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***Tax-paying for Fun and Profit***

by

Robert M. Kunstadt and Ilaria Maggioni

**Abstract**

Modern advances give us the ability to re-engineer the taxation system to benefit from computerized automation and the insights of modern psychology. People like to do things that bring a tangible reward. Tax-paying should be made FUN, not a chore. You will want to participate if you perceive a direct benefit. This new model selectively adapts the old English system of raising money by granting royal monopolies. A tax-paying entity would be allowed to make a bid on the percentage of tax it would pay for acquiring monopoly rights on a particular venture, posted publicly on a government-auction website for others to see and to post their alternative bids. Proposals put out for bid could immediately be tested for market viability by getting a thumbs-up/thumbs-down from the general public. The rewards to the proposer and to the public can be immediately perceived by all. Hence, the conditions for a positive stimulus-response-reward loop are fulfilled. Tax-paying becomes both fun and profitable, even more gratifying than betting in Las Vegas, because the bidder gets a perceptible benefit from it right away. The advantage to the state and its citizens is that monopoly efficiency does not just serve the monopolist but also the public. The would-be monopolist must make a precise calculation of how much to offer the state in taxes; upon pain of losing the auction to a competitor. With minimal government intervention, the “invisible hand” of economic theory is put to the task of serving the public good. **(Journal**

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*Tax-paying for Fun and Profit*

by

Robert M. Kunstadt and Ilaria Maggioni<sup>1</sup>

Every year, billionaire Warren Buffett raises money for a San Francisco charity by using eBay to auction the privilege of having lunch with him. This year, the auction raised its greatest total ever, US\$3.46 million.<sup>2</sup>

One may wonder why such a large sum. That the appeal is for charity may have some influence; but there are numerous charities and many ways to donate to them, besides this unusual online auction. Celebrity has a value, and publicity as a spinoff from celebrity, may motivate some bidders.

One thing is certain: without the *rule of law*, such an auction would be unlikely to succeed; or even to take place. Imagine that the U.S. were run like certain “banana republics” in which power derives from gang influence and emanates principally from the barrel of a

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<sup>2</sup> Vivek Shankar, “Buffett Charity Lunch Auction Reaps Record \$3.46 Million”, *Bloomberg News, Bloomberg Business Week*, June 11, 2012 (<http://www.businessweek.com/news/2012-06-11/buffett-charity-lunch-auction-reaps-record-3-dot-46-million>).

gun.<sup>3</sup> In such a society, a billionaire like Buffett would be unlikely ever to be seen in public, let alone at a well-publicized luncheon date promoted in advance on the Internet. Anyone interested in having lunch with Buffett, would not necessarily have to pay on eBay: kidnapping would be a viable option at less cost.<sup>4</sup>

Such considerations likely motivated Justice Oliver Wendell Holmes, writing even in a more laidback, pre-Internet era, to opine that “taxes are what we pay for civilized society”.<sup>5</sup>

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<sup>3</sup> Mao Tse Tung, “Problems of War and Strategy” (November 6, 1938), Selected Works, Vol. II, p. 224-225 (<http://www.marx2mao.com/Mao/PWS38.html>):

“All things grow out of the barrel of a gun. According to the Marxist theory of the state, the army is the chief component of state power. Whoever wants to seize and retain state power must have a strong army. Some people ridicule us as advocates of the ‘omnipotence of war’. Yes, we are advocates of the omnipotence of revolutionary war; that is good, not bad, it is Marxist. The guns of the Russian Communist Party created socialism. We shall create a democratic republic. Experience in the class struggle in the era of imperialism teaches us that it is only by the power of the gun that the working class and the labouring masses can defeat the armed bourgeoisie and landlords; in this sense we may say that only with guns can the whole world be transformed. We are advocates of the abolition of war, we do not want war; but war can only be abolished through war, and in order to get rid of the gun it is necessary to take up the gun.”

In the U.S., the same thought was publicized by Black Panther Huey P. Newton in his call for “Armed Self-Defense”. ([http://socialjustice.ccnmtl.columbia.edu/index.php/Huey\\_P. Newton :: Philosophy :: Armed Self-Defense](http://socialjustice.ccnmtl.columbia.edu/index.php/Huey_P._Newton_::Philosophy_::Armed_Self-Defense)).

<sup>4</sup> Bruce Weber, “J. Paul Getty III, 54, Dies; Had Ear Cut Off by Captors”, *The New York Times*, February 7, 2011. See also Patrick Radden Keefe, “The Snow Kings of Mexico”, *The New York Times Magazine*, June 17, 2012, p. 37, 38 (“The drug war in Mexico has claimed more than 50,000 lives since 2006.”). ([http://www.nytimes.com/2012/06/17/magazine/how-a-mexican-drug-cartel-makes-its-billions.html?\\_r=1](http://www.nytimes.com/2012/06/17/magazine/how-a-mexican-drug-cartel-makes-its-billions.html?_r=1)).

<sup>5</sup> *Compania General De Tabacos De Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (dissent by Justice Holmes).

But today, despite our interconnected and indeed “flattened” world,<sup>6</sup> taxes are still being collected on a model not substantially different from the time of the Egyptian Pharaohs.

Already at that time (long before Keynes), Joseph was collecting grain on a compulsory basis in good times, to hold in state-granaries for dispensing during hard times.<sup>7</sup>

Is it possible that modern advances may give us the ability to reengineer the taxation system in a new manner, in order to reap the benefits of computerized automation that are evidently at work every day? For example, the computerized operation of eBay permitted Buffett to raise large sums for charity with very little actual labor. The ability to conduct such online transactions efficiently, self-evident in the case of eBay -- which can auction a used camera worth \$20 with the same efficient facility as it auctions lunch with Buffett -- stands as testimony to the possibilities that are available now if only we are willing to take advantage by crafting new models.

One school of more modern economic thought extolls the benefit of the “invisible hand” in directing the marketplace among many offered possibilities.<sup>8</sup> Hence, exponents of

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<sup>6</sup> Thomas L. Friedman, “The World is Flat: A Brief History of the Twenty-First Century”, *Douglas & McIntyre* (2005).

<sup>7</sup> Genesis 41:34-37 (“Let Pharaoh take action to appoint overseers in charge of the land, and let him exact a fifth of the produce of the land of Egypt in the seven years of abundance. Then let them gather all the food of these good years that are coming, and store up the grain for food in the cities under Pharaoh’s authority, and let them guard it. Let the food become as a reserve for the land for the seven years of famine which will occur in the land of Egypt, so that the land will not perish during the famine. Now the proposal seemed good to Pharaoh and to all his servants.”).

