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The Great Balancing Act: The Effect of the America Invents Act on the Division of Power Between the Patent and Trademark Office and the Federal Circuit

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INTRODUCTION

The United States Constitution grants Congress the power “[t]o promote the Progress of Science and useful Arts”¹ by entering into a bargain that drives patent policy: Congress grants a patent to the inventor for a limited time, in exchange for the benefit to society of the invention.² The Constitution empowered Congress with broad authority,³ and Congress has, as in many areas of the law,⁴ created several entities that shape patent policy.⁵ Despite Congress’s creation of the United States Patent and Trademark Office (“PTO”), tasked with the regulation of patent applications and grants,⁶ courts—specifically

1. U.S. CONST. art. I, § 8, cl. 8 (granting Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).

2. Sarah Tran, *Administrative Law, Patents, and Distorted Rules*, 80 GEO. WASH. L. REV. 831, 855 (2012).

3. *Id.*

4. See William Weaver, Note, *Multiple-Agency Delegations & One-Agency Chevron*, 67 VAND. L. REV. 275, 276 (2014) (describing Congress’s frequent delegation).

5. Arti K. Rai, *Patent Validity Across the Executive Branch: Ex Ante Foundations for Policy Development*, 61 DUKE L.J. 1237, 1237 (2012) (“In patent law, as in most areas of law, Congress, courts, and administrative agencies are the key institutions with the potential to shape policy.”).

6. Tran, *supra* note 2, at 834 n.5.

semi-specialized appellate courts—have driven patent policy for nearly two centuries.⁷

Beginning in 1982 when Congress established a single, specialized court with near-exclusive appellate jurisdiction in patent cases, the United States Court of Appeals for the Federal Circuit, the judiciary has dominated the interpretation of the patent statute.⁸ From the initial Patent Act of 1790⁹ to the most recent overhaul of the patent system,¹⁰ Congress has drafted laws in broad terms, implicitly leaving much substantive law for the patent institutions, specifically the PTO and the Federal Circuit, to interpret.¹¹ Despite several amendments to the Patent Act, Congress has not yet given the PTO rulemaking authority over substantive questions of patent law.¹² The result is a legal hybrid whereby the PTO examines and issues patents—a process that necessarily invokes patentability determinations—while the Federal Circuit assumes primary authority of interpreting substantive questions of patent law.¹³ Surprisingly, however, the Federal Circuit has consistently refused to grant any deference to the legal conclusions of the PTO,¹⁴ and attempts at patent policy reform have been marred by the power struggle between the PTO and the Federal Circuit over substantive patent law.¹⁵

Despite qualifying as the most substantial overhaul to the patent system,¹⁶ the America Invents Act of 2011 (“AIA”)¹⁷ continues this trend. The AIA did not grant the PTO expansive authority to

7. See Rai, *supra* note 5, at 1237 (“In practice, though, courts have generally been regarded as the dominant players in shaping patent policy.”).

8. *Id.* at 1238.

9. Patent Act of 1790, ch. 7, § 1, 1 Stat. 109, 109–10 (1790) (granting authority to examine and issue patents to the Secretary of State, the Secretary of War, and the Attorney General).

10. Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).

11. Rai, *supra* note 5, at 1237–38. There are other agencies that influence patent policy, and those are mentioned later in this analysis. See *id.* at 1239–42 (considering the other agency actors that make patent policy, including the International Trade Commission and the Federal Trade Commission).

12. See John M. Golden, *Patentable Subject Matter and Institutional Choice*, 89 TEX. L. REV. 1041, 1044 (2011) (explaining that the PTO “lacks binding interpretive authority on matters of substantive law”).

13. *Id.* at 1043.

14. See Melissa F. Wasserman, *The Changing Guard of Patent Law: Chevron Deference for the PTO*, 54 WM. & MARY L. REV. 1959, 1962 (2013) (“[T]he [PTO] lacks robust substantive rulemaking authority and receives *no* judicial deference for its legal interpretations of the Patent Act.”).

15. Sarah Tran, *Patent Powers*, 25 HARV. J.L. & TECH. 609, 626 (2012).

16. David Kappos, *Re-Inventing the U.S. Patent System*, USPTO: DIRECTOR'S FORUM (Sept. 16, 2011, 5:45 PM), http://www.uspto.gov/blog/director/entry/re_inventing_the_us_patent [<http://perma.cc/D424-829H>].

17. Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).

promulgate rules of substantive patent law, despite early versions of legislation and numerous scholarly proposals requesting such authority.¹⁸ Congress did, however, grant the PTO new powers to be implemented after the PTO has issued a patent—most notably a post-grant review proceeding akin to an adjudicatory hearing wherein third parties may challenge the validity of granted patents.¹⁹ Many scholars understand the AIA's new grant of power as Congress's indication that the PTO reviews patents with force-of-law power, thus warranting judicial deference to its interpretations of substantive patent law and installing the PTO as the primary interpreter of the patent statute.²⁰

However, not all scholars agree.²¹ The argument for judicial deference is well articulated under administrative law, but even if interpreting the AIA's grant of adjudicatory powers to the PTO would serve as a trigger for deference,²² the potential impact of such a deferential shift on the patent system and policy is unclear. Two facts are undisputed: (1) the AIA expands the power of the PTO,²³ and (2) the Federal Circuit is uniquely positioned as the only court of appeals with subject matter jurisdiction over patent disputes, as its rulings are binding on all United States district courts.²⁴ What scholars still dispute is whether Congress, in enacting the AIA, intended to designate the PTO as the single interpreter of the Patent Act and permanently change the balance of power between the PTO and the Federal Circuit.

This Note argues that, considering the new authority established in the AIA and the complex distribution of patent authority among the judiciary, executive, and Congress, the traditional *Chevron*²⁵ framework for administrative deference is ill-suited to promote desired

18. Rai, *supra* note 5, at 1239 (“[T]he AIA did not give the agency the expansive rulemaking authority over questions of substantive patent law that had been proposed in earlier versions of the legislation.”).

19. Joe Matal, *A Guide to the Legislative History of the America Invents Act: Part I of II*, 21 FED. CIR. B.J. 435, 435 (2011).

20. Wasserman, *supra* note 14, at 1966–67; *see also* Rai, *supra* note 5, at 1239 (“[P]atent-law scholars are beginning to treat the PTO as a full-fledged participant in the institutional debate.”); Tran, *supra* note 15, at 610 (“[The AIA] will likely change forever the institutional structure of the patent system, particularly the roles of the Patent Office and Federal Circuit and the relationship between administrative law and patent law.”).

