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Roderick Blevins

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RESURRECTING THE PUBLIC VOICE: THE EXPANSION OF STANDING IN PATENT LITIGATION

ABSTRACT

The Federal Circuit's dismissal of Consumer Watchdog's appeal in 2014 illustrates a systemic shortcoming of standing in patent law. More specifically, the current implementation of the federal standing doctrine in patent litigation prevents public interest organizations from litigating the validity of patents. This shortcoming appears in spite of the fact that the patent system exists as a public endorsement of a private right in exchange for a purported social contribution on the part of the inventor and her invention.

Instead of constructing an ill-fated legislative solution, this Comment suggests that the shortcoming may be overcome through action at the Patent Office. More specifically, the Patent Office, in promulgating rules relating to its internal operation, may establish a committee to recognize certain public interest organizations for membership in a special program. That program would offer those select organizations—chosen on the basis of meritorious criteria and for a limited term—the opportunity to submit themselves to monetary penalty upon losing an inter partes reexamination. The monetary loss then constitutes an injury in fact, the baseline requirement for appeal from administrative action.

Indeed, this proposal not only meets the reduced requirements of an appeal from the agency but also arguably fulfills all the constitutional, prudential, and policy considerations inherent in the federal standing doctrine. Thus, this Comment proposes an immediately viable method for resurrecting the public voice in patent litigation, further allowing the public to speak out regarding its will in social and technological development.

INTRODUCTION

In 2013, Consumer Watchdog, “a nonprofit organization dedicated to providing an effective voice for taxpayers and consumers,”¹ challenged a patent sought by the Wisconsin Alumni Research Foundation (WARF) through *inter partes* reexamination² at the U.S. Patent and Trademark Office (PTO).³ Despite its interference, the PTO ruled in favor of WARF and granted the patent, a ruling which Consumer Watchdog appealed to the Court of Appeals for the Federal Circuit.⁴

The injury cited by Consumer Watchdog changed during the course of litigation. The patent itself involved developments surrounding embryonic stem cell research, so initially Consumer Watchdog was primarily concerned that “the ‘913 patent allowed WARF to completely preempt all uses of human embryonic stem cells, particularly those for scientific and medical research.”⁵ In its appeal, though, Consumer Watchdog cited “a severe burden on taxpayer-funded research in the State of California where [Consumer Watchdog] is located.”⁶ Finally, in the course of pretrial filings, the organization decided that its injury flowed from being barred from further *inter partes* reexaminations as a result of the Board of Patent Appeals and Interferences’ (BPAI) ruling.⁷

Addressing Consumer Watchdog’s assertion, the Federal Circuit quickly decided that this final cited injury was inadequate to establish Article III standing:

¹ *About*, CONSUMER WATCHDOG, <http://www.consumerwatchdog.org/about> (last visited Nov. 10, 2014).

² *Inter partes* reexamination permitted third-party interference in the validity of granted patents under the 2006 version of the Patent Act. *See* 35 U.S.C. § 311(a) (2006). In 2012, the America Invents Act (AIA) replaced this provision with a mechanism called *inter partes* review, a more liberalized version of *inter partes* reexamination established by the old Act. *See* 35 U.S.C. §§ 311–318 (2012); JANICE M. MUELLER, *PATENT LAW* 433 (4th ed. 2013). In this Comment, though, both provisions will be discussed as *inter partes* reexamination for simplicity.

³ *Found. for Taxpayer & Consumer Rights v. Patent of Wis. Alumni Research Found.*, No. 2012-011693, 2013 WL 5397843 (B.P.A.I. Jan. 22, 2013).

⁴ *Consumer Watchdog v. Wis. Alumni Research Found.*, 753 F.3d 1258, 1260 (Fed. Cir. 2014).

⁵ *Id.*

⁶ *Id.* (alteration in original).

⁷ *See* Brief of Appellant in Response to United States at 3, *Wis. Alumni Research Found.*, 753 F.3d 1258 (No. 2013-1377), 2014 WL 534827 (noting the estoppel from further reexamination and stating that the appeal challenges “the PTO’s specific action of . . . issuing a decision with which CW was dissatisfied in the reexamination”). Please note also that, under the new AIA regime, the BPAI has been renamed the Patent Trial and Appeals Board. *See* 35 U.S.C. § 6(a) (2012). For the purposes of this Comment, though, the moniker BPAI will apply to both.

Consumer Watchdog is not engaged in any activity that would give rise to a possible infringement suit. Nor does Consumer Watchdog provide any indication that it would file another request seeking to cancel claims at the Patent Office. In any event, as Consumer Watchdog only has a general grievance against the '913 patent, the "conjectural or hypothetical" nature of any injury flowing from the estoppel provisions is insufficient to confer standing⁸

This rejection conveys the principles of standing both in patent law and in federal jurisdiction more broadly.⁹ In deciding to dismiss, the Federal Circuit gave no weight to the fact that the plaintiff was a public interest organization, albeit a self-proclaimed one, and simply relied on the fact that Consumer Watchdog did not identify "a particularized, concrete interest in the patentability of the '913 patent, or any injury in fact flowing from the [BPAI]'s decision."¹⁰

Consumer Watchdog's nearly comical carousel of cited injuries constitutes the organization's legitimate attempts to overcome a shortcoming in federal jurisdiction as it relates to patent law. Indeed, *WARF* is the latest in a line of cases demonstrating a growing interest on the part of public interest organizations in patent litigation.¹¹ This trend should both please and benefit the public for reasons aptly demonstrated by a somewhat absurd hypothetical. Consider a circumstance in which a U.S. pharmaceutical company, Pharmacorp, develops a drug that cures every ailment from HIV to gout to stage fright, all with a single oral dose. Naturally trying to capitalize on its miraculous invention, Pharmacorp applies for a patent and intends to charge over \$1,000,000 per dose. The public has a vested interest in access to this miracle drug, but at such an immense price, the availability of its benefits will be severely limited until the patent term expires. As a result, a public interest organization may choose to challenge the validity of the patent, first at the PTO and, if unsuccessful there, in federal court.

As demonstrated in *WARF*, no such appeal would be available to a public interest organization, the *inter partes* challenge of which fell short. In patent

⁸ *Wis. Alumni Research Found.*, 753 F.3d at 1262–63.

⁹ *See infra* Part II.A.

¹⁰ *Wis. Alumni Research Found.*, 753 F.3d at 1263.

¹¹ *See, e.g.*, *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 (2013) (involving a challenge to the validity of patents relating to medical genetic sequencing techniques originally filed by the ACLU); *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 702 F. Supp. 2d 181, 183 (S.D.N.Y. 2010) (noting the ACLU as representing plaintiffs); *see also* Amelia Smith Rinehart, *Patent Cases and Public Controversies*, 89 NOTRE DAME L. REV. 361, 362 (2013).

law, courts have interpreted the broadly defined federal standing doctrine to practically¹² require infringing activity and threat of suit in order to establish standing.¹³ This narrow interpretation effectively precludes public interest organizations from satisfying the standing requirement in patent cases. In the above hypothetical, no public interest organization engages in the research, development, and production of pharmaceuticals such that it could infringe on Pharmacorp's patents for the purposes of federal standing. Such organizations currently try to avoid the standing issue by encouraging companies in the same industry to bring suits and thereafter join those suits.¹⁴ However, most companies have a very strong incentive to forgo such challenges. Consider DrugCo, a competitor of Pharmacorp, challenging the patentability of the miracle drug based on the argument that the drug's immense social benefit somehow takes it beyond the realm of patentable subject matter. This social-benefit argument would likely spell trouble for DrugCo's own patents. Companies may actively shirk socially beneficial challenges to patents because of this risk. As a result, public interest organizations, and transitively the public generally, are denied recourse to defend the interests of the populous beyond the walls of the PTO following a loss before the BPAI.¹⁵ Further, due to the above-described corporate self-interest, certain worthwhile patent challenges may be underrepresented as companies try to protect their own patent portfolios, weakening the patent system as a whole.

This Comment proposes a system whereby the PTO may resurrect the public voice in patent litigation by expanding standing to include public

¹² This "practically" modifier is in place because the Court's decision in *MedImmune, Inc. v. Genentech, Inc.*, though dealing primarily with declaratory judgment jurisdiction, theoretically broadened the standing doctrine in patent law. 549 U.S. 118 (2007). In practice, however, the *MedImmune* test has been applied almost identically to the old test mentioned here. See *infra* note 21 and accompanying text.

¹³ MUELLER, *supra* note 2, at 601. Part I.A below covers the current application of the standing doctrine in patent litigation in greater detail.

¹⁴ Rinehart, *supra* note 11, at 362.

¹⁵ Statistics showing the relative success of *inter partes* reexaminations versus *ex parte* reexaminations demonstrate the importance of an adversarial system in challenging patent validity. Roger Shang, *Inter Partes Reexamination and Improving Patent Quality*, 7 NW. J. TECH. & INTELL. PROP. 185, 192 (2009) (showing a "59% all-cancellation rate [of patent claims through *inter partes* reexamination as] compared [to] the 10% all-cancellation rate of *ex parte* reexamination"). Shortcomings persist even in the adversarial *inter partes* system, though—most notably, for the purposes of this Comment, in the limited permissible grounds of reexamination. Paul Morgan & Bruce Stoner, *Reexamination vs. Litigation: Making Intelligent Decisions in Challenging Patent Validity*, 86 J. PAT. & TRADEMARK OFF. SOC'Y 441, 455 (2004) (noting that challenges are limited to those based on prior art); see also Damon C. Andrews, *Why Patentees Litigate*, 12 COLUM. SCI. & TECH. L. REV. 219, 236 (2011) ("Additionally, there is no opportunity for defendants to cross-examine and depose inventors during *inter partes* reexamination, . . . [so] they must rely solely on written documents to invalidate a patent.").

interest organizations. To do so, the PTO should recognize a handful¹⁶ of public interest organizations that may voluntarily subject themselves to potential monetary injury by challenging patents through *inter partes* reexamination. The monetary injury flowing from a failed challenge would confer standing to challenge the ruling of the BPAI—as opposed to directly challenging the validity of the patent itself—allowing the issue of validity to be transitively litigated once more.¹⁷ Part I of this Comment introduces the current application of the standing doctrine in challenging patents and discusses the underlying policies of patent law. In so doing, Part I introduces the shortcomings of the current standing doctrine and identifies the pillars of patent law principles on which any modifications to the current doctrine must be constructed. Part II then explores the legal frameworks implicated in such a proposal, namely federal standing doctrine and issues in administrative law relating to the expansion of the PTO’s capabilities. Part III outlines the proposed system in detail and discusses its potential implications with respect to the underlying concerns of federal standing and patent law. This Comment then concludes by discussing the viability of this proposal, its potential impact on the patent system, and its societal effects.

I. PATENT LAW, STANDING, AND THE NEED FOR CHANGE

This Comment presents a proposal for creating standing in patent litigation specifically for public interest organizations. While the proposal does not implicate a change to patent law *per se*, a discussion of some basic principles of patent law will help facilitate an understanding of the motivation and significance of the proposed change. This Part provides the necessary background for such an understanding. First, section A explains the current application of the standing doctrine in patent law, emphasizing the lack of standing afforded to public interest organizations. Then, section B explores the role of public interest in patent law and its underlying policy to lend further

¹⁶ This limitation is not arbitrary; it honors federal standing policy by limiting the workload of the courts to ensure they hear meaningful disputes. *See infra* Part II.A.4. The notion of a “handful” is discussed more specifically below. *See infra* Part III.A (discussing organizations to which opportunities to participate will be offered).

¹⁷ This Comment focuses on the procedural standing to litigate and not on the substantive grounds on which a patent may be challenged. For the sake of space, then, neither the law relating to patentability nor the potential grounds for a claim of invalidity in the public interest context are explored in this Comment in any depth. However, only certain challenges to patent validity are available through *inter partes* review, which serves to limit the increase in litigation that would come as a result of this proposal. *See infra* Part III.B.I.

strength to the argument—first for change generally and second for the worthiness of the specific change proposed herein.

