

STANDING AGAINST BAD PATENTS

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ABSTRACT

Direct competitors possess the ability to challenge bad patents that hinder their ability to compete. However, numerous factors—including the cost of bringing such challenges and the fear of retaliation from patent holders—cause bad patents to remain unchallenged. In theory, members of the public who are harmed by the patents can bridge this gap by filing suit in federal court under the Administrative Procedure Act or the Declaratory Judgment Act. But in practice, the Federal Circuit has aggressively blocked such challenges using the administrative law doctrine of standing. The America Invents Act now provides the public with a robust mechanism for challenging bad patents in the Patent Trial and Appeals Board (PTAB). However, obstacles remain because public interest groups cannot appeal adverse PTAB decisions to the Federal Circuit if they cannot establish actual injury. This Article discusses the important role that the public plays in the patent system by challenging patents that direct competitors cannot or will not challenge. It contends that the Federal Circuit has distorted the Supreme Court’s standing jurisprudence by making it significantly harder for third parties to establish that they are within the zone of interests of a statute. It further maintains that constitutional standing limits any challenges from public advocacy groups that have not experienced any direct harm. Finally, this Article makes suggestions to the PTO and Congress to facilitate patent challenges from members of the public.

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I. INTRODUCTION

The doctrine of standing prevents unwanted litigants from challenging agency actions. Grounded in separation of powers,¹ the doctrine ensures that litigants are adverse, are directly concerned by the issue at hand,² and have

1. *Allen v. Wright*, 468 U.S. 737, 750 (1984) (“[T]he ‘case or controversy’ requirement defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded. The several doctrines that have grown up to elaborate that requirement are founded in concern about the proper—and properly limited—role of the courts in democratic society.”) (internal quotations omitted); *see also* *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (noting how standing helps limit judicial power “to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process”) quoting *Flast v. Cohen*, 392 U.S. 83, 97 (1968)); Carl Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415, 423–28 (1991) (discussing various rationales for standing).

2. *Valley Forge*, 454 U.S. at 472 (“[A]t an irreducible minimum, Art. III requires the party who invokes the court’s authority to show that he personally has suffered some actual

a strong incentive to litigate.³ Standing requires that parties suing an agency have a true stake in the outcome of the litigation.⁴

But standing can serve a more malicious purpose. In the 1930s, liberal Supreme Court Justices who supported the New Deal developed the doctrine to shield agencies from scrutiny.⁵ As Justice Brennan observed, the doctrine has become “a catchall for an unarticulated discretion.”⁶ A court might decline to find standing based on political ideology⁷ or as “caseload management” to keep the court’s docket manageable.⁸

This harmful use of standing can be seen in patent law at the United States Court of Appeals for the Federal Circuit (Federal Circuit), which is a semi-specialized court.⁹ Almost all patent cases appeal to the Federal

or threatened injury as a result of the putatively illegal conduct of the defendant”) (internal citation omitted).

3. *See id.* (explaining that standing ensures that legal issues will be resolved “in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action”); *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975) (“As an aspect of justiciability, the standing question is whether the plaintiff has ‘alleged such a personal stake in the outcome of the controversy’ as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court’s remedial powers on his behalf.” (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962))).

4. *See Valley Forge*, 454 U.S. at 472–73; *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972) (“The requirement that a party seeking review must allege facts showing that he is himself adversely affected . . . does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome.”).

5. *See* Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 STAN. L. REV. 591, 640 (2010) (showing that prior to 1940, liberal justices were empirically far more likely to deny standing); Robert J. Pushaw, *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 458–59 (1996) (discussing how the New Deal Supreme Court used “justiciability to shield progressive legislation from conservative substantive due process challenges” and formulated new standing and ripeness doctrines “to prevent disruption of administrative agency processes”).

6. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 66 (1975) (Brennan, J., dissenting) (internal quotation omitted).

7. *See* Richard J. Pierce, Jr., *Is Standing Law or Politics?*, 77 N.C. L. REV. 1741, 1744 (1999) (studying all courts of appeal decisions from 1993 to 1998 and finding that “Republican judges denied standing to environmental petitioners almost four times as often as did Democratic judges.”).

8. *See Warth*, 422 U.S. at 519 (Douglas, J., dissenting) (noting that “[s]tanding has become a barrier to access to the federal courts” and “[t]he mounting caseload of federal courts is well known.”).

9. *See* John M. Golden, *The Federal Circuit and the D.C. Circuit: Comparative Trials of Two Semi-Specialized Courts*, 78 GEO. WASH. L. REV. 553, 555 (2010) (arguing that the Federal Circuit is a semi-specialized court whose “grip on patent appeals is much more complete than the D.C. Circuit’s grip on appeals involving administrative law.”); Sapna Kumar, *Expert Court, Expert Agency*, 44 U.C. DAVIS L. REV. 1547 (2011) (arguing

Circuit; patent cases comprise more than sixty percent of the court's docket, and this number continues to grow.¹⁰ Because of its repeated exposure to powerful institutional players, the Federal Circuit has traditionally been viewed as pro-patent¹¹ and at risk of capture by patent attorneys and interest groups.¹² It is therefore unsurprising that the Federal Circuit has used standing to prevent outsiders from gaining a foothold in the litigation process.¹³ In this regard, the counter-majoritarian difficulty manifests itself in the Federal Circuit,¹⁴ which can gain favor with the insular patent community by disregarding the will of Congress and, ultimately, the general

that the Federal Circuit acts as an expert in patent law and is the de facto administrator of the Patent Act).

10. Golden, *supra* note 9; Kumar, *supra* note 9; UNITED STATES COURT OF APPEALS FOR THE FED. CIRCUIT, APPEALS FILED BY CATEGORY: FY 2016 (2016), http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/FY16_Caseload_by_Category.pdf. This figure has significantly risen in the past few years. Jason Rantanen, *Federal Circuit Now Receiving More Appeals Arising From the PTO Than the District Courts*, PATENTLY-O (Mar. 2, 2016), <https://patentlyo.com/patent/2016/03/receiving-appeals-district.html> (discussing the dramatic rise in PTO appeals after passage of the AIA). Interestingly, in the 2011 Fiscal Year, only forty percent of the Federal Circuit's cases involved patents. Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 GEO. L.J. 1437, 1439 (2011).

11. See David R. Pekarek-Krohn & Emerson H. Tiller, *Federal Circuit Precedent: An Empirical Study of Institutional Authority and Intellectual Property Ideology*, 2012 WIS. L. REV. 1177, 1183 (2012) (observing that "there is much commentary that the Federal Circuit has been a pro-patent court, even more pro-patent than some of the regional courts had been prior to the creation of the Federal Circuit," though many commentators observe the court appears to prefer narrow patents).

12. See, e.g., Melissa F. Wasserman, *The Changing Guard of Patent Law: Chevron Deference for the PTO*, 54 WM. & MARY L. REV. 1959, 2016 (2013) (noting that the Federal Circuit's patent jurisprudence "has exhibited some symptoms that are consistent with bias" including a trend towards strengthening patents); Stuart Minor Benjamin & Arti K. Rai, *Fixing Innovation Policy: A Structural Perspective*, 77 GEO. WASH. L. REV. 1, 17 (2008) (describing how prior to the Supreme Court's intervention on Federal Circuit jurisprudence, "the Federal Circuit had made defending a patent against charges of invalidity significantly easier" and that the court's behavior "was arguably consistent with standard accounts of capture of regulatory processes by well-represented interest groups.").

13. See *infra* Section III.B.

14. The phrase "counter-majoritarian difficulty" was coined by Alexander Bickel to describe the problem of unelected judges using their power disregard the will of elected officials, therefore acting counter to "majority will." See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-17 (2d ed. 1962) (arguing that "judicial review is a counter-majoritarian force in our system" and maintaining that when the Supreme Court declares a statute unconstitutional, it acts against "the prevailing majority"). Generally, standing ensures that the counter-majoritarian federal judiciary does not usurp "the policy-making functions of the popularly elected branches." William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 222 (1988).

public.¹⁵ Standing practices that filter third parties—who could bring patent challenges that regulated parties often will not—insulate bad patents and facilitate agency capture.¹⁶ Without the safeguard of third party standing, the right to litigate against agencies would generally be limited to regulated parties whose interests may run counter to the interests of the general public.¹⁷

The 2011 Leahy–Smith America Invents Act (AIA) presents a potential solution to this problem. The AIA expanded the U.S. Patent and Trademark Office’s (PTO’s) ability to reexamine previously issued bad patents.¹⁸ Congress added several provisions to the Patent Act to allow third parties to challenge patents in the Patent Trial and Appeal Board (PTAB).¹⁹ Under the Patent Act’s § 321 post–grant review (PGR), parties may challenge a patent within nine months of issuance.²⁰ PGR challenges may be made on the basis of failure to meet § 101 (eligible subject matter), § 102 (novelty and prior art), and § 103 (obviousness) challenges; third parties can additionally challenge patents under most of § 112’s patentability requirements.²¹ After the nine–month window expires, § 311 inter partes

15. Gregory Dolin has suggested that the historical push for addressing bad patents came from members of Congress, judges, and academics, as opposed to patent holders. Gregory Dolin, *Dubious Patent Reform*, 56 B.C. L. REV. 881, 891–92 (2015).

16. See Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 499–500 (2008) (arguing that “citizen suits allow citizens to ensure that agencies are not captive to regulated entities” and that as a remedy for capture, citizen suits “may serve a separation-of-powers interest arguably as valid as the anticonscription function.”). For example, in environmental law, citizen–standing provisions allow third parties to challenge the Environmental Protection Agency’s failure to enforce various environmental laws against transgressors. See Cassandra Stubbs, *Is the Environmental Citizen Suit Dead? An Examination of the Erosion of Standards of Justiciability for Environmental Citizen Suits*, 26 N.Y.U. REV. L. & SOC. CHANGE 77 (2001) (observing that Congress adopted the first environmental citizen–suit provision “against a backdrop of weak environmental laws, lax enforcement, and the popularity of agency capture theory.”).

17. See, e.g., Matthew T. Kirsch, *Upholding the Public Trust in State Constitutions*, 46 DUKE L.J. 1169, 1187 (1997) (explaining that standing has “traditionally been an obstacle to environmentally concerned plaintiffs seeking access to the courts” and that modern constitutional standing requirements are “often difficult for plaintiffs in environmental litigation to meet”).

18. See Sarah Tran, *Patent Powers*, 25 HARV. J.L. & TECH. 595, 629 (2012) (describing how the AIA “gives the USPTO more tools (in the form of new proceedings) to weed out low-quality patents.”).

19. See *infra* Part IV.B.

20. 35 U.S.C. § 321 (2011).

21. Section 321 states: “A petitioner in a post-grant review may request to cancel as unpatentable one or more claims of a patent on any ground that could be raised under paragraph (2) or (3) of section 282(b) (relating to invalidity of the patent or any claim).” *Id.* Section 282(b)(2) allows for challenges under § 101, 102, and 103, while § 282(b)(3)

review (IPR) allows challenges under §102 and § 103 based on published prior art or patents.²² The new procedures for challenging issued patents have been wildly popular; the number of IPRs filed went from 514 in the 2013 fiscal year to 1310 in the 2014 fiscal year, and settled around 992 in the 2015 fiscal year.²³

Notwithstanding the AIA's new procedures, questions remain regarding how to get third parties standing to challenge bad patents. Most scholars have focused on the Declaratory Judgment Act (DJA),²⁴ which allows, "in a case of actual controversy," for a court to "declare the rights and other legal relations of any interested party seeking such declaration."²⁵ However, as this Article will explain, the DJA is too limited to be an effective tool for fully protecting third-party rights, given that its focus is on protecting direct competitors.²⁶ Consequently, this Article focuses on standing under § 702 of the Administrative Procedure Act (APA), which creates a general cause of action for parties adversely affected by an agency decision.²⁷

Part II of this Article considers impediments that prevent direct competitors from challenging bad patents, including the high cost of bringing challenges and the risk to the direct competitor's own patents. It further examines limitations on members of the public who want to challenge patents. Part III provides an overview of standing in the Federal

allows for § 112 challenges excepting best mode. However, there is some disagreement over whether challenges should be permitted under § 101. *See, e.g.*, David Hricik, *Are the Courts Correct in their Assumption that a Patent Issued on Non-Patentable Subject Matter is Invalid?*, PATENTLY-O (Aug. 27, 2012), <http://patentlyo.com/patent/2012/08/are-the-courts-correct-in-their-assumption-that-a-patent-issued-on-non-patentable-subject-matter-is-invalid.html> (arguing that § 101 is not one of the "conditions of patentability," and is therefore excluded from § 282(b)(2)).

22. 35 U.S.C. § 311 (2015).

23. U.S. PATENT & TRADEMARK OFFICE, PATENT TRIAL AND APPEAL BOARD STATISTICS 4 (2015), <http://www.uspto.gov/sites/default/files/documents/2015-04-30%20PTAB.pdf>. Some parties have used IPRs for more malicious purposes, such as when billionaire Karl Bass filed IPRs to manipulate stock prices. *See* Jennifer Robichaux, Comment, *Hedge Funds Should Be Able to Challenge Patent Validity Using Inter Partes Review Despite Mixed Motives*, 54 HOUS. L. REV. 1315, 1317 (2017) (discussing Bass's use of IPRs to impact stock prices).

24. *See generally* Gaia Bernstein, *The End User's Predicament: User Standing in Patent Litigation*, 96 B.U. L. REV. 1929 (2016); Amelia S. Rinehart, *Patent Cases and Public Controversies*, 89 NOTRE DAME L. REV. 361 (2013); Megan M. La Belle, *Patent Law as Public Law*, 20 GEO. MASON L. REV. 41, 44 (2012).

25. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 126 (2007) (quoting 28 U.S.C. § 2201(a) (2006)).

26. *See infra* Section III.B.2.

27. *See* 5 U.S.C. § 702 (2012).

Circuit, and examines problems with regard to establishing constitutional standing and meeting the Federal Circuit's zone of interests test.

Part IV discusses the expansion of third-party rights under the AIA. It maintains that the statutory text and legislative history of the AIA both confirm that Congress intended for members of the public to be able to challenge bad patents. It further observes that third parties are now within the zone of interests because Congress intended the public to be beneficiaries under the Patent Act. Part V suggests potential changes that can be made to further expand standing. Specifically, Part V proposes that Congress create constitutional standing for third parties to bring challenges in the PTAB by adding a *qui tam* provision to the AIA. It argues that Congress could alternatively improve current PTAB procedures by adding an internal level of appeal for adverse decisions from administrative patent judges. Part VI concludes.

II. OBSTACLES TO CHALLENGING BAD PATENTS

In an ideal world, if the PTO issued a bad patent, someone would seek to invalidate it—either through litigation or an administrative proceeding. But in practice, many bad patents remain unchallenged,²⁸ leading to vast social costs.²⁹ This Part considers non-legal impediments that can prevent such challenges, and discusses the resulting public impact. Section A considers why direct competitors do not challenge bad patents, including the high cost of bringing challenges, the risk of harming one's own patents, and the risk of retaliation. Section B examines how bad patents harm the public.