21. *See* Sapna Kumar, *The Accidental Agency?*, 65 FLA. L. REV. 229, 238 (2013) (“Congress did not substantially alter the balance of power between the Federal Circuit and the PTO.”).

22. An agency's interpretation of its organic statute is entitled to judicial deference if Congress delegated to it the authority to issue interpretations that carry the force of law and the agency has used that authority in interpreting the statute. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

23. Matal, *supra* note 19, at 435; Wasserman, *supra* note 14, at 1964.

24. 28 U.S.C. § 1295 (2012); *see also* J. Jonas Anderson, *Patent Dialogue*, 92 N.C. L. REV. 1049, 1051 (2014) (discussing the jurisdiction of the Federal Circuit).

25. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 837 (1984).

patent policy reform. Thus, a more flexible approach, likely *Skidmore*²⁶ deference, is ideal to honor Congress's complex institutional design of the patent system. Part I of this Note discusses the historical balance of power between agencies and courts from the first patent statute and the creation of the Federal Circuit to the Patent Act of 1952, using a historical analysis to highlight preexisting tensions. Part II analyzes and critiques the scholarly calls for *Chevron* deference for post-grant review proceedings established under the AIA. Part III argues that courts should grant *Skidmore* deference to the PTO's interpretations of substantive patent law, facilitating the necessary checks and balances on the creation of patent law and policy.

I. CONGRESSIONAL DELEGATION OF PATENT POWER BETWEEN AGENCIES AND COURTS

Although patent law is of great importance to the American economy—fostering continuous innovation to progress society²⁷—Congress, tasked with continuously responding to rapid technological change, has neither the time nor expertise to retain exclusive control over patent reform.²⁸ The U.S. patent system thus has a unique institutional structure, primarily featuring the PTO, an agency designated with the task of determining patentability;²⁹ the Federal Circuit, an appellate court of near-exclusive national jurisdiction;³⁰ and a non-comprehensive statute that leaves significant room for interpretation.³¹ This Part provides a brief overview of the history of the PTO, the creation of the Federal Circuit, and the relationship of those bodies in creating patent policy upon the delegation of Congress. Next, this Part discusses the treatment of calls for judicial deference under the Patent Act of 1952.

26. *Skidmore v. Swift & Co.*, 323 U.S. 134, 134 (1944).

27. Paul R. Gugliuzza, *The Federal Circuit as a Federal Court*, 54 WM. & MARY L. REV. 1791, 1800 (2013) (explaining the economic benefits of patent innovation).

28. See Rai, *supra* note 5, at 1266 (explaining that Congress is “usually unable to act quickly in the face of rapid technological development” and thus must delegate to other actors in the patent system).

29. 35 U.S.C. § 131 (2012) (“The [USPTO] Director shall cause an examination to be made of the application . . . and if on such examination it appears that the applicant is entitled to a patent under the law, the Director shall issue a patent therefor.”).

30. 28 U.S.C. § 1295 (2012).

31. Golden, *supra* note 12, at 1044.

A. *The History of the Patent and Trademark Office*

Congressional delegation of the constitutional patent power³² predates the PTO, originating in the late eighteenth century. Under the Patent Act of 1790, Congress granted the Secretary of State, the Secretary of War, and the United States Attorney General authority to examine patent applications and issue patents.³³ Congress expanded the scope of executive power over patents in the Patent Act of 1836, which created the first Patent Office and empowered it with broad authority.³⁴ Under the Patent Act of 1836, the Patent Office gained authority “to superintend, execute, and perform, all such acts and things touching and respecting the granting and issuing of patents for new and useful discoveries, inventions, and improvements.”³⁵ Congress did not, however, enumerate any specific authority of the Patent Office to make rules interpreting substantive patent law.

Patent law was untouched by significant reform until the Patent Act of 1952, which created the modern PTO and tasked it with the mission to “foster[] innovation and competition primarily through examining patent applications and determining which inventions warrant the grant of a patent.”³⁶ Congress specifically endowed the PTO with the power to promulgate rules for conducting proceedings in the PTO and rules governing the conduct of patent practitioners.³⁷ Notably, however, the statute did not grant any substantive rulemaking authority to the PTO.³⁸ Considering the lack of congressional delegation of substantive rulemaking authority over the Patent Act of 1952 and the Federal Circuit’s persistent refusal to grant judicial deference to the agency’s substantive interpretations of the Patent Act, many considered

32. U.S. CONST. art. I, § 8, cl. 8 (granting Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).

33. Patent Act of 1790, ch. 7, § 1, 1 Stat. 109, 109–10 (1790).

34. Tran, *supra* note 15, at 617.

35. Patent Act of 1836, ch. 357, § 1, 5 Stat. 117, 117–18 (1836).

36. Wasserman, *supra* note 14, at 1967.

37. Patent Act of 1952, Pub. L. No. 82-593, § 6, 66 Stat. 792, 793. See Kumar, *supra* note 21, at 237 (noting that the “procedural rules are promulgated through notice-and-comment rulemaking” and are “bind[ing on] patent applicants”); Tran, *supra* note 15, at 617 (discussing the Patent Act of 1952).

38. See Wasserman, *supra* note 14, at 1962 (“[T]he [PTO] lacks robust substantive rulemaking authority.”). But see Tran, *supra* note 15, at 617–18 (interpreting the 1952 Act as “encompassing the authority to promulgate *some* substantive rules,” such as finding a patent invalid if the patent agent withheld material facts during prosecution (emphasis added)). Interpretations of the Patent Act of 1952’s grant of authority to make binding rules is discussed *infra* Section I.C.

the PTO a weak administrative agency.³⁹ Consequently, the judiciary has historically assumed the role as “the most important expositor of the substantive law of patents in the United States,” filling the gaps Congress left in the patent statutes.⁴⁰

B. The Creation of Semi-specialized Federal Courts

Following the creation in 1891 of the modern three-tier federal courts system—i.e., regional district courts, regional courts of appeals, and the United States Supreme Court—patent appeals were indistinct from appeals in other areas of law. Thus, the regional courts of appeals maintained jurisdiction over patent appeals for nearly a century.⁴¹ The widespread jurisdiction led to numerous circuit splits on important patent issues, which prompted congressional intervention to streamline appellate authority over patent disputes, as well as patent policymaking.