<sup>8</sup> Adam Smith, "Theory of Moral Sentiment", (1759), pp. 184–5 of *The Glasgow Edition of the Works and Correspondence of Adam Smith*, vol. i, Oxford University Press (1982) (“By preferring the support of domestic to that of foreign industry, [an individual] intends only his

the “Chicago School” espouse free rein for economic actors to conduct their business as they best see fit, free of needless regulation. For example, Judge Richard Posner argues for de-regulation of intellectual property licensing transactions, opining that “tie-ins are normally innocuous and the same is probably true of end-product royalties as well”.<sup>9</sup> But taxation, at least since the time of the Pharaohs, does not work that way. You are ordered to pay up, and you pay or go to jail; there is no choice in the matter. The underlying assumption is that citizens do not enjoy paying taxes, so they have to be compelled (without free will).

That old-fashioned assumption is now due for re-examination. Modern psychology tells us that behavior can be conditioned by a system of “cue, response, and reward”.<sup>10</sup>

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own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an *invisible hand* to promote an end which was no part of his intention.”) (emphasis added).

<sup>9</sup> Richard A. Posner, “Transaction Costs and Antitrust Concerns in the Licensing of Intellectual Property”, *J. Marshall Rev. Intell. Prop. L.* 325, 333 (2005).

<sup>10</sup> Charles Duhigg, “The Power of Habit: Why We Do What We Do in Life and Business”, *Random House* 2012, pp. 276, 278 (<http://www.scribd.com/RHPG/d/86118501-The-Power-of-Habit-by-Charles-Duhigg-an-excerpt>). See also, Gordon R. Foxall, “Foundations of consumer behaviour analysis”, *Marketing Theory*, Volume 1(2), 165–199, 192, Footnote 2 (2001) (“The essential method is to analyse behaviour in terms of its contingent relationships with the consequences it produces; thus, ‘A behavioural contingency consists of a stimulus, a response, and the outcome the response produces in the presence of that stimulus’ [citation omitted].”). See also, Justice Frankfurter in *Mishawaka Rubber & Woolen Mfg. Co. v. S.S. Kresge Co.*, 316 U.S. 203 (1942) (“The protection of trade-marks is the law’s recognition of the psychological function of symbols . . . Whatever the means employed, the aim is the same – to convey through the mark, in the minds of potential customers, the desirability of the commodity upon which it appears. Once this is attained, the trademark owner has something of value.”)

Simply put, it may be that the carrot is mightier than the stick.<sup>11</sup> A reward-based system of taxation may better harmonize with human nature.

Hence, even without belaboring the precise details of current academic debates concerning the most apt theoretical framework for the analysis of consumer behavior, it seems plain enough that our current taxation system flagrantly violates the most elementary principles of sound and practical modern marketing. Any particular reward resulting from taxation (e.g., a police officer may be there if and when you need aid) is remote and speculative. But the pain of payment is immediate: it stings with every pay stub and with every receipt from a purchase of goods or services.

Hence, the habit of human behavior most likely to be stimulated under the current system, is tax evasion. In consequence, we suffer from governmental failure on a terrifying scale, such as the current Greek debt crisis.<sup>12</sup> New York State responded to the public harm of tax evasion by enacting a new law that rewards individuals who report tax fraud.<sup>13</sup>

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<sup>11</sup> John Wooden and Steve Jamison, “Wooden on Leadership”, McGraw-Hill (April 2005), p. 165.

<sup>12</sup> “There is room for easier fiscal policies in Europe's strained economies, but Greeks must pay their taxes to strengthen their economy, International Monetary Fund chief Christine Lagarde says. The IMF managing director, who has repeatedly called tax evasion one of Greece's biggest problems, raised the issue again in an interview with CNN television today, one week before the country holds national elections. ‘I think that tax compliance is a necessary tool to restore any country's situation - Greece, like others,’ she said, according to excerpts released ahead of the broadcast.” *Herald Sun*, June 12, 2012 (<http://www.heraldsun.com.au/business/markets/greeks-must-pay-their-taxes-imf-chief-christine-lagarde/story-fn7j1dyq-1226392497288>). “Greece is a fairly small country, but for the past year it has been causing an awfully big uproar. Burdened by a pile of government debt that could force it into default (and the European banking system into a meltdown),



The tax system needs to be re-engineered using the insights of modern psychology: that people like to do things that bring a tangible reward. Tax-paying should be made FUN, not a chore. You want to participate if you see a benefit for yourself.<sup>14</sup>

What could such a system of taxation look like? We can derive a first approach for a new model, from the history of intellectual-property law. The antecedent of our modern patent system was the English system of royal monopolies.<sup>15</sup> The Crown found it advantageous to raise money by conferring monopoly rights to deal in commodities such as sugar, ink, paper and the like. The system of Crown monopolies was easily subject to abuse; not the least, because the Crown – itself being subject to no meaningful regulation – was

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Greece has had to adopt ever more stringent austerity plans in order to secure a bailout from the European Union. Explanations of how Greece got in this mess typically focus on profligate public spending. But its fiscal woes are also due to a simple fact: tax evasion is the national pastime. See also, James Surowiecki, “Dodger Mania”, *The New Yorker*, The Talk of the Town The Financial Page, July 11, 2011

([http://www.newyorker.com/talk/financial/2011/07/11/110711ta\\_talk\\_surowiecki](http://www.newyorker.com/talk/financial/2011/07/11/110711ta_talk_surowiecki)).

<sup>13</sup> Eric Schneiderman, “Going After Tax Cheats”, *National Law Journal*, June 11, 2012 (“In 2010, New York took the lead with a new approach that protects taxpayers not only from fraud in government spending, but from fraudulent tax evasion that is equally harmful to the people of our state. We passed a law that reformed our state's False Claims Act to encourage whistleblowers to come forward to report corporate tax cheats, and expressly permitted the attorney general's office to work with whistleblowers to file tax fraud lawsuits.”).

<sup>14</sup> That is the principle that perennially draws crowds to Las Vegas. “Gov. Rendell To 60 Minutes: ‘You’re Simpletons!’”, *CBS Philly*, January 7, 2011 (<http://philadelphia.cbslocal.com/2011/01/07/gov-rendell-to-60-minutes-youre-simpletons/>). See also “Gov. Ed Rendell calls ‘60 Minutes’ Staff Members ‘Simpletons’ During Gambling Episode”, *Pennlive*, January 10, 2011 (“People have been gambling since organized society was formed on the banks of the Tigris and Euphrates. They were gambling. And they will gamble as long as there's life on this planet. And that's a fact," Rendell told '60 Minutes' reporter Leslie Stahl.”)

([http://www.pennlive.com/midstate/index.ssf/2011/01/gov\\_ed\\_rendell\\_calls\\_60\\_minute.html](http://www.pennlive.com/midstate/index.ssf/2011/01/gov_ed_rendell_calls_60_minute.html)).