28. See, e.g., Jay P. Kesan & Andres A. Gallo, *Why "Bad" Patents Survive in the Market and How Should We Change?—The Private and Social Costs of Patents*, 55 EMORY L.J. 61 (2006); Joseph Scott Miller, *Building a Better Bounty: Litigation-Stage Rewards for Defeating Patents*, 19 BERKELEY TECH. L.J. 667, 688–89 (2004) (arguing that challenges to bad patents are an undersupplied public good); see also Gaia Bernstein, *The Rise of the End User in Patent Litigation*, 55 B.C. L. REV. 1443, 1444–45 (2014) (discussing the growing role of end users in challenging bad patents).

29. See Miller, *supra* note 28, at 690 (discussing the social costs of bad patents); see also Mark A. Lemley, *Rational Ignorance at the Patent Office*, 95 NW. U. L. REV. 1495, 1497, 1515–19 (2001) (arguing that bad patents have deterrent effects, create licensing hold-up issues, and facilitate antitrust collusion).

A. OBSTACLES FOR DIRECT COMPETITOR PATENT CHALLENGES

1. *Cost of Challenging Bad Patents*

Patent litigation is extremely expensive.³⁰ The American Intellectual Property Law Association's 2015 Report of the Economic Survey revealed that while the median litigation cost decreased slightly in 2015, it is still \$600,000 for less than \$1 million at risk.³¹ For \$1 to \$10 million at risk, that amount rises to \$950,000; for \$10 to \$25 million at risk, the cost is \$1.9 million.³² The high litigation costs create opportunities for holders of bad patents. Non-practicing entities or "patent trolls" flourish, in part, because it is cheaper for a business to pay for a patent license than it is to challenge the patent.³³ Likewise, even practicing entities can take the form of "patent bullies," asserting bad patents against entities that cannot afford to litigate.³⁴

IPRs may be less expensive than litigation, but are nevertheless still costly. The filing fee alone for an IPR is \$23,000 and, with attorney fees, the median cost to bring an IPR rises to \$275,000 through a PTAB hearing or to \$350,000 through an appeal to the Federal Circuit.³⁵ Consequently,

30. Joseph Farrell & Robert P. Merges, *Incentives to Challenge and Defend Patents: Why Litigation Won't Reliably Fix Patent Office Errors and Why Administrative Patent Review Might Help*, 19 BERKELEY TECH. L.J. 943, 949 (2004) (discussing the cost of patent litigation).

31. AM. INTELLECTUAL PROP. LAW ASS'N, REPORT OF THE ECONOMIC SURVEY 37 (2015) [hereinafter AIPLA 2015 REPORT]. The figure represents the median litigation cost for patent infringement suits, inclusive of all costs. *Id.* In 2013, the same figure was even higher—\$700,000. *Id.*

32. *Id.*

33. See Ted Sichelman, *Commercializing Patents*, 62 STAN. L. REV. 341, 368 (2010) (observing that non-practicing entities are pejoratively referred to as "trolls" because they "tend to exploit litigation and licensing market defects to extract unwarranted rents from commercializers, usually on patents that the commercializer was completely unaware of before the NPE's demand for payment."); see also Mark A. Lemley & A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 COLUM. L. REV. 2117, 2153 (2013) (noting that some non-practicing entities aggregate patents in an area of technology, forcing parties to pay for a license to the bundle even if they think individual patents are invalid); Colleen V. Chien, *Software Patents as a Currency, Not Tax, On Innovation*, 31 BERKELEY TECH. L.J. (forthcoming 2017) (describing potential advantages and drawbacks of non-practicing entity suits in context of software patents).

34. Ted Sichelman, *The Vonage Trilogy: A Case Study in "Patent Bullying"*, 90 NOTRE DAME L. REV. 543, 549–50 (2014) ("[P]atent bullies' take full advantage of weak, uncertain, and vague patents; the high costs of litigation; the ability to delay lawsuits; and their massive resources in order to engage in highly anticompetitive behavior, often against market entrants and startups."); Colleen V. Chien, *Of Trolls, Davids, Goliaths, and Kings: Narratives and Evidence in the Litigation of High-Tech Patents*, 87 N.C. L. REV. 1571 (2009) (describing such litigators as "Goliaths").

35. See AIPLA 2015 REPORT, *supra* note 31, at 38.

small businesses and startups may find it cheaper to pay for a license than to challenge the patent in the PTAB.³⁶ For example, Personal Audio LLC—a patent holding company—targeted several small podcasters and threatened to sue if a license was not purchased.³⁷ Recognizing that small businesses could not afford to challenge Personal Audio’s patent, the Electronic Freedom Foundation (EFF) crowdsourced money to file an IPR, and successfully invalidated critical claims.³⁸

There are ways that the problem of cost could be addressed. First, PTAB proceedings could be significantly cheaper. In the European Patent Office (“EPO”), for example, an opposition proceeding can be filed against a European patent for around \$1,000.³⁹ Second, fee shifting could be used to defray the cost of litigation and encourage more injured parties to challenge bad patents.⁴⁰

2. *Fear of Invalidation of One’s Own Patents*

Another major obstacle to competitors challenging bad patents is a fear of harming its own patent portfolio, especially for § 101 challenges. If a challenger succeeds in convincing the court that its competitor’s patents are not patentable subject matter, the challenger may undermine the validity of

36. The majority of defendants in cases brought by patent trolls are companies with less than \$10 million in annual revenue. Colleen Chien, *Startups and Patent Trolls*, 17 STAN. TECH. L. REV. 461, 464 (2014) (observing that at least fifty–five percent of unique defendants in patent troll suits have annual revenue of \$10 million or less).

37. See Letter from Personal Audio LLC to anonymized recipient (Apr. 23, 2013), <https://trollingeffects.org/demand/personal-audio-2013-04-23-0> (demanding royalties for Personal Audio LLC’s patent).

38. *Podcast ‘Patent Troll’ Faces Blow After US Ruling*, BBC NEWS (Apr. 13, 2015), <http://www.bbc.com/news/technology-32286340>. The EFF cited the high cost of IPRs as a reason why nonprofit organizations need the ability to challenge bad patents, given that the cost is prohibitive for many small businesses. Vera Ranieri, *Congress: Stop Trying to Limit EFF’s Ability to Challenge Patents*, ELEC. FRONTIER FOUND. (Apr. 23, 2015), <https://www.eff.org/deeplinks/2015/04/congress-stop-trying-limit-effs-ability-challenge-patents> (“Patents that have been wrongly granted hurt the public, and the public should have a right to challenge them.”).

39. Hazel Ford & Leythem A. Wall, *A Trump Card for Challengers*, LIFE SCI. INTELL. PROP. REVIEW (April 30, 2015), http://www.finnegan.com/resources/articles/articles_detail.aspx?news=119a5f40-981d-43c2-b62c-1a89d6ad8142 (noting that the EPO charges a flat fee of \$842 to file an opposition). However, EPO oppositions do not allow for discovery. *Id.*

40. See Bernstein, *supra* note 28, at 1489–93 (arguing that fee shifting could be used to encourage end users to challenge bad patents); Jay P. Kesan, *Carrots and Sticks to Create a Better Patent System*, 17 BERKELEY TECH. L.J. 763, 795 (2002) (“[O]ne-way, pro-defendant, fee-shifting in a narrow set of circumstances can be an effective disincentive by increasing the cost to patentees of engaging in certain kinds of opportunistic conduct.”).

its own patents.⁴¹ As Professor Rochelle Dreyfuss has noted, “because standing in court largely limits the class of potential challengers to entities within the same industrial sector as the patent holder, no one raises questions that call the entire industry’s holdings into question.”⁴²

Relatedly, Dreyfuss notes that by the time a group finally manages to bring such a challenge, the court is reluctant to disrupt settled expectations.⁴³ For example, consider the litigation regarding Myriad Genetics’ patents on isolated BRCA 1 and BRCA 2 (“the *Myriad* litigation”). In a concurrence, Judge Moore on the Federal Circuit stated that if she were “deciding this case on a blank canvas,” she “might conclude that an isolated DNA sequence that includes most or all of a gene is not patentable subject matter.”⁴⁴ Judge Moore noted that the PTO “has allowed patents on isolated DNA sequences for decades,” and observed that “[t]here are now thousands of patents with claims to isolated DNA” and a large number of patents that claim “purified natural products or fragments thereof.”⁴⁵ She concluded that courts must be “particularly wary of expanding the judicial exception to patentable subject matter where both settled expectations and extensive property rights are involved.”⁴⁶

To the extent that other judges are reluctant to disrupt settled patentability expectations, Dreyfuss’s concern is a significant one. As discussed above, patent challenges are extremely expensive. After a bad patent issues, a public interest group may need to wait to make sure that the patent poses a real risk to the public welfare, and would then need to find the funds to cover the high cost of litigation and find suitable plaintiffs who could survive a standing challenge. By the time such a case made it to the Federal Circuit, expectations may be settled, making it that much harder to get the patent (or class of patents) invalidated.

41. See Eileen M. Kane, *Splitting the Gene: DNA Patents and the Genetic Code*, 71 TENN. L. REV. 707, 726 (2004) (“[P]atent litigation also often involves similarly situated competitors, neither of which may be interested in raising an issue with implications beyond the patent in suit.”); La Belle, *supra* note 24, at 65 (“[T]he parties usually best positioned to contest bad patents—competitors—often are loath to initiate challenges because of concerns about putting their own intellectual property at risk.”).

42. Rochelle Cooper Dreyfuss, *Giving the Federal Circuit a Run for Its Money: Challenging Patents in the PTAB*, 91 NOTRE DAME L. REV. 235, 292 (2015).

43. *Id.*

44. *Ass’n for Molecular Pathology v. U.S. Patent & Trademark Office*, 689 F.3d 1303, 1343 (Fed. Cir. 2012) (Moore, J., concurring), *rev’d in part sub nom.* *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 (2013).

45. *Id.*

46. *Id.*

3. Retaliation

Some competitors fear that if they challenge a bad patent, the patent holder will retaliate. Many parties will infringe a patent and hope that the patent holder does not notice, especially academics researching in life sciences.⁴⁷ Challenging a bad patent can bring unwanted scrutiny, especially for small competitors. A competitor who files a declaratory judgment action may find itself faced with a countersuit for patent infringement.⁴⁸

A competitor cannot stay anonymous if it files an IPR or a district court proceeding.⁴⁹ This poses several problems. Commentators have noted that small companies may want to challenge a large competitor's patents without the fear of retaliation.⁵⁰ Although anonymous challenges are available for ex parte reexamination,⁵¹ such challenges are limited to prior art from printed publications and patents, as well as statements from the patent owner in judicial or PTO proceedings.⁵²

Contrast PTAB proceedings with opposition proceedings in the EPO. Like post-grant review, a European opposition proceeding must be brought within nine months of a patent's issuance. However, a "straw man provision" allows challengers to remain anonymous in the EPO and name

47. See Sapna Kumar & Arti Rai, *Synthetic Biology: The Intellectual Property Puzzle*, 85 TEX. L. REV. 1745, 1757 (2007) (noting that in the biopharmaceutical industry, "firms may be able to circumvent anticommons difficulties through secret infringement that does not come to light (if at all) until after the six-year statute of limitations has run"); John P. Walsh et al., *View from the Bench: Patents and Material Transfers*, 309 SCIENCE 2002 (2005) (finding that academic researchers frequently ignore patents).

48. See La Belle, *supra* note 24, at 65.

49. See Saurabh Vishnubhakat et al., *Strategic Decision Making in Dual PTAB and District Court Proceedings*, 31 BERKELEY TECH. L.J. 45, 59 n.67 (2016) (observing that IPRs cannot be filed anonymously due to constraints under 35 U.S.C. § 315(a) and (b)).

50. See Mark D. Janis, *Inter Partes Patent Reexamination*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 481, 489 n.32 (2000) ("One can imagine, for example, a small company that fears an infringement suit from a large patent owner, and would like to test the patent in a relatively inexpensive reexamination forum without attracting attention to the possible infringement."); Kristen J. Osenga, *Rethinking Reexamination Reform: Is It Time for Corrective Surgery, Or Is It Time to Amputate?*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 217, 236 (2003) ("[T]he requirement that a real party in interest must be identified for inter partes reexamination is a disincentive for smaller parties to utilize this mechanism.")

51. 35 U.S.C. § 301(e) (2012) ("Upon the written request of the person citing prior art or written statements pursuant to subsection (a), that person's identity shall be excluded from the patent file and kept confidential."); 37 C.F.R. § 1.501(d) (2016).

52. 35 U.S.C. § 301(a) (2012).

only their attorney or another third party.⁵³ The anonymous party then becomes a party to the proceeding, allowing it to participate in oral proceedings.⁵⁴ Such straw man proceedings are permitted so long as the real party of interest does not attempt to circumvent the law by abuse of due process.⁵⁵

4. *Time Constraints and Limitations for Inter Partes Review*

Time constrains for PGRs limit competitor challenges to bad patents. PGRs can only be filed within nine months of a patent's issuance, which can make them difficult to use. A newer competitor may not have been in business when the PGR window closed or may not have been developing products in the same line of technology. Even an established competitor would have to make educated guesses as to which issued patents would pose a threat years down the line, as costs would limit the number of challenges it can bring.

After the PGR period ends, parties can still seek cancellation of patent claims using IPR.⁵⁶ But unlike PGR challenges, which can be brought on a wide variety of grounds, IPRs are considerably more limited. The request for cancellation for in an IPR must be “on a ground that could be raised under § 102 or § 103 and only on the basis of prior art consisting of patents or printed publications.”⁵⁷ Consequently, for a challenge being brought more than nine months after issues that is based on § 101 or § 112, expensive litigation in federal court remains a competitor's only option.

53. See Filip De Corte et al., *AIA Post-Grant Review & European Oppositions: Will They Work in Tandem, or Rather Pass Like Ships in the Night?*, 14 N.C. J.L. & TECH. 93, 101 (2012) (discussing anonymous oppositions); see also G 0003/97 *INDUPACK AG/Hartdegen Emmerich Ing.* O.J. EPO 245 (1999) (holding that the use of straw man in EPO oppositions is permissible and observing that the “formally authorised [sic] opponent is treated as a party”), <http://www.epo.org/law-practice/case-law-appeals/recent/g970003ep1.html>.

54. *Id.*

55. Abuse of due process occurs if the real party of interest is the patent holder or if “the opponent is acting on behalf of a client in the context of activities which, taken as a whole, are typically associated with professional representative” without possessing requisite qualifications. G 0004/97 *Genentech*, O.J. EPO 270 (1999), <https://www.epo.org/law-practice/case-law-appeals/recent/g970004ex1.html>.

56. 35 U.S.C. § 311 (2012).

57. 35 U.S.C. § 311(b).

5. *Free-Rider Problem*

Challenges to bad patents also suffer from a free-rider problem.⁵⁸ To challenge a patent, a competitor must bear the high cost of litigation and take the risk that the court will disagree. But if the competitor succeeds, then the invalidated patent becomes a public good that other competitors, who bore neither cost nor risk, will benefit from.⁵⁹ Consequently, competitors have an incentive to save resources by waiting for someone else to deal with the problematic patent.