1. Creation of the Court of Customs and Patent Appeals

In 1929, Congress empowered the Court of Customs and Patent Appeals (“CCPA”), an Article I court, to hear appeals from the Patent Office and other agencies’ proceedings. However, the CCPA’s jurisdiction over patent appeals was not exclusive;⁴² patent litigation was still reviewed by regional circuit courts, which lead to circuit splits and significant forum-shopping.⁴³ The CCPA’s unexpected execution of primarily judicial (and emphatically non-administrative) power prompted Congress to convert the CCPA into an Article III court.⁴⁴ The CCPA’s patent jurisprudence changed significantly when Congress overhauled the Patent Act in 1952, bolstering the scheme for resolving patentability and infringement disputes. Congress’s failure to grant the PTO substantive rulemaking authority consequently positioned the CCPA to make important decisions regarding the implementation and

39. Gugliuzza, *supra* note 27, at 1820. This Note discusses changes to the perception of the PTO as a weak agency resulting from the enactment of the AIA *infra* Part II.

40. Michael J. Burstein, *Rules for Patents*, 52 WM. & MARY L. REV. 1747, 1757 (2011).

41. Gugliuzza, *supra* note 27, at 1800.

42. *Id.* The CCPA also maintained jurisdiction over patent appeals from the International Trade Commission (“ITC”). Kumar, *supra* note 21, at 234. The ITC is given little discussion in this Note, but it should be noted that the ITC does not have concurrent authority over the Patent Act. The ITC is an independent agency governed by the Tariff Act of 1930, which grants it authority to exclude from the United States the importation of goods that infringe patents. *Id.* at 238.

43. Kumar, *supra* note 21, at 234.

44. *See id.* at 239–40 (stating that it was “unclear what changed in the court’s mission” when Congress converted the CCPA to an Article III court).

interpretation of the Patent Act.⁴⁵ Despite the prominent influence of the CCPA in patent lawmaking and policy, Congress continued to seek increased uniformity in patent law across jurisdictions.⁴⁶

By 1977, the Senate was considering reform to the judiciary; it even contemplated a National Court of Appeals.⁴⁷ Within this debate, senators commonly acknowledged that the patent system needed reform and uniformity to eliminate circuit splits and chaotic treatment of patent law caused by competing appellate interpretations.⁴⁸

2. The Federal Circuit and Exclusive Jurisdiction Over Patent Appeals

The Federal Courts Improvement Act (“FCIA”) provided the desired uniformity: the creation of the Federal Circuit with exclusive jurisdiction over three sources of appeals: (1) federal district court cases “arising under” the patent laws, (2) proceedings within the PTO, and (3) International Trade Commission (“ITC”) investigations over potentially infringing imported products.⁴⁹ The Federal Circuit had an important mandate—to use its expertise and specialization to establish uniformity in the development and application of patent law.⁵⁰

After the creation of the Federal Circuit, other institutional actors—namely, the Supreme Court and Congress—retreated from substantive patent lawmaking and deferred to the Federal Circuit’s decisionmaking. Namely, the Supreme Court and Congress, the two institutions that previously directed patent law, seemingly lost interest in substantive patent law.⁵¹ The Supreme Court heard only two substantive patent issues from 1982 to 2001, and Congress did not make any substantive changes to patent law until the AIA in 2011.⁵² This new apathy shown by the Supreme Court and Congress, coupled

45. *See id.* at 240–41 (discussing the CCPA’s ability to make important choices regarding implementation of the 1952 Act).

46. *Id.* at 234.

47. *Id.* at 243.

48. *See id.* “For example, the Eight Circuit invalidated 89% of all patents, whereas the Tenth Circuit invalidated only 30%” of patents during that time period. *Id.*

49. 28 U.S.C. § 1295 (2012) (declaring the jurisdiction of the U.S. Court of Appeals for the Federal Circuit); Federal Courts Improvement Act, Pub. L. No. 97-164, 96 Stat. 25 (1982); *see also* Gugliuzza, *supra* note 27, at 1801 (discussing the FCIA’s changes to the federal judiciary).

50. Melissa F. Wasserman, *The PTO’s Asymmetric Incentives: Pressure to Expand Substantive Patent Law*, 72 OHIO ST. L.J. 379, 380 (2011); *see also* Gugliuzza, *supra* note 27, at 1801–02 (detailing the discussion, in FCIA’s legislative history, of the lack of uniformity as the cause of forum shopping and the overwhelm of regional courts of appeals and the Federal Circuit’s task to provide “expertise in highly specialized and technical areas” (quoting S. REP. NO. 97-275, at 6 (1981))).

51. Anderson, *supra* note 24, at 1051.

52. *See id.* at 1051–52.

with the PTO's lack of substantive rulemaking power, aggrandized the role of the Federal Circuit into a powerful creator of patent policy.⁵³

C. The Patent Act of 1952 and Denials of Judicial Deference

Historically, the patent system has maintained a tenuous relationship with administrative law. Though the PTO is an executive agency tasked with all initial patentability determinations, the Federal Circuit has continuously resisted meaningfully engaging traditional administrative law principles when reviewing the PTO's decisions and interpretations, beginning principally with the Patent Act of 1952.⁵⁴ Thus, the courts have generally refused to apply the traditional deference regimes to the PTO, leaving the courts with the ultimate say on patent policy.

1. The *Chevron* Doctrine and "Step Zero"

Congress often delegates its lawmaking authority when it does not have the capacity, resources, or time to resolve and develop every detail of a legislative scheme.⁵⁵ In delegating its lawmaking authority, Congress has a choice of interpreter. Historically, courts have declared that it is the role, even the responsibility, of the court to say what the law is.⁵⁶ However, in the modern administrative state, Congress may delegate the authority to interpret its statutory provisions to agencies through their empowering statutes.⁵⁷ Meanwhile, courts, when reviewing an agency's action and interpretation of statutory provisions, must determine whether Congress delegated interpretive authority to the agency, warranting a high level of deference to the agency interpreting within that authority, or whether such interpretive power exceeds the power of the agency, leaving the court with responsibility to say what the law is.⁵⁸ This analytical deference framework, derived from *Chevron, U.S.A., Inc. v. NRDC, Inc.*, relies on a theory of

53. *Id.* at 1051; *see also* Gugliuzza, *supra* note 27, at 1795 (stating that the Federal Circuit "has an enormous influence on patent law and innovation policy").

54. *See* Wasserman, *supra* note 14, at 1965 ("[T]he patent system has historically suffered from a lack of serious engagement with administrative law."); *see also* Tran, *supra* note 15, at 616 ("[The Federal Circuit] has historically chosen not to defer to agencies on issues of patent law.").

55. Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 368 (2010).

56. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

57. Lisa S. Bressman, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2016 (2011).

58. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (creating the judicial standard for when courts must defer to the agency's interpretation of the statute).

congressional delegation whereby Congress “delegate[s] interpretive authority to the agency whenever it fails to resolve the meaning of particular statutory language,” either implicitly (by leaving gaps in the statute for the agency to fill) or explicitly.⁵⁹

In *Chevron*, the Court established a two-part test governing judicial review of agency interpretations.⁶⁰ First, the court determines whether Congress has spoken directly to the specific question at issue.⁶¹ If there is no ambiguity in Congress’s intent, both the court and agency must follow that unambiguously expressed intent.⁶² However, if Congress has explicitly left a gap for the agency to fill, then it has intended to delegate interpretive power to the agency. In this scenario, the court, under the second step of *Chevron*, must defer to the agency’s reasonable interpretation of the statute.⁶³ The Court suggested several reasons for Congress’s intent to delegate to agencies (instead of courts) the authority to fill gaps in statutes: “agency expertise, lack of legislative foresight, . . . to obtain consensus on an issue while allowing divergent coalitions to ‘take their chances’ on a favorable decision at the administrative level,”⁶⁴ and the separation-of-powers implication that political value judgments should be made by the politically accountable branches of government, not unelected judges.⁶⁵

Following *Chevron*, the Court further clarified the deference regime, creating a “prequel” to *Chevron*, also known as “Step Zero.”⁶⁶ In *United States v. Mead Corp.*,⁶⁷ the Court held that an agency is only entitled to *Chevron* deference “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of such authority.”⁶⁸ That is, before applying *Chevron*, a court must determine if Congress *intended* to defer to the agency on this type of interpretation of this specific type of statute

59. Bressman, *supra* note 57, at 2016.

60. *Chevron*, 467 U.S. at 842–43.

61. *Id.* at 842.

62. *Id.* at 843.

63. *Id.* at 843–44.

64. Bressman, *supra* note 57, at 2016 (quoting *Chevron*, 467 U.S. at 865).

65. See Jacob S. Sherkow, *Administrating Patent Litigation*, 90 WASH. L. REV. 205, 241 (2015); see also *Chevron*, 467 U.S. at 865 (“While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . .”).

66. Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 217 (2006).

67. 533 U.S. 218 (2001).

68. *Mead*, 533 U.S. at 226–27.

in this particular context.⁶⁹ A court must consider the agency's conferred authority alongside other statutory context in determining whether "Congress would expect the agency to be able to speak with the force of law" to fill the gaps and ambiguity in the statute.⁷⁰

The Supreme Court further recognized that notice-and-comment rulemaking and formal adjudication are strong indicators of delegation warranting *Chevron* deference, assuming that Congress intentionally granted such authority to conduct a "formal administrative procedure" involving fairness and deliberation with the expectation that the agency bind with the force of law.⁷¹

2. *Skidmore* Deference

If *Chevron* does not apply because the statute fails at either of the aforementioned steps, the proper framework typically implemented is outlined in *Skidmore v. Swift & Co.*,⁷² which provides for a sliding scale of deference depending on the persuasiveness of the agency's interpretive process.⁷³ *Skidmore*, predating both the Administrative Procedure Act ("APA") and *Chevron*, held that even when the courts (rather than an agency) maintain the primary responsibility for statutory interpretation, the court should give due weight to an agency's interpretation of its own organic statute because of its familiarity with its provisions.⁷⁴ Although *Skidmore* was decided long before the creation of *Mead's* Step Zero, scholars and courts generally agree that if *Chevron* does not apply, courts will give *Skidmore* deference to agency interpretations "within the agency's peculiar sphere of action," including patent law.⁷⁵

Under *Chevron*, courts defer to reasonable interpretations regardless of the thoroughness or consistency of the agency's reasoning.⁷⁶ Conversely, *Skidmore* requires an ad hoc approach in determining the appropriate weight accorded to an administrative interpretation given an agency's expertise, experience, and judgment.⁷⁷ The court particularly inquires into the "thoroughness evident in its

69. Gersen, *supra* note 66, at 217.

70. Lisa S. Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1451 (2005).

71. *Mead*, 533 U.S. at 230–31.

72. 323 U.S. 134, 140 (1944).

73. Bressman, *supra* note 70, at 1447–55.

74. *Skidmore*, 323 U.S. at 137; John M. Golden, *The USPTO's Soft Power: Who Needs Chevron Deference?*, 66 SMU L. REV. 541, 548 (2013).

75. Golden, *supra* note 74, at 548.

76. *Id.*

77. *Skidmore*, 323 U.S. at 140.

consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”⁷⁸ The weight of *Skidmore* deference ultimately turns on the power of the agency to persuade the court, not that its interpretation is *correct*, but that it reflects informed consideration and supported reasoning by the agency. Because *Skidmore* presents a sliding-scale approach, the court is not bound to a specific level of deference in every case.

3. No Substantive Rulemaking Authority Under the Patent Act

The primary goal of patent law is to foster innovation.⁷⁹ Yet it would be a daunting task, requiring a substantial expenditure of resources, to require the PTO at the early stages of patent-application examination to make an individualized inquiry and determine whether a particular patent actually promotes innovation.⁸⁰ Instead, the Patent Act of 1952 instructs the PTO to make a patentability determination through a threshold examination of the patent for satisfaction of the validity standards under the statute. This role necessarily involves significant consideration of innovation, cost of patents, and benefits to consumers.⁸¹ These standards, however, are far from clear; the statute is broad and “skeletal in structure,” thus necessitating a substantial legal interpretation to derive any practical use from its words.⁸²

Consider, as an example, the requirement that the patent cover patent-eligible subject matter.⁸³ The Patent Act of 1952 (and accordingly, the PTO) requires that the subject matter of a patent application be a “new and useful process, machine, manufacture, or composition of matter.”⁸⁴ The Supreme Court has long held that

78. *Id.*

79. See Stuart M. Benjamin & Arti K. Rai, *Who's Afraid of the APA? What the Patent System Can Learn from Administrative Law*, 95 GEO. L.J. 269, 274–75 (2007) (naming the “major normative goal of patent law” as innovation, including “initial invention and the commercialization of such invention”).

80. See *id.* at 276 (discussing the extreme difficulty and practical impossibility of requiring the PTO or the courts to determine if a particular patent promotes innovation).

