

The Uneasy Case for Patent Federalism

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Nationwide uniformity is often considered an essential feature of the patent system, necessary to fulfill that system's notice and incentive purposes. In the last three years, however, nearly half the states have enacted laws that seek to disrupt this uniformity by making it harder for patent holders to enforce their patents within the enacting states. There is an easy case to be made against giving states greater authority over the patent system. Doctrinally, state efforts to impose their own patent policies would likely be preempted by federal law; normatively, such efforts would threaten to disrupt the system's balance between innovation incentives and a robust public domain and would permit rent seeking by states that disproportionately produce or consume innovation.

There is, nevertheless, an uneasy case that this particular form of patent federalism may be a good thing. The federal patent system has systemic flaws that lead to low-quality patents, nuisance patent litigation, and patent trolls exploiting asymmetric bargaining power. And efforts to address these flaws have faltered, or have had limited effects, due to public-choice dynamics in the patent system, so the scope of patent protections has expanded over time without regard to the system's purpose of encouraging innovation.

States may help address some of these problems not in spite of, but because of, their own flaws. States have their own public-choice dynamics, which happen to offset some of the flaws of the federal system. The enactment of state anti-patent laws has been driven largely by small businesses and local small-business groups, which, unlike most patent holders, have preexisting influence in state government. And the laws they have crafted using this influence are well-targeted to affect only the most troublesome patent cases: nuisance cases, cases asserting low-quality patents, and cases targeting end users. States pushing back with anti-patent laws, then, may represent an effective second-best solution to the problem of harmful patent assertions. Moreover, recognizing the dynamics that led to state anti-patent laws may provide helpful insights in designing federal patent reforms.