Scholars have proposed a number of solutions to this problem. If plaintiffs who successfully invalidated patent claims in the PTAB or in court were financially rewarded with a “patent bounty,” this would increase the incentive for competitors and non-competitors alike to bring such challenges. Several scholars have suggested ways for financing the bounty, such as requiring the patent holder to pay it.⁶⁰ However, these ideas have not gained any traction in Congress.

6. *Conclusions*

Examining the problems above, it becomes clear that many of the obstacles to challenging bad patents could be lessened with changes to the Patent Act. Fees for IPRs and PGRs could be reduced and the PTO could allow for anonymous complaints. Bounties for bad patents could be paid to those who successfully challenge a bad patent, and more aggressive fee

58. See Michael J. Burstein, *Rethinking Standing in Patent Challenges*, 83 GEO. WASH. L. REV. 498, 543–44 (2015) (“Because the costs of challenging patents are borne singly but the benefits are spread globally, parties who might be interested in such challenges have an incentive to free ride on the efforts of others”); Dreyfuss, *supra* note 42, at 237 (arguing that “there is a collective action problem” with challenging patents through litigation, because “every would-be challenger has an incentive to sit back and wait for a competitor to do the heavy lifting.”); Farrell & Merges, *supra* note 30, at 952 (discussing the free-rider problem).

59. Megan M. La Belle, *Against Settlement of (Some) Patent Cases*, 67 VAND. L. REV. 375, 399 (2014) (arguing that an alleged infringer may choose to settle rather than seek invalidation of the patent holder’s patent to prevent competitors from benefitting).

60. For example, Anup Malani and Jonathan Masur suggest that a person whose patent is invalidated in litigation should have to pay a penalty to the successful challenger. Anup Malani & Jonathan S. Masur, *Raising the Stakes in Patent Cases*, 101 GEO. L.J. 637, 672–73 (2013). Under their proposal, patent holders who are successful would also get a stronger reward, either heightened damages or an extension of their patent term. *Id.* at 658. John Thomas proposes a bounty being paid out prior to issuance when a third party supplies information that causes a patent claim to be rejected by the PTO. John R. Thomas, *Collusion and Collective Action in the Patent System: A Proposal for Patent Bounties*, 2001 U. ILL. L. REV. 305, 342 (2001).

shifting could be implemented, thus lessening both the free-rider effect and the financial burden of litigation.

However, patent holders have good reasons not to push for such changes. Amending the Patent Act to facilitate patent challenges will present some risk to all patent holders, given changes to the statute will increase uncertainty.⁶¹ A risk-averse party might prefer having its competitors' bad patents left in place rather than risk statutory changes. For this reason, addressing the problem of public participation may be the best way to confront the bad patent problem.

B. IMPACT ON THE PUBLIC

The Constitution sets out a public mission for the patent system: “to promote the Progress of Science and useful Arts.”⁶² Yet for many years, patent rights were treated as purely private rights affecting only the patent holder and its direct competitors.⁶³ However, this view has come under increasing scrutiny. Commentators have observed that the private law characterization of patents has led to skewed standing jurisprudence under the DJA⁶⁴ and has impacted how courts award remedies.⁶⁵

The idea that bad patents harm more than just direct competitors has been gaining traction. The EFF has started a Patent Busting Project that crowd-sources money to file IPRs.⁶⁶ Although the EFF's efforts, in part,

61. Several scholars have observed various ways in which the AIA has created uncertainty. *See, e.g.*, Mark A. Lemley, *Does “Public Use” Mean the Same Thing It Did Last Year?*, 93 TEX. L. REV. 1119, 1123–24 (2015) (discussing ambiguity in the AIA with regard to what constitutes “public use”); Gregory Dolin, *Dubious Patent Reform*, 56 B.C. L. REV. 881, 922, 924–25 (2015) (discussing how post-issuance review mechanisms under the AIA raise uncertainty for patent holders).

62. U.S. CONST. art. I, § 8, cl. 8; *see also* John M. Golden, *Patent Privateers: Private Enforcement's Historical Survivors*, 26 HARV. J.L. & TECH. 545, 547 (2013) (“U.S. patent law is federal statutory law designed to advance a constitutionally sanctioned public policy.”).

63. Both the Supreme Court and the Federal Circuit have noted that patent infringement is a tort intended to make a private party whole. *See, e.g.*, *Carbice Corp. of Am. v. Am. Patents Dev. Corp.*, 283 U.S. 27, 33 (1930) (“Infringement, whether direct or contributory, is essentially a tort, and implies invasion of some right of the patentee.”); *In re Cambridge Biotech Corp.*, 186 F.3d 1356, 1358, 1371 (Fed. Cir. 1999) (“[P]atent infringement is properly classified as a tort, albeit one created by federal statute.”).

64. *See La Belle, supra* note 24, at 96–98 (2012).

65. *See* Ted Sichelman, *Purging Patent Law of “Private Law” Remedies*, 92 TEX. L. REV. 517, 529, 567 (2014) (arguing that the private law view of patent damages disregards the “overriding goal” of promoting innovation, and proposing a more discretionary approach).

66. *Patent Busting Project*, ELEC. FRONTIER FOUND., <https://www.eff.org/patent-busting> (last visited Aug. 13, 2017); *EFF Files Challenge with Patent Office Against*

are to protect small entities that are vulnerable to patent trolls, the organization is also concerned about patent owners hindering free expression by enforcing bad patents on means of online communication, like podcasting.⁶⁷

The Federal Circuit has recognized that the issuance of patents is a public concern.⁶⁸ For example, in *MCM Portfolio LLC v. Hewlett-Packard Co.*, MCM challenged the constitutionality of the PTAB. The court held that IPRs do not violate Article III of the Constitution and held that the PTO has the right to correct its mistakes by cancelling erroneously granted claims.⁶⁹ Nevertheless, the Federal Circuit severely limits standing and downplays the harm that bad patents cause to the general public.⁷⁰

1. Higher Costs for Goods and Services

When patents are erroneously granted, the public pays higher prices. The patent holder or an exclusive licensee can use supracompetitive pricing if no comparable product exists.⁷¹ Manufacturers wishing to sell products that fall within the bad patent's scope may have to pay for an unnecessary license or engage in costly design-around activities; extra costs are then passed on to the consumer.⁷² Indeed, Congress has recognized the impact of bad patents on the cost of pharmaceuticals and, under the Hatch–Waxman Act, has granted a 180-day period of exclusivity to the generic drug manufacturer that first files an Abbreviated New Drug Application challenging a drug patent.⁷³

Troll's Podcasting Patent, ELEC. FRONTIER FOUND. (Oct. 16, 2013), <https://www.eff.org/troll/releases/eff-files-challenge-patent-office-against-trolls-podcasting-patent>.

67. *Id.*

68. See *Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 604 (Fed. Cir. 1985) (observing that “the grant of a valid patent is primarily a public concern” and finding that “the threshold question usually is whether the PTO, under the authority assigned to it by Congress, properly granted the patent”).

69. 812 F.3d 1284, 1291 (Fed. Cir. 2015).

70. See *infra* Section III.B.

71. Kesan, *supra* note 40, at 767. Likewise, as Judge Richard Posner notes, excessive patent protection leads to excessive market prices and other problems associated with bad patents. See Richard Posner, *Do Patent and Copyright Law Restrict Competition and Creativity Excessively?*, BECKER-POSNER BLOG (Sept. 30, 2012), <http://www.becker-posner-blog.com/2012/09/do-patent-and-copyright-law-restrict-competition-and-creativity-excessively-posner.html>.

72. See Shubha Ghosh & Jay Kesan, *What Do Patents Purchase? In Search of Optimal Ignorance in the Patent Office*, 40 HOUS. L. REV. 1219, 1227–28 (2004) (explaining that the cost of bad patents includes unnecessary licensing costs and wasteful design-around activities).

73. See Glynn S. Lunney, Jr., *FTC v. Actavis: The Patent-Antitrust Intersection Revisited*, 93 N.C. L. REV. 375, 386–89 (2015) (“That Congress provided such a special

Paying higher prices, however, is not a basis for standing in the Federal Circuit. In the *Myriad* litigation, a diverse group of plaintiffs challenged Myriad's isolated gene patents using the DJA.⁷⁴ Several of the plaintiffs complained about the high cost of BRCA 1 and 2 testing.⁷⁵ Indeed, soon after the Supreme Court struck down Myriad's patents, the cost of testing was halved.⁷⁶

However, in striking standing for all but one of the plaintiffs, the Federal Circuit emphasized the narrowness of the doctrine. The court noted that "a case or controversy must be based on a *real* and *immediate* injury or threat of future injury that is *caused by the defendants*," and narrowly construed "injury" to be a threat of suit or demand of royalty payments.⁷⁷ It further held that "a declaratory judgment plaintiff must allege both (1) an affirmative act by the patentee related to the enforcement of his patent rights, and (2) meaningful preparation to conduct potentially infringing activity."⁷⁸ Merely paying higher prices is therefore insufficient.

2. *Lack of Access to Goods and Services*

The public is harmed when bad patents block access to goods and services.⁷⁹ For example, DNA Sciences was the exclusive licensee of a patent on the isolated, purified gene that causes Long QT Syndrome, a condition that can cause sudden death.⁸⁰ DNA Sciences sued competitor GeneDx, and was successful in shutting down its testing program.

incentive to encourage challenges to pharmaceutical patents, and not patents generally, suggests that pharmaceutical patents, particularly weak pharmaceutical patents, impose uniquely high costs on society.").

74. *Ass'n for Molecular Pathology v. U.S. Patent & Trademark Office*, 669 F. Supp. 2d 365 (S.D.N.Y. 2009), *rev'd*, 689 F.3d 1303 (2012), *rev'd on other grounds sub nom. Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 (2013).

75. *Id.* at 374–75.

76. See Sy Mukherjee, *The Supreme Court's Gene Patent Ruling Is Already Leading to Cheaper Cancer Tests*, THINKPROGRESS (June 14, 2013, 2:35 PM), <https://thinkprogress.org/the-supreme-courts-gene-patent-ruling-is-already-leading-to-cheaper-cancer-tests-b5ff1d4b09a9/> (noting that Ambry's most detailed BRCA testing cost \$2,200—nearly half the cost of Myriad's comprehensive test).

77. *Ass'n for Molecular Pathology v. U.S. Patent & Trademark Office*, 689 F.3d 1303, 1319–20 (internal quotation marks omitted).

78. *Id.* at 1318 (citations omitted).

79. See, e.g., Sapna Kumar, *Life, Liberty, and the Pursuit of Genetic Information*, 65 ALA. L. REV. 625, 661–63 (2014) (discussing how diagnostic patents can harm third parties when a patent holder does not offer the test that it has a monopoly over).

80. See Misha Angrist et al., *Impact of Gene Patents and Licensing Practices on Access to Genetic Testing for Long QT Syndrome*, 12 GENETICS MED. S111 (2010). Isolated DNA is now considered to be unpatentable under § 101 of the Patent Act. *Myriad Genetics*, 133 S. Ct. at 2120.

Consequently, no LQTS testing was offered for a period of 18 months,⁸¹ possibly causing one death.⁸²

In theory, the public should never lose access to life-saving tests and treatments. In *eBay v. MercExchange*, the Supreme Court held that a patent holder seeking a permanent injunction must satisfy a four-factor test, which includes demonstrating “that the public interest would not be disserved by a permanent injunction.”⁸³ Injunctions are therefore unlikely to be granted for patents on tests or treatments that are only being offered by the infringer.

There are problems, however, that *eBay* could not address. Often a company seeking to offer goods or services covered by a patent does not want to risk litigation and will cease potentially infringing activity upon receipt of a cease-and-desist letter.⁸⁴ Moreover, the *eBay* decision does not apply to the International Trade Commission (ITC), which has the power to exclude goods that infringe patents at the U.S. border.⁸⁵ Although the ITC is supposed to take into account the public interest before issuing an exclusion order, it has not denied an exclusion order on such grounds since 1984.⁸⁶ Consequently, in practice, patents do hinder public access to life-saving technologies.

81. See Angrist et al., *supra* note 80, at S120.

82. In a statement before the PTO, Marc Grodman attributed the death of a ten-year old girl to the lack of available LQTS testing. *Stifling or Stimulating—The Role of Gene Patents in Research and Genetic Testing: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 110th Cong. 35 (2007) (statement of Marc Grodman, CEO, Bio-Reference Labs).

83. 547 U.S. 388, 391 (2006).

84. An example of this was seen in the *Myriad* litigation. The Yale University’s DNA Diagnostics Laboratory developed large rearrangement testing for a genetic mutation that causes breast cancer. Yale’s test was able to find women at high risk for breast cancer that Myriad’s test missed. Yale sought permission to offer the test, but Myriad refused and threatened to sue, causing Yale to stop offering the test and leaving the public without an equivalent test for one year. Supplemental Declaration of Ellen T. Matloff at ¶ 8, *Ass’n for Molecular Pathology v. U.S. Patent & Trademark Office*, 702 F. Supp. 2d 181 (S.D.N.Y. 2010) (No. 09-cv-04515), 2010 WL 10107606. Yale also received a cease-and-desist letter for their other BRCA 1 and 2 testing. Carole Bass, *Can Genes Be Intellectual Property?*, YALE ALUM. MAG. (May/June 2013), <https://yalealumnimagazine.com/articles/3678/can-genes-be-intellectual-property>.

85. See *Spanson, Inc. v. U.S. Int’l Trade Comm’n*, 629 F.3d 1331, 1369 (Fed. Cir. 2010) (holding that *eBay* does not apply to the ITC because of the “different statutory underpinnings for relief” under § 337 of the Tariff Act).

86. See Sapna Kumar, *The Other Patent Agency: Congressional Regulation of the ITC*, 61 FLA. L. REV. 529, 567 (2009) (discussing the three cases in which the ITC denied an exclusion order on public policy grounds).

3. Impeded Downstream Research

The public is also harmed when bad patents impede downstream research.⁸⁷ Competitors may abandon promising research when lacking the funds to challenge a problematic patent.⁸⁸ This issue is especially pronounced in biomedical research, given the risk of a tragedy of the anticommons arising from fractured patent rights.⁸⁹ In *Madey v. Duke*, the Federal Circuit gutted the experimental use exception, holding that if an “act is in furtherance of the alleged infringer’s legitimate business” and not “solely for amusement, to satisfy idle curiosity, or for strictly philosophical inquiry,” then the act does not qualify for the experimental use defense.⁹⁰ Because the Patent Act lacks an exception for downstream research, nonprofit research institutions can be hindered.⁹¹

III. STANDING LIMITATIONS TO ORIGINAL FEDERAL COURT ACTIONS

Members of the public can potentially play an important role in challenging bad patents in federal court. Unlike direct competitors, they do not have patents that could be invalidated as a result of their action and therefore face little risk of retaliation. Although non-competitors may not

87. See Robert P. Merges, *As Many as Six Impossible Patents Before Breakfast: Property Rights for Business Concepts and Patent System Reform*, 14 BERKLEY TECH. L.J. 577, 592 (1999) (discussing the cost of invalid patents, including “foregone research opportunities, abandoned or avoided by the patentee’s competitors who fear infringement liability . . .”).