81. 35 U.S.C. § 131 (2012) (“The [PTO] Director shall cause an examination to be made on the application . . . ; and if on such examination it appears that the applicant is entitled to a patent under the law, the Commissioner shall issue a patent therefore.”); see Benjamin & Rai, *supra* note 79, at 276–77 (“[T]he patent statute directs the PTO to determine whether the patent application meets validity standards that have scientific and technical underpinnings.”).

82. Wasserman, *supra* note 50, at 381–82 (discussing generally the effect of patentability standards on innovation, costs, and benefits).

83. 35 U.S.C. § 101 (2012).

84. *Id.*

abstract ideas do not constitute patentable subject matter.⁸⁵ If a potential patentee submits for patenting a software embedded on a CD-ROM and the PTO determines that the software, even in the form of a tangible disk, is an “abstract idea” and thus unpatentable, the PTO is making a substantive interpretive rule that will receive no judicial deference.⁸⁶ The Federal Circuit has assumed exclusive responsibility for interpreting the substantive law of the Patent Act and has not deferred to the PTO on such matters.⁸⁷ This places the PTO, which is charged with enforcing the statute, in a difficult position—it must determine if each patent meets the statutory standard, yet it lacks the authority to promulgate rules to interpret the substantive provisions of the statute.⁸⁸

4. The Federal Circuit's Resistance to Administrative Principles

The PTO is unique among other prominent agencies in its lack of significant authority to issue substantive rules; consequently, its legal interpretations of the Patent Act do not receive *Chevron* deference.⁸⁹ The Federal Circuit has only granted judicial deference to the PTO when the PTO is interpreting statutory provisions related to the conduct or procedures within the agency.⁹⁰ Many scholars have suggested that the failure of Congress to give the PTO substantive interpretative powers of the Patent Act has rendered it a weak administrative agency.⁹¹ Others have blamed the Federal Circuit for

85. *E.g.*, *Bilski v. Kappos*, 561 U.S. 593, 594 (2010) (“This Court’s precedents provide three specific exceptions to §101’s broad principles: laws of nature, physical phenomena, and abstract ideas.” (quoting *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980))).

86. *See* Golden, *supra* note 74, at 548 (providing patent-eligible subject matter as an example to demonstrate how the substantive law standards necessarily implicate policymaking when the PTO makes patentability determinations).

87. Tran, *supra* note 15, at 616–17.

88. *See* Golden, *supra* note 12, at 1045:

A key aspect of patent law’s distinctiveness is the [PTO’s] lack of substantive rulemaking power. As a result of this limitation, the [PTO] lacks authority to issue presumptively binding rules on the substantive legal questions . . . , even though the [PTO] must routinely rule on such issues in deciding whether to grant patents.

89. *See* Benjamin & Rai, *supra* note 79, at 271 (noting that the PTO is unlike agencies such as the Environmental Protection Agency and the Federal Communications Commission that have authority to “render legal interpretations” of their organic statutes, thus warranting judicial deference).

90. *Cooper Techs. Co. v. Dudas*, 536 F.3d 1330, 1335–37 (2008). The Federal Circuit has recently granted *Chevron* deference for the PTO’s regulations governing the *procedures* of Inter Partes Review. *See In re Cuozzo Speed Techs., LLC*, 793 F.3d 1268, 1279 (Fed. Cir. 2015).

91. Gugliuzza, *supra* note 27, at 1820.

creating for itself the role as the dominant, and maybe sole, player in patent policy.⁹²

Indeed, the Federal Circuit has contributed to the balance of power in the patent system by continuously denying deference. The PTO, however, has not remained silent.⁹³ Three cases best characterize the Federal Circuit's treatment of administrative law in patent cases and its narrow construction of the agency's authority: *Animal Legal Defense Fund v. Quigg*,⁹⁴ *Merck & Co. v. Kessler*,⁹⁵ and *Dickinson v. Zurko*.⁹⁶

In *Quigg*, the PTO issued a notice stating that non-human organisms such as animals were patentable under 35 U.S.C. § 101, prompting a number of animal rights organizations to challenge the agency's failure to comply with the APA's⁹⁷ required notice-and-comment procedures.⁹⁸ The Federal Circuit ruled in favor of the PTO, holding that the notice was an *interpretive* rule, which is exempt from APA requirements, and not a *substantive* rule, which constitutes a "change in existing law or policy."⁹⁹ The court reasoned that the type of substantive declaration that would require APA compliance is not within the PTO's limited authority to promulgate rules governing the conduct of its proceedings.¹⁰⁰ *Quigg* created some confusion around the distinction between interpretive and substantive rules,¹⁰¹ but the decision undoubtedly limited the PTO's authority.¹⁰²

Five years after *Quigg*, the PTO again defended a statutory interpretation in *Merck*—a "Notice of Final Determination"¹⁰³ that interpreted a statute limiting the length of potential patent term

92. Tran, *supra* note 15, at 616.

93. See Rai, *supra* note 5, at 1238–39 (stating that the PTO, despite its weaknesses, has "begun to flex its muscle"); Tran, *supra* note 15, at 617 ("The [PTO] has not been complacent. It has pushed for greater autonomy and has achieved some success.").

94. 932 F.2d 920, 920 (Fed. Cir. 1991).

95. 80 F.3d 1543, 1550 (Fed. Cir. 1996).

96. 527 U.S. 150, 150 (1999).

97. 5 U.S.C. § 553 (1946). The Administrative Procedure Act, Pub. L. No. 70-404, 60 Stat. 237 (1946) governs how administrative agencies may propose and issue regulations, in the absence of statutory standards for courts to review agency actions.

98. *Animal Legal Def. Fund*, 932 F.2d at 922, 927.

99. *Id.* at 927.

100. *Id.* at 930.

101. See, e.g., *Tafas v. Doll*, 559 F.3d 1345, 1345 (Fed. Cir. 2000) (demonstrating disagreement on the Federal Circuit bench as to "what it means for a rule to be a valid procedural rule as opposed to an invalid substantive one").

102. Tran, *supra* note 15, at 618–19 (noting that the court limited the PTO's authority, even without delineating the limits of its authority or articulating a rationale for doing so).