<sup>15</sup> Adrian Johns, “Piracy. The Intellectual Property Wars From Gutenberg to Gates”, *The University of Chicago Press*, Chicago and London (2009), p. 28.

easily persuaded to favoritisms having no rational economic basis. Such a system, being undemocratic in the extreme, found little favor over the long run. However, its rationalized outgrowth – a patent system designed to encourage innovative ideas by granting analogous monopoly rights to the first inventor to disclose – was “the origin of all Anglo-American intellectual property law”.<sup>16</sup> The same basic system employed in England was incorporated into the U.S. Constitution (Article I, Sec. 8) and continues to this very day in the form of the modern Patent Office and its regulations and proceedings for conferring monopoly patent rights.

Critical to the valid operation of the patent system in its current form, is that monopoly patent rights may only be granted to disclosures that are novel and non-obvious.<sup>17</sup> Hence, the modern patent system is unlike the original system of Crown monopolies, which could be granted in respect of the most banal commodities; and which perhaps conferred precisely the most benefit upon their holders, when applied in that manner.

While today we may look down upon the Crown monopoly as an historical relic -- not unlike the medieval death-penalty for game-poaching -- it may be that to discard it totally is to do ourselves an economic disservice. After all, many things have economic value despite not being so new. The basic idea of lunch with a celebrity is nothing particularly novel, but in the event it seems to have been worth over three million dollars. So we might take a second look at the Crown monopoly concept, too.

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<sup>16</sup> *Id.*

<sup>17</sup> 35 USC §§102-103.

From a combination of old ideas, it may be that a new one can be now crafted. Monopolies may have value not just for new ideas but also for old ones. We don't like to confer monopolies on old ideas, because it impoverishes the public domain. But there may be a range of ideas that are too banal to qualify for patent protection, but that still could benefit from monopoly implementation. For example, the idea of driving all cars on the right side of the road. There is nothing inventive about it; in fact, it is more or less an arbitrary choice since cars may also be driven successfully on the left side of the road (UK). But the economic consequences of not making a choice, of allowing anarchy on the road, would be disastrous. Hence, there is often economic value in promulgating a standard; and a strong incentive to do so in order to rationalize a productive market and avoid inefficiency.

One way to do so, is by government fiat. But generally, modern economic thinkers suggest to minimize the role of government central planning if possible; better to leave decisions to the invisible hand of the marketplace.<sup>18</sup>

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<sup>18</sup> E.g., Milton Friedman, "Capitalism and Freedom (Chicago: University of Chicago Press, 1962), Chapter 1, 'The Relation Between Economic Freedom and Political Freedom'", pp. 7-17 ("It is widely believed that politics and economics are separate and largely unconnected; that individual freedom is a political problem and material welfare an economic problem; and that any kind of political arrangements can be combined with any kind of economic arrangements. The chief contemporary manifestation of this idea is the advocacy of 'democratic socialism' by many who condemn out of hand the restrictions on individual freedom imposed by 'totalitarian socialism' in Russia, and who are persuaded that it is possible for a country to adopt the essential features of Russian economic arrangements [i.e., central planning] and yet to ensure individual freedom through political arrangements. The thesis of this chapter is that such a view is a *delusion*, that there is an intimate connection between economics and politics, that only certain arrangements are possible and that, in particular, a society which is socialist cannot also be democratic, in the sense of guaranteeing

Hence the problem: how to minimize the need for central planning, and facilitate decision-making by invisible hand, without descent into anarchy.

## **I. Basic Principles**

So back to the Buffett lunch (“choose what you want to eat” = “buffet lunch”). We determined that it would be better if taxation could be made more voluntary; and that modern Internet technology facilitates efficient auctions. To combine these principles, let’s suppose that a tax-paying entity were to be allowed to make a bid on how much tax it would pay on a particular venture. For example, suppose Verizon wishes to erect cellphone towers to provide cellular service to the borough of Manhattan (we are back in time, before this has been done). Verizon could just start to do so, and face competition from Sprint, AT&T and the like. Or, Verizon could post an online proposal at a government website, in which it detailed its plan and placed a bid for the monopoly right to erect towers in accordance with the plan.

That is not unlike government contract procedures in which bids are solicited; but in this case the initiator of the plan – its “inventor”, if you will – is Verizon.

Back in the old days, the Crown could have granted a monopoly to Verizon just because its President might have been a royal relative. Clearly, we don’t want to encourage that now.

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individual freedom”). (<https://www.mtholyoke.edu/acad/intrel/ipe/friedman.htm>) (emphasis added).

Nowadays, we have ubiquitous public auction procedures like that conducted by eBay for Warren Buffett, which run fairly and in the open so as to be generally judged trustworthy. Profitable exploitation of Internet technology in innovative ways in principle need not be limited to private ventures like eBay; especially considering that the Internet itself originated with a government-funded program (DARPA, a defense network).<sup>19</sup>

Hence, once Verizon has posted its plan, competitiveness demands that alternative bidders be permitted. Verizon, as the “inventor”, had the chance to define the terms of the proposed monopoly. The terms must be clear and definite and posted publicly for all to see. Thereafter, other bidders may have a chance to top Verizon’s bid. Possibly, Verizon as the “inventor” of the proposal, might be afforded a certain percentage of its bid as a “head start”: unless another bidder exceeds Verizon’s bid by at least the bid increment of the “head start”, Verizon will win the monopoly on the terms it has drafted. As a further reward for the first bidder’s initiative and labor, the system might allow the first bidder to continue bidding on its proposal by a small standard bid increment; while second comers would have to place minimum bid increments set as a percentage of the original bid.

What, one may ask, *is* the bid? That is, what exactly is it that Verizon is offering as the consideration for a monopoly grant?

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<sup>19</sup> An auction mechanism has long been successfully used in the court system for resolving bankruptcy proceedings -- since long before eBay was online. 11 USC §363.

The answer is *taxes*. The key item of consideration in a bid, is what percentage of sales will be paid to the state in the form of taxes. The higher the percentage, the better the bid.

The scope of a monopoly would be defined by the monopoly applicants themselves. The applicants would be responsible to draft a “claim” -- in the same manner that patent claims are now drafted. The scope of a monopoly would be determined by its claim. It would be the holder's responsibility to enforce the monopoly claim, in court if necessary. Just like a patent claim, the monopoly claim would not confer upon its holder the right to do anything that conflicted with a prior outstanding claim -- a patent is not a license to make, since it can be dominated by a prior patent.<sup>20</sup> Hence (just as in the present patent system), it would be incumbent upon the applicant, at its own risk and expense, to search for prior outstanding claims before posting a new proposal for bidding. Otherwise, the applicant might just be buying a ticket to a lawsuit.