88. See Kesan, *supra* note 40, at 767 (explaining that one of the costs of bad patents is “the social cost of abandoned research activities by the patentee’s competitors who may fear infringement.”).

89. See Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698, 698 (1998) (observing that privatization of upstream biomedical research, in the form of patents and other intellectual property, may create anticommons property that can be “economically and socially costly”); Arti K. Rai & Rebecca S. Eisenberg, *Bayh-Dole Reform and the Progress of BioMedicine*, 66 LAW & CONTEMP. PROBS. 289, 297–98 (2003) (noting that anticommons concerns from patents are “quite pressing in contemporary biomedical research that draws upon many prior discoveries made by different scientists in universities and private firms”).

90. *Madey v. Duke Univ.*, 307 F.3d 1351, 1362 (Fed. Cir. 2002); see also Katherine J. Strandburg, *What Does the Public Get? Experimental Use and the Patent Bargain*, 2004 WIS. L. REV. 81, 87 (2004) (“[T]he experimental-use exemption has been reduced to a mere *de minimis* exception that bears little relation to the implications of a particular experimental use for the public benefits of follow-on innovation.”).

91. For example, in the *Myriad* litigation, one of the original plaintiffs argued that she had the capability to offer genetic testing that was more comprehensive than what Myriad offered, but she could not due to Myriad’s patents. *Ass’n for Molecular Pathology v. U.S. Patent & Trademark Office*, 669 F. Supp. 2d 365, 372 (S.D.N.Y. 2009).

have the resources that a large competitor has, they can crowdsource public knowledge of prior art to challenge bad patents⁹² and can pool resources to cover the costs of litigation.⁹³

Standing, however, remains a significant obstacle. To challenge a patent in federal court, a plaintiff must establish standing under either the DJA or § 702 of the APA.⁹⁴ A series of Federal Circuit decisions has made this quite difficult by narrowing the category of who can be considered a direct competitor. Moreover, public interest groups that challenge patents in the PTAB may lack constitutional standing, thus preventing them from appealing adverse decisions to the Federal Circuit. Section A provides an overview of the standing doctrine and discusses both constitutional standing and the zone of interests test. Section B then discusses how the Federal Circuit has made it difficult for members of the public to establish standing in patent cases.

A. INTRODUCTION TO STANDING

The Supreme Court has described standing as being “an essential and unchanging part of the case-or-controversy requirement of Article III.”⁹⁵ To

92. AskPatents.com allows users to crowd-source prior art for bad patents. It was inspired by the Peer to Patent trial in the PTO. Joel Spolsky, *AskPatents.com: A Stack Exchange to Prevent Bad Patents*, STACK OVERFLOW (Sept. 20, 2012), <http://blog.stackoverflow.com/2012/09/askpatents-com-a-stack-exchange-to-prevent-bad-patents/>. EFF has also relied on crowd-sourcing information to bring IPRs. See Julie Samuels, *EFF's Fight for Open 3D Printing Continues at Ask Patents*, ELEC. FRONTIER FOUND. (March 18, 2013), <https://www.eff.org/deeplinks/2013/03/effs-fight-open-3d-printing-continues-askpatentscom>.

93. For example, United Patents is a subscription-based service that uses fees from company members to monitor patent trolls, file IPRs, and even purchase patents before trolls can. MARTA BELCHER & JOHN CASEY, *HACKING THE PATENT SYSTEM: A GUIDE TO ALTERNATIVE PATENT LICENSING FOR INNOVATORS* 4 (2014), https://www.eff.org/files/2014/05/29/hacking_the_patent_system.pdf. End users of products and services can also serve a similar role. See, e.g., *Organic Seed Growers & Trade Ass'n v. Monsanto Co.*, 718 F.3d 1350, 1353–54 (Fed. Cir. 2013) (involving a group of farmers seeking declaratory judgments of noninfringement and invalidity of twenty-three patents owned by Monsanto); see also Bernstein, *supra* note 28, at 1445 (discussing the role that end users play in challenging patents); Ellen Matloff, *A Genetic Counselor Explains How Gene Patents Harmed Her Patients*, BREAST CANCER ACTION (June 27, 2013), <http://www.bcaction.org/2013/06/27/a-genetic-counselor-explains-how-gene-patents-harmed-her-patients/> (discussing how Yale genetic counselor Ellen Matloff's research was impacted by Myriad's BRCA 1 and 2 patents, leading her to become a plaintiff in the *Myriad* litigation).

94. See *infra* Section III.B.

95. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); see also U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . to Controversies between two or more States;—between a State and Citizens of another State;—between

bring a case, a plaintiff must “demonstrate a personal stake in the outcome in order to assure that concrete adverseness which sharpens the presentation of issues necessary for the proper resolution of constitutional questions.”⁹⁶ The Court has further noted that “[a]bstract injury is not enough,” and that a plaintiff must show that he or she “sustained or is immediately in danger of sustaining some direct injury” from the challenged conduct.⁹⁷

Notwithstanding the Supreme Court’s insistence of standing’s constitutional roots, the doctrine dates back only to the 1930s,⁹⁸ with two developments playing a major role in its creation and evolution. The first development was the birth of the administrative state. As Professor Cass Sunstein has noted, during the New Deal, courts were viewed as lacking necessary expertise, flexibility, and accountability to tackle difficult social problems facing society.⁹⁹ Agencies, by contrast, were viewed as instruments for promoting public interest, making them the superior part of government to carry out the New Deal agenda.¹⁰⁰ When the APA was enacted 1946, § 702 stated that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”¹⁰¹ To protect agencies, sympathetic judges developed standing and other justiciability doctrines as a way of insulating agencies from outside challenges.¹⁰²

Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”).

96. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983).

97. *Id.* at 101–02.

98. *Fletcher*, *supra* note 14, at 225.

99. Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2079 (1990) (“[C]ourts lacked the flexibility, powers of coordination, initiative, democratic accountability, and expertise necessary to deal with complex social problems.”).

100. *See id.* at 2080 (discussing the creation of new agencies to implement the New Deal); Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1048 (1997) (noting that after the APA was implemented, “the dominant understanding of the administrative agencies was that they were instruments for promoting the public interest”).

101. 5 U.S.C. § 702 (2012).

102. *See* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1437–38 (1988) (explaining that pro–New Deal judges used justiciability doctrines to protect agencies from outside challenges); Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309, 366 (1995) (“[C]onstitutional historians have largely agreed that standing evolved to stave off unwelcome attacks by those harmed by regulatory programs that were designed to combat the Depression.”).

The second development to impact standing was the recharacterization of certain areas of private law as public law.¹⁰³ The private law model views lawsuits as a mechanism reserved “for settling disputes between private parties about private rights.”¹⁰⁴ Applied to standing, this approach limited court access to industries that were the direct targets of regulation. Competitors and the public who were affected by the regulation had no mechanism to challenge the court’s action and had to resort to the political process.¹⁰⁵

The public law model is considerably broader, viewing lawsuits as tools for the court to vindicate statutory or constitutional policies.¹⁰⁶ Beginning in the early 1970s, the Supreme Court began to embrace this more inclusive view of litigation with regard to public challenges to agency actions. In *Association of Data Processing Service Organizations v. Camp*, for example, the Supreme Court held that a party had standing so long as there was constitutional standing and the injury in fact was arguably within the zone of interests protected by the statute or constitutional provision at issue.¹⁰⁷ This current public law model permits courts to engage in policymaking in a limited scope, allows for greater third-party participation, and recognizes the court’s ability to resolve disputes traditionally left to Congress or to agencies.¹⁰⁸

1. *Standing Under the Administrative Procedure Act*

A party attempting to challenge an agency action under the APA must first show that it has constitutional standing by establishing that the government’s action caused it an injury that can be redressed by the court. Second, the party must show that it is within the zone of interests that Congress intended to protect.

103. See Jonathan Remy Nash, *Standing’s Expected Value*, 111 MICH. L. REV. 1283, 1311 (2013) (discussing the Supreme Court’s shift beginning in the 1970s from a private law model to a public law model for standing); La Belle, *supra* note 24, at 48–50 (discussing the expansion of the public law adjudication).

104. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976).

105. See Sunstein, *supra* note 102, at 1436 (noting that under the common law, regulated industries had access to court while “the interests of competitors and regulatory beneficiaries were not legally cognizable”). The private law view of courts dates back to *Marbury v. Madison*. See 5 U.S. 137, 170 (1803) (“The province of the court is, solely, to decide on the rights of individuals . . .”).

106. Chayes, *supra* note 104, at 1284.

107. 397 U.S. 150, 153 (1970).

108. See Chayes, *supra* note 104, at 1307–08 (discussing six institutional advantages of a public law model of litigation).

a) Constitutional Standing

Constitutional standing is based on “concern about the proper—and properly limited—role of the courts in a democratic society.”¹⁰⁹ Along with other justiciability doctrines, it helps maintain separation of powers by establishing “limits to the powers of an unelected, unrepresentative judiciary in our kind of government.”¹¹⁰ To establish constitutional standing, the plaintiff must show that she has suffered an injury in fact, an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.¹¹¹ The plaintiff must also show that the injury at issue was caused by the government’s action and that the injury is redressable.¹¹² Standing is “substantially more difficult” to establish by third parties whom are not the direct target of a government action.¹¹³

In *Lujan v. Defenders of Wildlife*, a group of plaintiffs challenged a regulation that could indirectly cause harm to endangered animals outside the United States.¹¹⁴ The Supreme Court held that the plaintiffs lacked injury because that the plaintiffs’ plan to one day visit the animals was not “concrete” and thus did not constitute an “actual or imminent injury.”¹¹⁵ *Lujan* was notable because the Endangered Species Act contains a citizen–standing provision, which allowed the plaintiffs to meet the zone of interests test.¹¹⁶ *Lujan* thus established that constitutional standing is a distinct requirement.

109. *Allen v. Wright*, 468 U.S. 737, 750 (1984).

110. *Id.* (internal quotation marks omitted); see also John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1230 (1993) (observing that standing protects separation of powers by ensuring “the court is carrying out *its* function of deciding a case or controversy, rather than fulfilling the *executive’s* responsibility of taking care that the laws be faithfully executed”).

111. *Lujan*, 504 U.S. at 560–61 (explaining that “[t]he party invoking federal jurisdiction bears the burden of establishing these elements” and that each element must be supported with evidence). The Supreme Court has admitted that standing doctrine “incorporates concepts concededly not susceptible of precise definition.” *Allen*, 468 U.S. at 751.

112. *Lujan*, 504 U.S. at 561. There are other constitutional standing issues, such as the prohibition against general grievances, as well. See *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.3 (2014) (noting that generalized grievances “do not present constitutional ‘cases’ or ‘controversies’.”).

113. *Lujan*, 504 U.S. at 562 (citation omitted).

114. *Id.* at 555, 562–63.

115. *Id.* at 564 (citation omitted).

116. *Id.* at 572 (discussing 16 U.S.C. § 1540(g)).

b) Zone of Interests

The zone of interests test is a murky administrative law doctrine. It is partially derived from § 702 of the APA, which states that a person can obtain judicial review of an agency decision if that person suffers a legal wrong because of it or is harmed by it.¹¹⁷ The Supreme Court has noted that in enacting the APA, Congress did not intend “to allow suit by every person suffering injury in fact.”¹¹⁸ Thus, the Court held that plaintiffs must also establish that the interest they are seeking to protect is “arguably within the zone of interests” that Congress sought to protect.¹¹⁹ The test is somewhat controversial, because the Court has been inconsistent in how it defines the zone of interest¹²⁰ and has made conflicting statements regarding the source of law which grounds the test.¹²¹ The Court appears to have settled on the test being a requirement independent of constitutional and prudential standing.¹²²

Courts apply the zone of interests test by asking whether the plaintiff’s interests “fall within the zone of interests protected by the law invoked.”¹²³ To do this, courts look to the traditional tools of statutory interpretation to determine “whether a legislatively conferred cause of action encompasses a

117. *See* *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 395 (1987) (describing the zone of interests test as a “gloss on the meaning of § 702”). Section 702 states that, “A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702 (2012).

118. *Clarke*, 479 U.S. at 395.

119. *Id.* at 396.

120. *See* Jonathan R. Siegel, *Zone of Interests*, 92 GEO. L.J. 317, 347–50 (2004) (discussing the Supreme Court’s inconsistent precedent regarding the zone of interests test and calling for greater consistency).

121. *See* *Kowalski v. Tesmer*, 543 U.S. 125, 128–29 (2004) (stating that the zone of interests test is an issue of prudential standing); *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 97 (1998) (stating that the zone of interests test is an issue of statutory standing); *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014) (holding that the test is an independent requirement); *see also* Siegel, *supra* note 120, at 341 (discussing the confusion regarding the legal source of the zone of interest test). An argument can also be made that the zone of interests test conflates federal question jurisdiction with standing. *See* Fletcher, *supra* note 14, at 234–35 (maintaining that the inquiry under the zone of interests test duplicates existing federal jurisdiction doctrine that considers whether the plaintiff’s claim is “wholly insubstantial or frivolous”).

122. *See* *Lexmark*, 134 S. Ct. at 1387 (maintaining that standing is not prudential, but instead, requires the court to determine “using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim”).

123. *Id.* at 1388.

particular plaintiff's claim."¹²⁴ This can include the statute's context and purpose,¹²⁵ legislative history,¹²⁶ and related regulations.¹²⁷

The Supreme Court has recently emphasized that the zone of interests test is highly permissive. In *Lexmark International v. Static Control Components*, the Court stressed that under the APA, the test is "'not meant to be especially demanding.'"¹²⁸ It described the APA's review provision as "generous" and observed that its "lenient approach" was meant to preserve the APA's flexibility in permitting suits "for violations of numerous statutes of varying character that do not themselves include causes of action for judicial review."¹²⁹ Likewise, in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, the Court noted that the test does "not require 'any indication of congressional purpose to benefit the would-be plaintiff,'" and maintained that "the benefit of any doubt goes to the plaintiff."¹³⁰ Importantly, the Court observed the test prevents a lawsuit only if the plaintiff's interests in the case "'are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'"¹³¹

2. *Standing Under the Declaratory Judgment Act*

The DJA addresses the situation where one party is involved in a dispute with another party that could sue, but declines to do so.¹³² The statute confers upon courts "unique and substantial discretion in deciding whether to declare the rights of litigants."¹³³ The DJA states that "[i]n a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking

124. *Id.* at 1387.

125. *See id.* at 1389 (explaining that the Lanham Act's "detailed statement of the statute's purposes" makes it easy to identify that the plaintiff is within the zone of interests); *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2211 (2012) (citing to treatises that discuss the purpose of the Indian Reorganization Act).