103. A "Notice of Final Determination" states the PTO's decision to grant or deny the applicant's application for a patent term extension. 35 U.S.C. § 156 (2012).

extensions for certain patents related to the pharmaceutical industry.¹⁰⁴ This time, the Federal Circuit ruled against the PTO, firmly holding that the “broadest of the PTO’s rulemaking powers” under 35 U.S.C. § 6(a) “authorize[s] the Commissioner to promulgate regulations directed only to the ‘conduct of proceedings in the [PTO]’; NOT . . . the authority to issue *substantive* rules.”¹⁰⁵ Although the court in *Merck* refused to grant deference to the PTO’s interpretation, it did not address the PTO’s authority to promulgate rules at all.¹⁰⁶ Nonetheless, the decision, perhaps inadvertently, served as the impetus for deying the PTO any substantive rulemaking authority in patent law.¹⁰⁷ Prompted by the limiting nature of *Merck*, the PTO began asserting more influence over patent law and policy.¹⁰⁸

The final case, *Dickinson*, centered on the applicability of the APA to the PTO. The Supreme Court examined whether the Patent Act specifies a judicial standard of review and to what extent that should displace the APA.¹⁰⁹ Notably, the Patent Act predates the APA, which was enacted in 1946, and subsequent amendments did not add any language concerning how PTO actions should be reviewed in courts. Until 1999, the Federal Circuit held that the APA did not apply to its review of the PTO.¹¹⁰ The Supreme Court disagreed,¹¹¹ holding that the APA sets the “governing standards for review of [PTO] fact-finding” and rejecting the Federal Circuit’s less deferential clearly erroneous standard of review.¹¹² Several patent scholars praise *Dickinson* as a monumental move by the Supreme Court to apply administrative law to the patent system.¹¹³ However, the decision did not fundamentally challenge the Federal Circuit’s failure to apply administrative principles of deference to the PTO’s substantive statutory

104. *Merck & Co. v. Kessler*, 80 F.3d 1543, 1550 (Fed. Cir. 1996).

105. *Id.* at 1549–50 (emphasis added).

106. Tran, *supra* note 15, at 620.

107. *Id.*

108. *See id.*

109. Benjamin & Rai, *supra* note 79, at 280.

110. *Id.* at 271.

111. *Dickinson v. Zurko*, 527 U.S. 150, 150 (1999).

112. Tran, *supra* note 15, at 620. The APA provides for a “substantial evidence” standard. *Dickinson*, 527 U.S. at 164.

113. Benjamin & Rai, *supra* note 79, at 270; *see, e.g.*, Tran, *supra* note 15, at 620 (“[E]minent patent law scholars view the decision as a symbolic effort by the Supreme Court to redirect the Federal Circuit’s general approach to the [PTO].”); *see also* Tran, *supra* note 2, at 867 (“[The Supreme Court] chided the lower courts for crafting a stricter standard for reviewing PTO decisions than for decisions by other agencies.”).

interpretation.¹¹⁴ After *Dickinson*, Congress remained silent—at least until 2011.

II. THE LEAHY-SMITH AMERICA INVENTS ACT OF 2011 AND RENEWED CALLS FOR *CHEVRON* DEFERENCE

In 2011, Congress conducted the first significant reform to the patent system in sixty years¹¹⁵ with the enactment of the AIA.¹¹⁶ This Part provides a brief overview of the AIA's changes to the patent system, which were made in response to the many calls for patent reform. It then analyzes the arguments for judicial deference, triggered by the AIA's creation of new PTO post-grant proceedings.

A. Long-Awaited Reforms and the Enactment of the AIA

For decades, Congress debated the necessity of reforming the patent system. Since the enactment of the Patent Act of 1952, patent practitioners and scholars complained of delays in the patent examination and review processes as well as the overwhelming number of low-quality patents, colloquially termed “bad patents,” frequently issued by the PTO.¹¹⁷ Many patent scholars and practitioners praise the meaningful reforms in the AIA, considering it the “most significant overhaul to our patent system, since the founding fathers first conceived of codifying a grand bargain between society and invention.”¹¹⁸ Indeed, the Act bolsters the PTO's authority and provides for important, comprehensive changes to resolve significant problems in the patent system.¹¹⁹

The relevant additions to the PTO's primary responsibilities stem from the creation of the Patent Trial and Appeal Board (“PTAB”). The Act instructs the agency to appoint “administrative patent judges . . . of competent legal knowledge and scientific ability”¹²⁰ who are tasked with reviewing examiners' rejections of patent applications and appeals for reexaminations of patent applications, as well as conducting proceedings after initial patent grants¹²¹—namely, the

114. Tran, *supra* note 2, at 835.

115. Wasserman, *supra* note 14, at 1964.

116. The Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).

117. Tran, *supra* note 15, at 627–28.

118. Kappos, *supra* note 16.

119. Tran, *supra* note 15, at 626.

120. 35 U.S.C. § 6(a) (2012).

121. *Id.* § 6.

“inter partes review”¹²² and the “post-grant review.”¹²³ Although the AIA implemented many changes relevant to the discussion of the balance of power between the PTO and the Federal Circuit, this Note focuses on the post-grant review and inter partes review proceedings, the creation of which served as the impetus for scholarly calls for judicial deference.

The inter partes review (“IPR”) proceeding allows a challenger, within nine months of the issuance of a patent, to institute a proceeding to review the patent and request its cancellation under two specific requirements for patentability.¹²⁴ The PTO director has authority to authorize an IPR if he determines that the petition raises a “reasonable likelihood that the petitioner would prevail with respect to at least [one] of the claims challenged.”¹²⁵ The Act also empowers the director to prescribe certain regulations, including establishing the standards and procedures for inter partes review, including regulating discovery and granting protective orders.¹²⁶

The post-grant review (“PGR”) proceeding is similar to, but broader in scope than, the IPR. The AIA permits a challenger to request the cancellation of patent claims as unpatentable on *any* ground of patent validity, not solely the two validity requirements permitted under the inter partes review.¹²⁷ Additionally, the AIA imposes a standard for PGR: the director must determine that the challenger’s petition “demonstrate[s] that it is more likely than not that at least [one] of the claim challenges is unpatentable.”¹²⁸ The director is again empowered to prescribe regulations to develop the procedural aspects of the proceeding, including the submission of supplemental information, discovery standards, sanctions for litigation abuse, and granting protected orders.¹²⁹

Both proceedings result in a “final written decision with respect to the patentability of any [challenged] patent claim.”¹³⁰ However, the PGR proceedings are the more robust tool. The purpose of instituting PGR proceedings was to address the infiltration of weak patents by

122. *Id.* § 311.

123. *Id.* § 321.

124. *Id.* § 311(b) (limiting petitioner’s challenge to patentability under 35 U.S.C. §102 (the “novelty” requirement) or §103 (the “nonobviousness requirement”) and “only on the basis of prior art consisting of patents or printed publications”).

125. *Id.* § 314.

126. *Id.* § 316(a).

127. *Id.* § 321(b).

128. *Id.* § 324(a).

129. *Id.* § 326(a).

