lockean state of nature.” *Id.* at 567.

There is no question as to which category patent rights were thought to belong. Patent rights both here and in England were regarded as privileges or franchises. As Justice Clarence Thomas has explained on more than one occasion: “[p]atents convey only a specific form of property right—a public franchise.” *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1375 (2018). Indeed, “[n]otwithstanding a movement to recognize a ‘core’ property right in inventions, the English common law placed patents squarely in the final category,

as franchises that ‘depend upon express legislation,’ and ‘hath [their] essence by positive municipal law.’” *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 848 n.2 (2015) (Thomas, J., joined by Alito, J., dissenting) (quoting 7 W. Holdsworth, *A History of English Law* 479, n.7, 480 & n.4, 497 (1926)).

The Supreme Court has reaffirmed that fundamental point many times over the past two hundred years. In 1834, for instance, the Court could say without controversy or fear of contradiction that “it has never been pretended, by any one, either in this country or in England, that an inventor has a perpetual right, at common law, to sell the thing invented.” *Wheaton v. Peters*, 33 U.S. 591, 660-61 (1834). “[A]s it regards patent rights,” the Court went on, the “principle is familiar” that any such rights “originated, if at all, under the acts of congress.” *Id.* 663-64; *see also id.* at 684-85 (Thompson, J., dissenting) (“[T]he books furnish no case, that I am aware of, where an action has been attempted to be sustained upon any supposed common law right of the inventor.”). The Court reiterated that definitive statement in 1850, declaring that “[t]he inventor of a new and useful improvement certainly has no exclusive right to it, until he obtains a patent. This right is created by the patent.” *Gayler v. Wilder*, 51 U.S. 477, 493 (1850); *see also id.* at 503-04 (Daniel, J., dissenting) (explaining that “[t]he mere mental process of devising an invention enters not into the nature of property according to the common law; it forms no class or division in any of its enumerations or definitions of estates or property,” and that patent rights were “unknown to the rules and principles of the common law”).

A few years later, in 1856, the Court again stressed that “the right of property which a patentee has in his invention, and his right to its exclusive use, is derived altogether from these statutory provisions; and this court have always held that an inventor has no right of property in his invention, upon which he can maintain a suit, unless he obtains a patent for it, according to the

acts of Congress; and that his rights are to be regulated and measured by these laws, and cannot go beyond them.” *Brown v. Duchesne*, 60 U.S. 183, 195 (1856). The Supreme Court has never deviated from these very basic principles. See, e.g., *Bloomer v. McQuewan*, 55 U.S. 539, 549 (1852); *Crown Die & Tool Co. v. Nye Tool & Mach. Works*, 261 U.S. 24, 40 (1923); *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 525-26 (1972); *Oil States*, 138 S. Ct. at 1374.

That unbroken line of authority eviscerates the notion, now peddled by certain activists—especially those claiming to be originalists—that patent rights are equal in stature to traditional property rights. They are not, and have never been thought to be.

## **B. Patents Are Restraints on Free Enterprise and Justified to the Extent They Serve the Public Interest.**

The Framers understood that patents differ in origin from core private property rights—in fact, their existence represents a *deviation* from the nature of private property rights in land or chattels in the Lockean tradition, because they impose regulatory barriers restraining liberty and free enterprise. As Sir Edward Coke put it, patents are monopolies that “restrain” people “of . . . freedom[] or liberty that they had before.” Edward Coke, *Third Part of the Institutes of the Law of England* 181 (1644). Hence, Justice Thomas has explained that “[l]ike the royal prerogatives that were their historical antecedents, patents have a regulatory effect: They ‘restrain *others* from manufacturing, using or selling that which [the patent holder] has invented’ for a specified period of time.” *Teva*, 135 S. Ct. at 847 (Thomas, J., joined by Alito, J., dissenting) (quoting *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 510 (1917)).