A. Limited Standing in Current Patent Litigation

This Comment sets out to establish standing for public interest organizations to challenge the validity of patents in federal court. Generally speaking, plaintiffs in patent law seek declaratory judgments in such challenges, so the present discussion of standing in patent law will be limited to standing relating to patent cases seeking declaratory judgments. In these cases, the relevant precedent largely flows from decisions of the Court of Appeals for the Federal Circuit.¹⁸

The Federal Circuit initially narrowed the broad federal standing doctrine to a single, two-part test of justiciability in cases seeking declaratory judgments of patent invalidity. Plaintiffs had standing to seek declaratory judgments of invalidity when the following two conditions were met: (1) the plaintiff reasonably believed that she was under immediate threat of suit, and (2) she was engaging in or taking steps towards the activity which created the basis for that potential infringement suit.¹⁹ Simplified, the Federal Circuit required *both* that a plaintiff alleging invalidity was either practicing a patent or intending to do so such that she could be sued for patent infringement *and* that the plaintiff believed that such an infringement suit was imminent.²⁰ For instance, in *Teva Pharmaceuticals USA, Inc. v. Pfizer, Inc.*, the Federal Circuit affirmed that Teva, while engaging in activity that may constitute infringement, failed to show that its company was under sufficient threat of litigation from Pfizer to confer standing.²¹

The Supreme Court expanded the notion of standing in challenging patent validity in *MedImmune, Inc. v. Genentech, Inc.*²² In *MedImmune*, the plaintiff argued that it was coerced into continued payment of royalties by a fear of

¹⁸ The Federal Circuit hears all appeals from rulings of the BPAI and from trials involving patent law in federal district court. MUELLER, *supra* note 2, at 40. Thus, much of the interpretation and court-made additions to patent law have come from the Federal Circuit. *Id.* at 40–41.

¹⁹ *Id.* at 601; *Teva Pharms. USA, Inc. v. Pfizer, Inc.*, 395 F.3d 1324, 1330 (Fed. Cir. 2005) (citing *Amana Refrigeration, Inc. v. Quadlux, Inc.*, 172 F.3d 852, 855 (Fed. Cir. 1999)).

²⁰ *Teva*, 395 F.3d at 1333 (“In order for this case to be one fit for judicial review, Teva must be able to demonstrate that it has a reasonable apprehension of *imminent* suit.”).

²¹ *Id.* at 1338.

²² 549 U.S. 118 (2007).

infringement litigation.²³ The Court determined that this injury conferred standing upon the plaintiff, holding that the Federal Circuit’s two-part test was too narrowly construed.²⁴ More specifically, the Court found that the two-part test contravened other Supreme Court precedent and should thus be eliminated.²⁵ In its stead, the Court applied what can be called the “all the circumstances” test, whereby “the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy . . . of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.”²⁶ Accordingly the Federal Circuit has since adjudged the case-or-controversy requirement of standing by replacing the old two-part test with the “all the circumstances” test from the *MedImmune* decision.²⁷ Despite the apparent added leniency in the new test, though, courts have applied the new test in practically identical ways to that of the old two-prong “reasonable apprehension of imminent suit” from *Teva* and others.²⁸

As a result, public interest organizations still lack the capacity to meet the court-made test for standing in patent litigation, even in the wake of the illusory loosening in *MedImmune*. As highlighted in *WARF*, public interest organizations generally do not engage in the production of goods such that they could reasonably infringe on the patents they may wish to challenge.²⁹ As a consequence, neither do the companies—the patents of which these public interest organizations wish to challenge—have any reason to consider bringing suit against them. Public interest organizations, then, find themselves

²³ *Id.* at 122.

²⁴ *Id.* at 132 n.11.

²⁵ *Id.*; see also *Teva Pharms. USA, Inc. v. Novartis Pharms. Corp.*, 482 F.3d 1330, 1339 (2007) (confirming that the Supreme Court had overruled the “reasonable apprehension of imminent suit” test in its *MedImmune* decision).

²⁶ *MedImmune*, 549 U.S. at 127 (quoting *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

²⁷ MUELLER, *supra* note 2, at 604; see, e.g., *Novartis*, 482 F.3d at 1339. Article III requirements of a justiciable case or controversy are discussed more generally in Part II.A.1 of this Comment.

²⁸ Rinehart, *supra* note 11, at 364. Rinehart notes that courts have been reluctant to recognize atypical bases for standing beyond what would have already been adequate to confer standing under the pre-*MedImmune* doctrine. *Id.*; see, e.g., *Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329 (Fed. Cir. 2008). Some decisions have gone so far as to apply something very near to the old test as a reflection of the new, requiring “a showing of affirmative acts from the patentee indicating an intention to enforce his patent and affirmative acts from the declaratory plaintiff indicating that she is ‘ready, willing and able’ to infringe the patents” in order to confer standing. Rinehart, *supra* note 11, at 364 (quoting *Arris Group, Inc. v. British Telecomms. PLC*, 639 F.3d 1368, 1374 (Fed. Cir. 2011)).

²⁹ See, e.g., *Consumer Watchdog v. Wis. Alumni Research Found.*, 753 F.3d 1258, 1262 (Fed. Cir. 2014) (noting that “Consumer Watchdog [was] not engaged in any activity that would give rise to a possible infringement suit”).

marooned on an island of valid public concern with no ship of standing by which they can reach a forum to challenge patent activity.

While this conundrum may appear vexing, the procedural differences between cases like *MedImmune* and those like *WARF* yield the key to constructing the standing that public interest organizations need and deserve³⁰ to challenge the validity of patents. For instance, many challenges to patent validity, including that which began the *MedImmune* litigation, originate in federal district court.³¹ In contrast, the case in *WARF* came as an appeal from the ruling of the BPAI within the PTO.³² *MedImmune* brought its case pursuant to the Declaratory Judgment Act,³³ which permits such challenges. Consumer Watchdog, on the other hand, brought its case pursuant to 35 U.S.C. § 319,³⁴ which provides for a right to appeal the decisions of the BPAI.³⁵ Appeals of the latter type have relaxed standing requirements which Part II.A explores in greater detail, while the post-*MedImmune* test applies particularly to appeals of the former type.³⁶ In this light, the mention of Consumer Watchdog's lack of infringing activity in *WARF*³⁷ appears to simply be contemplative dicta. Indeed, the court in *WARF* ultimately held that the statutory estoppel provisions springing from the ruling of the BPAI failed to confer standing for appeal upon Consumer Watchdog.³⁸ This focus, along with

³⁰ This Comment is predicated on the notion that public interest organizations accurately reflect and represent the public voice. Thus, these organizations “deserve” the standing to challenge patents transitively through their representation of the public, which itself merits judicial attention given the implicit public endorsement in patents. See *infra* note 48 and accompanying text.

³¹ See, e.g., *MedImmune*, 549 U.S. at 122; see also MUELLER, *supra* note 2, at 42–47 (discussing the role of district courts in patent litigation).

³² Compare *MedImmune*, 549 U.S. at 122, with *Wis. Alumni Research Found.*, 753 F.3d at 1260.

³³ Declaratory Judgment Act, 28 U.S.C. § 2201(a) (2012); *MedImmune*, 549 U.S. at 122.

³⁴ See 35 U.S.C. § 319 (2012) (now providing for a right to appeal to the PTAB); *Wis. Alumni Research Found.*, 753 F.3d at 1260.

³⁵ See 35 U.S.C. § 319 (2012); cf. Administrative Procedure Act, 5 U.S.C. § 702 (2012).

³⁶ See, e.g., *Sandoz, Inc. v. Amgen, Inc.*, 773 F.3d 1274, 1281–82 (Fed. Cir. 2014) (dismissing for lack of standing). The Federal Circuit's entire discussion of standing focused on the likelihood of infringement under the immediacy and reality components of the “all the circumstances” test in *MedImmune, Id.* at 1279–80.

³⁷ See, e.g., *Wis. Alumni Research Found.*, 753 F.3d at 1261 (“Consumer Watchdog does not allege that it is engaged in any activity involving human embryonic stem cells that could form the basis for an infringement claim.”).

³⁸ *Id.* at 1262. In other words, while a showing of infringing activity may have been adequate to establish standing, the Federal Circuit did not rely on the absence thereof in dismissing the case. Rather, the alleged harm was inadequate simply because “[t]he estoppel provisions contained within the inter partes reexamination statute do not constitute an injury in fact for Article III purposes.” *Id.* at 1262. In reaching this conclusion, the Federal Circuit discussed the federal standing doctrine's development generally but never contended that infringing activity, either actual or potential, was *necessary* to establish a case or controversy under Article III. See generally *id.*

the doctrine discussed in Part II below, suggests that appeals from decisions of the BPAI simply have to show an adequate injury flowing from the ruling under the broader federal standing doctrine, which may or may not fulfill the post-*MedImmune* test required under the Declaratory Judgments Act. In short, the distinction drawn between *WARF* and *MedImmune* is one of procedural posture, with administrative appeals carrying less of a burden in demonstrating standing.³⁹

This distinction provides a key opening for creating standing for public interest organizations in the landscape of appeals from administrative rulings. Accordingly, the solution outlined in this Comment is narrowly circumscribed only for cases reaching federal court as appeals from the BPAI. In such circumstances, only the broader federal standing doctrine need be fulfilled—plaintiffs’ cognizable injuries are not limited to those which stem from infringing activity. Part II explores these nuances of the federal standing doctrine in great detail. Regardless, any proposed solution must still observe the principles underlying patent law in order for them to be viable, though, even if that solution avoids implicating the typical standing doctrine for the declaratory judgment cases common in patent law. Part B now explores those principles in particular as they relate to the inclusion of the public voice in patent litigation.

B. The Importance of Public Interest in Patent Law Policy

The U.S. government imbues patent holders with temporary exclusive rights in exchange for the social benefit of the invention’s publication.⁴⁰ These social benefits take many forms. For instance, after its patent term expires, an invention enters the public domain, allowing for its unlimited use and production.⁴¹ Even during the patent term, the publication of the invention allows for its study and further development by other inventors, and the invention itself creates economic stimulation through the sale of a novel product.⁴² Inventors may even design around patent claims to create

³⁹ Part II.A.2 explores the advantages of this distinction and the lowered standing requirements for appeals from administrative action.

⁴⁰ See U.S. CONST. art. I, § 8, cl. 8.

⁴¹ MUELLER, *supra* note 2, at 31.

⁴² *Id.* That said, given the lack of a robust experimental use defense, much of the experimental use discussed here could technically constitute patent infringement. See Timothy R. Holbrook, *Possession in Patent Law*, 59 SMU L. REV. 123, 139–42 (2006).

competition—to society’s economic and technological benefit—without compromising the patent protections themselves.⁴³

Therefore, broadly speaking, the entire system exists “to encourage the promotion of progress to benefit the public as a whole.”⁴⁴ While the patent rights of a patentee must be protected, ideally those protections should only extend to a degree adequate to encourage the continued use of the system and no further.⁴⁵ In other words, the protections tied to a patent are merely the means to the end that is the public good, not another end unto themselves necessarily.⁴⁶ All that is not to say that inventors’ rights are irrelevant; the patent system simply exists first to promote the interests of the public, the users.⁴⁷ Without diving headfirst into the rabbit hole that is the philosophical exploration of benefit and value, the government should certainly be concerned with accommodating the voice of the public in a system designed expressly for its benefit.

Thus, patent law exists as a public protection of a private right created in inventors.⁴⁸ In other words, the *public* transitively provides the patent protections to these inventors through the administrative arm of representative government. Denying the public access to federal courts in contesting what the public is endorsing through the granting of patents begins to resemble the exclusion of shareholders from the right to speak to or influence the activities of a corporation in which they are part owners. The notion is nonsensical.

Thus, the primary end of the patent system and the public endorsement implicated in granted patents both suggest that the public should have a legal recourse to challenge patent validity outside of the PTO. Beyond these principles, recent judicial trends further support the notion that public voice and public interest should have a greater role in patent law. For instance, the

⁴³ Holbrook, *supra* note 42, at 139–42.

⁴⁴ Rinehart, *supra* note 11, at 361 (citing U.S. CONST. art. I, § 8, cl. 8).

⁴⁵ See MUELLER, *supra* note 2, at 31–32.

⁴⁶ *Id.* at 30 (noting that “[p]atents are fundamentally incentive systems”); see also *infra* note 47.

