Question 2A:

The patent system is an antiquated legal regime that has outlived its purpose of promoting progress. A patent is a limited property right, which provides the rights to exclude and alienate. It can prevent others from using, selling, importing, manufacturing, or licensing that right to others. This bundle of rights has arguably served as an incentive to create, invest, innovate, commercialize, and to design around. It theoretically provides a means by which an inventor can both recoup their investments and prevent others from commercializing their invention. It also purportedly benefits the public, by encouraging the disclosure of an inventor’s ideas to the public, which they otherwise would not do for fear of losing their monopoly on that idea. This disclosure, in turn, creates a building block off of which others may innovate. Finally, a patent reputedly offers a more feasible and affordable solution than other rewards for innovation. It does not require monetary expenditures for the encourage of innovation, and it assigns the government minimal work in overseeing the process. The free market, a cornerstone of our modern-day, capitalist society, theoretically assigns value far better than can another actor, such as Congress. For these reasons, the patent system has been a valued addition to our society since our nation’s founding.

The patent system, however, no longer serves our society. In major sectors like pharmaceuticals and technology, patents serve as a weapon used to threaten or crush competitors. Large companies build up arsenals of patents – valuable patents interspersed with those that are potentially worthless – for use in potential litigation. Small and nascent companies, in contrast, spend large sums to obtain one patent, maybe several, to cover their invention or inventions. With such small patent portfolios, these smaller companies or lone inventors have too little leverage (and remaining capital) with which to defend themselves from the larger companies, leading the larger companies to destroy or absorb them. Accordingly, the patent system no longer promotes innovation – it instead rewards players who have already established their dominance in the market.

The patent system as currently designed also fails to reward society. Although society purportedly receives the benefit of ideas in exchange for temporary exclusion, the costs of such exclusion have become too great to bear. In the pharmaceutical industry, patent thickets prevent the public from accessing generic medicines for many years after the first associated patent has expired. Furthermore, even during the period of exclusivity associated with the first related patent, the monopoly guaranteed by a patent is used to set exorbitantly high prices. This is not the cost bargained for by society.

Another cost to society comes in the form of trade secrets. Many inventions, particularly in the technology sector, are kept as trade secrets because the inventor or assignee would not be able to identify whether their competitor was infringing their invention. Although it is argued that these inventions could be reverse engineered, technology moves so quickly in this age that by that time they would have already been replaced by something new.

Finally, the patent system no longer serves society because the pace of technological advancement has outstripped the speed with which the judiciary and the public can keep themselves informed of such technologies. It is no longer realistic to expect a judge and jury to fully grasp the technologies involved in patent disputes, and it does society a disservice to have such ill-equipped arbiters at the helm. Although Congress also often lacks such expertise – as evidenced by any Congressional hearing involving a piece of recent technology – it can at least spend its time examining a broad array of experts.
Although a true solution will take imagination and input from society at large, several potential (albeit incomplete) solutions exist. In the technology sector, a vibrant open-source community promotes innovation without ownership. This allows innovation to occur more quickly and collaboratively, as inventors can build off one another’s work without inviting patent disputes and legal challenges. Another potential solution involves state-sponsored research and development, in sectors like the pharmaceutical industry. During the Cold War, the United States government secretly developed technology relating to nuclear weapons, and fostered competition by establishing dueling laboratories. Although each laboratory was accountable to the federal government, they also each had an incentive to outperform one another to be able to claim preeminence in their field. Similarly, the government could promote and sponsor innovation in the pharmaceutical sector, and then pass along the benefits to society in the form of affordable medications. These solutions, as well as others yet to be identified, could help us transition away from the current, broken patent system that is failing our society. Instead, we could build a new system that both better fostered innovation from the small and large actors and also better served society.

(Word Count: 793)