Given their status as government interventions that restrain common law freedoms, patents are to be regarded as purely instrumental, existing in order to benefit society rather than their immediate owners. The text of the Constitution makes this point explicitly. As noted above, the Constitution authorizes Congress to confer patent rights “[t]o promote the Progress of Science and



useful Arts,” U.S. Const., art. 1, §8, cl. 8., and this clause is alone among Congress’ enumerated powers in that the Framers conditioned it on the promotion of a specific public purpose. Madison, in his so-called “Detached Memoranda,” echoed the point that patents are legitimate only to the extent that they help advance the welfare of society as a whole. “Monopolies,” he wrote, “tho’ in certain cases useful, ought to be granted with caution, and guarded with strictness agst. abuse,” and indeed “[t]here can be no just objection to a temporary monopoly” only insofar as it operates “as a compensation for a benefit actually gained to the community.”

Madison’s point of view was echoed and amplified by no less an authority than Thomas Jefferson—the father of the patent system, author of the Patent Act of 1793, the nation’s first patent administrator, and a prolific inventor in his own right. After a long discourse on the basic incompatibility between the natural law of property rights and the institution of patent monopolies, Jefferson concluded that “[i]nventions then cannot, in nature, be a subject of property. Society may give an exclusive right to the profits arising from them, as an encouragement to men to pursue ideas which may produce utility, but this may or may not be done, according to the will and convenience of the society, without claim or complaint from any[ ]body.” Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in 6 *The Writings of Thomas Jefferson* 181 (H.A. Washington ed., 1854). In short, wrote Jefferson, “the exclusive right to invention [is] given not of natural right, but for the benefit of society”—and because a system of patent rights was in such tension with the public’s natural rights to property and liberty, Jefferson was confident that very few inventions would be so deserving as to be “worth to the public the embarrassment of an exclusive patent.” *Id.* As the Supreme Court later summarized, it was Jefferson’s firmly held view that “[t]he grant of an exclusive right to an invention was the creation of society—at odds with the inherent free nature of disclosed ideas—and was not to be freely given. Only inventions and

discoveries which furthered human knowledge, and were new and useful, justified the special inducement of a limited private monopoly. Jefferson did not believe in granting patents for small details, obvious improvements, or frivolous devices.” *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 9 (1966).

The Supreme Court has also been a consistent voice in the chorus stressing that patents represent a derogation from the traditional rights of others to use their property and energies in economic pursuits free from government-imposed monopolies. As the Court put it in *United States v. American Bell Telephone Co.*, 128 U.S. 315, 370 (1888), “[t]he United States, by issuing the patents . . . , has taken from the public rights of immense value, and bestowed them upon the patentee. In this respect the government and its officers are acting as the agents of the people, and have, under the authority of law vested in them, taken from the people this valuable privilege, and conferred it as an exclusive right upon the patentee.” Thus, the Court has long explained that unlike traditional forms of property, patents find their justification only in the benefits they contribute to the public—and that the rights of a patent holder should therefore be defined so as to maximize the benefit to the public. Writing in 1829, Justice Story acknowledged that “[w]hile one great object” of the patent laws was to provide “a reasonable reward to inventors, . . . the *main* object was ‘to promote the progress of science and useful arts;’ and this could be done best, by giving the public at large a right to make, construct, use, and vend the thing invented, at as early a period as possible.” *Pennock v. Dialogue*, 27 U.S. 1, 19 (1829) (emphasis added). The Court repeated the point in 1858, calling it “undeniably true, that the limited and temporary monopoly granted to inventors was never designed for their exclusive profit or advantage; the benefit to the public or community at large was another and doubtless the primary object in granting and securing that monopoly.” *Kendall v. Winsor*, 62 U.S. 322, 327–28 (1858).

Renowned economic and political thinkers, especially those long invoked by conservatives, have likewise emphasized that it would be a grave error to equate patents with traditional property rights, and that unthinkingly superimposing property concepts onto the patent system can have serious, adverse consequences for the liberty and property interests individuals rightly enjoy in political society.