⁴⁷ *Brenner v. Manson*, 383 U.S. 519, 534–35 (1966) (“The basic *quid pro quo* contemplated by the Constitution and the Congress for granting a patent monopoly is the benefit derived by the public from an invention with substantial utility. Unless and until a process is refined and developed to this point—where specific benefit exists in currently available form—there is insufficient justification for permitting an applicant to engross what may prove to be a broad field.”). For an interesting discussion on the *quid pro quo* of patents, see also Sean B. Seymore, *Making Patents Useful*, 98 MINN. L. REV. 1046, 1074 (2014) (noting that “an oft-touted justification for the patent system is that society will get some benefit from the invention’s disclosure”).

⁴⁸ See Rinehart, *supra* note 11, at 361.

MedImmune decision constitutes part of this trend, liberalizing access to patent litigation in theory if not in effect.⁴⁹ Further, the Court's 2006 decision in *eBay Inc. v. MercExchange, LLC*⁵⁰ illustrates a liberalizing trend toward user rights.⁵¹ The Supreme Court in *eBay* decided that the Federal Circuit had been granting injunctions too readily, holding that the four-factor test for equitable relief applies in patent law as much as it does elsewhere.⁵² In the wake of *eBay*, courts grant injunctive relief significantly less frequently, favoring instead the granting of damages in exchange for the continued infringing activity.⁵³ This trend demonstrates that the Court would rather supply a legal remedy in exchange for continued infringing activity rather than enjoin defendants from that activity in accordance with strict patent protections, arguably providing compulsory licenses to infringers.⁵⁴ Indeed, judicial decision-making perceived as anti-patent-troll⁵⁵ can be characterized as promoting user rights in the same vein.⁵⁶

Thus, expanding standing to challenge patents, even by circuitous methods, honors the policy underlying patent law in addition to the current jurisprudential trends therein. Though the proposal offered here does not implicate a change in patent law itself, the concept flows from the principles of the patent system and those displayed in the above judicial decisions.⁵⁷

⁴⁹ See *supra* note 26 and accompanying text.

⁵⁰ 547 U.S. 388 (2006).

⁵¹ Benjamin Petersen, *Injunctive Relief in the Post-eBay World*, 23 BERKELEY TECH. L.J. 193, 197 (2008) (noting that no sources "have cited Justice Roberts' concurrence as authority for upholding strong patent rights").

⁵² 547 U.S. at 393–94.

⁵³ Petersen, *supra* note 51, at 193.

⁵⁴ *Id.* at 209–13.

⁵⁵ Patent assertion entities, or patent trolls, are entities which acquire patents in order to enforce them on users without practicing the patents themselves. See John M. Golden, "Patent Trolls" and Patent Remedies, 85 TEX. L. REV. 2111, 2112 n.7 (2007).

⁵⁶ See, e.g., *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014) (lowering the standard for the award of attorney fees, making it easier for users to litigate to protect their user rights); *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (increasing the specificity requirements of patent claims, largely eliminating ambiguous and broadly enforceable patent claims).

⁵⁷ See *infra* Part III.A (introducing no new substantive grounds on which patents may be challenged). Also noteworthy, the expansion of standing here could help monitor the patent system generally. See *infra* Part III.

II. LEGAL FRAMEWORKS IMPLICATED IN CHANGES TO PATENT-RELATED STANDING

This Comment seeks to provide a basis for broadening standing in patent litigation by expanding the authority of the PTO to allow for special recognition of certain⁵⁸ public interest groups. This remedy implicates two areas of law, namely federal jurisdiction and administrative law. More specifically, the doctrine of standing in federal court is contained within the law of federal jurisdiction,⁵⁹ and its effective amendment requires an understanding both of its application and of its underlying policies. The expansion of the PTO's authority requires an examination of its place in administrative law as a federal agency, and the authority with which it would be empowered may implicate issues of constitutionality. This Part examines each of these legal frameworks in the context of the remedy proposed in this Comment.

A. *The Doctrine of Standing and Its Application*

The doctrine of justiciability controls those cases which federal courts have authority to hear.⁶⁰ Justiciability itself houses nested doctrines which determine the conditions under which a case may be brought—namely standing, ripeness, and mootness.⁶¹ However, the remedy proposed in this Comment is unlikely to lead to a confrontation with ripeness or mootness;⁶² this section will therefore focus on standing and its role in patent law. This section first explains the rules, both constitutional and prudential, governing federal standing and explores the policy implications behind them. Then, this section discusses the mechanisms by which those requirements can be relaxed or waived. Next, this section emphasizes the unwavering injury-in-fact requirement given its fundamental nature to the area of law. Finally, the broader policies of standing

⁵⁸ See *supra* note 16.

⁵⁹ See ERWIN CHERMERINSKY, FEDERAL JURISDICTION § 2.3, at 57 (5th ed. 2007).

⁶⁰ *Consumer Watchdog v. Wis. Alumni Research Found.*, 753 F.3d 1258, 1260 (Fed. Cir. 2014).

⁶¹ *Id.*

⁶² The doctrine of ripeness allows courts to eliminate claims based on overly speculative or otherwise premature injuries. CHERMERINSKY, *supra* note 59, § 2.4.1, at 117 (5th ed. 2007) (stating that “ripeness centers on whether [the claimed] injury has occurred yet”). The entire purpose of the remedy proposed in this Comment, though, is to create a scheme in which injury is generated to grant Article III standing, so ripeness is not of concern here. See *infra* Part III. The doctrine of mootness allows “federal courts to dismiss cases where there no longer is a live controversy.” CHERMERINSKY, *supra* note 59, § 2.1, at 45. However, with the scheme proposed, the injury would persist until remedy is either granted or denied, so the issue of mootness would not arise either. See *infra* Part III.

are explored to ensure that, even where the remedy proposed in this Comment does not abridge legal mechanisms, it does not abridge the doctrines underlying the mechanisms either.

1. *Aspects of Standing in Federal Court*

Article III of the Constitution provides the basis for the doctrine of standing in federal court.⁶³ More specifically, Article III, Section 2, Clause 1 provides that “judicial Power shall extend to all Cases . . . arising under this Constitution . . . [and] Controversies between . . . Citizens of different states.”⁶⁴ Facially, this provision neither addresses the notion of “standing” nor serves to limit the scope of federal adjudication in a very restrictive way. However, federal courts have clarified and limited this scope through judgments and have established certain doctrines to delineate which cases may be heard.⁶⁵ Most prominently, the Supreme Court has stated that “Article III . . . restricts [judicial power] to the . . . [power] to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law.”⁶⁶ This delineation reflects “concern about the proper—and properly limited—role of the courts in a democratic society.”⁶⁷

Federal courts have promulgated multiple doctrines—namely standing, ripeness, and mootness—in observance of this need for limitation.⁶⁸ Specifically, standing requires a plaintiff to “‘allege[] such a personal stake in the outcome of the controversy’ as to warrant his [or her] invocation of federal-court jurisdiction and to justify exercise of the court’s remedial powers on his [or her] behalf.”⁶⁹ Plaintiffs bear the burden of demonstrating standing⁷⁰ by satisfying three key requirements described in *Lujan v. Defenders of Wildlife*⁷¹:

⁶³ See CHEMERINSKY, *supra* note 59, § 2.1, at 45 (citing Article III as the basis for the doctrine of standing).

⁶⁴ U.S. CONST. art. III, § 2, cl. 1.

⁶⁵ *Wis. Alumni Research Found.*, 753 F.3d at 1260.

⁶⁶ *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009).

⁶⁷ *Id.* at 492–93 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

⁶⁸ *Summers*, 555 U.S. at 493 (“The doctrine of standing is one of several doctrines that reflect this fundamental limitation.”); *Wis. Alumni Research Found.*, 753 F.3d at 1260 (“These doctrines—including standing, ripeness, and mootness—distinguish justiciable cases from those that are not.”).

⁶⁹ *Warth*, 422 U.S. at 498–99 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)).

⁷⁰ *Summers*, 555 U.S. at 493.

⁷¹ 504 U.S. 555, 560–61 (1992).

First, the party must show that it has suffered an “injury in fact” that is both concrete and particularized, and actual or imminent (as opposed to conjectural or hypothetical). *Second*, it must show that the injury is fairly traceable to the challenged action. *Third*, the party must show that it is likely, rather than merely speculative, that a favorable judicial decision will redress the injury.⁷²

These three requirements apply equally to cases on appeal and to cases on trial.⁷³

Because the PTO is an administrative agency, though, appeals to the Federal Circuit from the BPAI do not originate in the district courts. While neither the patent statute nor the APA—which governs the standard of review for patent appeals—expressly includes standing requirements in its language enabling judicial review,⁷⁴ the need for standing also applies to cases that are appealed from rulings of administrative agencies.⁷⁵ This need persists despite the fact that an appearance before an administrative agency does not require such standing.⁷⁶ Indeed, “Once a party seeks review in a federal court, ‘the constitutional requirement that it have standing kicks in.’”⁷⁷ Thus, parties who contest administrative proceedings within the agency must satisfy the requirements of standing to appeal or contest any agency rulings in federal court.

Courts have traditionally applied further prudential requirements inherent to standing in addition to its constitutional elements.⁷⁸ Primary examples of these prudential requirements include the following: a claim on the basis of an

⁷² *Wis. Alumni Research Found.*, 753 F.3d at 1260–61 (emphasis added) (citing *Lujan*, 504 U.S. at 560–61); see also *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (applying *Lujan* but separating “concrete and particularized” from “actual or imminent” as subparts of the “injury in fact” requirement).

⁷³ *Id.* at 1261 (citing *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013)).

⁷⁴ See 5 U.S.C. § 702 (2012) (“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.”); 35 U.S.C. § 319 (“A party dissatisfied with the final written decision of the Patent Trial and Appeal Board under section 318(a) may appeal the decision pursuant to sections 141 through 144. Any party to the inter partes review shall have the right to be a party to the appeal.”). But see 5 U.S.C. § 702 (“Nothing herein . . . affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground . . .”).

⁷⁵ *Wis. Alumni Research Found.*, 753 F.3d at 1261 (citing *Sierra Club v. EPA*, 292 F.3d 895, 899 (D.C. Cir. 2002)); see also *supra* note 74.

⁷⁶ *Wis. Alumni Research Found.*, 753 F.3d at 1261.

⁷⁷ *Id.* (quoting *Sierra Club*, 292 F.3d at 899).

⁷⁸ See *id.* (mentioning that “prudential aspects that are not part of Article III . . . may be relaxed” under certain conditions).

alleged violation of a statutory or constitutional provision must be within the “zone of interests of the challenged provision”; grievances asserted must be particular not generalized or shared by many people; and plaintiffs may not bring suit to protect the interests of third parties.⁷⁹ These prudential requirements are discussed in turn below. The prudential considerations differ from their constitutional counterparts above only on the basis of their sources—namely federal jurisprudence and the Constitution, respectively.⁸⁰ In application, however, these prudential requirements may be reduced under certain circumstances, discussed below.⁸¹ Regardless of their rigidity, a proposed change to the standing doctrine naturally gains strength by honoring these prudential requirements.

The first of these prudential requirements, the zone-of-interests test, also happens to be the haziest in application. As a rule, the zone-of-interests test simply requires that a person bringing suit on the basis of statutory infringement show that he or she is within the zone of interests protected by the relevant statute.⁸² The Court articulated this requirement in *Ass’n of Data Processing Service Organizations v. Camp*,⁸³ noting the need to determine “whether the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question,”⁸⁴ thus expanding the prudential requirement to include cases brought on constitutional bases. In *Data Processing*, the plaintiffs originally brought suit against the Comptroller of Currency and American National Bank & Trust Company, alleging that the Comptroller’s grant of permission to banks to engage in data processing services—and American National Bank’s preparation to do so—violated protections afforded to them by Bank Service

⁷⁹ Rinehart, *supra* note 11, at 369 (citing *Bennett v. Spear*, 520 U.S. 154, 162 (1997)). These requirements have been called into question by the Supreme Court’s recent decision in *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386–88 (2014). The Supreme Court in *Lexmark* seems to have eliminated prudential grounds for denying standing by retroactively labeling earlier decisions on those bases as actually standing on the constitutional requirement of a justiciable case or controversy. *Id.* However, the exact future of prudential requirements is unclear; in any event, the solution outlined in this Comment avoids their concerns, regardless of their continued existence. For further discussion of *Lexmark* and prudential standing requirements, please see *infra* notes 127–37 and accompanying text.

⁸⁰ See CHEMERINSKY, *supra* note 59, § 2.3.4, at 84.