126. *See* *Barlow v. Collins*, 397 U.S. 159, 164 (1970) (holding that "statutory provisions and their legislative history" implicitly showed that tenant farmers are within the zone of interests).

127. *See Pottawatomi Indians*, 132 S. Ct. at 2211 (holding that the Department of the Interior's regulations make it clear that the statute at issue is concerned about land use).

128. *Lexmark*, 134 S. Ct. at 1389 (quoting *Pottawatomi Indians*, 132 S. Ct. at 2210).

129. *Id.*

130. *Pottawatomi Indians*, 132 S. Ct. at 2210.

131. *Id.* (quoting *Clarke*, 479 U.S. at 399).

132. Donald L. Doernberg & Michael B. Mushlin, *The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action and Expanded Federal Jurisdiction While the Supreme Court Wasn't Looking*, 36 UCLA L. REV. 529, 553 (1989).

133. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995).

such declaration, whether or not further relief is or could be sought.”¹³⁴ The Supreme Court has interpreted Congress’s use of the word “may” to confer discretion on the court, noting that it provides courts with “an opportunity, rather than a duty” to review.¹³⁵

The DJA can be used to challenge patents, particularly when a patent holder threatens to sue the alleged infringer but stops short of actually suing. Prior to its passage, competitors who were not actually sued for patent infringement faced the dilemma of incurring “growing potential liability for patent infringement” or abandoning what was possibly non-infringing use.¹³⁶ The DJA provided a way for competitors to have the dispute resolved by the court.¹³⁷

In *MedImmune v. Genentech*, the Supreme Court clarified the standing requirement for patent actions under the DJA.¹³⁸ MedImmune entered into a patent license agreement with Genentech, but believed that one of the licensed patents was invalid.¹³⁹ Because MedImmune was a licensee, it was unclear whether it could bring the suit without first breaching the license, under the theory that it would have no real apprehension of suit, and therefore no case or controversy.¹⁴⁰

The Court held that to meet Article III’s case and controversy requirement, the dispute at issue must be “definite and concrete, touching the legal relations of parties having adverse legal interests; and that it be real and substantial and admit of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.”¹⁴¹ It observed that “the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.”¹⁴²

134. 28 U.S.C. § 2201(a) (2012).

135. *Wilton*, 515 U.S. at 287–88.

136. *See* *Cardinal Chemical Co. v. Morton Int’l, Inc.*, 508 U.S. 83, 96 (1993).

137. *Id.*

138. 549 U.S. 118, 126 (2007).

139. *Id.* at 121.

140. *See id.* at 128–29; *see also* *Studiengesellschaft Kohle, m.b.H. v. Shell Oil Co.*, 112 F.3d 1561, 1568 (Fed. Cir. 1997) (holding that a licensee cannot bring suit “until it (i) actually ceases payment of royalties, and (ii) provides notice to the licensor that the reason for ceasing payment of royalties is because it has deemed the relevant claims to be invalid”).

141. *MedImmune*, 549 U.S. at 118.

142. *Id.*

The *MedImmune* Court observed that there is little case law regarding the statute's applicability "in which the plaintiff's self-avoidance of imminent injury is coerced by threatened enforcement action of a *private party* rather than the government."¹⁴³ However, it maintained that "the requirements of [a] case or controversy are met where payment of a claim is demanded as of right and where payment is made, but where the involuntary or coercive nature of the exaction preserves the right to recover the sums paid or to challenge the legality of the claim."¹⁴⁴ Finding no Article III problems, the Court concluded that it had subject matter jurisdiction over the case.¹⁴⁵

B. CHALLENGES FOR ESTABLISHING STANDING IN THE FEDERAL CIRCUIT

1. *Administrative Procedure Act*

The most significant obstacle for third parties attempting to sue in patent cases is meeting the zone of interests test.¹⁴⁶ In *Animal Legal Defense Fund v. Quigg (ALDF II)*, the Federal Circuit declared that third parties are outside the Patent Act's zone of interests.¹⁴⁷ In this case, the several animal defense groups challenged the PTO Commissioner's rule that found "non-naturally occurring, non-human multicellular organisms" to be patentable subject matter under § 101, maintaining that the PTO should have used notice-and-comment rulemaking.¹⁴⁸

The Federal Circuit correctly held that the appellants lacked constitutional standing. As discussed above, to meet constitutional standing, the plaintiff must show injury in fact, causation, and redressability. The court maintained that two of the appellants lacked injury in fact. The Humane Farmers Association and the Association of Veterinarians for Animal Rights claimed injury based on animal cruelty, maintaining that

143. *Id.* at 130.

144. *Id.* at 131 (quoting *Altwater v. Freeman*, 319 U.S. 359, 365 (1943)).

145. *Id.* at 137.

146. *See, e.g.*, *Animal Legal Def. Fund v. Quigg*, 932 F.2d 920, 938 (Fed. Cir. 1991) (narrowly construing the zone of interests test to limit patent challenges by non-competitors) [hereinafter *ALDF II*]; *see also* Xuan-Thao Nguyen, *Patent Prudential Standing*, 21 GEO. MASON L. REV. 17, 43–44 (2013) (criticizing the Federal Circuit's confusing application of standing that makes it difficult for nonexclusive licensees and some exclusive licensees to challenge patents).

147. *ALDF II*, 932 F.2d at 937–38.

148. *Animal Legal Def. Fund v. Quigg*, 710 F. Supp. 728, 729–30 (N.D. Cal. 1989) [hereinafter *ALDF I*], *aff'd on other grounds*, 932 F.2d 920 (Fed. Cir. 1991). The district court found that this rule was exempted from public notice and comment requirements of the APA. *Id.* at 732.

they would have to spend more money as a result of the rule.¹⁴⁹ The court concluded that standing was not met because this group of appellants failed to distinguish their harm from that of “any member of the public with a particularized conviction about protecting animals.”¹⁵⁰

The Federal Circuit found that the other appellants lacked causation. Several farmers and farming groups claimed to have “economic injury” with regard to members having to pay royalties to purchase animals or lose profits from having genetically inferior animals.¹⁵¹ These appellants argued that causation was met because these injuries could be traced to the Commissioner’s rule. The Federal Circuit disagreed, holding that causation was not met because the appellants’ injuries were “speculatively dependent” on the acts of independent inventors—who must develop non-naturally occurring farm animals and seek a patent for injuries to occur.¹⁵² The court similarly observed that the American Society for the Prevention of Cruelty to Animals and the Marin Humane Society lacked causation because they could not establish that the Commissioner’s rule caused their injury of having to increase their budgets and enforcement staff to handle increased animal experimentation due to the potential patentability of animals.¹⁵³

Rather than let the ruling rest on lack of constitutional standing, however, the Federal Circuit also held that the zone of interests test was not met. Citing to *Lujan*, the court correctly observed that the Patent Act is the relevant statute because that is the one “whose violation is the gravamen of the complaint.”¹⁵⁴ The appellants argued that they were within the zone of interests of the Patent Act because patents are issued for “public good” and because patent case law “emphasizes the importance of the public interest and the constitutional requirement of a public benefit.”¹⁵⁵ But the Federal Circuit disagreed, maintaining that the Patent Act cannot be so broad as to encompass challenges from any member of the public. It held broadly that the structure of the statute shows Congress’s intent to provide “only the remedies provided therein to ensure that the statutory objectives would be

149. *ALDF II*, 932 F.2d at 936.

150. *Id.*

151. *Id.* at 932 (the PTO conceded that the alleged injuries sufficed to establish injury in fact).

152. *Id.* at 933.

153. *See id.* at 936–37.

154. *Id.* at 937.

155. *Id.* at 938.

realized,” citing to the sections of the statute that permit civil suits as support.¹⁵⁶

In an unusual move, the Federal Circuit analogized the facts of its case to that of *Block v. Community Nutrition Institute*.¹⁵⁷ In *Block*, the Supreme Court found that Congress implicitly precluded consumers from challenging milk marketing orders because “members of the public ‘might themselves frustrate achievement of the statutory purposes.’”¹⁵⁸ The *Block* Court held that the statute’s explicit judicial review provision for a limited group, coupled with the statute’s lack of any express provision for consumer participation showed that Congress intended to exclude consumers from challenging the orders.¹⁵⁹ The Federal Circuit claimed that the appellants were likewise trying to thwart Congress’s purposes in implementing the Patent Act by challenging the PTO in federal court.

The Federal Circuit’s analysis is highly flawed for several reasons. The zone of interests test is not meant to be a gatekeeper to limit courts’ dockets. Beginning in the late 1980s, the Supreme Court has taken a permissive approach to the test, emphasizing that it is not “especially demanding” and that it requires no indication on Congress’s part to specifically include the

156. *Id.* (citing to 35 U.S.C. §§145 (civil action to obtain patent); 146 (civil action in case of interference); 135 (interference action; subsection (c) provides that discretionary actions by the Commissioner under that subsection are reviewable under section 10 of the APA); 281–282 (in civil action for infringement, validity of patent can be challenged defenses); 291 (civil action in case of interfering patents); 301–02 (reexamination proceedings)).

157. *Id.* at 939; *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340 (1984).

158. *ALDF II*, 932 F.2d at 938 (quoting *Block*, 467 U.S. at 352).

159. *Block*, 467 U.S. at 346–48.

plaintiff.¹⁶⁰ Any benefit of the doubt goes to the plaintiff.¹⁶¹ The Federal Circuit failed to establish that the appellants' suit was "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed" that Congress authorized the appellants to sue.¹⁶² It provided no support in the statute or the legislative history to show that the goals of the appellants were in tension with the goals of Congress in enacting the Patent Act. More problematic, the court used such broad language that it essentially held that nobody could bring APA-based challenges against the PTO, no matter how direct or significant the injury.

The Federal Circuit further erred in relying on the *Block* decision, which was based on the doctrine of implied preclusion, and not the zone of interests test. *Block* has been interpreted by the Supreme Court to hold that if a statute allows for review of an agency action by a party who must first exhaust administrative remedies, then it creates a strong inference that parties "who are not *subject* to the administrative process" do not have the right to challenge the statute.¹⁶³ The *Block* Court emphasized the fact that the relevant statute did not have any provision expressly permitting participation by consumers¹⁶⁴ and observed that "the preclusion issue turns ultimately on whether Congress intended for that class to be relied upon to challenge agency disregard of the law."¹⁶⁵ Under the Court's reasoning, if Congress had wanted consumers to be able to challenge the agency's action, it would have given the group access to administrative remedies that were available to other groups.

160. See *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987) (holding that the zone of interests test "is not meant to be especially demanding . . ."); see also *Match-E-Ben-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (holding that the test prevents a suit "only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit suit.'" (quoting *Clarke*, 479 U.S. at 399)). Indeed, parties have even met the zone of interests test in the Supreme Court with goals that were seemingly contradictory to Congress's intent. In *Bennett v. Spear*, a group of ranchers challenged Fish and Wildlife Service's (FWS) decision to reduce water to the public in order to protect endangered sucker fish. 520 U.S. 154, 159 (1997). The ranchers successfully established that they were within the zone of interests of the Endangered Species Act (ESA) notwithstanding the fact that they were not trying to protect an endangered species. *Id.* at 166. The Court's rationale was that Congress intended the best data possible to be used in making such a determination, and that the ranchers were trying to improve the quality of information that FWS was using. *Id.* at 172.

161. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389 (2014) (recognizing that the Court has historically indicated "'that the benefit of any doubt goes to the plaintiff'" (quoting *Pottawatomi Indians*, 132 S. Ct. at 2210)).

162. *Id.* (internal quotation marks omitted).

163. *Sackett v. EPA*, 132 S. Ct. 1367, 1374 (2012).

164. *Block*, 467 U.S. at 347.

165. *Id.*

The Federal Circuit in *ALDF II* erred in applying *Block* to deny judicial review. In patent law, there is no mandatory administrative process that a party must exhaust before filing a lawsuit in federal district court—either under the APA or the DJA. Furthermore, the Patent Act has allowed for public participation for many years through post-grant review, which has steadily expanded over time. Congress, therefore, *does* rely on the general public to challenge the PTO’s disregard for patentability standards under the Patent Act. Allowing challenges under the APA would not circumvent Congress’s intent, given (1) there is no mandatory administrative process for challenging a patent and (2) Congress clearly intended for the public to assist in challenging bad patents. Consequently, it cannot be implied that Congress intended to preclude third-party challenges under the Patent Act.

2. *Declaratory Judgment Act*

There are several problems with using the DJA to protect the public for purposes of the zone of interests test. In *MedImmune, Inc. v. Genentech, Inc.*, the Supreme Court emphasized that the doctrine protects plaintiffs from “imminent injury,” in the form of a threatened action by the government or a private party.¹⁶⁶ Although the Court rejected the Federal Circuit’s strict “reasonable apprehension of suit” test,¹⁶⁷ there still must be “a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.”¹⁶⁸ Thus, use of the DJA in this context is viewed as protecting the rights of individuals who face imminent harm, and not the rights of the general public.¹⁶⁹

166. 549 U.S. 118, 128–30 (2007).

167. The Federal Circuit previously restricted use of the DJA to cases where there was “both (1) an explicit threat or other action by the patentee, which creates a reasonable apprehension on the part of the declaratory judgment plaintiff that it will face an infringement suit, and (2) present activity which could constitute infringement or concrete steps taken with the intent to conduct such activity.” *Gen-Probe Inc. v. Vysis, Inc.*, 359 F.3d 1376, 1380 (Fed. Cir. 2004).

168. *MedImmune*, 549 U.S. at 128.

169. An argument can be made that the DJA is not as narrow as courts have interpreted. For example, Professor Megan La Belle has described the Federal Circuit’s current approach to standing under the statute as “myopic” and has argued the private law approach has caused the Federal Circuit to prematurely dismiss patent declaratory judgment cases. La Belle, *supra* note 24, at 46. However, until the Supreme Court clarifies its statements from *MedImmune*, it is unlikely that the Federal Circuit will change its approach.

Following the *MedImmune* decision, the Federal Circuit has taken a narrow view of who meets the standing requirements under the statute.¹⁷⁰ The Federal Circuit has held that there must exist:

(1) an explicit threat or other action by the patentee, which creates a reasonable apprehension on the part of the declaratory plaintiff that it will face an infringement suit, and (2) present activity which could constitute infringement or concrete steps taken with the intent to conduct such activity.¹⁷¹

In other words, “where a patentee asserts rights under a patent based on certain identified ongoing or planned activity of another party, and where that party contends that it has the right to engage in the accused activity without license, an Article III case or controversy will arise.”¹⁷²

The Federal Circuit emphasized that “a case or controversy must be based on a *real* and *immediate* injury or threat of future injury that is *caused by the defendants*,” and narrowly construed “injury” to be a threat of suit or demand of royalty payments.¹⁷³ It further held that a plaintiff must be able to allege “an affirmative act by the patentee related to the enforcement of his patent rights,” and further show “meaningful preparation to conduct potentially infringing activity.”¹⁷⁴

The narrowness of this standard can be seen in the *Myriad* litigation. The district court found standing for the twenty plaintiffs.¹⁷⁵ The Federal Circuit, however, found that only three plaintiffs had alleged “affirmative patent enforcement actions directed at them by Myriad.”¹⁷⁶ Of those plaintiffs, only Dr. Harry Ostrer was found to have clearly alleged “a sufficiently real and imminent injury” because he claimed an intention to immediately begin offering BRCA 1 and BRCA 2 testing as soon as Myriad’s patents were invalidated and because Myriad had demanded that he pay for a license.¹⁷⁷

Much of the Federal Circuit’s jurisprudence with regard to the DJA has been borne out of confusion. The Federal Circuit conflates elements of

170. *Id.* at 78.