Now we have crafted a system of taxation that can be administered on a voluntary basis rather than through blunt-force penal compulsion. The reward to Verizon for offering to pay taxes, and to pay them handsomely enough to top bids by others, is a monopoly grant (comparable to the former Crown monopolies).

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<sup>20</sup> Melvin Blecher, “Dominating Patents: a View from the Bridge”, *CLIN. CHEM.* 34/9, 1705-1708 (1988) (<http://www.clinchem.org/content/34/9/1705.full.pdf>). See also, Robert P. Merges and Richard R. Nelson, “On the Complex Economics of Patent Scope”, 90 *Colum. L. Rev.* 839, 860 (1990) (“The broad patent is said to “dominate” the narrower one. In such a situation, the holder of the narrower (‘subserving’) patent cannot practice the invention without a license from the holder of the dominant patent.”) (<http://cyber.law.harvard.edu/IPCoop/90merg2.html#n96>).

The proposed new system is not suggested as an exclusive tax-paying solution -- more as an incentive for would-be monopolists to compete among themselves by making a fair tax contribution in exchange for market exclusivity. Individuals and other corporate tax-payers could continue to pay taxes according to a traditional model. However, a corollary benefit for the general public is that an increased volume of tax revenues due to voluntary bid-in contributions, would permit lowering tax rates for other tax-payers.<sup>21</sup>

### **A. Principal Advantages**

The advantage to the state and its citizens, is that monopoly efficiency does not just serve the monopolist, but also the public. The would-be monopolist must make a precise calculation of how much to offer the state; upon pain of losing the auction to a competitor. The “invisible hand” of capitalist theory therefore is put to the task not only of serving itself, but simultaneously serving the public good.

This is especially valuable in a modern society in which the “first-mover advantage” may be strong enough that as a practical matter, *de facto* monopolies may more frequently arise.<sup>22</sup> For example, Microsoft to this very day dominates the market for word-processing software; not because its WORD program is necessarily superior, but principally because it

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<sup>21</sup> This would naturally help to correct the imbalance between effectively-lower tax rates enjoyed by many of the “1%”, and the higher rates paid by many salaried workers in the “99%”, which is often criticized in public debate about the current tax system.

<sup>22</sup> Marvin B. Lieberman, David B. Montgomery, “First-Mover Advantages”, *Strategic Management Journal*, Vol. 9, Special Issue: Strategy Content Research. (Summer, 1988), pp. 41-58.

could be sold bundled with the dominant WINDOWS operating system.<sup>23</sup> If Microsoft had been required to bid competitively against a public proposal for word-processing software, our desktops might look very different today.

The beneficial improvements in economic efficiency resulting from proceeding with public input up front, are already manifest in the successful operation of such Internet service businesses as Kickstarter.com. That service permits anyone to post a proposed venture and to solicit public support in the form of financial commitments (subscriptions). Only if enough subscriptions are raised, need the venture proceed. The new JOBS Act rules for online fundraising by small companies will facilitate such activities.<sup>24</sup> The present proposal represents a further step in this direction, adding the fuel of monopoly power to the fire of venture capitalism (to paraphrase Abraham Lincoln).<sup>25</sup>

The bidding system could operate like a virtual world, similar to the currently-existing online “Second Life” virtual reality. Instead of marketing real products at tremendous expense for R&D and advertising, proposed new products and business plans could be tested effectively in virtual reality through the public bidding system which could offer a public comment feature with a Like/Dislike tally. This would bring the benefit of

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<sup>23</sup> See, e.g., Richard A. Posner, “Transaction Costs and Antitrust Concerns in the Licensing of Intellectual Property”, *J. Marshall Rev. Intell. Prop. L.* 325, 334 (2005).

<sup>24</sup> H.R. 3606: Jumpstart Our Business Startups Act (JOBS Act), Title III, Crowdfunding (<http://www.govtrack.us/congress/bills/112/hr3606/text>) (signed into law on April 5, 2012).

<sup>25</sup> Abraham Lincoln, “Second Lecture on Discoveries and Inventions” (Feb. 11, 1859) (“The patent system ... added the fuel of interest to the fire of genius, in the discovery and production of new and useful things.”) (<http://showcase.netins.net/web/creative/lincoln/speeches/discoveries.htm>).



crowd-sourcing to refine and validate online proposals and to attract the attention of competitive bidders to the most popular proposals. It would also offer environmental benefits by eliminating the waste that can result from untrammelled competition in the real world. Especially in the winner-take-all environment that seems increasingly to prevail in our modern economy, business failure exacts a large toll from inefficient allocation of resources due to overlapping competitive efforts (which cannot possibly all succeed). For example, solar-energy businesses exhibit an inefficient boom/bust cycle.<sup>26</sup>

In a marketplace in which products are increasingly purchased sight-unseen from online warehouses like Amazon.com, and in which local stores consequently disappear,<sup>27</sup> it is no great difficulty for consumers to judge proposed new products using an online testbed administered by the Patent Office; giving thumbs-up/thumbs-down to them on the basis of the applicant's online marketing proposal and indeed even committing financially to make actual purchases (on a subscription basis, *a la* Kickstarter.com). Hence, we are now in position to substitute marketplace judgment of the desirability of a monopoly grant to a

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<sup>26</sup> “Solyndra Close To Filing Bankruptcy Plan”, *Associated Press* (June 15, 2012) (<http://fuelfix.com/blog/2012/06/15/solyndra-close-to-filing-bankruptcy-plan/>).

<sup>27</sup> Edward Moyer, “Best Buy releases list of stores to close this year”, *news.cnet.com*, April 14, 2012 (“Pummeled by e-commerce giant Amazon, the big-box retailer said last month that it would shut down 50 stores in the U.S. this year.”) ([http://news.cnet.com/8301-1001\\_3-57414199-92/best-buy-releases-list-of-stores-to-close-this-year/](http://news.cnet.com/8301-1001_3-57414199-92/best-buy-releases-list-of-stores-to-close-this-year/))

particular applicant, for an abstract bureaucratic evaluation of patentability under the current slippery yardstick of theoretical “non-obviousness”<sup>28</sup>

In other words, what the market wants, the market should get; that is the basic operating principle of market capitalism (subject only to moral requirements such as "no contract killings" and the like). By affording monopoly rights on the basis of demonstrated online consumer preferences (on the model of AMERICAN IDOL) and upon a competitive public commitment by the applicant in the form of a bid-in tax-payment percentage as *quid pro quo* for a monopoly grant, the market demand can be satisfied most efficiently. The waste (both financial and environmental) resulting from ruinous competition on a winner-take-all basis, can be eliminated up front.