For instance, Friedrich Hayek singled out patents as exemplifying the principle that “[w]here the law of property is concerned, it is not difficult to see that the simple rules, which are adequate to ordinary mobile ‘things’ or ‘chattel’ are not suitable for indefinite extension.” Friedrich A. Hayek, *Individualism and Economic Order* 113 (1948). Thus Hayek warned that “the extension of the concept of property to such rights and privileges as patents for inventions, copyright, trade-marks, and the like” raised “acutely” “[t]he problem of the prevention of monopoly and the preservation of competition.” *Id.* at 113-14. Indeed, Hayek wrote that “[i]t seems to me beyond doubt that in these fields a slavish application of the concept of property as it has been developed for material things has done a great deal to foster the growth of monopoly and that here drastic reforms may be required if competition is to be made to work.” *Id.* at 114. “Patents, in particular,” he went on, “provide so clear an illustration of how it is necessary . . . not to apply a ready-made formula but to go back to the rationale of the market system and to decide for each class what the precise rights are to be which the government ought to protect.” *Id.* And in words that should hit especially close to home, Hayek lamented “the way in which a mechanical extension of the property concept by lawyers has done so much to create undesirable and harmful privilege.” *Id.* Consistent with that view, Milton Friedman has written that on the subject of patents, “[o]ne thing is clear. The specific conditions attached to patents and copyrights . . . are

not a matter of principle. They are matters of expediency to be determined by practical considerations.” Milton Friedman, *Capitalism and Freedom* 127-28 (40th anniversary ed. 2002).

Richard Posner has also written at length about how the patent system can undermine the workings of the free market if the interests of patent holders are elevated above the interests of the public. In general, Posner notes that “[w]ith greater legal protection for patentees . . . comes a greater danger that the inventor will be enabled to charge a higher price than he needs to recover the fixed costs of his invention, thereby restricting access to the invention more than is necessary.” William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* 296 (2003). More particularly, Posner explains that “[w]hen patent protection provides an inventor with more insulation from competition than he needed to have an adequate incentive to make the invention, the result is to increase market prices above efficient levels, causing distortions in the allocation of resources; to engender wasteful patent races . . . ; to increase the cost of searching the records of the Patent and Trademark Office in order to make sure one isn’t going to be infringing someone’s patent with your invention; to encourage the filing of defensive patents (because of anticipation that someone else will patent a similar product and accuse you of infringement); and to encourage patent ‘trolls,’ who buy up large numbers of patents for the sole purpose of extracting licensee fees by threat of suit, and if necessary sue, for infringement.” Richard A. Posner, *Do Patent and Copyright Law Restrict Competition and Creativity Excessively?*, The Becker-Posner Blog (Sept. 30, 2012, 10:30 PM), <https://bit.ly/2FpASjy>.

The upshot here is that patents are not ends in themselves. They are utilitarian instruments of social welfare that are in serious tension with the rights to liberty and property that are vested by nature and protected by the common law. They can be useful in promoting social welfare insofar as they encourage valuable inventions that would not otherwise come into being—but to

the extent they confer a privilege on the inventor that is more than necessary to encourage inventions, they can be destructive and illegitimate. Critics who fail to recognize the priority that must be given the public weal—and who focus instead on the private interest of inventors, to the exclusion of the general good facilitated by economic and personal liberty—betray a basic failure to grasp the nature of the patent system and the ends it was created to serve.

## **II. SERIOUS FLAWS HAVE EMERGED IN THE PATENT SYSTEM THAT CONGRESS AND THE COURTS HAVE WISELY BEGUN TO ADDRESS.**

The contemporary patent system sometimes falls well short of fulfilling the ends that the Constitution and the Founders envisioned for it. Rather than treating the grant of a patent as an act that imposes serious restraints on the natural rights of the public at large, and thus should be undertaken only with the utmost deliberation, the current system has flooded the economy with patents of dubious value. Many have criticized Congress for failing to set higher standards for patentability. *See, e.g.,* Richard A. Posner, *Why There Are Too Many Patents in America*, *The Atlantic* (July 12, 2012), <https://bit.ly/2VGe6Z6>; Landes & Posner, *The Economic Structure of Intellectual Property Law* at 326 (“The foregoing analysis suggests grounds for skepticism that the existing level of patent protection is essential to enabling inventors to recover their fixed costs. These grounds are reinforced by a growing body of empirical studies . . .”).