⁸¹ See *infra* Part II.A.2.

⁸² CHEMERINSKY, *supra* note 59, § 2.3.6, at 100.

⁸³ 397 U.S. 150 (1970).

⁸⁴ *Id.* at 153.

Corporation Act of 1962.⁸⁵ In applying the zone-of-interests test, the Court decided that the limitations in the Bank Service Corporation Act⁸⁶ implicitly afforded potential competitors protection from actions that exceed that permitted realm.⁸⁷ Thus, protections may be construed even where a statute neither directly applies to the complaining party nor expressly provides protections therefor.⁸⁸

As *Data Processing* partly illustrates, this zone-of-interests test and its application have created several concerns and issues. Most prominently, the doctrine has been applied very inconsistently.⁸⁹ At times, the Court has applied the test in a relatively harmless fashion, stating that “[t]he test is not meant to be especially demanding.”⁹⁰ In other cases the Court has used the test as the hammer of federal justiciability to dismiss.⁹¹ The general rule in scholarship is that the zone-of-interests test applies only in cases seeking judicial review of agency actions.⁹² However, the Federal Circuit in *WARF* stated clearly that in appealing from administrative proceedings these prudential requirements—including this zone-of-interests test—may be relaxed.⁹³ Accordingly, plaintiffs are left with a test that seems as likely to depend on the feelings of the

⁸⁵ *Id.* at 151, 155. Plaintiffs also alleged that the Comptroller’s action violated National Bank Act in being outside the scope of its permitted action, but the Court chose not to discuss that particular statute or its relevance. *Id.* at 157–58.

⁸⁶ 12 U.S.C. § 1864 (1976) (“No bank service corporation may engage in any activity other than the performance of bank services for banks.”).

⁸⁷ *Data Processing*, 397 U.S. at 156. The Court goes on to discuss that nothing in the Bank Service Corporation Act or the National Bank Act precluded judicial review of Comptroller decisions, permitting the court to hear the case and completing the construction of standing for the plaintiff-petitioners. *Id.* at 157. For a presentation of the statutory basis for the judicial review of administrative decisions, see *supra* note 74.

⁸⁸ See *Data Processing*, 397 U.S. at 155–56.

⁸⁹ CHEMERINSKY, *supra* note 59, § 2.3.6, at 103–05; see also *Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479 (1998) (“[O]ur prior cases have not stated a clear rule for determining when a plaintiff’s interest is ‘arguably within the zone of interests’ to be protected by a statute”); *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 396 (1987) (“The ‘zone of interest’ formula in *Data Processing* has not proved self-explanatory”).

⁹⁰ *Clarke*, 497 U.S. at 400; see also *Nat’l Credit Union Admin.*, 522 U.S. at 499 (finding that “[r]espondent’s interest in limiting the markets that credit unions can serve is ‘arguably within the zone of interests to be protected’” despite the fact that Congress did not intend for such protections to be afforded under the statute).

⁹¹ See, e.g., *Air Courier Conference of Am. v. Am. Postal Workers Union AFL-CIO*, 498 U.S. 517, 530 (1991) (declining to consider the Postal Workers Union to be under the protection of the Private Express Statutes).

⁹² CHEMERINSKY, *supra* note 59, § 2.3.6, at 105. This belief stems from discussion in *Clarke* where the Court refers to the test as a “gloss” on the APA’s discussion of right to judicial review. *Clarke*, 497 U.S. at 400 n.16.

⁹³ See *Consumer Watchdog v. Wis. Alumni Research Found.*, 753 F.3d 1258, 1261 (Fed. Cir. 2014).

particular judges or justices hearing the case as on any objective circumstances—along with the knowledge that the test may be left out altogether.

In addition to the zone-of-interests test, courts also applied the presumption against generalized grievances as a prudential requirement in evaluating standing. The specific generalized grievances to which this doctrine refers are those in which the harm allegedly suffered is incurred simply in the course of being a concerned citizen and taxpayer.⁹⁴ This requirement, among others, prevents any concerned citizen from bringing suit against a patent holder whose patent the citizen considers invalid or unethical.⁹⁵ However, the doctrine does not preclude citizens from bringing suit simply because an injury is suffered by many in the course of citizenship; for instance, constitutional claims alleging government infringement of the litigant’s specific constitutional rights are not subject to the presumption against generalized grievances.⁹⁶ Instead, the doctrine seeks to exclude the citizen who, alleging no injury to a specific constitutional right, “claims an interest only as a taxpayer or a citizen in having the government follow the law.”⁹⁷

While the remedy proposed in this Comment avoids the generalized-grievance concern altogether, the policy underlying its application must be examined to ensure that, while there are no mechanical inconsistencies in a new system, no doctrinal inconsistencies exist either. The Supreme Court’s stance on this subject has evolved over time, and as a result the issue has been the subject of a fair amount of discussion. Early cases on the subject denied standing for claims which were deemed “comparatively minute and indeterminable”⁹⁸ or “merely [of] a general interest common to all members of

⁹⁴ CHEMERINSKY, *supra* note 59, § 2.3.5, at 91. Interestingly, Chemerinsky views the decision in *Lujan* as positing that this requirement is actually constitutional rather than prudential. *Id.* at 91 n.163. *Contra* *Flast v. Cohen*, 392 U.S. 83, 120 (1968) (Harlan, J., dissenting) (“[I]t is, nonetheless, clear that [such] plaintiffs . . . are not *constitutionally* excluded from the federal courts. The problem . . . is . . . to determine in what circumstances, consonant with the character and proper functioning of the federal courts, such suits should be permitted.”).

⁹⁵ *See Wis. Alumni Research Found.*, 753 F.3d at 1263 (refusing to recognize standing where “Consumer Watchdog only ha[d] a general grievance against the ‘913 patent”); CHEMERINSKY, *supra* note 59, § 2.3.5, at 91.

⁹⁶ CHEMERINSKY, *supra* note 59, § 2.3.5, at 91–92.

⁹⁷ *Id.*

⁹⁸ *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923) (denying standing to a citizen alleging harm as a result of a Maternity Act despite being a US citizen and taxpayer).

the public.”⁹⁹ The Court in *Frothingham v. Mellon* cited the “remote, fluctuating and uncertain” likelihood of harm to come from future government expenditure,¹⁰⁰ but the Court’s concern seems to be essentially one of numbers.¹⁰¹ After all, providing legal recourse in federal court for trivial injury suffered by millions of citizens would crush the efficacy of the court system.¹⁰²

The Supreme Court’s decision in *Flast v. Cohen* represented a departure from this doctrine. In *Flast*, the plaintiff was granted standing as a taxpayer alleging that appropriations for purchase of textbooks and school supplies for parochial schools violated the Establishment Clause of the First Amendment.¹⁰³ In revisiting the presumption against generalized grievances, the Court established a two-part nexus, which must be shown for cases that find their foundational injury in a citizen’s status as a taxpayer: “First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged.”¹⁰⁴ The first requirement essentially dictates that the harm must have occurred through a congressional action taken pursuant to “the taxing and spending clause of Art. 1, § 8, of the Constitution.”¹⁰⁵ Then, the second requirement establishes that a plaintiff must indicate an exact constitutional limitation on the taxing and spending power which has been exceeded by the action; merely showing that Congress has exceeded its constitutionally delegated powers would not be adequate for standing.¹⁰⁶ This second component distinguished *Flast* from *Frothingham* in the eyes of the Court because the Tenth Amendment is not a limitation on congressional spending in the same sense as the First Amendment is.¹⁰⁷ While its holding was narrow, *Flast*’s greatest significance is found simply in its willingness to consider certain generalized harms as conferring standing.

⁹⁹ *Ex parte Levitt*, 302 U.S. 633, 634 (1937) (denying standing claimed on the basis of injury stemming from citizenship and from membership in the state bar).

¹⁰⁰ 262 U.S. at 487.

¹⁰¹ *Flast v. Cohen*, 392 U.S. 83, 83 (1968) (noting that the plaintiff in *Frothingham* was denied standing “not because she was a taxpayer but because her tax bill was not large enough. . . . [E]ntertaining that taxpayer’s suit . . . might [have] open[ed] the door of federal courts to countless such suits”).

¹⁰² For a discussion of preventing the overrun of federal courts as a central policy in the standing doctrine, see *infra* note 209 and accompanying text.

¹⁰³ *Flast*, 392 U.S. at 87–88.

¹⁰⁴ *Id.* at 102.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 102–03.

¹⁰⁷ CHEMERINSKY, *supra* note 59, § 2.3.5, at 94.

Flast ultimately created only a small exception to an otherwise steadfast rule, not a window for other allowances to be made. Through a series of subsequent decisions¹⁰⁸ the Supreme Court ultimately isolated one type of circumstance as a cognizable exception to the rule against generalized grievances: situations in which the government's use of its spending power is alleged to have violated the Establishment Clause.¹⁰⁹ As discussed below, part of the motivation behind this restrictive view certainly aims to avoid crushing the courts with innumerable inconsequential cases.¹¹⁰ However, this policy also found part of its basis in separation of powers concerns. In *Frothingham*, the Court noted that the presumption against generalized grievances prevents judicial overreach.¹¹¹ In *Flast*, the Court recognized that Article III "define[s] the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government," with justiciability existing as a check on any such potential intrusion.¹¹² In *United States v. Richardson*, the Court pointed to the democratic nature of the U.S. government as the mechanism by which the accountability sought could be obtained, implying that asking the Court to police the rest of the government exceeded its mandate.¹¹³ In all of these cases, these concerns arise as reasons to observe limitations on standing, particularly in the realm of generalized grievances.¹¹⁴ As a result, the underlying policy

¹⁰⁸ See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464 (1982) (denying standing despite an Establishment Clause claim given that the action contested was an exercise of the use of government property, not an exercise of the spending power); *United States v. Richardson*, 418 U.S. 166 (1974) (denying standing for plaintiff seeking CIA expenditure list as not being an action under the spending power); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974) (denying standing to plaintiff challenging Executive Branch action for not challenging a spending-power action under Article I, Section 8).

¹⁰⁹ CHEMERINSKY, *supra* note 59, § 2.3.5, at 96.

¹¹⁰ See *infra* Part II.A.4, note 209 and accompanying text.

¹¹¹ *Frothingham v. Mellon*, 262 U.S. 447, 488–89 (1923) (“[Adjudicating generalized grievances] would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly [courts] do not possess.”).

¹¹² 392 U.S. 83, 95 (1968).

¹¹³ 418 U.S. at 179 (“Lack of standing within the narrow confines of Art. III jurisdiction does not impair the right to assert [one’s] views in the political forum or at the polls.”).

¹¹⁴ See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 474 (1982) (“Proper regard for the complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury.”); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974) (“To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role

implications of this prudential rule are twofold: the practical concern for the efficacy of the courts and the principled concern over separation of powers. While this particular requirement—that grievances not be generalized—may not arise in the scheme proposed by this Comment, any new system should honor these underlying policies to withstand the scrutiny both of lawmakers and eventually of the judiciary.

After considering the presumption against generalized grievances, courts then applied the limitation on third-party standing, the third prudential consideration in making standing determinations. The Supreme Court recognized this limitation in *Warth v. Seldin* by stating that “even when the plaintiff has alleged injury sufficient to meet the ‘case or controversy’ requirement, this Court has held that the plaintiff 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.”¹¹⁵ This rule serves two purposes: first, it prevents third parties from litigating issues which the persons of primary interest have no interest in litigating; and second, it leads to higher quality litigation and adjudication by involving primarily concerned parties.¹¹⁶

Despite its appearance as a bright-line rule, three major exceptions have been promulgated in response to this prudential consideration. Two of these exceptions have little bearing on the problem at hand. The first involves situations in which there exists a close relationship between the plaintiff and the third party,¹¹⁷ and the second deals with the overbreadth doctrine, which “permits a person to challenge a statute on the ground that it violates the First Amendment rights of third parties not before the court, even though the law is constitutional as applied to that defendant.”¹¹⁸ For reasons apparent, neither of these exceptions is particularly relevant to the expansion of standing in patent litigation as proposed in this Comment.

The third exception, however, is of great importance to this Comment and arises when a third party whose interests are represented is likely unable to sue.

of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing ‘government by injunction.’”).

¹¹⁵ 422 U.S. 490, 499 (1975).