Prices may be lower, not higher, due to the resulting cost savings to producers who are more-or-less assured of a market for their subscribed-for monopoly products. Importantly, except in rare cases the resulting monopolies need not result in exorbitantly high price levels, since patent monopolies by their nature do not protect the patentee against competition from non-infringing substitute goods. Even under the present patent system, a novel and non-obvious patented pain-relieving arthritis pill cannot be sold for \$1,000 each:

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<sup>28</sup> 35 USC §103. “Non-obviousness” is presently interpreted in the subjective eye of the beholder, in person of an hypothetical “PHOSITA” (person having ordinary skill in the art). *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398 (2007).

aspirin is available as a non-infringing alternative pain-reliever for 1 cent. *BIC Leisure Prods. v. Windsurfing Intern.*, 1 F.3d 1214 (Fed. Cir. 1993).<sup>29</sup>

Thomas Edison is reported to have said: “Genius is one per cent inspiration, ninety-nine per cent perspiration.”<sup>30</sup> Taking a cue from Edison, it seems that the current patent system may have it essentially backwards: the reward of a patent monopoly is granted upon the basis of a patent examiner's bureaucratic evaluation of the degree of inspiration (“non-obviousness”) exhibited by a putative inventor; subject to review by federal judges. Meanwhile, the grunt work of successfully marketing what otherwise would remain “on the shelf” as a theoretical improvement without practical effect, gets no substantial respect from the patent system. It is here that the presently-proposed improved system can show its stuff: the reward of monopoly is not to be conferred in a bureaucratic vacuum, but rather in a close-as-possible-to-real-world, online virtual-world of competitive bidding and demonstrated public interest in and commitment to a proposed project.

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<sup>29</sup> See also Richard A. Posner, “Transaction Costs and Antitrust Concerns in the Licensing of Intellectual Property”, *J. Marshall Rev. Intell. Prop. L.* 325, 329-330 (2005) (“...whether the rights holder can use his rights to obtain a monopoly return depends on whether there are good substitutes for his product; if there are, he will not be able to obtain a monopoly return. And that is the usual case. But this has never been adequately understood by the law; hence, the pervasive restrictions that antitrust law imposes on IP licensing. Nonetheless, the situation is improving, as we shall see, as courts become more sophisticated in regard to economics.”) (footnote omitted).

<sup>30</sup> <http://www.phrases.org.uk/meanings/genius-is-one-percent-perspiration-ninety-nine-percent-perspiration.html>

The concept of "commercial success" as an indicator of patentability<sup>31</sup> will therefore assume new significance -- in an expanded and indeed largely-controlling role. Desk-bound patent examiners and federal judges will be relieved of their current abstract task of assessing the merits of alleged inventive activity, in favor of actual marketplace judgments in which money talks. Thus, the "invisible hand" economic principle will take priority over formalistic evaluation of "non-obviousness". A key difference is that under the proposed new system, non-obviousness would no longer be a requirement for a monopoly grant; rather, the grant results from a direct, publicly-disclosed *quid pro quo* for the making of a proposal which finds actual receptiveness in the online marketing testbed; and which is committed to a public benefit in the form of tax payments voluntarily bid-in through the online public-auction process. The rewards to the proposer and to the public are both immediately perceptible by all. Hence, the condition for a positive stimulus-response-reward loop is fulfilled. Tax-paying becomes both fun and profitable, because you get a perceptible benefit from it right away. Grover Norquist, with his "no more taxes" mantra, will look like a Grinch trying to steal children's toys.<sup>32</sup>

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<sup>31</sup> "Commercial success", if attributable to the benefits of the claimed invention, argues in favor of patentability. E.g., *Lindemann Maschinenfabrik GmbH v. American Hoist and Derrick Company et al.*, 730 F.2d 1452 (CAFC 1984).

<sup>32</sup> "Mr. Norquist is president of Americans for Tax Reform (ATR), a taxpayer advocacy group he founded in 1985 at President Reagan's request. ATR is a coalition of taxpayer groups, individuals and businesses opposed to higher taxes at the federal, state and local levels. ATR organizes the TAXPAYER PROTECTION PLEDGE, which asks all candidates for federal and state office to commit themselves in writing to oppose all tax increases." (<http://www.atr.org/about-grover>)

Effectively, the present system is turned on its head. Now, local governments compete to lure businesses by offering tax holidays, municipal financing, and the like. Under the new system, those wishing to enjoy government largesse in the form of monopoly rights, would have to sharpen their pencils and offer to pay more tax – not less.<sup>33</sup> But at the same time, they would be happy to do so since they get the exact commercial advantage they seek; and on their own defined terms.

## **B. Replacement of *ad hoc* local action**

This new plan may replace various ad hoc tax subsidies and penalties that now proliferate, often leading to unfair competition. In some instances there are now rich rewards, and in other instances discriminatory penalties. In both cases, interstate and foreign commerce may be economically distorted. Subsidies, in particular, may already be actionable as grounds for imposition of countervailing duties under current international law.

### **1. Examples of unfair benefits**

Local governments now compete to lure businesses by offering tax holidays, municipal financing, and the like. For example, states like South Carolina, Alabama and Tennessee enacted incentive programs to attract business to the state. Such initiatives come under the auspices of creating new employment opportunities and revamping service economy catering to the growing communities. However, they do come at a tangible cost --

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<sup>33</sup> In fact, the Federal government, under its Commerce clause power (U.S. Constitution, Article 1, Section 8), has the right to forbid competition among states to lure businesses from out of state in that manner.

the tax breaks offered to companies in exchange for settling within state borders are passed on to the local population as tax increases.<sup>34</sup>

## **2. Examples of unfair penalties**

One example of a special tax rate applied to a particular activity, is the doubled sales-tax rate imposed on car rental transactions in Manhattan. The motivation is likely to soak tourists, since residents may exempt themselves from paying the tax by filing proof of local residence.<sup>35</sup> Similarly, “airport fees” are imposed at many other car rental locations, likely for a similar reason: “let the tourists pay for airport expansion”<sup>36</sup>; or “lodging fees” are similarly advocated to be imposed on tourists: “Would I support a lodging tax increase? Hell, yes. Tourists have money. Would I support an overall tax increase (even temporarily)? Hell,

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<sup>34</sup> Mike Lillis, “Foreign Auto Makers Won Billions in Government Subsidies”, *The Washington Independent*, December 16, 2008 (“... this argument — that the government has no business interfering in free markets — ignores an increasingly frequent tradition among Southern states, which have fronted billions in local taxpayer dollars in the past two decades to attract foreign auto plants. Those incentives, arriving in the form of tax breaks, training for new employees and even land, have enticed BMW to South Carolina, Mercedes to Alabama and Nissan to Tennessee ... But that flourishing didn’t come without significant taxpayer help ... Alabama, for example, secured construction of a Mercedes-Benz plant in 1993 by offering \$253 million in state and local tax breaks ... For Honda, ... \$158 million in similar perks, adding \$90 million in enticements when the company expanded the plant three years later. A 2001 deal with Toyota left the company with \$29 million in taxpayer gifts.”) (<http://washingtonindependent.com/22236/cars>).