Observers have long recognized the serious social costs that flow from an overabundance of undeserving patents—although, as described below, the problems is perhaps more acute now than ever before. But as early as 1809, the Superintendent of Patents lamented that ““many of the patents are useless, except to give work to the lawyers, & others so useless in construction as to be . . . merely intended for sale.”” Edward C. Walterscheid, *Patents and Manufacturing in the Early Republic*, 80 *J. Pat. & Trademark Soc’y* 855, 888 (1998) (quoting Letter from William Thornton,

Superintendent, U.S. Patent Office, to Amos Eaton (May 5, 1809)). In 1826, a federal judge noted that “[t]he very great and very alarming facility with which patents are procured is producing evils of great magnitude,” and then soared to rhetorical heights in expressing his frustration: “It encourages the flagitious peculations of imposters, and the arrogant pretensions of vain and fraudulent projectors. Interfering patents are constantly presented to our observation, and patentees are everywhere in conflict. Amidst this strife and collision, the community suffers under the most diversified extortions. . . . The most frivolous and useless alterations in articles in common use are denominated improvements . . . . Implements and utensils, as old as the civilization of man, are daily, by means of some ingenious artifice, converted into subjects for patents.” *Thompson v. Haight*, 23 F. Cas. 1040, 1041 (C.C.S.D.N.Y. 1826). Similar criticisms persisted thereafter. *See, e.g.*, Sen. John Ruggles, S. Rep. Accompanying S. 239, 24th Cong., 1st Sess. (Apr. 28, 1836) (noting that “[a] considerable portion of all the patents granted are worthless and void,” and that patent litigation was “daily increasing in an alarming degree, [and is] onerous to the courts, ruinous to the parties, and injurious to society”).

But the problem has grown much worse—because nowadays even the lax standards Congress has set are not reliably enforced. Indeed, today the problem of erroneously issued patents is extremely serious, and the public at large suffers considerable harm as a consequence. Weeding out such bad patents does not take anyone’s property, but rather promotes valid property rights and economic liberty that should not be hampered by improperly issued government monopolies. Erroneously issued patents operate as unjustified regulatory restraints on free enterprise and often lead to frivolous and costly litigation by entities whose sole purpose is to extract tax-like payments from legitimate innovators, especially when courts are quick to enjoin productive activity at the

behest of patent trolls who offer nothing of value in exchange for the privileges they seek to enforce.

Fortunately, Congress and the Supreme Court have begun taking steps to address these problems, and thereby restore the patent system to its constitutionally prescribed role. These measures should be applauded, not denigrated, especially by conservatives who profess the virtues of free markets, economic liberty, and limited government regulation.

**A. The Problem of Erroneously Issued Patents Undermines the Legitimacy of the Patent System and Requires a Response.**

It should come as no surprise (least of all to conservatives) that government agencies make mistakes. Here the particular government agency is the U.S. Patent and Trademark Office, and the mistakes primarily flow in one direction: granting patents that should not be issued. The extent of the problem—and the fact that it practically works only one way—reflects several factors, including a serious pro-grant bias built into the patent system and the problem of insufficient resources given to the PTO. This dynamic stands in sharp contrast to the Framers’ view that granting patents is a weighty act requiring the utmost justification.

The system’s pro-grant bias is reflected in the application process itself. For starters, patent examination is an *ex parte* process in which the burden is on the examiner to show that a patent should not be granted, rather than on the applicant to show that he or she is really entitled to one. See *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992). Moreover, a patent applicant has “no general duty to conduct a prior art search” and “no duty to disclose art of which [the] applicant is unaware.” *Bruno Indep. Living Aids, Inc. v. Acorn Mobility Servs., Ltd.*, 394 F.3d 1348, 1351 n.4 (Fed. Cir. 2005). The consequence is that the patent examiner evaluating an application may not be aware of information showing that an application is not worthy. See *Kappos v. Hyatt*, 566 U.S. 431, 437 (2012); *Microsoft Corp. v. i4i Ltd. P’ship*, 564 U.S. 91, 108-112 (2011). The U.S. Court