¹¹⁶ CHEMERINSKY, *supra* note 59, § 2.3.4, at 84.

¹¹⁷ *Id.* at 86; *see also* *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (granting standing to teachers of a private school to represent the rights of their students).

¹¹⁸ CHEMERINSKY, *supra* note 59, § 2.3.4, at 89–90; *see also* *Sec’y of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947 (1984) (granting standing to a fundraiser to represent the interests of charities, including the Fraternal Order of Police, in protecting freedom-of-speech rights).

In such a circumstance, this exception simply states that “there are situations where competing considerations outweigh any prudential rationale against third-party standing . . . [w]here practical obstacles prevent a party from asserting rights on behalf of itself.”¹¹⁹ In such circumstances, the third party representing another’s interests must demonstrate both “a sufficient injury-in-fact to satisfy the Art. III case-or-controversy requirement”¹²⁰ and the ability “to frame the issues and present them with the necessary adversarial zeal.”¹²¹

As a result, cases in which courts have been willing to find standing under this exception are typically those involving perceived social justice issues, issues that easily lend themselves to “adversarial zeal.” For instance, the defendant in *Barrows v. Jackson* championed the cause of black citizens whose rights were being violated by state application of damages for breach of racially biased housing contracts.¹²² In that case, the defendant, a white property owner in Los Angeles, was sued for breach of contract when she allowed “non-Caucasians” to move into the premises, the original sale of which was contingent on a contract agreeing that “no part of [her] said real property . . . should ever at any time be used or occupied by any person . . . not wholly of the white or Caucasian race.”¹²³ In being sued for breach of contract, the property owner had incurred the required injury in fact.¹²⁴ The Court then recognized that in certain cases “the reasons which underlie [the] rule denying standing to raise another’s rights . . . are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained,” namely in circumstances where “it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court.”¹²⁵

While meritorious and commendable, this exception—and indeed the prudential rule itself—may not necessarily come into play when considering the viability of the patent-law standing expansion proposed in this Comment. Regardless, the exception represents an important principle which is critical to

¹¹⁹ *Sec’y of State of Md.*, 467 U.S. at 956.

¹²⁰ *Id.* As discussed below, the injury-in-fact requirement persists even when other constitutional and prudential requirements may be waived. *See infra* note 143.

¹²¹ *Sec’y of State of Md.*, 467 U.S. at 956.

¹²² *See* 346 U.S. 249, 251–52 (1953).

¹²³ *Id.* at 251.

¹²⁴ *Id.* at 255–56 (“This principle [denying standing unless injury has been suffered] has no application to the instant case in which the respondent has been sued for damages . . . and in which a judgment against [her] would constitute a direct pocketbook injury.”).

¹²⁵ *Id.* at 257.

the viability of this proposed expansion to patent law standing. Specifically, this doctrine demonstrates that, upon suffering a cognizable injury, a plaintiff could argue a case on the basis of third-party rights and concerns.¹²⁶ This permission, along with avenues for avoiding certain requirements of standing discussed below, would have provided the basis for this Comment's proposal even prior to the Supreme Court's pivotal ruling in *Lexmark*.

In 2014, in a landmark decision in *Lexmark International, Inc. v. Static Control Components, Inc.*, the Supreme Court largely eliminated the notion of prudential standing requirements.¹²⁷ In *Lexmark*, Static Control developed a technology that would allow third parties "to refurbish and resell Lexmark cartridges."¹²⁸ Lexmark, naturally upset, brought suit against Static Control alleging copyright infringement.¹²⁹ Static Control, in turn, filed a counterclaim against the printing giant for, among other things, false advertising under the Lanham Act.¹³⁰ The factual bases for its claim, according to Static Control, were misrepresentations to both consumers and manufacturers that the law essentially protected every aspect of Lexmark's control of the printer cartridge life-cycle.¹³¹ The district court dismissed Static Control's counterclaim because it lacked "prudential standing," relying on the prudential requirements outlined above.¹³² The Sixth Circuit reversed, and the Supreme Court "granted certiorari to decide the appropriate analytical framework for determining a party's standing to maintain an action for false advertising under the Lanham Act."¹³³ At issue was whether Static Control, as neither a consumer nor a manufacturer of printer cartridges, fell under the zone of interests of the Lanham Act.¹³⁴

Justice Scalia, writing for a unanimous Court, stated, "Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because 'prudence' dictates."¹³⁵ In so deciding, the Court corrected course on prior jurisprudence by noting that the zone-of-interests

¹²⁶ See *infra* note 178 and accompanying text.

¹²⁷ 134 S. Ct. 1377, 1388 (2014).

¹²⁸ *Id.* at 1384.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 1385 (citations omitted).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 1388 (citation omitted).

requirement is merely a matter of statutory interpretation, rather than an application of a prudential standing requirement.¹³⁶ The Court seems to say that the balance of the prudential requirements—outside of the zone-of-interests requirement, which, as just established, is actually statutory—cannot allow a Court to deny standing in a case.¹³⁷ Thus, it may be that the prudential requirements traditionally observed in the federal standing doctrine no longer hold sway. Regardless, to the extent that a proposed expansion of standing can placate the objections of any legal scholars clinging to those requirements, those requirements may still be evaluated.

2. *Relaxation of Constitutional and Prudential Standing Requirements*

In some situations, the constitutional and, to the extent they may have survived *Lexmark*, prudential requirements of standing may be circumvented.¹³⁸ Specifically, “Congress may enact statutes creating legal rights, the invasion of which creates standing.”¹³⁹ More critically for the purposes of this Comment, Congress may also afford procedural rights that reduce the requirements of standing, eliminating the need for immediacy and redressability.¹⁴⁰ As a particularly relevant example, procedural rights to appeal administrative decisions lead to such a relaxation of standing’s requirements.¹⁴¹ The system proposed herein takes advantage of this feature by transitively challenging the validity of patents through appeal from the PTO pursuant to the right to agency review under the AIA.¹⁴²

¹³⁶ *Id.* at 1387 (“Whether a plaintiff comes within ‘the “zone of interests”’ is an issue that requires us to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff’s claim.”).

¹³⁷ *Id.* at 1388 (“We do not ask whether in our judgment Congress *should* have authorized Static Control’s suit, but whether Congress in fact did so.”).

¹³⁸ *Consumer Watchdog v. Wis. Alumni Research Found.*, 753 F.3d 1258, 1261 (Fed. Cir. 2014) (“[W]here Congress has accorded a procedural right . . . certain requirements of standing—namely immediacy and redressability, as well as prudential aspects that are not part of Article III—may be relaxed.” (citing *Massachusetts v. EPA*, 549 U.S. 497, 517–18 (2007))).

¹³⁹ *Id.* at 1262 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)).

¹⁴⁰ *Id.* at 1261–62 (citing *Massachusetts v. EPA*, 549 U.S. 497, 517–18 (2007)).

¹⁴¹ *Id.*

¹⁴² See *infra* text accompanying notes 238–39.

3. *Injury in Fact as the Cornerstone of Standing*

Despite the ability to procedurally circumvent some of the requirements of standing, injury in fact must always be present.¹⁴³ As a result, the injury-in-fact requirement merits an in-depth discussion unto itself. After all, injury in fact, given relaxation of standing under procedural rights, presents the greatest hurdle in appealing administrative decisions, such as those made by the PTO in *inter partes* reexaminations.¹⁴⁴

In approaching this injury-in-fact hurdle, two main concerns arise: whether an injury has been personally suffered, and whether that injury is sufficient to establish standing.¹⁴⁵ The former aspect has much more bearing on the issue of interest groups bringing suit and, as a result, seems to have a fair amount of interplay with the prudential requirement barring third-party suits discussed above.¹⁴⁶ Two cases from the 1970s, *Sierra Club v. Morton*¹⁴⁷ and *United States v. Students Challenging Regulatory Agency Procedure (SCRAP)*,¹⁴⁸ illustrate the personal injury requirement aptly.¹⁴⁹

Sierra Club purports to address the issue “as to what must be alleged by persons who claim injury of a noneconomic nature to interests that are widely shared.”¹⁵⁰ For this Comment, though, this case also presents a helpful illustration of the distinction between bases for standing and bases for argument in court once standing is conferred. In *Sierra Club*, Walt Disney Enterprises outlined a plan to develop the Mineral King Valley area in the Sierra Nevada Mountains under a permit from the U.S. Forest Service.¹⁵¹ The Sierra Club, self-described today as “the nation’s largest and most influential grassroots environmental organization,”¹⁵² sought to preserve the area by

¹⁴³ *Wis. Alumni Research Found.*, 753 F.3d at 1262 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 505, 578 (1992)); see also *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) (“[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.”); *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972) (stating that the Court previously decided “persons had standing to obtain judicial review of federal agency action under § 10 of the APA where they had alleged that the challenged action had caused them ‘injury in fact’”).

¹⁴⁴ See *supra* Part I.

¹⁴⁵ CHEMERINSKY, *supra* note 59, § 2.3.2, at 62.

¹⁴⁶ See *supra* text accompanying notes 115–25 (discussing the limitation on third-party standing).

¹⁴⁷ 405 U.S. 727.

¹⁴⁸ 412 U.S. 669 (1973).

¹⁴⁹ CHEMERINSKY, *supra* note 59, § 2.3.2, at 62–63.

¹⁵⁰ *Sierra Club*, 405 U.S. at 734.

¹⁵¹ *Id.* at 729.

¹⁵² *About Us*, SIERRA CLUB, www.sierraclub.org/about (last visited Sept. 21, 2015).

seeking both declaratory and injunctive relief to prevent the Forest Service from issuing the development permits.¹⁵³ In its complaint, Sierra Club “alleged that the development ‘would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife in the park and would impair the enjoyment of the park for future generations.’”¹⁵⁴

The Supreme Court held that Sierra Club lacked standing for the suit,¹⁵⁵ noting that “Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development.”¹⁵⁶ Sierra Club relied on the APA¹⁵⁷ to challenge the impending agency action, but in its complaint the Club did not address the issue of personal injury.¹⁵⁸ Instead, the Club claimed that its “longstanding concern with and expertise in such matters were sufficient to give it standing as a ‘representative of the public.’”¹⁵⁹

The Court rejected this notion that a party could represent the interests of a generally aggrieved public, calling it a misinterpretation of case law.¹⁶⁰ More specifically, the Court believed the contention to be a misinterpretation¹⁶¹ of *Scripps-Howard Radio v. FCC*¹⁶² and *FCC v. Sanders Bros. Radio Station*.¹⁶³ The Court further clarified the doctrine by establishing that “the fact of economic injury is what gives a person standing to seek judicial review under the statute, but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate.”¹⁶⁴

¹⁵³ *Sierra Club*, 405 U.S. at 730.

¹⁵⁴ *Id.* at 734.

¹⁵⁵ *Id.* at 741.

¹⁵⁶ *Id.* at 735.

¹⁵⁷ *See supra* note 35.

¹⁵⁸ *See Sierra Club*, 405 U.S. at 736.

¹⁵⁹ *Id.* (citing *Citizens Comm. for the Hudson Valley v. Volpe*, 425 F.2d 97, 105 (1970)).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 736–38.

¹⁶² 316 U.S. 4 (1942).

¹⁶³ 309 U.S. 470 (1940).

¹⁶⁴ *Sierra Club*, 405 U.S. at 737. *But see* *United States v. Students Challenging Regulatory Agency Procedure (SCRAP)*, 412 U.S. 669, 686 (1973) (“[W]e made it clear that standing was not confined to those who could show ‘economic harm . . .’”). While the Court in *Sierra Club* ultimately affirmed the dismissal of the case for lack of standing, this statement represents much more than dicta. It serves as recognition of previously existing law based on its assertion that “*Sanders* and *Scripps-Howard* thus established [this] dual proposition.” Accordingly, while the statement itself is dicta, the rule is established law from the two cases. *See Sierra Club*, 405 U.S. at 737.

Through this discussion, *Sierra Club* aptly illustrates several important elements of the injury-in-fact requirement and its place in this Comment. First, the decision emphasizes that an aggrieved party must be able to show personal injury despite any specialized or concentrated interest in the subject of litigation.¹⁶⁵ This requirement persists despite the fact that “[o]ften the very best adversaries are national organizations such as the NAACP or the American Civil Liberties Union that have a keen interest in the abstract question at issue in the case, but no concrete injury of fact whatever.”¹⁶⁶ Second, if standing may be first established through such a showing, public interest *may* be considered and argued in the course of litigation.¹⁶⁷ Thus, injury in fact is required to open the gate to litigation but not to pave the road beyond; from there, public interest arguments may make up the avenue along which a party seeks relief. These points suggest that, as long as the mechanism here presents an injury in fact, the case may subsequently be argued on the issue of patent validity based on public interest.