171. *BP Chems. Ltd. v. Union Carbide Corp.*, 4 F.3d 975, 978 (Fed. Cir. 1993).

172. *Ass’n for Molecular Pathology v. U.S. Patent & Trademark Office*, 689 F.3d 1303, 1320 (2012) (quoting *SanDisk Corp. v. STMicroelectronics, Inc.*, 480 F.3d 1372, 1381 (Fed. Cir. 2007)).

173. *Id.* at 1319–20.

174. *Id.* at 1318.

175. *Ass’n for Molecular Pathology v. U.S. Patent & Trademark Office*, 702 F. Supp. 2d 181, 186–89 (2010).

176. *Ass’n for Molecular Pathology*, 689 F.3d at 1319–20.

177. *Id.*

constitutional standing, prudential standing, and ripeness.¹⁷⁸ The court goes back and forth on whether Article III requires it to keep the scope of standing narrow, or whether the court merely made a policy decision at some point in time.¹⁷⁹ But even setting aside the Federal Circuit's errors, the fact remains that the DJA—as interpreted by the *MedImmune* Court—was designed for addressing imminent harm faced by an individual, not general harm faced by the public. This makes it a flawed vehicle for bringing cases of broad public interest in which the PTO's actions harm the public, but nobody is at risk of being sued by the patent holder.

3. *Challenges for Reforming Standing in the Federal Circuit*

The Federal Circuit's aggressive use of standing and justiciability raises the question of whether the court is attempting to insulate patent holders and the PTO from challenges, just as post–New Deal courts once shielded agencies from scrutiny. In *ALDF II*, the court maintained that if it adopted ALDF's position, it would “be opening the door to collateral attack on the validity of issued patents” and that “any competitor could simply file suit against the Commissioner [of the PTO] challenging a patent's validity.”¹⁸⁰ In the *Myriad* litigation, Judge Moore noted in a concurrence that the court needed to be “particularly wary of expanding the judicial exception to patentable subject matter where both settled expectations and extensive property rights are involved.”¹⁸¹

The Federal Circuit today is quite different from what it was twenty–five years ago in *ALDF II*. In its early years, the court used its mandate of promoting uniformity in patent law as an excuse to disregard administrative law.¹⁸² But in the past decade, the court has gained eight new judges with a wide diversity of backgrounds. The current court has been much more likely

178. Burstein, *supra* note 58, at 505–09.

179. See Lisa A. Dolak, *Power or Prudence: Toward a Better Standard for Evaluating Patent Litigant's Access to the Declaratory Judgment Remedy*, 41 U.S.F. L. REV. 407, 420–25 (2007) (observing confusion within the Federal Circuit as to whether policy or Article III drives the requirement that plaintiffs suing under the Declaratory Judgment Act have “reasonable apprehension” of being sued).

180. *ALDF II*, 932 F.2d 920, 938 (1991); see also Burstein, *supra* note 58, at 530 n.211 (arguing that the Federal Circuit's position was probably correct because “arguably every statute that Congress passes purports to protect the public good.”).

181. *Ass'n for Molecular Pathology*, 689 F.3d at 1343 (Moore, J., concurring in part).

182. See Sapna Kumar, *The Accidental Agency?*, 65 FLA. L. REV. 229, 258 (2013) (observing how the Federal Circuit has misconstrued the APA with regard to patent cases).

to correctly apply administrative law to patent cases,¹⁸³ perhaps signaling an end to patent law exceptionalism.¹⁸⁴

The Federal Circuit, however, is still burdened by its rigid precedent. The major Federal Circuit decisions regarding standing under the APA and the DJA are the relics of an earlier court that resisted properly applying administrative law. The Federal Circuit should revisit its earlier cases and implement a broader standing doctrine that is in accordance with the Supreme Court's more public law-oriented precedent.

IV. STANDING UNDER THE AMERICA INVENTS ACT

Although public participation in administrative patent challenges has been around in some form for more than thirty years, pre-AIA proceedings were very limited in scope. The AIA greatly expanded third parties' ability to challenge bad patents and clarified Congress's intent that the public should play a role in improving patent quality. Section A discusses the public's right to challenge patents pre-AIA. Section B examines how the AIA has dramatically expanded those rights. Section C then discusses how the AIA impacts standing.

A. PRE-AIA THIRD-PARTY RIGHTS

Ex parte reexamination was introduced in 1980; it provided members of the public with a way to request reexamination during the life of a patent.¹⁸⁵

183. For example, the Federal Circuit historically resisted applying *Chevron* deference to patent decisions from the ITC. See Kumar, *supra* note 86, at 553–56. But in 2015, the court reversed course and held that the *Chevron* framework was appropriate whenever the ITC interprets the Tariff Act. See *Suprema, Inc. v. Int'l Trade Comm'n*, 796 F.3d 1338, 1345 (Fed. Cir. 2015) (en banc) (holding that “Congress has delegated authority to the Commission to resolve ambiguity in Section 337 if the Commission does so through formal adjudicative procedures”); *ClearCorrect Operating, LLC v. Int'l Trade Comm'n*, 810 F.3d 1283, 1286 (Fed. Cir. 2015) (applying the *Chevron* framework to the ITC's interpretation of “articles”). This marks a major departure from 1999, when the Supreme Court rebuked the Federal Circuit for not following the APA when reviewing PTO decisions. See *Dickenson v. Zurko*, 527 U.S. 150, 152 (1999) (holding that the APA applies to judicial review of PTO determinations).

184. Patent law exceptionalism is the tenancy of the Federal Circuit to disregard basic administrative law precedent and principals with respect to patent decisions. See, e.g., Paul R. Gugliuzza, *The Federal Circuit as a Federal Court*, 54 WM. & MARY L. REV. 1791, 1796–97 (2013) (providing examples of Federal Circuit exceptionalism); Kumar, *supra* note 182, at 277 (noting that the Federal Circuit's manipulation of law and fact and its refusal to apply proper deference to the ITC are examples of patent exceptionalism); Wasserman, *supra* note 12, at 2002 (discussing how the Supreme Court has reprimanded “the Federal Circuit for its endorsement of patent law exceptionalism.”).

185. See Act of Dec. 12, 1980, Pub. L. No. 96-517, § 302, 94 Stat. 3015 (1980).

Reexamination was granted if the requester discovered patents or printed publications that raised “a substantial new question of patentability.”¹⁸⁶ Congress’s intent was not to protect the public against bad patents, but rather to “strengthen[] investor confidence in the certainty of patent rights”¹⁸⁷ and to protect patent holders from harassment.¹⁸⁸ Consequently, Congress allowed the requester to participate in only one response to the patent holder,¹⁸⁹ and did not allow the requester to participate in any appeal.¹⁹⁰ These limitations led to low utilization of the procedure.¹⁹¹

In 1999, Congress passed the American Inventors Protection Act, which created inter partes reexamination proceedings.¹⁹² Like current IPRs, inter partes reexamination was based on only printed publications and prior art patents that could be used as a basis for an anticipation or obviousness challenge.¹⁹³ Three years later, Congress granted third parties the right to appeal adverse decisions to the Federal Circuit.¹⁹⁴

But even with these expanded rights, several limitations remained. First, challengers could only rely upon prior art and patents; there was no mechanism for challenging a patent under subject matter or enablement.¹⁹⁵ Second, challengers were limited to a single response against the patent holder and strong estoppel provisions severely hindered challengers.¹⁹⁶

186. 35 U.S.C. § 304 (2006).

187. H.R. REP. NO. 96-1307, pt. 1, at 3 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 6460, 6462.

188. *See* Michael A. Carrier, *Post-Grant Opposition: A Proposal and a Comparison to the America Invents Act*, 45 U.C. DAVIS L. REV. 103, 112–13 (2011) (observing that under the 1981 amendments to the Patent Act, “Congress was concerned about challengers’ potential harassment of patentees”).

189. *Id.* at 113.

190. *See* J. Steven Baughman, *Reexamining Reexaminations: A Fresh Look at the Ex Parte and Inter Partes Mechanisms for Reviewing Issued Patents*, 89 J. PAT. & TRADEMARK OFF. SOC’Y 349, 356 (2007) (arguing that ex parte reexamination offered “fewer opportunities for the requester to participate actively” compared to inter partes review, and no opportunity to participate in any appeal).

191. *See* Carrier, *supra* note 188, at 113.

192. Intellectual Property and Communications Omnibus Reform Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501 (1999).

193. 35 U.S.C. § 311(b) (2011).

194. 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, §§ 13105-13106, 116 Stat. 1758, 1900–01 (2002); *see also* J. Steven Baughman, *Choosing Inter Partes Reexamination or Review: What to File, and When?*, 24 INTELL. PROP. & TECH. L.J. 8, 9 (2012) (discussing how inter partes reexamination allowed for ongoing participation by the requesting party).

195. *See* Carrier, *supra* note 188, at 114.

196. 35 U.S.C. § 314(b)(2) (2012); *see* Carrier, *supra* note 188, at 114 (describing how one estoppel provision prevented “a requester from challenging the validity of any fact determined in the examination” and another prohibited “a requester from later asserting the

Consequently, a major statutory change was needed to expand public challenges to issued patents.

B. SCOPE OF THIRD-PARTY RIGHTS UNDER THE AMERICA INVENTS ACT

In 2011, Congress passed the AIA, which made several substantial changes to U.S. patent law.¹⁹⁷ The AIA provides a means for determining Congress's current intent regarding whom the Patent Act protects and whom has standing. The statutory changes in the AIA as well as the legislative history show clear intent for Congress to provide a broader role for members of the public in safeguarding patent quality.

1. *Expressly Granted Third-Party Rights*

The AIA provided a dramatic expansion of public rights. PGRs now allow people to challenge a patent under § 101 or § 112,¹⁹⁸ albeit only for a nine-month window after issuance.¹⁹⁹ The AIA also provides for fairly formal proceedings for PGRs and IPRs that allow the public to take an active role in challenging a bad patent.²⁰⁰ Either the challenger or the patent holder may request an oral hearing²⁰¹ or discovery,²⁰² making the public participation far more significant compared to the single response permitted under reexamination.

invalidity of a patent on any ground that it ‘raised or could have raised.’”) (quoting 35 U.S.C. § 315(c) (2012)).

197. See Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011). Reactions to the AIA were mixed. Professor Sarah Tran observed that while then-director David Kappos lauded the AIA as “the most significant overhaul to our patent system, since the founding fathers first conceived of codifying a grand bargain between society and invention,” others have criticized the AIA “for being poorly written and rife with ambiguity.” Tran, *supra* note 18, at 610.

198. See 35 U.S.C. § 321(b) (2011) (a party can bring a challenge under any patentability ground except failure to meet the best mode requirement).

199. 35 U.S.C. § 321(c) (2012); see generally Scott A. McKeown et al., *EPO Opposition Procedures, a Model for Post-Grant Review?*, PATENTS POST-GRANT (Mar. 7, 2010), <http://www.patentspostgrant.com/epo-opposition-procedures-a-comparison-with-inter-partes-reexamination-in-the-uspto> (observing a number of parallels between PGRs and European oppositions, including the nine-month time frame and the broad array of grounds for challenges).

200. See Wasserman, *supra* note 12, at 1988–89 (arguing that procedures for post-grant review and inter partes review are formal enough to merit *Chevron* deference).

201. 35 U.S.C. § 316(a)(10) (2012) (providing a right to an oral hearing for inter partes review); 35 U.S.C. § 326(a)(10) (2012) (providing a right to an oral hearing for post grant review).

202. 35 U.S.C. § 316(a)(5) (2012) (providing a right to discovery for inter partes review); 35 U.S.C. § 326(a)(5) (2012) (providing a right to discovery for post grant review).

Congress clearly intended any member of the public to be able to be able to use IPRs and PGRs. For Covered Business Method (CBM) review, Congress explicitly noted that the party bringing the action must have been sued or charged with infringement.²⁰³ Given that Congress knew how to limit the scope of parties bringing administrative patent challenges for CBM review, it clearly did not intend to restrict the class of challengers for PGRs and IPRs.

The AIA has furthermore made improvements to prior art submission. The AIA allows for anonymous third party submissions of prior art and requires the submitter to provide a concise description of the relevance of each piece of prior art.²⁰⁴ By contrast, pre-AIA, third parties were not permitted to discuss the relevance of such prior art, thereby limiting the utility of the procedure. These statutory changes show that Congress intended to increase public participation in the patent system.

2. *Legislative History*

The AIA's legislative history further confirms Congress's intent to expand public rights to improve patent quality. The House Committee on the Judiciary issued a Report regarding H.R. 1249—the House version of the AIA. In the “Purpose and Summary” section, the House Report noted that “the need to modernize our patent laws has found expression in the courts,” observing that the Supreme Court had reversed Federal Circuit patent decisions six times in a four-year period.²⁰⁵ The House Report maintained that the Court's decisions “reflect a growing sense that

203. *See* Leahy-Smith America Invents Act § 18(a)(1)(B) (2012) (“A person may not file a petition for a transitional proceeding with respect to a covered business method patent unless the person or the person's real party in interest or privy has been sued for infringement of the patent or has been charged with infringement under that patent.”); *see also* 37 C.F.R. § 42.302(a) (2015) (“A petitioner may not file with the Office a petition to institute a covered business method patent review of the patent unless the petitioner . . . has been sued for infringement of the patent or has been charged with infringement under that patent.”).

204. 35 U.S.C. § 122(e)(2)(A) (2015).

205. H.R. REP. NO. 112-98, pt. 1, at 38–39 (2011), <http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt98/pdf/CRPT-112hrpt98-pt1.pdf> (noting that Congress had not enacted legislation in “nearly 60 years,” and that although “[t]he object of the patent law today must remain true to the constitutional command,” the “form needs to change, both to correct flaws in the system that have become unbearable, and to accommodate changes in the economy and the litigation practices in the patent realm”).

questionable patents are too easily obtained and are too difficult to challenge,”²⁰⁶ and stated that it was “time for Congress to act.”²⁰⁷

The House Report further recognized the patent community’s call for “improving patent quality and providing a more efficient system for challenging patents that should not have issued.”²⁰⁸ More explicitly, it noted:

The purpose of the “America Invents Act,” as reported by the Committee on the Judiciary, is to ensure that the patent system in the 21st century reflects the constitutional imperative. Congress must promote innovation by granting inventors temporally limited monopolies on their inventions *in a manner that ultimately benefits the public* through the disclosure of the invention to the public.²⁰⁹

The House Report shows that Congress intended to expand the rights of the public to ensure patent quality. It discussed how once a patent application is published, “members of the public . . . may realize they have information relevant to a pending application.”²¹⁰ It also observed how pre-AIA law unduly restricted the information that the public could bring to the PTO’s attention.²¹¹

Finally, the House Report discussed the limitations of reexamination for members of the public under prior law. It noted that a third party “had fewer challenges it could raise” in reexamination than in federal court.²¹² It further observed that under the old system, “the third-party challenger had no role once the proceeding was initiated” and recognized that a challenger who lost under reexamination had no right to appeal the decision.²¹³ It is therefore clear that in passing the AIA, Congress deliberately intended to signal an expanded role for the public in safeguarding the quality of patents.