of Appeals for the Federal Circuit has also been criticized for putting an undue thumb on the scales in favor of granting patents. *See, e.g.*, Landes & Posner, *The Economic Structure of Intellectual Property Law* at 335-36; Richard A. Posner, *Patent Trolls*, The Becker-Posner Blog (July 21, 2013, 5:12 PM), <https://bit.ly/2GxB5Af>. And once an examiner decides to grant a patent, no further review occurs within the agency; the patent issues without any check to ensure it is really deserving.

Understaffing at the PTO makes the problem considerably worse, especially in the face of the immense and increasing volume of annual patent applications. For instance, in 2016 alone the PTO received over 650,000 patent applications, more than double the amount received in 2000. *See* U.S. Patent & Trademark Office, *Performance & Accountability Report for Fiscal Year 2016*, at 179, <https://bit.ly/2JdxmZ>. With the increasing number of patent applications, patent examiners can devote only about 20 hours to evaluating each one. *See* Michael D. Frakes & Melissa F. Wasserman, *Does Agency Funding Affect Decisionmaking?: An Empirical Assessment of the PTO's Granting Patterns*, 66 Vand. L. Rev. 67, 72 n.16 (2013). In addition, the task of examining patents has only become more difficult as the Nation's economy has grown more dependent on technology and as technology itself has become more complex.

As Justice Gorsuch has explained, as a result of this dynamic, “[s]ometimes . . . bad patents slip through.” *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1353 (2018). Indeed, there is widespread agreement that the PTO issues many patents of dubious validity. *See, e.g.*, Fed. Trade Comm’n, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* 5-7 (2003), <https://bit.ly/2HvfkUy>. That perception is borne out by empirical evidence showing that courts invalidate roughly half of litigated patents in cases that reach final judgment. *See*



Christopher R. Leslie, *The Anticompetitive Effects of Unenforced Invalid Patents*, 91 Minn. L. Rev. 101, 105-06 (2006).

As the Framers knew would happen, the issuance of bad patents imposes numerous costs on society. Among other vices, invalid patents effectively operate as a tax and impose unnecessary regulation on legitimate innovation; bad or questionable patents have frequently been used as the basis of strike or nuisance suits that are often settled based on the cost of defense rather than anything to do with the value of the patent or harm of the alleged infringement, *see, e.g.*, Fed. Trade Comm’n, *Patent Assertion Entity Activity* 4, 10 (Oct. 2016), <https://bit.ly/2JYpSt1>; bad patents have repeatedly been used in bad-faith assertions against unsophisticated targets; and in the context of complex product industries, the assertion of bad patents harms both consumers and owners of valid patents on true innovations by increasing price, reducing the pool of potential royalties available to the owners of valid patents, or both.

The prevalence of bad patents has allowed certain actors to exploit the system at great public cost for their own private gain. As the Supreme Court has recognized, in recent years, “[a]n industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees.” *eBay Inc.*, 547 U.S. at 396 (Kennedy, J., concurring). Indeed, “[s]ome companies . . . use patents as a sword to go after defendants for money, even when their claims are frivolous. This tactic is often pursued through demand letters, which ‘may be sent very broadly and without prior investigation, may assert vague claims of infringement, and may be designed to obtain payments that are based more on the costs of defending litigation than on the merit of the patent claims.’” *Commil USA, LLC v. Cisco Sys., Inc.*, 135 S. Ct. 1920, 1930 (2015). These companies—variously known as non-practicing entities, patent assertion entities, or, more pejoratively, as patent trolls—“can impose a ‘harmful tax on