The Court’s decision in *SCRAP*¹⁶⁸ provides a relatively immediate and contrasting application of its decision in *Sierra Club*, establishing another important ideological building block for the standing this Comment creates. In *SCRAP*, a group of law students brought suit against the United States and the Interstate Commerce Commission (ICC), seeking an injunction to prevent enforcement of ICC orders allowing railroads to collect an additional surcharge.¹⁶⁹ In its complaint, *SCRAP* alleged the following harms had been suffered by its members: “each of its members was caused to pay more for finished products”; each used the outdoor and natural areas in and around Washington, D.C., for “recreational [and] aesthetic purposes,” purposes which had been harmed by the increase in freight rates; each breathed the air in the D.C. area, air which has suffered additional pollution as a result of the modified rate structure; and each had suffered additional taxes as a result of the rate increase.¹⁷⁰ In alleging this relatively general but personal harm, *SCRAP* distinguished its case from that in *Sierra Club* by pointing out that its members

¹⁶⁵ See *supra* notes 158–60 and accompanying text.

¹⁶⁶ Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 891 (1983).

¹⁶⁷ See *supra* text accompanying note 164.

¹⁶⁸ *SCRAP*, 412 U.S. 669.

¹⁶⁹ *Id.* at 678.

¹⁷⁰ *Id.* (alteration in original).

had actually availed themselves of the natural resources they sought to protect.¹⁷¹

The Court agreed with SCRAP's characterization, noting that in *SCRAP*, "by contrast, the appellees claimed that the specific and allegedly illegal action of the Commission would directly harm them in their use of the natural resources of the Washington Metropolitan Area."¹⁷² This agreement came with the acknowledgment that the interest in *SCRAP* was geographically far broader than that in *Sierra Club*, in that "all persons who utilize the scenic resources of the country . . . [or] breathe its air[] could claim harm similar to that alleged . . . here."¹⁷³ In recognizing this difference, the Court established that "standing is not to be denied simply because many people suffer the same injury."¹⁷⁴ Even further, the Court emphasized that such a policy "would mean that the most injurious and widespread Government actions could be questioned by nobody."¹⁷⁵ For the purposes of this Comment, then, the fact that interest in patents is common to the U.S. public does not create a substantial policy concern in expanding standing to contest patent validity.¹⁷⁶

Together, these two cases reveal the indispensable nature of the need for personally suffered injury. Both cases involved public interest groups bringing suit to protect the environment, but only SCRAP alleged a personally suffered injury to establish standing.¹⁷⁷ Further, the fact that the public interest might make up the majority of the argument following the allegation of harm made no difference to the Court in *SCRAP*; the Court merely required that some harm be alleged to establish standing first.¹⁷⁸ However, while these cases illustrate the requirement of personally suffered injury, a different standard

¹⁷¹ *Id.* at 684–85.

¹⁷² *Id.* at 687.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 688.

¹⁷⁶ As a reminder, though, this concern is only implicated as a matter of policy; this Comment's proposal avoids the issue by creating a specific cognizable harm for the organizations bringing the suit, though the interest in the patent litigation on behalf of the public is shared by many. *See infra* Part III.A.

¹⁷⁷ Compare *SCRAP*, 412 U.S. at 687 ("[H]ere, . . . appellees claimed that the specific and allegedly illegal action of the Commission would directly harm them in their use of the natural resources."), with *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972) ("The Sierra Club failed to allege that it or its members would be affected . . . by the Disney development.").

¹⁷⁸ *See supra* notes 172–75; *see also SCRAP*, 412 U.S. at 689 n.14 ("[A]n identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." (quoting Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968))).

exists for parties seeking declaratory or injunctive relief in anticipation of a supposedly impending harm.¹⁷⁹ The public interest organizations' ultimate goals in litigating through the proposed system will likely be declaratory judgments against the patents they attack, so the standards specific to equitable relief bear discussion.

Unlike those seeking legal remedies, plaintiffs seeking declaratory or injunctive relief¹⁸⁰ must demonstrate likelihood of future injury as a result of the challenged action.¹⁸¹ The Court's decision in *City of Los Angeles v. Lyons* established the differing standing requirements for cases in which plaintiffs seek equitable relief.¹⁸² In *Lyons*, Los Angeles police had subjected the plaintiff to a controlling choke-hold following a traffic stop.¹⁸³ Lyons then sought, in addition to damages, "injunctive relief . . . against the use of control holds" except in special, threatening circumstances.¹⁸⁴ However, the Court ultimately dismissed the complaint for lack of standing, stating that "Lyons' standing to seek the injunction requested depended on whether he was likely to suffer future injury from the use of chokeholds by police officers."¹⁸⁵

In order for Lyons to have established that requisite likelihood, the Court suggested that he would have to allege not only another encounter with police but also that "all police officers in Los Angeles *always* choke any citizen with whom they happen to have an encounter . . . [or] that the City ordered or authorized [them] to act in such a manner."¹⁸⁶ Given that neither of these preposterous allegations was present, the Court dismissed,¹⁸⁷ but not before making a particularly interesting comment in dicta, noting that the legality of

¹⁷⁹ See *infra* note 181 and accompanying text.

¹⁸⁰ Equitable remedies are frequently sought in patent litigation, so much of the discussion in those cases deal with this standard. As a result, the doctrine bears presentation here. Its application to patent challenges seeking declaratory judgment is discussed in *supra* Part I.A.

¹⁸¹ See *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) ("[S]tanding to seek the injunction requested depended on whether [plaintiff] was likely to suffer future injury . . .").

¹⁸² 461 U.S. at 111. A similar differentiation in standing requirements on the basis of the remedy sought was previously discussed in *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974), but the Court there dismissed for lack of an alleged personally suffered injury. *Id.* at 495 ("None of the named plaintiffs is identified as himself having suffered any injury in the manner specified."). Thus the discussion regarding equitable relief there was purely dicta. See also *Rizzo v. Goode*, 423 U.S. 362, 372-73, 380 (1976) (mentioning differing standards for equitable relief but citing non-identification of defendants as perpetrators and federalism principles in dismissing for lack of standing).

¹⁸³ *Lyons*, 461 U.S. at 97.

¹⁸⁴ *Id.* at 98.

¹⁸⁵ *Id.* at 105.

¹⁸⁶ *Id.* at 106.

¹⁸⁷ *Id.* at 110.

challenged actions are equally challengeable under an action for damages as under an action seeking injunctive relief.¹⁸⁸ In other words, activity which is not necessarily challengeable in seeking equitable remedy may be challenged through seeking damages and, in the course of adjudication, be determined illegal, practically enjoining the party from continuing the practice.

Regardless, *Lyons* established that a complaining party must allege a certain likelihood of future harm to have standing in seeking injunctive relief.¹⁸⁹ Since the decision, though, the Court has applied *Lyons* in cases in which plaintiffs sought declaratory judgment as well.¹⁹⁰ As a result, in addition to establishing the personal nature of the alleged harm, plaintiffs seeking any form of equitable relief must currently allege the continuing likelihood of that harm. Thus, were the system proposed herein to rely on suits directly seeking declaratory judgment, plaintiffs would have to show—and indeed they must show currently—a likelihood of harm flowing from the assertion of a patent’s claims in order to challenge the validity thereof.¹⁹¹

Having established a personally suffered harm, however, the question still remains as to what injury is sufficient to establish standing. No clear delineation exists as to what exactly constitutes adequate injury, but courts have acknowledged that infringements on common-law, constitutional, or statutory rights all provide injury adequate to establish standing.¹⁹² Further, certain other injuries may confer standing, but those injuries are decided on an injury-by-injury basis, and no clear rules seem to distinguish those injuries the courts consider adequate.¹⁹³

Historically, injuries to common-law rights comprised the entirety of the field of standing-granting injury.¹⁹⁴ In early jurisprudence, the Court explained that no standing was granted “unless the right invaded [was] a legal right[]—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege.”¹⁹⁵ The

¹⁸⁸ *Id.* at 111 (“The legality of the violence to which Lyons claims he was once subjected is at issue in his suit for damages and can be determined there.”).

¹⁸⁹ *Id.* at 106.

¹⁹⁰ *See, e.g., County of Riverside v. McLaughlin*, 500 U.S. 44, 47–50 (1991) (seeking injunctive and declaratory relief for practice of delaying probable cause hearings over holiday weekends).

¹⁹¹ *See supra* note 27 and accompanying text.

¹⁹² CHEMERINSKY, *supra* note 59, § 2.3.2, at 69.

¹⁹³ *Id.* at 75.

¹⁹⁴ *Id.* at 69.

¹⁹⁵ *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 137–38 (1939).

plaintiffs in *Tennessee Electric* tried to claim a right to protection from competition as a manifestation of a right to protect their property, franchises, “from injury or destruction by competition.”¹⁹⁶ Given that “competition between natural persons is lawful,” no such right was deemed to exist at common law, so no standing was conferred on the plaintiffs for the suit.¹⁹⁷

Injury to statutory and constitutional rights can further establish standing,¹⁹⁸ but given that the harm proposed in the solution below is strictly economic, a discussion of injury to statutory and constitutional rights is not presently necessary.

4. Policy Underlying Federal Standing

To promote viability, any argument to expand a doctrine should take into consideration the policy underlying the doctrine and its application. In the case of standing in federal court, the doctrine arguably serves several purposes in limiting access to those courts. First, standing maintains the ideological pillar of separation of powers.¹⁹⁹ Justice Scalia describes standing as protecting legislation from “wanton assaults”²⁰⁰ by the general, not-particularly-aggrieved public, thus protecting the extent to which judges and justices may subvert the democratic process of lawmaking with the undemocratic process of adjudication.²⁰¹ To the extent that cases challenge legislation, Justice Scalia views the courts as protecting the interests of individuals and minorities, through undemocratic adjudication, from democratic—and thus inherently majoritarian—legislation.²⁰² Under this theory, then, to expand or neglect the doctrine of standing would be to allow the courts to determine these issues not just for minorities but also for the majority as a whole, a task for which the unelected judiciary is ill-suited.²⁰³ In short, standing “excludes [courts] from

¹⁹⁶ *Id.* at 138.

¹⁹⁷ *Id.* Plaintiffs also tried in vain to invoke statutory rights and constitutional rights which supposedly protected them from competition, but no such rights were found to exist. *Id.* at 137–38 (“In no aspect of the case have the appellants standing to maintain the suit.”). Thus no discussion as to the adequacy of infringement on constitutional rights to create standing is given in this case.

¹⁹⁸ CHEMERINSKY, *supra* note 59, § 2.3.2, at 69.

¹⁹⁹ *Id.* § 2.3.1, at 58.

²⁰⁰ Scalia, *supra* note 166, at 892 (quoting A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 102 (T. Bradley ed. 1945) (1835)).

²⁰¹ *Id.* at 892–93.

²⁰² *Id.* at 894.

²⁰³ *Id.* at 894, 896 (stating that judges are “selected from the aristocracy of the highly educated, instructed to be governed by a body of knowledge that values abstract principle above concrete result,” and “removed from all accountability to the electorate”).

the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest *of the majority itself*.²⁰⁴ These separation-of-powers concerns escalate further when the case at hand calls into question the constitutionality of an action made by the Executive or Legislative Branches of the federal government.²⁰⁵ Simultaneously, though, this concern supports the need for judicial review as much as it seeks to limit it.²⁰⁶ After all, judicial review keeps executive and legislative powers in check in the same sense that the doctrine of standing limits judicial power by restricting the scope of federal justiciability.²⁰⁷

Second, standing protects the federal court system in multiple ways. As a practical matter the doctrine keeps the courts from being overwhelmed with trivial cases—trivial because there is neither a cognizable harm nor an available redress.²⁰⁸ Otherwise, courts may be flooded with cases in which plaintiffs seek relief on principle rather than on the basis of harm.²⁰⁹ That said, Chemerinsky expresses skepticism towards this concern, pointing to the high cost of litigation as a potentially adequately controlling factor in limiting suits even in the absence of standing.²¹⁰ As a political shield, standing protects the federal courts from polarizing its relationships with other branches of the federal government by making it more difficult for the courts to tackle politically charged issues.²¹¹ Should the judiciary take up political banners, the Legislative and Executive Branches may take steps to reduce the power of the judiciary to stamp out certain political stances.²¹² However, political matters are inevitably addressed by the courts,²¹³ where the other branches of government disagree with the policy ramifications of judicial decisions, they

²⁰⁴ *Id.* at 894.