206. *Id.* at 39 (citing referencing statements made by U.S. Senator Patrick J. Leahy during a hearing held by the Senate Judiciary Committee).

207. *Id.*

208. *Id.* at 39–40.

209. *Id.* at 40 (emphasis added).

210. *Id.* at 48.

211. *Id.* at 48–49 (explaining that while pre-AIA law permitted submissions of relevant information, such as prior art, by third parties, the submitter was “precluded from explaining why the prior art was submitted or what its relevancy to the application might be”) (internal citations omitted).

212. *Id.* at 45.

213. *Id.*

C. THE AIA'S IMPACT ON STANDING

1. *The Zone of Interests Test is Met*

The language of the AIA and the House Report both show that members of the public seeking to invalidate bad patents are within the zone of interests protected by the AIA. As the Supreme Court noted, the test bars suit only if the plaintiff's interest is "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."²¹⁴ When Congress passed the AIA, it was clearly concerned about the impact that bad patents have on the public. Under § 321 and § 311, Congress expanded the ability of third parties to file patent challenges, and the House Report emphasized the importance of increasing the quality of patents and noted that the public could play a role in improving such quality. Consequently, third-party lawsuits challenging bad patents are in no way inconsistent with Congress's intent and are consequently within the Patent Act's zone of interests.

A counterargument could be made that the AIA focused on increasing the public's role only in PTAB proceedings, not in the court system. After all, the AIA did not provide any new mechanisms for the public to file suit in federal district court. The zone of interests test, however, merely requires the plaintiff to establish that Congress's intent in enacting the pertinent statute included protecting the group that is attempting to sue.²¹⁵ Here there is ample evidence that Congress intended to increase public participation in the patent process and to protect the integrity of patents such that they benefit the public.²¹⁶ Any party that seeks to invalidate a bad patent in federal court shares Congress's interest in ensuring that issued patents ultimately benefit the public. Although Congress focused its efforts on post-grant review, it cannot be said that public interest patent litigation is "marginally related to or inconsistent with the purposes implicit" in the AIA.²¹⁷

Congress likely recognized that there would be some actions that could not be brought in the PTAB. Challenges under § 101 and § 112 can only be brought through post-grant review within nine months of issuance, but given how rapidly Supreme Court jurisprudence is evolving, it is possible that a § 101 or § 112 problem would only manifest after the post-grant

214. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (quoting *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 389 (1987)).

215. *See Air Courier Conf. v. Am. Postal Workers Union*, 498 U.S. 517, 524 (1991).

216. *See supra*, Part IV.B.

217. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389 (2014).

period ended. Congress acknowledged that under the old law, a third party had more ways to challenge a bad patent in court than it did in the PTO. Although the AIA lessened the disparity, it did not get rid of it altogether. Given Congress's explicitly stated desire to improve patent quality, members of the public are within the zone of interests of the Patent Act.

2. *Constitutional Standing*

Constitutional standing has emerged as a sticking point in appealing PTAB proceedings. In PTAB challenges, the Patent Act permits anyone to challenge a bad patent, including those who were not harmed. This raises the question of whether the injury-in-fact requirement of constitutional standing has been met.

a) *Consumer Watchdog v. Wisconsin Alumni Research Foundation*

In 2006, Consumer Watchdog filed an inter partes reexamination proceeding before the PTO, arguing that prior art rendered Wisconsin Alumni Research Foundation's (WARF) embryonic stem cell patents invalid.²¹⁸ Although some of WARF's claims were initially rejected, WARF subsequently amended the claims to narrow them and was successful in having the patents reissued.²¹⁹

Consumer Watchdog appealed to the Federal Circuit, only to have its appeal dismissed for lack of standing. The court noted that under *Lujan*, a plaintiff "must show that it has suffered an 'injury in fact' that is both concrete and particularized, and actual or imminent."²²⁰ The court observed that Consumer Watchdog did not engage in any activity involving embryonic stem cells, nor did it have any intention to do so. It further noted that Consumer Watchdog was not a licensee of the patents at issue.²²¹ Consumer Watchdog maintained that its requested reexamination proceeding conferred standing.²²² However, the Federal Circuit found that the PTO's "disagreement with Consumer Watchdog did not invade any legal right conferred by" the Patent Act, and observed that "[t]he statute did not guarantee a particular outcome favorable to the requester."²²³

218. *Consumer Watchdog v. Wis. Alumni Research Found.*, 753 F.3d 1258, 1260 (Fed. Cir. 2014).

219. *Found. for the Taxpayer v. Wis. Alumni Research Found.*, No. 2012-011693, 2013 WL 5397843, at *7 (Bd. Pat. App. & Interf., Jan. 22, 2013).

220. *Consumer Watchdog*, 753 F.3d at 1261.

221. *Id.*

222. *Id.*

223. *Id.* at 1262.

The Federal Circuit further rejected Consumer Watchdog's argument that the Patent Act's allowance of appeals to the court conferred standing. The court disagreed, observing that a statutory grant of a procedural right does not eliminate the requirement that the plaintiff "have a particularized, concrete stake in the outcome of the reexamination."²²⁴ The court thus concluded that "Consumer Watchdog has only alleged a general grievance" concerning the stem cell patent and denied the appeal.²²⁵

Although *Consumer Watchdog* involved the pre-AIA Patent Act, the same reasoning would apply to IPRs and PGRs under the AIA. Under the Patent Act, a party to either proceeding can appeal the PTAB's decision to the Federal Circuit.²²⁶ However, although the explicit right to appeal allows plaintiffs to automatically meet the zone of interests test, a plaintiff must also establish constitutional standing.

b) Supreme Court Precedent and *Consumer Watchdog*

Although the *Consumer Watchdog* decision has attracted some criticism,²²⁷ it fits within existing administrative law precedent. The most analogous Supreme Court decision is *Federal Election Commission v. Akins*, in which the Court dealt with the issue of injury in fact and general grievances.²²⁸ The Federal Election Commission (FEC) determined that the American Israel Public Affairs Committee (AIPAC) was not a "political committee" under the Federal Election Campaign Act (FECA) and was therefore not obligated to release information regarding its membership.²²⁹ A group of voters whose views were opposed to AIPAC filed a complaint with the FEC, seeking to have the information released. The FEC investigated the allegations but ultimately decided that AIPAC was not a political committee subject to the FECA. Although the voters' injury was intangible, the Court held that injury in fact was met because the information would help the voters evaluate candidates running for public office.²³⁰

224. *Id.*; see also *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) ("Unlike redressability . . . the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.").

225. *Consumer Watchdog*, 753 F.3d at 1263.

226. 35 U.S.C. § 141(c) (2015).

227. See Dreyfuss, *supra* note 42, at 294–95; see also *infra* note 246 and accompanying text).

228. 524 U.S. 11 (1998).

229. 524 U.S. 11, 13 (1998).

230. *Id.* at 21; see also *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (observing that "[a]lthough tangible injuries are perhaps easier to recognize," that the Supreme Court has confirmed that intangible injuries can be concrete and meet the injury-in-fact requirement).

The *Akins* Court also clarified what constitutes a general grievance. The Court noted that for widely shared grievances, “the political process, rather than the judicial process, may provide the more appropriate remedy.”²³¹ The Court noted that a generalized grievance “appears in cases where the harm at issue is not only widely shared, but is also of an abstract and indefinite nature.”²³² In other words, plaintiffs must be able to show injury to their own interests as opposed to merely possessing a general interest in the administration of the law.²³³ The Court concluded that although the plaintiffs’ injury was widely shared, their harm was sufficiently concrete.²³⁴

The injuries that Consumer Watchdog alleged were shared by the general public and were of an “abstract and indefinite nature.” Consumer Watchdog maintained that WARF’s “broad and aggressive assertion” of its patent put “a severe burden” on taxpayer-funded research in California.²³⁵ By contrast, the plaintiffs in *Akins* could show that they were injured by the lack of information, which Congress recognized as a harm, and which affected their ability as individuals to make an informed decision when voting.²³⁶

Another problem with Consumer Watchdog’s appeal was that it was attempting to represent the interests of other parties. The organization’s stated mission is to be “a voice for taxpayers and consumers in special interest-dominated public discourse, government and politics.”²³⁷ The Supreme Court has held that a party “generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.”²³⁸ The concern is that without this limitation, courts would be forced to decide “abstract questions of wide public significance” that other governmental institutions could more competently

231. *Akins*, 524 U.S. at 23.

232. *Id.*

233. *Id.* at 23–24.

234. *Id.* at 24–25.

235. Opening Brief for Appellant at 2, *Consumer Watchdog v. Wis. Alumni Research Found.*, 753 F.3d 1258, 1260 (Fed. Cir. 2014) (No. 2013-1377), 2013 WL 3489791, at *1–2. Consumer Watchdog’s opening and reply briefs did not address standing; it likely did not anticipate that constitutional standing could be a problem given the express right to appeal granted in the Patent Act.

236. *Akins*, 524 U.S. at 24–25 (concluding that “the informational injury at issue” was “directly related to voting, the most basic of political rights, is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of constitutional power to authorize its vindication in the federal courts”).

237. Opening Brief for Appellant at 2, *Consumer Watchdog v. Wis. Alumni Research Found.*, 753 F.3d 1258, 1260 (Fed. Cir. 2014) (No. 2013-1377), 2013 WL 3489791, at *1.

238. *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004).

address.²³⁹ The only exceptions to the prohibition are if “the party asserting the right has a ‘close’ relationship with the person who possesses the right” or the right holder is hindered in protecting its own interest.²⁴⁰ Consequently, Consumer Watchdog should have sought out researchers whose work was actually being hindered to join as plaintiffs on the challenge.²⁴¹

Professor Dreyfuss has argued that the Supreme Court’s decision in *ASARCO Inc. v. Kadish* supports standing for challengers who lose in the PTAB.²⁴² In state court, taxpayers and a teacher’s association challenged an Arizona statute that permitted a state agency to lease minerals. The Arizona Supreme Court held that the statute was unconstitutional, and a group of mineral lessees appealed to the U.S. Supreme Court.²⁴³ The United States argued that the case should be dismissed because the plaintiffs could not have filed the suit as an original action in federal court due to lacking constitutional standing.²⁴⁴ The United States’ argument was based on the fact that people generally cannot file federal lawsuits on the mere basis of being taxpayers, because such interests are generalized grievances shared by millions of other people.²⁴⁵

The *ASARCO* Court held that standing existed. The Court recognized that the plaintiffs would not have had standing to bring the original action in federal court, due to having a widely shared injury that was not distinct.²⁴⁶ However, it recognized that state courts are not bound by federal standing requirements and possess authority “to render binding judicial decisions” on federal law.²⁴⁷ The Court thus decided that the constitutional standing requirements applied to the first party to invoke federal judicial power, which in this case, was the defendant.²⁴⁸ It concluded that that standing was

239. *Id.*

240. *Id.* at 130.

241. One could also argue that Consumer Watchdog is trying to solve a problem that could more effectively be addressed by Congress. For example, Congress passing a research exemption allowing not-for-profit researchers to utilize patented technology would address Consumer Watchdog’s concerns.

242. Dreyfuss, *supra* note 42, at 295 (citing *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989)).

243. *ASARCO*, 490 U.S. at 611.

244. *Id.* at 612.

245. *Id.* at 613.

246. *Id.* at 613–15. Generally, people cannot file federal lawsuits on the mere basis of being taxpayers, because such interests are generalized grievances shared by millions of other people. *Id.*

247. *Id.* at 618.

248. *Id.* at 618–19.

met because the state court's decision posed a threat to the validity of the defendants' mineral leases.²⁴⁹

Consumer Watchdog can be distinguished from *ASARCO* on several grounds. In *ASARCO*, the Supreme Court found it notable that the plaintiffs wanted the state court, not the federal court, to hear the case. By contrast, in *Consumer Watchdog*, the plaintiff was actively trying to have its case heard by a federal court and could not show that it had lost anything concrete due to the PTAB's ruling, as it suffered no direct injury. Furthermore, the *ASARCO* decision was grounded in federalism concerns. The Supreme Court recognized that it had no authority to impose federal standing requirements on a state court that chose to exercise jurisdiction over a federal matter.²⁵⁰ By contrast, no federalism concerns existed in *Consumer Watchdog*, and the plaintiff merely alleged a generalized grievance.²⁵¹

c) Policy Concerns with *Consumer Watchdog*

The problem remains that third party actions represent an imperfect solution to a flawed patent system, providing a mechanism for challenging bad patents when direct competitors refuse to do so.²⁵² The fact that standing does not automatically exist to appeal PTAB decisions poses a problem for the integrity of post-grant challenges. For agency adjudication, an internal level of appeal typically exists before the plaintiff has to appeal to a federal appellate court. For example, in patent proceedings in the International Trade Commission, the plaintiff first litigates before an administrative law judge, whose decision is then reviewed by six Commissioners.²⁵³ For post-grant challenges, however, the Federal Circuit is essentially playing the role of the second level of agency review.²⁵⁴ There are currently 267

249. *Id.*

250. *Id.* at 617 (holding that the Arizona court had the right to disregard federal standing requirements, and maintaining this outcome “properly follow from the allocation of authority in the federal system”).

251. *See* Rinehart, *supra* note 24, at 399 (noting when a third party “alleges a public harm to competition that affects general health and safety,” that such a party “seeks to raise a generalized grievance,” which is generally prohibited).

252. *See* Bernstein, *supra* note 24, at 110–113, 135–36 (discussing how end users are harmed by patents and proposing an expansion of end-user standing as a partial remedy); La Belle, *supra* note 24, at 56, 98–99 (discussing how federal court adjudication “is the primary gatekeeper of patent quality” and maintaining that the Federal Circuit should relax standing requirements).

253. 19 U.S.C. §§ 1330, 1337 (2012).

254. *See* John M. Golden, *Working Without Chevron: The PTO as Prime Mover*, 65 DUKE L.J. 1657, 1678–79 (2016) (observing that after the AIA, the PTO remains “the

Administrative Patent Judges.²⁵⁵ Although the three-judge panels for PTAB decisions should improve the quality of the patent judges' decisions,²⁵⁶ it will be difficult for panels to maintain uniformity with each other. Moreover, out of the thousands of decisions issued by the PTAB and its predecessor, only thirty-five precedential opinions currently exist.²⁵⁷

The Federal Circuit serves an important role in creating consistency in PTAB jurisprudence, and yet, it cannot properly serve that role when the plaintiff lacks standing. Part V makes suggestions for how this problem can be addressed.

