Life, Liberty, and the Pursuit of Genetic Information
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Abstract
Over the past few decades, scientists have made breakthroughs in understanding how genetic mutations contribute to disease in the human body. This has led to the availability of genetic testing, allowing patients to know whether they carry a particular mutation and allowing doctors to provide appropriate medical treatment based on test results. Thus, knowledge of one’s genetic information can help people make informed decisions regarding medical treatment.

A complicating factor, however, is gene patents. An inventor that determines the function of a gene and isolates it can get a patent, not just on the isolated gene itself, but also on diagnostic tests detecting the presence of the gene. Such a patent allows the holder to block others from offering diagnostic tests for the gene, regardless of whether the patent holder actually offers the test. Thus, gene patents have the potential to prevent patients from learning about their own genetic information, thereby impacting their ability to make informed health care decisions.

This Article argues that the Patent Act, as applied, violates the Fifth Amendment Due Process Clause. Individuals have a fundamental liberty interest in knowledge regarding their own genetic information, to the extent that such information will help them make informed decisions regarding medical treatment. Because gene patents are issued by the government and block individuals from obtaining this necessary information, the Patent Act as applied is unconstitutional. This constitutional problem likely extends beyond gene patents into other patents blocking diagnostic testing. Consequently, it is imperative that Congress amend the Patent Act to prevent gene patents from unduly restricting individuals access to their own genetic information.