²⁰⁵ CHEMERINSKY, *supra* note 59, § 2.3.1, at 58 (stating that “the ‘standing inquiry is especially rigorous [because of separation of powers concerns] when reaching the merits of a dispute would force [it] to decide whether an action taken by one of the other two branches of the federal government was unconstitutional” (quoting *Raines v. Byrd*, 521 U.S. 811, 819–20 (1997))).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 59.

²⁰⁹ *Id.*

²¹⁰ *Id.* (“But in light of the high costs of litigation, one must wonder how large the burden really would be without the current standing restrictions.”).

²¹¹ *Id.*

²¹² *Id.*

²¹³ *See, e.g., Burwell v. Hobby Lobby, Inc.*, 134 S. Ct. 2751 (2014) (religious objection to Affordable Care Act); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion).

may take—and indeed have taken²¹⁴—steps to redirect the ship of policy without removing the judicial sails for having simply addressed the wind. More concretely, the legislature specifically may always enact law to counteract judicial decisions as it sees fit without resorting to a limitation on or reduction in judicial power.²¹⁵

Third, standing supposedly improves judicial decision-making in two ways: first, by presenting specific conflicts to which courts may apply applicable law, and second, by ensuring the issue has an effective litigant by requiring specific injury in fact.²¹⁶ Problems exist with both of these defenses, though. For instance, some cases end up being adjudicated focusing on policy implications and *stare decisis* rather than on the injury at hand, so the need for a specific conflict may vary.²¹⁷ Further, applying the doctrine of standing does not guarantee that a case will have an effective litigant. As Chemerinsky illustrates, “The best litigator in the country who cared deeply about an issue could not raise it without a plaintiff with standing; but a *pro se* litigant, with no legal training, could pursue the matter on his or her own behalf.”²¹⁸

Fourth, and finally, standing purports to protect fairness by preventing “intermeddl[ing]” litigation.²¹⁹ Courts, though, may end up turning away a genuinely aggrieved party because that party cannot show injury in fact as required by this doctrine,²²⁰ a stance which hardly deserves the label of fairness. Ultimately, each of the justifications for the doctrine of standing fails to align perfectly with the practical application of the doctrine, particularly in the landscape of patent cases where the notion of injury has received an even narrower interpretation in practice, as discussed above. Still, any solution which can fulfill the technical requirements of standing while honoring its underlying policies likely promises adoptive success. The solution proposed

²¹⁴ See, e.g., U.S. CONST. amend. XI. The Eleventh Amendment of the Constitution was a reaction to *Chisholm v. Georgia*, 2 U.S. 419 (1793), and it granted states immunity from suit by non-citizens. See *Hans v. Louisiana*, 134 U.S. 1, 11 (1890).

²¹⁵ See *id.*

²¹⁶ CHEMERINSKY, *supra* note 59, § 2.3.1, at 59. While Chemerinsky points to the factors discussed in notes 217–18, below, as reasons these policies may not be well served in actuality, the skepticism expressed in this statement is my own.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 60.

herein attempts to accomplish both of these tasks in addressing a noted shortcoming in the standing doctrine in patent cases.²²¹

B. Administrative Law and Rulemaking Authority of the PTO

An administrative incapacity on the part of the PTO to promulgate the necessary rule would nullify any doctrinal viability of a proposed solution to this problem. Indeed, the PTO lacks much of the substantive rulemaking authority of other administrative agencies.²²² The Federal Circuit has recognized that the “broadest” of the PTO’s powers is the ability to “establish regulations, not inconsistent with the law,” which “govern the proceedings of the Office.”²²³ Thus, while the PTO lacks the ability to affect substantive law,²²⁴ it does possess the power to promulgate rules relating to its own internal function.²²⁵ For instance, this internal function includes “authority over PTO practice, including interference proceedings.”²²⁶ Thus, choosing organizations to which the PTO can offer membership in the scheme constructed in this Comment likely falls within the PTO’s rulemaking capabilities. Part III, below, outlines the proposal in detail.

III. THE PROPOSED SOLUTION AND ITS IMPLICATIONS IN THE LAW

This Comment puts forth a solution for extending standing in patent litigation to public interest organizations. This Part outlines how the PTO—in conjunction with some cooperation from the courts—may transitively extend standing to those organizations. This extension flows from offering a small number of organizations the chance to participate in a program whereby they pay a monetary forfeit on losing a reexamination at the PTO. That monetary expense would constitute an injury in fact to confer standing on these organizations to then litigate the underlying issue of patent validity in federal court. After presenting the solution in detail, this Part considers the implications of the solution with respect to the federal standing doctrine and the underlying principles of patent law.

²²¹ See *infra* Part III.B.1.

²²² See 35 U.S.C. § 2(b)(2) (2012).

²²³ *Stevens v. Tamai*, 366 F.3d 1325, 1333 (Fed. Cir. 2004) (quoting 35 U.S.C. § 2(b)(2)(A) (2000)).

²²⁴ See 35 U.S.C. § 2(b)(2).

²²⁵ See *id.*

²²⁶ *Stevens*, 366 F.3d at 1333 (quoting *Gerritsen v. Shirai*, 979 F.2d 1524, 1527 n.3 (Fed. Cir. 1992)).

A. *Enabling the PTO to Endow Organizations with Standing*

The PTO, federal courts, and public interest organizations should take the following steps in order to expand standing in patent litigation to greater include the public voice. First, the PTO should promulgate a rule allowing itself to recognize certain public interest organizations for a special system involving *inter partes* reexaminations. More specifically, the PTO should enable itself to extend offers of participation in a scheme in which public interest organizations must pay a monetary penalty upon losing an *inter partes* reexamination.²²⁷ The exact dollar amount of the forfeit is not critical, but avoiding extremes would be advisable. An exceptionally small dollar amount may become nominal to the point that it fails to create standing and fails to deter frivolous challenges, thereby harming the viability of this mechanism. On the other hand, an exceptionally large dollar amount may dissuade any public interest organizations from participating, but a moderate degree of expense may assist in winnowing which organizations merit recognition in order to keep the number appropriately small.

Second, the PTO must structure the rule such that it maintains discretion over the organizations to which it extends offers of participation, with guidelines included as to the sorts of organizations which merit recognition. The Patent Trial and Appeal Board (PTAB), the successor to the BPAI under the America Invents Act (AIA),²²⁸ is one logical candidate for making decisions relating to such offers; it has a vested interest in maintaining its own administrative efficiency, and it is rather uniquely positioned to understand which organizations may be most effective in challenging patents. Alternatively, the patent office may choose to create a new committee (Committee) to oversee this program. The Committee option would allow the BPAI to maintain its current responsibilities in hearing *inter partes* reexaminations while allowing the Committee itself to develop organizational expertise on public interest in patent litigation. In any event, this element of the rule will allow the PTO to keep the number of participating organizations to an optimal minimum.

Specifically, the controlling parameters relating to this membership and its optimal minimum serve the purposes of both standing—by limiting access to

²²⁷ Third parties may also challenge an issued patent's validity through post-grant review and covered business method procedures under the AIA. See 35 U.S.C. § 321; 37 C.F.R. §§ 42.300–42.304 (2014). However, this solution focuses on *inter partes* review.

²²⁸ See *supra* note 7.

federal courts—and patent law—by avoiding substantial harm on the patent system from overexposure. First, the membership should set a low maximum number of organizations, likely on the order of ten public interest groups. This small number not only serves the policies described above but also encourages either the BPAI or the Committee to choose organizations that would cover as much of the diverse American society as possible.

A small membership established, that membership should come with certain requirements, the applications of which are left to the discretion of either the BPAI or the Committee. The following elements of organizations are suggested as potential criteria for these determinations: covering a wide swath of public interest; maintaining a diverse membership or target group; representing the public beyond its membership; and possessing the logistical wherewithal to adequately represent its interests effectively in litigation. The astute application of these criteria will ensure that participating organizations will make use of their privileges. Finally, membership should be limited to one- or two-year terms, after which all interested organizations submit petitions for consideration either to the BPAI or the Committee on the basis of the above criteria. The cycling of organizations prevents institutional capture and undue influence while encouraging diversity and a more comprehensive representation of the public interest.

Third, courts must recognize that the monetary injury suffered upon losing an *inter partes* reexamination confers adequate standing to appeal the ruling of the PTO in federal court. This situation contrasts sharply with that of Consumer Watchdog in *WARF*. There, Consumer Watchdog “relie[d] on the Board’s denial of [its] requested administrative action” in trying to establish an injury for purposes of the standing doctrine.²²⁹ The Federal Circuit noted in its opinion that the ruling “did not invade any legal right conferred upon Consumer Watchdog.”²³⁰ In contrast, under the new system proposed herein, the ruling will have visited economic harm on the participating organization, creating an injury in fact which the court must recognize for purposes of standing in an appeal from an administrative ruling.

Fourth, the system must incorporate a potential punishment or expulsion mechanism for organizations which do not conduct themselves in such a way as to encourage the feasibility of the system. More specifically, the mechanism

²²⁹ *Consumer Watchdog v. Wis. Alumni Research Found.*, 753 F.3d 1258, 1261 (Fed. Cir. 2014).

²³⁰ *Id.* at 1262.

should encourage a participating organization to be selective and judicious in the cases it chooses to pursue. Periodic review of the organization's activity in the new system should be conducted by the BPAI, whereby consistent frivolous over-activity within the Patent Office or in federal court may render the organization subject to expulsion from the system based on the discretion of the BPAI. Further, violations of the PTO ethical rules²³¹ could be made to automatically trigger either reprimand or expulsion. That said, if the PTO chooses to create the Committee mentioned above solely for the purpose of administering this system, the policing responsibilities may appropriately fall to that Committee.

Regardless of the exact organizational structure, this system creates standing for public interest organizations while operating within congressionally defined limits. Further, the system is narrowly constructed such that its impact will be limited exactly to the issue it is designed to address. These two features distinguish this proposed solution from others in the past and make it particularly, immediately, and uniquely viable.²³² Most notably, Professor Rinehart has suggested that Congress should pass a statute expanding standing for cases brought by any member of the public alleging "an injury relating to a restraint on his [or her] trade or to his [or her] health or safety."²³³ However, this statute likely opens the door for a flood of all kinds of civil cases in federal court by any member of the public, and it relies on the political viability of the idea by requiring congressional action to enact it. The solution described here contrasts sharply with that proposed by Professor Rinehart: suits will come as appeals pursuant to the AIA as an appeal from an administrative agency,²³⁴ not actions pursuant to the Declaratory Judgments Act,²³⁵ "persons" with standing will be limited to a select few public interest organizations; and the solution requires no congressional action. Most importantly, this system finally addresses a glaring and hypocritical²³⁶ hole in the standing doctrine as it relates to patent law and acknowledges the growing

²³¹ See USPTO Rules of Professional Conduct, 37 C.F.R. § 11.101 (2014).

²³² Cf. Rinehart, *supra* note 11, at 400 (suggesting congressional expansion of standing for cases challenging patents under the Declaratory Judgments Act to recognize restraint on trade or injury to health or safety as conferring standing in patent litigation).

²³³ *Id.*

²³⁴ See 35 U.S.C. § 319 (2012).

²³⁵ See 28 U.S.C. § 2201.

²³⁶ This language refers to the exclusion of the public from federal court in cases relating directly to the public's endorsement of technological innovations. See *supra* Part I.B.

trend toward public interest in patents and the federal standing relating to their adjudication.

B. Compatibility of the Proposal with Federal Standing and Patent Law

The solution described above ought to align not only with the mechanical considerations of the federal standing doctrine but also with the policy underlying standing and patent law. This section explores that compatibility. It first demonstrates that the solution honors all of the concerns inherent in the federal standing doctrine. Then, it confirms that the policy underlying patent law supports the adoption of this solution.