V. IMPROVING PTAB REVIEW

Bad patents harm many people—direct competitors who cannot offer competing goods, end users that pay higher prices, scientists who are unable to conduct research, and the general public that misses out on products and services that are never offered. Public challenges to patents provide an imperfect solution by serving as a failsafe when a bad patent gets issued and direct competitors are unwilling or unable to challenge it.

However, the PTAB will occasionally make mistakes, sometimes invalidating a claim that should have been left in place and sometimes finding a claim to be valid that is actually invalid. If the PTAB mistakenly invalidates a valid claim, then the patent holder can appeal to the Federal Circuit. But if the PTAB mistakenly leaves an invalid claim in place, a member of the public will lack constitutional standing and not be able to appeal, leading to an asymmetry.

This Part looks at ways to improve PTAB review and facilitate third-party challenges. Section A observes that Congress can create constitutional standing by adding a *qui tam* provision to post-issuance procedures. Section B suggests that Congress institute a second level of review within the PTAB to improve uniformity and lessen the Federal Circuit's role in reconciling disparate PTAB decisions.

primary, day-to-day authority on the meaning of substantive provisions of the Patent Act.”).

255. See U.S. PATENT & TRADEMARK OFFICE, PATENT PUBLIC ADVISORY COMMITTEE MEETING (2016), https://www.uspto.gov/sites/default/files/documents/PPAC_Transcript_20160818.pdf.

256. See generally Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006) (discussing decision-making for panels of judges).

257. Golden, *supra* note 254, at 1686.

A. CREATING CONSTITUTIONAL STANDING

An unorthodox solution to the problem of constitutional standing lies in qui tam actions, which allow Congress to utilize private citizens to enforce federal law. In a qui tam action, a private party, known as a “relator,” brings an action on behalf of the government.²⁵⁸ If the government’s action succeeds, the private party receives a share of the award. For example, the False Claims Act permits a party to bring a qui tam action alleging fraud on the government.²⁵⁹ As discussed below, parties that bring qui tam actions automatically have standing, making this a possible way for allowing members of the public to appeal an adverse PTAB determination.

1. Overview of Qui Tam Litigation

Qui tam litigation in the United States was adopted from the English legal system, which once relied heavily on qui tam litigation to perform the tasks of the police, government prosecutors, and administrative officials.²⁶⁰ In the eighteenth and nineteenth century, qui tam legislation in England was used for economic regulation, promoting public safety, and protecting the environment.²⁶¹ Although qui tam litigation is no longer used in England,²⁶² four qui tam provisions remain in the United States.²⁶³ The most heavily used provision is under the False Claims Act (FCA); § 3729 of the FCA prohibits people from making fraudulent claims for payment against the government,²⁶⁴ and § 3730 allows private parties to bring an action on behalf of the federal government for a violation of § 3729.²⁶⁵

Qui tam actions were once a part of the Patent Act. Prior to the enactment of the AIA, § 292 of the Patent Act made it unlawful for any person to engage in false patent marking with intent to deceive the public.²⁶⁶

258. See *United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928, 932 (2009) (discussing qui tam actions under the False Claims Act); see also Evan Caminker, Comment, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341 (1989) (providing a detailed overview of qui tam actions).

259. *Eisenstein*, 556 U.S. at 932. For an overview of qui tam litigation in the U.S., see John M. Golden, *Patent Privateers: Private Enforcement’s Historical Survivors*, 26 HARV. J.L. & TECH. 545, 577–84 (2013) (providing an overview of qui tam actions in patent law).

260. J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 566 (2000).

261. *Id.* at 591.

262. *Id.* at 606–08.

263. Richard A. Bales, *A Constitutional Defense of Qui Tam*, 2001 WIS. L. REV. 381, 387–88 (2001).

264. 31 U.S.C. § 3729 (2012).

265. 31 U.S.C. § 3730(a) (2012).

266. 35 U.S.C. § 292(a) (2012).

It included a qui tam provision, allowing any person to sue for false marking and split the proceeds from the suit evenly with the government.²⁶⁷ This provision was controversial for several reasons. Although some scholars and judges argued that false marking is harmful,²⁶⁸ it was expensive for businesses to remove patent numbers from products whenever a patent expired, yet it was very cheap for consumers to verify whether a patent was still valid.²⁶⁹ Moreover, courts struggled with how to calculate an appropriate fine, given that § 292 provided discretion to courts.²⁷⁰ Consequently, the provision was eliminated under the AIA in late 2011.²⁷¹

2. *Standing in Qui Tam Litigation*

What is notable about qui tam litigation is the fact that plaintiffs who bring such suits automatically have standing. The Supreme Court has held that under the False Claims Act that the Government's partial assignment of damages, coupled with its injury in fact, confers standing to a third party bringing a qui tam action.²⁷² The Court noted that there was a long tradition in England and the American Colonies of permitting such suits, indicating that they were in the category of "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process."²⁷³ The same reasoning applies to other statutes that provide a monetary reward to the plaintiff.

267. *Id.*

268. See Elizabeth I. Winston, *The Flawed Nature of the False Marking Statute*, 77 TENN. L. REV. 111, 132–34 (2009) (maintaining that false marking is harmful to consumers due to the erroneous belief that patented products are somehow superior to unpatented counterparts, and arguing that the government has a broad interest in preventing deceit); *Clontech Lab., Inc. v. Invitrogen Corp.*, 406 F.3d 1347, 1356–57, n.6 (Fed. Cir. 2005) (“[T]he act of false marking misleads the public into believing that a patentee controls the article in question (as well as like articles), externalizes the risk of error in the determination, placing it on the public rather than the manufacturer or seller of the article, and increases the cost to the public of ascertaining whether a patentee in fact controls the intellectual property embodied in an article.”).

269. See Thomas F. Cotter, *Optimal Fines for False Patent Marking*, 17 MICH. TELECOMM. & TECH. L. REV. 181, 185–87 (2010) (discussing the costs associated with § 292).

270. *Id.* at 188 (discussing the wide range of approaches to fining violators under § 292).

271. See David Kwok, *Determining Standing and Damages for “Competitive Injury” from False Patent Marks*, 17 VA. J.L. & TECH. 171, 175 (2012) (discussing how the AIA eliminated the qui tam provision and allows only the United States and parties that suffer “competitive injury” to sue).

272. *Vt. Agency of Nat. Res. v. United States ex rel. Steven*, 529 U.S. 765, 773 (1999).

273. *Id.* (quoting *Steel Co. v. Citizens for Better Env’t*, 523 U.S. 83, 102 (1998)).

Likewise, the Federal Circuit has held that plaintiffs who sued under the Patent Act's pre-AIA false marking provision had standing.²⁷⁴ The court noted that by passing legislation prohibiting deceptive mismarking, Congress decided that mismarking is harmful. Given that the government has standing to enforce its own law, a plaintiff bringing a qui tam action "as the government's assignee" would also have standing.²⁷⁵ The court distinguished the case from *Lujan*, where the suit was against the Government and where no party had established injury.²⁷⁶ It further clarified that an injury to the Government's sovereignty arising from violation of its laws is assignable to a third party.²⁷⁷

3. *Qui Tam and Administrative Patent Challenges*

Congress has already acknowledged that the issuance of bad patents is harmful. If it wishes to empower members of the public to challenge patents in the PTAB and allow them to appeal adverse decisions to the Federal Circuit, it could create constitutional standing through use of a qui tam provision. Such a provision might say:

(a) Whoever holds patent protection on a claim that that violates §§ 101, 102, 103, or 112 shall be fined \$50 per invalidated claim, not to exceed \$100 per patent.

(b) Any person may institute inter partes review or post grant review under § 311 or § 321 respectively for the penalty, in which event one-half shall go to the person suing and the other to the use of the United States.

The patent holder whose claims are invalidated would have to pay the small fee, with the government and the plaintiff splitting the penalty. Because the government is the real party of interest, the plaintiff should automatically have standing to appeal from the PTAB to the Federal Circuit.²⁷⁸

The introduction of a new qui tam action would no doubt be controversial. General concerns are that qui tam provisions encourage the government to permit suits that it ordinarily would not initiate and that

274. *Stauffer v. Brooks Bros., Inc.*, 619 F.3d 1321, 1325 (Fed. Cir. 2010).

275. *Id.* at 1326.

276. *Id.* at 1325–26.

277. *Id.* at 1326.

278. It is unclear whether there could be a qui tam provision without any fee being paid to the relator. In *Vermont Agency of Natural Resources*, the Supreme Court emphasized the fact that there was a partial assignment of the Government's damages claim. 529 U.S. at 773. But it is unclear that a damages award is mandatory for qui tam standing.

parties will misuse them for financial gain.²⁷⁹ Although public prosecutors can exercise judgment in deciding which conduct to challenge, there is a concern that financially-motivated relators will ignore the public welfare in filing qui tam suits.²⁸⁰

However, many of the common problems with qui tam litigation can be avoided. First, PTAB proceedings have built-in safeguards. Typical qui tam actions are filed directly in federal court with a generalist judge. But for post-grant challenges, expert PTAB judges ultimately decide which proceedings can go forward. These judges are more than sufficiently skilled to ensure that the challenging party is not making misrepresentations about prior art. Second, making the financial compensation very low will prevent parties from bringing such challenges solely for financial gain. Congress has explicitly recognized that bad patents pose a threat to the public; a qui tam provision would ensure that members of the public are able to challenge bad patents while allowing the PTAB to block unmeritorious challenges.

B. INTRA-AGENCY APPEALS

The current structure of the PTAB presents challenges for the agency in maintaining uniformity for post-issuance proceedings. Under the AIA, once a PTAB panel has issued an order for an IPR or PGR, the only avenue of appeal is directly to the Federal Circuit. Because there are close to 300 patent judges, the lack of internal appeal makes it difficult for the PTAB to maintain uniformity. The scarcity of precedential opinions from the PTAB further exasperates this problem.

Congress could help promote uniform adjudication by creating a level of appeal inside the PTAB. Such a system could be modeled after the International Trade Commission.²⁸¹ Congress could structure this by having parties appeal adverse PTAB decisions to a group of Commissioners. The

279. See Dayna Bowen Matthew, *The Moral Hazard Problem with Privatization of Public Enforcement: The Case of Pharmaceutical Fraud*, 40 U. MICH. J.L. REFORM 281, 297, 300 (2007) (observing that financially motivated plaintiffs will “pursue cases with poor factual support or pursue flimsy legal theories that establish bad precedent and waste public resources” and maintaining that the qui tam provision of the False Claims Act has led to excessive prosecution that the government alone would not have engaged in).

280. Beck, *supra* note 260, at 611 (observing that a “qui tam statute operates by appealing to the pecuniary interests of informers” and noting that if the “informer’s personal financial interest conflicts with public interests affected by an enforcement action, the public interest typically will be sacrificed”).

281. The ITC has six Commissioners that oversee six administrative law judges (ALJs). The ALJ issues an initial determination, then the Commission has sixty days to review it. The Commission can decline to review it (allowing the ALJ decision to stand), review and adopt it, modify it, or reverse it. Kumar, *supra* note 86, at 537.

Commissioners could then have ninety days to decide whether to accept the decision of the panel or to choose to revisit the case. Any decision issued by the Commissioners could automatically be made precedential. Alternatively, Congress could have PTAB decisions appeal to the PTO Director or to some other agency official.

Having an extra level of appeal would have several advantages. It would allow the PTAB to increase the uniformity by providing it with a mechanism for correcting erroneous decisions, and would reduce dependence on the Federal Circuit to correct errors.²⁸² Congress could then require the Federal Circuit to provide strong deference to PTAB decisions under *Chevron v. Natural Resources Defense Council, Inc.*²⁸³ Several scholars have already argued in favor of applying such deference to PTAB decisions as they currently stand.²⁸⁴ However, the current system has the weakness of depending on the Federal Circuit to unify the law.²⁸⁵ By adding an internal level of appeal, the Federal Circuit would no longer be forced into the role of the de facto head of the PTO. Such an approach could ultimately save costs by shifting the heavy lifting from the Federal Circuit to the PTO and reducing the need for costly Federal Circuit appeals.

VI. CONCLUSION

Members of the public play an important role in the patent system by challenging bad patents. Unlike direct competitors, third parties do not face repercussions from patent holders, nor do they have patents of their own at risk of invalidation. In expanding post-grant challenges under the AIA, Congress recognized that the general public can make a valuable contribution in patent law.

282. Admittedly, a downside of adding an internal appeal is that it would raise the overall cost of litigation. The challenger and patent holder would have to pay extra attorney's fees to cover the cost of the appeal inside the PTAB.

283. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (requiring courts to uphold an agency's reasonable interpretation of its ambiguous organic statute).

284. See Stuart Minor Benjamin & Arti K. Rai, *Administrative Power in the Era of Patent Stare Decisis*, 65 DUKE L.J. 1563, 1582–83 (2016) (arguing that the AIA confers the PTAB with the power to act with the force of law for IPRs, PGRs, and CBMs); Wasserman, *supra* note 12, at 1999, 2005 (arguing that although Congress failed to grant the PTO substantive rulemaking authority under the AIA, that “Congress intended the [PTO’s] post grant review proceedings to be effectuated through formal adjudication,” and thereby granted it power to speak with the force of law).

285. See Golden, *supra* note 254, at 1683.

The doctrine of standing, however, currently impedes meritorious patent challenges. Part of the fault lies with the courts. The Supreme Court has emphasized that the APA's review provision is "generous" and maintained that a "lenient approach" to the zone of interests test is appropriate for "preserving the flexibility" of the APA's judicial review provision.²⁸⁶ The Court has been clear that the test bars suit "only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress authorized that plaintiff to sue."²⁸⁷ Nevertheless, the Federal Circuit has limited the zone of interests test to direct competitors, thereby artificially constraining the class of people that can challenge the PTO's actions. The Supreme Court has shown little interest in intervening.

Although the Federal Circuit deserves blame, Congress is also at fault. In passing the AIA, it created a mechanism for third parties to challenge bad patents, and attempted to provide a path to appealing adverse PTAB decisions in the Federal Circuit. Having an avenue of appeal is important, given that Congress depends on the Federal Circuit to reconcile conflicting PTAB decisions and to generally serve as the de facto head of the PTO. But as the Federal Circuit has correctly observed, public interest groups lack constitutional standing, because they cannot show that they were injured any more than the public at large. This creates an asymmetric system where patent holders can challenge adverse PTAB decisions, but members of the public cannot.

The solution to these problems lies with Congress. One option is for Congress to pass a new *qui tam* provision to create constitutional standing for all PTAB litigants. Such a statutory change would formally recognize that members of the public serve an important role in challenging bad patents that are detrimental to society. Alternatively, Congress could add an internal level of appeal within the PTAB to improve uniformity and provide protection against erroneous decisions from administrative patent judges. These changes would advance Congress's goal of giving third parties greater access to the PTO, while preserving the overall integrity of the patent system.

286. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389 (2014).

287. *Id.* (quoting *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012)).