<sup>35</sup> Manhattan Resident Parking Tax Exemption ([http://www.nyc.gov/html/dof/html/parking/park\\_manhattan\\_res.shtml](http://www.nyc.gov/html/dof/html/parking/park_manhattan_res.shtml)).

<sup>36</sup> Boise, Idaho, car rental customer facility charge, Boise Municipal Code, Ch. 12-22.

no!”<sup>37</sup> Sometimes, the local residents are even given an express monopoly right: in Boston, locals are entitled to on-street parking that is forbidden to nonresident tourists.<sup>38</sup>

### **3. International treaty prohibition**

Government subsidies are already disfavored or outright prohibited at an international level by treaty.<sup>39</sup> Similar limitations should be enforced within individual national borders (including in the United States) by implementing laws banning unfair trade practices. A more integrated and balanced system like the public auction model proposed in this article works better to reduce fiscal burdens on tax-payers by offering an open playing field where all voluntary participants may engage in interstate commerce -- rather than leaving corrective action in the hands of state legislators prone to distortions driven by perceived benefits for local residents.

### **4. Power of Congress to regulate interstate and foreign commerce**

Such systems of local advantage work to the prejudice of interstate travelers (the affected "tourists") and hence are likely invalid as impingements upon the freedom to travel

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<sup>37</sup> Jill Ann Fryklund, “Vail Daily Letter: Tax the Visitor, Fine”, Vail Daily, June 3, 2012 (<http://www.vaildaily.com/article/20120604/LETTER/120609958>).

<sup>38</sup> Boston Resident Parking Permit (<http://www.cityofboston.gov/parking/residentparking/>).

<sup>39</sup> Tokyo Round Subsidies Code, the WTO SCM Agreement (“The basic principle is that a subsidy that distorts the allocation of resources within an economy should be subject to discipline. Where a subsidy is widely available within an economy, such a distortion in the allocation of resources is presumed not to occur. Thus, only ‘specific’ subsidies are subject to the SCM Agreement disciplines. There are four types of ‘specificity’ within the meaning of the SCM Agreement”; “The SCM Agreement creates two basic categories of subsidies: those that are prohibited, those that are actionable (i.e., subject to challenge in the WTO or to countervailing measures). All specific subsidies fall into one of these categories.”) ([http://www.wto.org/english/tratop\\_e/scm\\_e/subs\\_e.htm](http://www.wto.org/english/tratop_e/scm_e/subs_e.htm)).

afforded by the Federal Constitution. Since localities are not allowed to tax interstate sales online on the Internet,<sup>40</sup> they should not be allowed to tax interstate tourists for parking upon reaching their interstate destination; or for using the local airport as part of their interstate itinerary. The Federal government, under its power to regulate and tax interstate commerce, has the ability to restrict or prohibit business activities aimed at using interstate and foreign commerce; be it by imposing regulations concerning disclosure of Swiss bank accounts,<sup>41</sup> or by penalizing the use of "tax haven" stratagems for purposes of tax evasion.<sup>42</sup> Indeed, the same constitutional power may be employed entirely to prohibit transactions with foreign nations.<sup>43</sup> It is not hard to imagine that if a public will became manifest, financial transactions with certain jurisdictions whose known principal business is facilitating tax evasion, could be entirely prohibited in the same manner as financial transactions with Iran are now prohibited. The same Federal power would support a ban on states' bidding against each other to entice businesses by tax benefits and subsidies to transfer their headquarters from one state to another (manifestly, a business move made in interstate commerce).

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<sup>40</sup> *National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967).

<sup>41</sup> FACTA, 26 USC §1471.

<sup>42</sup> "Merck Agrees to Pay IRS \$2.3 Billion", IR-2007-35, Feb. 14, 2007 (<http://www.irs.gov/newsroom/article/0,,id=167773,00.html>). See also, Jim Edwards, "How Merck Lost \$2.3B in the Bermuda Triangle", [www.cbsnews.com](http://www.cbsnews.com), November 17, 2009 ([http://www.cbsnews.com/2102-505123\\_162-42843489.html?tag=contentMain;contentBody](http://www.cbsnews.com/2102-505123_162-42843489.html?tag=contentMain;contentBody)).

<sup>43</sup> Department of Commerce boycott regulations, Item Subject to the EAR, 15 CFR §734.3.



## II. Possible Objections; Responses

Far-fetched and outrageous, one might say? Fact is, governments already sell benefits against a price in the form of special-purpose taxes, user fees and even in public auctions. For a fee, one gets to cut the TSA security line at the airport.<sup>44</sup> For a fee, one gets to drive in the carpool lane without passengers.<sup>45</sup> For a fee, one may visit a National Park.<sup>46</sup> For a fee, one may lease offshore oil-drilling rights.<sup>47</sup> For a fee, one may purchase a channel on the radio spectrum at auction.<sup>48</sup> You can pay an extra fee to accelerate government examination of a patent application,<sup>49</sup> or a copyright application.<sup>50</sup>

Social Security benefits are variable depending upon how much one has worked over a lifetime career: the highest earners get the highest benefits.<sup>51</sup> This is presumably justified

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<sup>44</sup> “CBP’s Trusted Traveler Programs Reach One Million Members” (“Applications to Global Entry must be submitted online at [www.globalentry.gov](http://www.globalentry.gov). A fee of \$100 is collected via the website for a five-year membership.”) ([http://www.cbp.gov/xp/cgov/newsroom/news\\_releases/national/2011\\_news\\_archive/05052011\\_2.xml](http://www.cbp.gov/xp/cgov/newsroom/news_releases/national/2011_news_archive/05052011_2.xml)).

<sup>45</sup> E.g. [www.91expresslanes.com](http://www.91expresslanes.com) (Orange County, CA).

<sup>46</sup> For example, Yellowstone entrance fee ([www.nps.gov/yell/planyourvisit/feesandreservations.htm](http://www.nps.gov/yell/planyourvisit/feesandreservations.htm)).

<sup>47</sup> Deborah Solomon, “U.S. to Resume Lease Sales for Oil Drilling in the Gulf”, *The Wall Street Journal*, August 20, 2011.

<sup>48</sup> FCC Spectrum Auctions, <http://www.fcc.gov/topic/auctions>.

<sup>49</sup> 37 CFR §1.102 (“Advancement of examination ... (d) A petition to make an application special on grounds other than those referred to in paragraph (c) of this section must be accompanied by the fee set forth in § 1.17(h) [i.e., \$130].)