innovation” and create significant wealth loss. *Id.* In 2011 alone, it is estimated that non-practicing entities imposed costs of \$29 billion. *See* James Bessen & Michael J. Meurer, Essay, *The Direct Costs From NPE Disputes*, 99 *Cornell L. Rev.* 387, 389 (2014). In 2018, nearly 90% of all patent litigation in the high-tech industry involved non-practicing entities. *See* Unified Patents, 2018 Patent Dispute Report: Year in Review (Jan. 2, 2019), <https://bit.ly/2GxnRU9>. That figure is 91% thus far in 2019. *See* Unified Patents, Q2 2019 Patent Dispute Report (July 1, 2019), <https://bit.ly/2SwX2Ea>. Accordingly, if the government erroneously issues a patent, it is as if the government has without justification imposed an administrative regulation that impedes legitimate innovation and the free flow of commerce more broadly.

### **B. Congress and the Supreme Court Have Taken Steps in the Right Direction to Reform the Operation of the Patent System.**

The government has taken a number of steps to address the problems outlined above. These developments include Congress’ decision in 2011 to enact inter partes review, which makes it easier for the PTO to identify and cancel patents that were issued in error, and the Supreme Court’s decision in *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006), which ensures that patents do not receive favorable treatment compared to traditional property rights when seeking injunctions in court. Together these developments help bring the patent system somewhat closer to the constitutional vision the Framers had for it.

Conservative voices in some quarters have questioned the constitutional legitimacy of inter partes review, but the distinctive nature of patent rights makes clear that inter partes review is constitutional. The Supreme Court recently held as much in *Oil States*, 138 S. Ct. 1365, in an opinion by no less an authority than Justice Thomas. In a thorough and originalist analysis, Justice Thomas took great pains to explain that because patents have always been understood to be franchises or privileges—rather than core private property rights—Congress, when granting them,

has the discretion to reserve to itself or to the Executive Branch the power to revoke them upon a finding that they were issued in error. *Id.* at 1374-76. There is little question that those who wrote and ratified the Constitution understood that Congress possessed the power to enact a scheme like inter partes review. Inter partes review would have been perfectly constitutional in 1790; it must be equally so today.

Inter partes review serves many of the values conservatives have long embraced. In particular, because (as discussed above) erroneously issued patents operate as unjustified taxes and inefficient regulations, inter partes review is the functional equivalent of tax reform and deregulation. Similarly, inter partes review also contributes to needed litigation reform by reducing frivolous litigation, streamlining other litigation, and lowering costs. Indeed, even though non-practicing entities continue to file the bulk of patent litigation in the high-tech sector, the total amount of such litigation has declined in the wake of the establishment of the inter partes review process, while petitions seeking inter partes review have increased. *See* RPX Corp., *2017 in Review: A Year of Transition* (Jan. 2, 2018), <https://bit.ly/2Cwx3aF>. The resulting shift in proceedings has reduced the costs (monetary and non-monetary) of patent litigation.

For instance, as of 2017, one survey suggested that the median estimated total cost of litigating an inter partes review petition through a hearing at the Patent Trial and Appeal Board (the “PTAB”) was \$250,000. Am. Intellectual Prop. Law Ass’n (AIPLA), *Report of the Economic Survey* 43, 51 (June 2017). By contrast, another survey estimated the median total cost of a patent infringement suit through trial (and appeal where applicable) was anywhere from double to *twelve times* that amount, depending on the amount of money at stake. *Id.* at 41, 46. For patent litigation involving non-practicing entities, the median cost of litigating through trial is nearly \$3.7 million, or almost *fifteen times* the cost of litigating an inter partes review petition through a PTAB hearing.

See RPX Corp., *NPE Litigation: Costs by Key Events* 3-4 (Mar. 2015), <https://bit.ly/2CrSRV1>. Inter partes review is not just less costly, but more efficient than traditional litigation. Within three months after the preliminary response to a petition for inter partes review is due, the PTO Director must decide whether to institute inter partes review, 35 U.S.C. §314(b), and a final written decision on patentability must issue within one year after institution, *id.* §316(a)(11). By contrast, the average time just to get to trial in a patent infringement action in one of the fastest federal district court is 861 days, or well over two years. See Brian J. Love & James Yoon, *Predictably Expensive: A Critical Look at Patent Litigation in the Eastern District of Texas*, 20 Stan. Tech. L. Rev. 1, 14 tbl. 4 (2017). Other courts can take many years.