1. Observing Standing Requirements and Standing Policy

The solution described in Part III.A takes into consideration each of the principles and concerns underlying the federal standing doctrine. As a manifestation of this alignment, the standing conferred by the proposed system likely meets each aspect of the constitutional requirements for standing described in *Lujan*.²³⁷ This observation comes despite the fact that, in relating only to appeals from administrative rulings, the solution need only meet the baseline injury-in-fact requirement.²³⁸ Regardless, the injury-in-fact requirement is certainly fulfilled in the circumstance created in this solution: the public interest organization will have personally suffered a monetary injury as a result of the BPAI's ruling, and that injury is sufficient to confer standing.²³⁹

The proposed system also honors the prudential considerations inherent in the standing doctrine, once again in spite of the fact that such prudential considerations have likely been eliminated by *Lexmark* and may be avoided anyway in administrative appeals. In particular, the zone-of-interests requirement is likely inapplicable because any case brought through the mechanism of this solution would not relate to the infringement of an express "statut[ory] or constitutional guarantee."²⁴⁰ The presumption against generalized grievances²⁴¹ does not create any issues even should it be applied

²³⁷ *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *see supra* text accompanying notes 71–72.

²³⁸ *See supra* Part II.A.2.

²³⁹ *See supra* text accompanying note 198.

²⁴⁰ *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970); *see also supra* text accompanying note 82.

²⁴¹ *See supra* text accompanying notes 94–97.

because the injury suffered would flow directly from the loss at the *inter partes* reexamination.²⁴² This solution even avoids the policy underlying these prudential concerns; the injury is neither one shared by many nor one that flowed from being a citizen of the United States, and the separation of powers concerns of *Flast* and *Frothingham*²⁴³ do not appear here because the judiciary already has jurisdiction to review agency activity.²⁴⁴

In fact, the only prudential consideration potentially implicated by this solution is the general prohibition on bringing cases on behalf of third parties.²⁴⁵ After all, public interest organizations advocate for the interests of third parties almost by definition.²⁴⁶ Arguments before the judiciary, even having found grounds for standing under the system proposed, will be based on the interests of the public, including people who are not members of the organizations arguing on their behalf.²⁴⁷ Conveniently, courts have recognized some exceptions to this prudential consideration which may apply to the circumstance described in the solution herein.²⁴⁸ But, in reality, those exceptions are unnecessary. The *standing* of a party under the proposed system is based on the monetary injury suffered by the organization, *not* on the public interest in challenging the patent at issue. Further, as the Court established in *Sierra Club*, parties may argue a case based on public interest once a personal, economic injury flowing from an agency action has established standing.²⁴⁹

In sum, the proposed system meets all the requirements for standing and then some. Given that suits in federal court will come as appeals from administrative rulings, only the injury-in-fact requirement must be fulfilled. Given that the harm is economic in nature, personally suffered, and flowing from the ruling, that requirement is certainly met. The injury of the organization here likely goes beyond that minimum requirement to fulfill the full constitutional test required outside the context of administrative appeals. Further, the solution proposed above avoids any prudential concerns in the standing doctrine even though none of them need apply in the context of such

²⁴² See *supra* Part III.A.

²⁴³ See *supra* text accompanying notes 111–14.

²⁴⁴ Administrative Procedure Act, 5 U.S.C. § 702 (2012).

²⁴⁵ See *supra* notes 115–16.

²⁴⁶ See *supra* text accompanying note 48.

²⁴⁷ As implied above, this concern is not implicated when an organization is arguing on behalf of its members. See *supra* text accompanying notes 169–71.

²⁴⁸ See *supra* text accompanying notes 119–21.

²⁴⁹ See *supra* text accompanying notes 166–67.

appeals. The procedural validity of the standing conferred in the solution proposed is simply above contestation.

The proposed solution also addresses the underlying policy concerns in the standing doctrine in order to promote its worth and viability. First, the system described avoids any separation of powers concerns which standing protects.²⁵⁰ The proposed change does not create any additional scope of judicial review over agency action. Instead, the system only allows more parties—namely public interest organizations as representatives of the public—to make use of the right to judicial review which already exists, both in agency review and in determinations of patent validity. Thus, the solution does not create any additional overlap in powers expressly reserved for any branches of the federal government.

Second, the system described honors the central concern of protecting federal courts from being procedurally overwhelmed, substantively abused, or politically compromised.²⁵¹ For the first consideration, the proposal here only contemplates the recognition of a handful of public interest organizations, meaning that the number of parties which can bring suit to challenge BPAI rulings will only expand nominally.²⁵² Indeed, the beauty of this system largely lies in the fact that it practically privatizes the policing of potential suits for worthwhile controversies. The accountability mechanism monitoring participating organizations²⁵³ ensures that those organizations will be particularly selective in deciding which causes to champion in federal court. Further, the expense of litigation, both monetarily and in opportunity cost, will dissuade organizations further from taking up frivolous challenges to patent validity. Thus, the new system will lead to the public interest organizations bearing the brunt of the flood of potential litigants and reducing that flood to a relatively miniscule trickle of worthwhile cases which then reach federal court through appeal.²⁵⁴ Further, the number of additional cases will be limited by the limited types of invalidity challenges available in *inter partes* reexamination.²⁵⁵

²⁵⁰ See *supra* text accompanying notes 200–04.

²⁵¹ See *supra* text accompanying notes 208–12.

²⁵² See *supra* Part III.A.

²⁵³ See *supra* Part III.A.

²⁵⁴ This burden is borne by the public interest organizations in the sense that members of the public, wishing to have their voices heard in patent litigation, will have to find one of the eligible public interest organizations to take up their respective causes. See *supra* Part III.A.

²⁵⁵ See 35 U.S.C. § 311(b) (2012) (limiting the scope of *inter partes* review).

As for the gravity of the cases brought, many of these features also serve to ensure the importance of the cases reaching the courts. Beyond the advantages of the mechanisms, though, by their very nature cases implicating interests of the national public are very likely significant enough to merit the courts' attentions. Thus, any politically charged issues which may be brought up in litigation that stems from this solution, at the least, will not be brought up frivolously. Regardless, courts of late have hardly been reluctant to hear cases deciding hotly contested political issues,²⁵⁶ and the public deserves to have its voice heard given that it is transitively endorsing the protections given to patent holders.

Third, the proposed solution preserves the integrity of the litigation both by providing a zealous advocate and by providing an injury in fact as a basis for the adjudication. Public interest organizations exist purely to promote and protect the interests of their members and the public at large as they relate to the causes on which they focus.²⁵⁷ It is difficult to imagine a more zealous candidate for advocacy. Further, the monetary injury suffered by the organization would create an easy, centralizing issue to be litigated: the validity of the BPAI's ruling and, transitively, the validity of the patent. Accordingly, litigation surrounding these issues will not be diluted or weakened by the expansion of standing to include such circumstances.

Fourth and finally, the proposed solution does not constitute "intermeddling litigation"²⁵⁸ under the meaning given in standing policy. This policy consideration least of all creates concern over the proposed solution simply because the public inherently has a stake in all patent grants, so the notion that a public interest organization would be butting into areas in which they have no vested interest is simply incoherent. Accordingly, the solution given above in Part III.A not only passes all of the mechanical tests for standing but also honors each of the underlying considerations within the standing doctrine.

2. Receiving Support from Policy Underlying Patent Law

The public benefit and public service notions underlying patent law further support the proposal outlined in Part III.A. As discussed in Part I.B, the

²⁵⁶ See *supra* note 213 and accompanying text.

²⁵⁷ While this assertion may seem naïve as applied generally, the system proposed will ensure that the organizations selected for this program are of the commendable variety. See *supra* Part III.A.

²⁵⁸ See *supra* note 219 and accompanying text.

granting of a patent amounts to a public endorsement of the protections given to the patent holder.²⁵⁹ The public only gives this endorsement, however, in exchange for the public benefit received from the practice of the patent.²⁶⁰ Based on these two principles, patent law almost certainly promotes the notion of public involvement in the patent system, either to challenge those products which the public is perceived to endorse or to challenge those protections for products which the public believes are too important to grant exclusive protections on them.

The implementation of the solution described may also lead to the improvement of the quality of patents generally. For instance, public interest organizations have to first challenge the patent in question through *inter partes* reexamination—and lose—in order for the proposed system to function properly. This requirement clearly spells an increase in activity at the PTO by necessarily vigilant public interest organizations, which could lead to the improved function of the office itself. While this Comment focuses on challenges to patents on the basis of public interest, these organizations may develop into general third-party patent police, catching useless or otherwise invalid patents which may slip through the cracks in the examination process. This additional vigilance would likely improve the health of the patent system overall—independent of providing a much-needed avenue for seeking judicial review on behalf of the public.

This public benefit outweighs any potential harm to patent protections coming as a result of the expansion described in this Comment. The system described could weaken the patent system in the sense that, if the rights of patent holders may be subject to further expensive litigation, innovators may be more reluctant to use the patent system at all. However, the narrowly drawn nature of the expansion proposed here serves as much to limit the harmful effect on patent protections as it does to observe the principles of standing. Further, it is worth noting that this expansion does not affect the substance of patent law in any way; it does not subject patents to materially new types of challenges, only more challenges of the same type. As a result, the types of reasonable challenges which may be brought also limit the number of cases that may come as a result of this expansion. When the patent does come, though, implicating a major point of public interest, the avenue will be present

²⁵⁹ See *supra* note 48 and accompanying text.

²⁶⁰ See *supra* note 39 and accompanying text.

for the public to speak to its will regarding the validity of that patent *in federal court*.

The recent trends in patent law favoring the rights of the public further suggest that the solution proposed here is both commendable and timely.²⁶¹ As an example, the Supreme Court's decision in *MedImmune*, while not particularly helpful in application, acknowledged that parties may have stakes in patent litigation beyond what has been traditionally contemplated by the Federal Circuit.²⁶² Further, the Supreme Court's *eBay* decision may represent recognition on the part of the Court that public use of patented subject matter outweighs the exclusive rights of the patent holder.²⁶³ Finally, anti-troll jurisprudence tends to lend itself to user rights generally instead of formally favoring strong patent rights.²⁶⁴ Thus, the recognition of the public voice through the proposed system vastly outweighs whatever negligible detriment this expansion visits upon the protections given in patent law.

²⁶¹ See *supra* notes 49–56 and accompanying text.

²⁶² See *supra* note 49 and accompanying text.

²⁶³ See *supra* note 54 and accompanying text.

²⁶⁴ See *supra* note 56 and accompanying text.

CONCLUSION

The proposal outlined in this Comment offers a much-needed recourse in federal court for public interest organizations to challenge the validity of patents on behalf of the public.²⁶⁵ Further, that solution meets all of the mechanical requirements of the federal standing doctrine while simultaneously respecting policies underlying both standing and patent law. Its implementation does not require congressional action and thus does not face particularly potent political hurdles to adoption. All that remains is the enactment of the doctrine through the legal avenues described herein. In so doing, the PTO and federal courts can allow the public to challenge patents that could have a major impact on national progress, either socially or technologically. Regardless, implementing such an improvement in the midst of a crescendo of user rights could resurrect the public voice in patent law in a meaningful and lasting way without compromising the benefits of the patent system as a whole.

RODERICK BLEVINS*

²⁶⁵ See *supra* notes 11–15 and accompanying text.

* Articles Editor, *Emory Law Journal*; J.D. Candidate, Emory University School of Law, Class of 2016; M.Phil, University of Cambridge, 2013; B.S., Florida Institute of Technology, 2012. I must express my gratitude to my comment supervisor, Professor James B. Hughes, Jr., whose guidance, feedback, and support proved invaluable through the writing process—and whose pleasant conversations on topics both thought-provoking and timely provided a welcome diversion from the ennui of law school. Further thanks are due to Professor Timothy Holbrook, whose insight made this comment worth the ink and trees sacrificed in its name, and the wonderful editorial staff of *Emory Law Journal*—in particular, Rebecca Hall and Matt Johnson—who exhibited far more patience with me than I could have mustered for myself. To my family and incomparable friends, thank you for supporting the rather curious notion of wandering into law school after two engineering degrees and little in the way of forethought or preparation. I think we can all agree it could have gone far worse. Finally, I want to thank the engineers, the designers, and the innovators who drive civilization forward with their ingenuity and cleverness; I wrote this comment that the law might see that purpose fulfilled.