130. *Id.* § 328(a).

“weed[ing them out] before they have an adverse effect on the market.”¹³¹ These proceedings are the PTO’s most robust tool for invalidating patents because of the allowance of third-party challenges, a deviation from other proceedings involving only the patent owner and the agency; the broad scope of possible grounds for challenge, including any statutory requirement of patentability; and the “adversarial, court-like proceeding”¹³² conducted at the PTAB as a potential alternative to litigation.¹³³ Indeed, the PGR provisions serve as the rationalization for renewed calls for judicial deference to PTO interpretations of the Patent Act.¹³⁴

B. The Argument for Chevron Deference for Newly Created PTO Proceedings

Although the AIA created the PTAB and added significant post-grant review proceedings to the PTO’s authority, the AIA did not fulfill all of scholars’ requests. Despite the “repeated, vocal calls to do so” from the various actors in the patent system,¹³⁵ Congress failed to grant the PTO any substantive rulemaking authority in the AIA.¹³⁶ Nevertheless, scholars suggest that the AIA’s changes are a significant enough shift in the control of patent policymaking from the Federal Circuit to the PTO to merit systemic judicial deference.¹³⁷

131. ROBERT W. GOODLATTE, INNOVATION ACT, COMM. ON THE JUDICIARY, H.R. REP. NO. 113-279, at 100 (2013).

132. Wasserman, *supra* note 14, at 1977; *see also* Sherkow, *supra* note 65, at 224–32 (describing the post-grant review as “trial like” and a “viable . . . alternative to district court litigations . . . for patent validity questions.”) (internal citations omitted).

133. *See* Tran, *supra* note 15, at 613, 632 (discussing in depth the significance of the post-grant review proceedings).

134. *See generally* Wasserman, *supra* note 14 (arguing that *Chevron* deference for the PTO’s interpretation of the Patent Act would be a normatively desirable outcome).

135. Sherkow, *supra* note 65, at 207 n.8. *See also* Golden, *supra* note 74, at 542 (“A number of commentators have . . . called for Congress . . . to recognize the [PTO] as having greater authority to speak with the force of the law.”); Golden, *supra* note 12, at 1043 (“arguing that Congress should expand the [PTO’s] rulemaking authority so that it encompasses substantive questions of subject-matter eligibility”); Tran, *supra* note 15, at 624–25 (noting that the Department of Commerce and the PTO Director lobbied for Congress to address the narrow view of PTO authority and granted substantive rulemaking authority).

136. Rai, *supra* note 5, at 1238–39 (stating that the “AIA did not give the agency the expansive rulemaking authority over questions of substantive patent law”); *see also* Sherkow, *supra* note 65, at 253 (explaining that though Congress had the opportunity to increase the PTO’s authority, it “did little to vest the PTO with any more authority than it was previously given”).

137. Wasserman, *supra* note 14, at 2018 (“This Article concludes that the AIA rejects over two hundred years of court dominance in patent policy by anointing the PTO as the chief expositor of substantive patent law standards.”); *see also* Tran, *supra* note 15, at 626 (“The [AIA] continues the trend since 1999 of shifting power over patent law from the courts to the [PTO].”).

1. *Chevron* Deference for Post-grant Review Proceedings

Several patent practitioners and owners criticized Congress's refusal to grant the PTO substantive rulemaking authority under the Patent Act, which would have likely entitled its authorized interpretations to *Chevron* deference.¹³⁸ Even in the absence of such authority, scholars have begun arguing that the AIA's creation of post-grant review proceedings is a trigger for *Chevron* deference under *Mead*.¹³⁹ Given the characteristics that both inter partes review and PGR share with judicial proceedings (e.g., adversarial, trial-like proceedings, oral arguments, discovery, and administrative patent judges), there is a strong argument that Congress implicitly¹⁴⁰ intended these proceedings to bind with the force of the law and trigger the high level of deference to agency interpretation advanced by *Chevron*.¹⁴¹

The foremost scholar leading the charge for *Chevron* deference, Professor Melissa Wasserman, indicates four primary justifications for this argument: (1) the ambiguity of the Patent Act, (2) the formality of PGR proceedings as an implicit delegation by Congress of authority to bind with the force of the law, (3) an explicit intent of such a grant of authority in the statutory language, and (4) the expertise theory of congressional delegation.¹⁴² It is undisputed that the Patent Act is often ambiguous and leaves several gaps for the interpreter (whether the agency or the court) to fill in determining standards for patentability. Thus, this Note focuses on the latter three points of analysis.

The nature of the post-grant review established under the AIA, as mentioned above, is a trial-like, adversarial proceeding, which may constitute the type of formal adjudication contemplated under *Mead*'s Step Zero. Meanwhile, the APA states that the following signals formal adjudication: "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."¹⁴³ While the AIA does not use the phrase "on the record," it does require the administrator of post-grant review proceedings to provide "either party with the right to an oral hearing as part of the proceeding."¹⁴⁴ Furthermore, the AIA provides for sanctions or other consequences "for individuals who violate a policy announced during an agency's

138. Golden, *supra* note 74, at 542.

139. Wasserman, *supra* note 14, at 1966.

140. *Id.* at 1977 ("The AIA is silent as to the deference owed to the PTO's legal determinations announced during the inter partes and postgrant review.").

141. *Id.* at 1965–77.

142. *See generally id.*

143. 5 U.S.C. § 554 (2012).

144. 35 U.S.C. § 325(a)(10) (2012).

adjudication”—another indicator of the binding effect of the proceedings.¹⁴⁵ Thus, the argument for *Chevron* deference is that Congress intended the PGR proceedings to take place through formal procedures, both meeting and exceeding several formal adjudication requirements under the APA.¹⁴⁶ It so follows that Congress’s intent to establish the post-grant review as formal adjudication should warrant *Chevron* deference for the PTO’s interpretation of the Patent Act made during those proceedings.¹⁴⁷

Next, the call for *Chevron* deference relies on specific statutory language describing PGR as a demonstration of explicit congressional intent. Under the provision for post-grant review, the director is instructed to determine whether the challenger has shown that it is more likely than not that a challenged claim is unpatentable.¹⁴⁸ The director may also proceed with PGR if the challenger’s petition “raises a novel or unsettled legal question that is important to other patents or patent applications.”¹⁴⁹ Professor Wasserman points to this language as Congress’s intention that “the agency . . . make policy or law that affects the rights of many people,” as opposed to solely determining factual issues between specific parties.¹⁵⁰ Thus, Professor Wasserman argues that Congress intended the PTO to play a more significant policymaking function than before, given the PTO’s new power to resolve broad legal questions and the broad capacity of post-grant review to settle disputes on any grounds of patentability.¹⁵¹

Finally, Professor Wasserman turns to the expertise theory originally highlighted by the *Chevron* Court.¹⁵² Despite the specialization of the Federal Circuit, she determines that the PTO is more capable of determining patentability standards to accomplish the overarching goal of innovation than the judiciary.¹⁵³ Although some

145. Wasserman, *supra* note 14, at 1990–91 (referencing § 326(a)).

146. *Id.* at 1981–83.