The Supreme Court's *eBay* decision is of a piece. In another decision by Justice Thomas, the Court held that the "well-established principles of equity" that had developed over the years to govern when a plaintiff may secure a permanent injunction "apply with equal force to disputes arising under the Patent Act." 547 U.S. at 391. The Court unanimously repudiated a line of decisions from the Federal Circuit that showed an unjustifiable special solicitude for patent rights. The Federal Circuit had adopted "a 'general rule,' unique to patent disputes, 'that a permanent injunction will issue once infringement and validity have been adjudged.' The [Federal Circuit] further indicated that injunctions should be denied only in the 'unusual' case, under 'exceptional circumstances' and 'in rare instances . . . to protect the public interest.'" *Id.* at 393-94. The Supreme Court had no trouble concluding that there was no basis in equity jurisprudence for a rule entailing such a "categorical grant of [injunctive] relief." *Id.* at 394.

The *eBay* decision is a necessary step in reining in one of the more egregious special-patent rules issued by the Federal Circuit. There can be little doubt that "the decision whether to grant or deny injunctive relief" must be made "consistent with traditional principles of equity, in patent

disputes no less than in other cases governed by such standards.” *Id.* If anything, courts ought to be more skeptical about the appropriateness of injunctive relief in cases involving patent rights than in cases involving traditional property rights. For instance, Joseph Story wrote that “[i]n cases . . . where a patent has been granted for an invention, it is not a matter of course, for Courts of Equity to interpose by way of injunction.” 2 Joseph Story, *Commentaries on Equity Jurisprudence: As Administered in England and America* § 934, at 211 (Boston, Hilliard, Gray, & Co. 1836). Indeed, Story explained that injunctions were more likely to issue to the extent that “the patentee has put the invention into public use” over a long period of time, *id.*—which would tend to rule out injunctions in most cases brought by non-practicing entities. At the very least, the *eBay* decision restores some measure of sanity to patent litigation, and in the process reduces to some extent the *in terrorem* effect of threatened patent suits by non-practicing entities and others whose patents extract great value from the public with little or nothing to offer the public in return.

Conservatives should celebrate these developments. Both *inter partes* review and the *eBay* decision are small steps that put into practice the fundamental principles discussed at the outset of this paper: that patents are not equal to traditional property rights, but instead represent a restraint on free enterprise imposed in derogation of the liberty and property interests vested in individuals by nature. Patents can be useful as instruments of economic policy insofar as they help spur innovation—but they are legitimate only as a means to that end, and they cease to be legitimate when their social costs outweigh their public benefits.

## CONCLUSION

Patents occupy a distinctive place in our constitutional order. Certain conservatives have begun to extol them using the rhetoric of natural law or common law property rights, but an analysis based on first principles shows that point of view is profoundly mistaken. For generations both before and after the ratification of the Constitution, the consensus view understood that patents have no basis in natural law, the common law, or the tradition of property rights stretching back to John Locke. Rather, patents are government-created privileges that *restrain* individuals in the exercise of their common law rights to liberty and property. As restraints on free enterprise in derogation of the common law, patents are legitimate only insofar as they serve as a means to the end of greater societal welfare. The text of the Constitution recognizes this basic truth, and thus gives Congress the discretion to create a patent system only for the purpose of “promot[ing] the Progress of Science and useful Arts.” U.S. Const. art. I, §8, cl. 8.

Unfortunately, today’s patent system fails to live up to its constitutional mandate. The standards of patentability are too lax—and making matters worse, even those lax standards are frequently not enforced. Thankfully, Congress and the Supreme Court have taken some steps to put the patent system back on its rightful constitutional foundations. These steps include Congress’ decision to enact inter partes review, and the Supreme Court’s decision in *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006). Conservatives—especially those who celebrate the virtues of limited government, free enterprise, and individual liberty—should applaud these developments and encourage others like them.