<sup>50</sup> U.S. Copyright Office, Circular 10, Special Handling (“Special handling is the expedited processing of an online or paper application for registration of a claim to copyright or for the recordation of a document pertaining to copyright ... Special handling of a registration requires a special handling fee in addition to the registration fee.”).

<sup>51</sup> “How You Earn Credits”, SSA Publication No. 05-10072, ICN 467510, Jan. 2012 ([www.ssa.gov/pubs/10072.gov](http://www.ssa.gov/pubs/10072.gov)).

on the basis that the more one worked and thus has paid into the retirement system, the more one should receive as a benefit. The aim may be to encourage work rather than to reward loafing. Although this is a more direct connection between earnings and payout than is apparent in the case of the TSA line, in fact the same logic might be applied: the more one has worked and thereby accumulated disposable wealth available to pay a line-cutting fee, the more government benefit one should be allowed to claim in terms of time spared from waiting in line. The “economically-productive” (i.e., wealthy) citizen's time is by definition more valuable when calculated as a variable in a “time=money” equation.<sup>52</sup>

The Supreme Court's recent *Citizens United* decision,<sup>53</sup> further confirms that wealth is permitted to convey manifest advantages even under a democratic system of government. The Court ruled that corporations may not constitutionally be restricted from expending unlimited funds for political purposes, despite the possible consequence of tilting election results in favor of the biggest advertising spender.<sup>54</sup>

Similarly, government “tax expenditures” vary in many cases depending upon the claimant's income level. A home-mortgage interest deduction is most valuable to a wealthy

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<sup>52</sup> Here we are assuming that economics principles apply to the determination of economic issues; we are not assessing “cultural” value, “intrinsic” value, or the like.

<sup>53</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010).

<sup>54</sup> A possible constitutionally-permissible corrective for this consequence, would be to bar legislators from private, off-the-record communications with supplicants -- the same as judges are now barred from ex parte communications with litigants. Code of Conduct for United States Judges, Canon 3(A)(4). Hence, any legislative proposals -- whether originating from rich or poor, campaign contributors or not -- could only be made on the public record for all to see. At least this would permit the press and public to determine who was behind any lobbying attempts. The public record could also include third-party comments on such proposals, and thumbs-up/down indications posted by readers.

person, since the deduction saves tax at a higher progressive rate when claimed by a high-earning taxpayer than by a low-income taxpayer. Indeed, only high-earning taxpayers are even in position to purchase homes (particularly expensive homes) and to be approved by banks for large mortgages on them.

Hence, the idea of government user fees conveying rights against payment is not novel. Indeed, it is a trend correctly observed by Prof. Sandel.<sup>55</sup> What may be novel, and is herein argued to be desirable, is to permit the payers themselves to make and post public proposals for new forms of monopoly; and to insure, through an open and public competitive-bidding process in which the subject of the bidding is the tax percentage payable to the state (in its capacity as representative of the public), that the public may receive the highest available benefit. Otherwise, by stipulating only the customary systems of fixed or progressive tax rates on a non-specific basis (gross income and/or gross sales without regard to field of activity), the public is leaving money on the table; at the same time it loses the economic-efficiency benefits that publicly-sanctioned monopolies may provide.

Some new technology is already being employed by government for public purposes; for example, in Santa Monica, California:

“Using new technology, the city has adapted a system that resets the time on each parking meter to zero the moment a car pulls out of a space. And if a sign shows a parking limit of one hour, that is exactly what it means — once the meter runs out, it is done. Trying to fill it up with more quarters or another swipe of the credit card is

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<sup>55</sup> “‘What Money Can’t Buy’ and What It Shouldn’t Buy”, Interview PBS NewsHour, June 11, 2012. See also, Michael J. Sandel, “What Money Can’t Buy: The Moral Limits of Markets”, *Ferrar, Straus and Giroux* (2012).

just an exercise in futility. City officials say the changes are devised to make street parking more efficient by turning over spaces more quickly. But critics, including residents and visitors from near and far, say the tactic appears to be simply a way to squeeze more money out of the parking meters.”<sup>56</sup>

So in Santa Monica, government is using computer technology to literally nickel and dime citizens to rent on-street parking spaces. Government could instead be focusing on the real money that is being left on the table by not adopting a "high bidder wins" taxation strategy where it counts. Such a strategy is already being used successfully online at Priceline.com, in which consumers name their own desired price for hotel rooms.

Some may object that only well-funded corporations could make winning bids on proposals. However, the system could provide a “consolation prize” to the original poster -- a percentage of the gross if the project exceeds a certain minimum that qualifies it as a “success”. That incentivizes even low-income individuals to get ideas and make postings. Posters who cannot afford to outbid wealthier rivals to secure the monopoly rights to their own posted proposals, which may in many cases require substantial disposable capital to implement successfully, might still be afforded a benefit: in case a proposal becomes successful and raises a defined minimum amount of tax revenue, its original poster might be paid a percentage share of that revenue as the reward for his/her effort in getting the ball rolling. This would encourage and reward even low-income individuals, incentivizing them to participate in the system.

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<sup>56</sup> Jennifer Medina, “Santa Monica Resets Its Parking Meter System”, *The New York Times*, June 12, 2012 (<http://www.nytimes.com/2012/06/13/us/santa-monica-resets-parking-meter-system.html>).

To prevent abuse by spammers, a small fee could be levied upon the posting of each proposal (say \$100). This is less than the current minimum small-entity fee for filing a U.S. utility-patent application (\$190).<sup>57</sup>

It would be possible to assign a duration for each monopoly proposal. A term could be set by the applicant in the proposal itself, according to the applicant's own evaluation of the appropriate term required for the business plan to succeed. Thus, the "invisible hand" principle could be applied, rather than a centrally-planned fixed term (although the maximum monopoly term could be fixed by law, if desired). This is not unlike our current patent system, in which the patentee gets to choose the term of its patent by deciding whether or not to pay the maintenance fees which are due periodically in order to maintain a patent in force for its full 20-year term.<sup>58</sup>

One may wonder how quality can be assured, if monopoly proposals are able to squelch all competition in a nascent industry. Here, we may draw upon the ability of our online interconnected society to inject advantages that would not have been possible in the time of Adam Smith (or Karl Marx). Proposals put out for bid can get a thumbs-up/thumbs-

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<sup>57</sup> 37 CFR §1.16.

<sup>58</sup> 37 CFR §1.20. This is another example of how current law sometimes confers a benefit upon extra payment, just as in TSA airport-security lines. A wealthy patentee can afford to pay for a longer patent term than can an impoverished patentee. A theoretical justification for these fees is that if a patent is successful the patentee should be able to afford to pay to maintain it; and conversely, if the patentee has no funds to pay a maintenance fee, the patent should be removed from the register as deadwood. This justification is only partly convincing, since there may be many reasons why any particular patentee comes up short of funds just at the time when a maintenance fee payment is due (it could just be bad timing due to a stock-market crash, as in 2008).

down from the general public (in FACEBOOK lingo, “Like/Dislike”). Unless a proposal gets sufficient thumbs-up support, it may not proceed as a monopoly. Hence, the would-be monopoly entrepreneur gets immediate public feedback on the viability of any posted proposal. This saves substantial sums on market research and is strongly economically-efficient (since those proposals that lack indicia of likely commercial success with the public, do not get funded).<sup>59</sup>

Bear in mind that this system of posted bidding would be voluntary, not compulsory. Anyone may still launch any desired venture without putting it out for bid first. This can be accomplished through “prior user rights” that grandfather such prior practitioners to continue doing what they have been doing, despite any subsequent grant of “monopoly” rights through the public bidding process.<sup>60</sup>

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<sup>59</sup> Patrick Vlaskovits, “Henry Ford, Innovation, and That ‘Faster Horse’ Quote”, *HBR Blog Network*, August 29, 2011

([http://blogs.hbr.org/cs/2011/08/henry\\_ford\\_never\\_said\\_the\\_fast.html](http://blogs.hbr.org/cs/2011/08/henry_ford_never_said_the_fast.html)) (“... Ford's adherence to his vision of the mass-market car and how to materialize that vision was instrumental in both his early success in growing Ford Motor Company as well as his later failure to respond in a timely and effective manner to rapid innovation in the marketplace. The real lesson learned was not that that Ford's failure was one of not listening to his customers, but of his refusal to continuously test his vision against reality, which led to the Ford Motor Company's failure of continuous innovation, resulting in a catastrophic loss of market share from which it never recovered.”).

<sup>60</sup> Compare America Invents Act (“AIA”) Sec. 5, amending 35 USC §273 to provide that a commercial prior use in the United States of a later U.S. patented invention is a defense to patent infringement, hence the prior user may continue to practice the invention:

“§ 273. Defense to infringement based on prior commercial use (a) IN GENERAL.— A person shall be entitled to a defense under section 282(b) with respect to subject matter consisting of a process, or consisting of a machine, manufacture, or composition of matter used in a manufacturing or other commercial process, that would otherwise infringe a claimed invention being asserted against the person if—

The America Invents Act (“AIA”) strengthens provisions for grandfathering prior users against patent suits, to permit them to continue what they have been doing all along, even in secret.<sup>61</sup> This tends to undercut the rationale of the traditional patent system, which sought to tease out public disclosure of commercial processes using patent monopoly as a carrot and the risk of injunction as a stick. Since under the new law prior users gain strong rights, we are already now partway to implementation of our herein-proposed new regime (under which prior users may also be grandfathered against the effect of the granted monopoly).

However, the disadvantage of not participating in the new public-bidding system, is that publicly-sanctioned monopoly rights will not be afforded. Hence, the capitalist is given a new choice, and the power to discriminate (to the decimal place) in calculating how much tax percentage to offer in a bid for the desired right.

That the proposal fosters marketing success rather than pure inventive activity, might be cited as an objection. For example, Prof. Lemley already criticizes the present patent system on this basis.<sup>62</sup> Lemley, in his eagerness to explode the “myth” of the pioneering

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(1) such person, acting in good faith, commercially used the subject matter in the United States, either in connection with an internal commercial use or an actual arm’s length sale or other arm’s length commercial transfer of a useful end result of such commercial use; and (2) such commercial use occurred at least 1 year before the earlier of either— (A) the effective filing date of the claimed invention; or (B) the date on which the claimed invention was disclosed to the public in a manner that qualified for the exception from prior art under section 102(b)”.

<sup>61</sup> AIA Sec. 5, amending 35 USC §273.

<sup>62</sup> Mark A. Lemley, “The Myth of the Sole Inventor”, *Michigan Law Review*, Vol. 110:709-760 (March 2012).

patent inventor in order to denigrate the conceptual basis for providing a patent law, assembles an impressive number of interesting facts from the history of science -- without drawing proper conclusions from them.

It should be no surprise that many inventions are combinations of pre-existing elements that build upon known technology. *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007) (“a patent composed of several elements is not proved obvious merely by demonstrating that each element was, independently, known in the prior art”).<sup>63</sup>

Also, that inventors may be ill-suited at commercializing their inventions -- which can lead to delays in introducing improvements<sup>64</sup> -- was already pointed out and a remedy proposed (the “public patent pool”).<sup>65</sup>

Finally and most importantly, that successful marketing -- like successful inventing -- may benefit from a monopoly status, supports the present article's suggestion for re-engineering patent law, antitrust law and tax policy into a novel combination in order to confer such advantage; and to do so not free of charge, not by chance accident or unregulated

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<sup>63</sup> In fact, Lemley's basic thesis -- that supposedly great inventions were actually made in banal ways not meriting economic reward -- is expressly barred by the terms of the current patent statute itself:

“35 U.S.C. 103 Conditions for patentability; non-obvious subject matter.

(a) . . . ***Patentability shall not be negated by the manner in which the invention was made.*** (emphasis added).

<sup>64</sup> Lemley, *Id.* at 711 (“Commercialization theory, which hypothesizes that we grant patents in order to encourage not invention but product development, seems to founder on a related historical fact: most first inventors turn out to be lousy commercializers who end up delaying implementation of the invention by exercising their rights”).

<sup>65</sup> Robert M. Kunststadt and Ilaria Maggioni, “A Proposed ‘U.S. Public Patent Pool’”, *les Nouvelles* (March 2011), p. 10.



happenstance, but rather in an intentional, directed, focused and controlled manner so as to maximize private and public benefit (*laserlike*, we might say). Once the concept is grasped, a wide new realm of social engineering opens for development. A path of improvement may be extended in a multitude of ways upon experimentation and experience.

### **III. Conclusion**

A tax-paying entity would be allowed to make a bid on the percentage of tax it would pay for acquiring monopoly rights on a particular venture, posted publicly on a government-auction website for others to see and to post their alternative bids. Proposals put out for bid could immediately be tested for market viability by getting a thumbs-up/thumbs-down from the general public. The rewards to the proposer and to the public can be immediately perceived by all. Hence, the conditions for a positive stimulus-response-reward loop are fulfilled. Tax-paying becomes both fun and profitable, even more gratifying than betting in Las Vegas, because the bidder gets a perceptible benefit from it right away. The advantage to the state and its citizens is that monopoly efficiency does not just serve the monopolist but also the public. The would-be monopolist must make a precise calculation of how much to offer the state in taxes; upon pain of losing the auction to a competitor. With minimal government intervention, the “invisible hand” of economic theory is put to the task of serving the public good.