147. *Id.* at 1989–90 (“*Mead* states that a congressional conferral of formal adjudicatory authority is a ‘very good indicator’ that Congress intended to delegate legislative power to an agency.” (quoting *United States v. Mead Corp.*, 533 U.S. 218, 230–31 (2001))).

148. 35 U.S.C. § 324(a) (2012).

149. *Id.* § 324(b).

150. Wasserman, *supra* note 14, at 1993 (explaining that such language would warrant *Chevron* deference under the reasoning in *Mead*).

151. *Id.*

152. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984) (suggesting that the agency “with great expertise and charged with responsibility for administering the provision would be in a better position to do so”); see also Rochelle C. Dreyfuss, *The Federal Circuit: A Continuing Experiment in Specialization*, 54 CASE. W. RES. L. REV. 769, 809 (2004) (“One of the central rationales for creating administrative agencies was that they would have greater expertise and focus than generalist legislatures or courts.”).

153. Wasserman, *supra* note 14, at 2008–09.

Federal Circuit judges hold scientific degrees, which are helpful for patent determinations, virtually all PTO examiners hold advanced scientific degrees in the precise areas of their work. Further, the PTO has mechanisms—including hearings, studies, collaboration with other agencies, and facilitated communication with patent constituents—to make the necessary patent policy decisions.¹⁵⁴

2. Elephant or Mouse?

Professor Wasserman presents a compelling argument for the application of administrative law to the patent system: if Congress, in enacting the AIA and creating post-grant review proceedings, intended PGR to bind with the force of law, the PTO should receive *Chevron* deference for its interpretations of substantive patent law. Nevertheless, some scholars are hesitant to accept such a radical shift to the patent system.¹⁵⁵ Considering the Federal Circuit's historical refusal to afford *any* judicial deference to the PTO's interpretations of the Patent Act's substantive provisions, granting the high level of deference contemplated under *Chevron* would be dramatic.¹⁵⁶ Though *Mead* demands deference when Congress intended for the agency's interpretations to bind with the force of the law, the Supreme Court has recognized "extraordinary cases [where] there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."¹⁵⁷ The Court has expressed its skepticism that Congress would "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions . . . [by] hid[ing] elephants in mouseholes."¹⁵⁸ That is, Congress would not implicitly delegate a task to an agency that would change a long-standing and pervasive regulatory structure.

Some scholars have invoked the "elephants in mouseholes" doctrine to temper the expectations that the AIA manifests Congress's intent to wholly shift the role of patent policymaking from the courts to the PTO, reasoning that "a new grant of authority to the [PTO] to effectively displace [the Federal Circuit] as the primary means to those

154. *Id.* at 2009–10.

155. *See, e.g.,* Golden, *supra* note 74, at 546 ("I doubt that courts will find that Congress has silently endowed the [PTO] with a primary interpretive authority that the courts have long understood the [PTO] to lack").

156. Wasserman, *supra* note 14, at 1995.

157. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

158. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (requiring a "textual commitment of authority" in the statute before affording deference).

ends seems to [be] more ‘elephant’ than ‘mouse.’”¹⁵⁹ Though the court has only applied the doctrine in extraordinary cases,¹⁶⁰ the patent system may merit the doctrine’s application. To find a power shift sufficient to warrant *Chevron* deference, one must accept that Congress has “turned on its head” a legal regime it earlier created—one with a single court with exclusive, specialized jurisdiction over patent appeals and a task to clarify and unify patent law.¹⁶¹

The AIA lacks any clear, express congressional intent to remove from the court its historical, enduring and near-exclusive role in determining patentability standards, which Congress arguably would abrogate if desired.¹⁶² And the legislative history similarly lacks any such indication.¹⁶³ Though the legislative history reveals discussion of proposals to grant the PTO substantive rulemaking authority, explicit proposals were ultimately rejected despite multiple attempts to insert them.¹⁶⁴ Still, the elephants in mouseholes doctrine may be insufficient to overcome Professor Wasserman’s administrative law arguments, particularly given the high bar for cases meriting the application of the doctrine¹⁶⁵ and the common reluctance to infer meaning from congressional inaction.¹⁶⁶

159. Golden, *supra* note 74, at 546.

160. *Brown & Williamson Tobacco*, 529 U.S. at 159.

161. Golden, *supra* note 74, at 546.

162. Tran, *supra* note 15, at 652 (“Given that the courts have played a prominent role in determining the core standards for patentability over the history of the patent, . . . the principle of *stare decisis* [sic] suggests Congress would need to speak clearly to remove this role.”).

163. Golden, *supra* note 74, at 545.

164. *Id.* (“[T]he legislative history of the AIA prominently featured the trouncing of a proposal to give the [PTO] general rulemaking authority.”).

165. The question of whether the AIA grants primary interpretative power to the PTO through the Patent Act is readily distinguished from cases where the Court refused the agency’s theory of implicit delegation. For example, in *Brown & Williamson Tobacco*, 529 U.S. 120, the Court refused to grant the FDA jurisdiction to regulate tobacco products because Congress consistently and clearly stated that the FDA lacked authority to regulate tobacco, against the backdrop of a comprehensive legislative scheme already regulating tobacco. By contrast, the Patent Act has been seldom reformed, leaving significant room in its provisions for substantive legal interpretations, and Congress has not expressly disavowed the PTO’s rulemaking authority.

166. Tran, *supra* note 2, at 865 (noting that although it is typically presumed that Congress, when reenacting a statute without change does so with awareness of administrative or judicial statutory interpretations, “the Supreme Court has cautioned that ‘reliance on congressional inaction . . . deserve[s] little weight in the interpretive process’” (quoting *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) (internal quotation marks omitted))).

III. FINDING BALANCE IN *SKIDMORE*: A FLEXIBLE DEFERENCE MODEL FOR THE PATENT SYSTEM

This Note does not contest Professor Wasserman's premise that the PTO deserves *some* deference. But given the significant changes in the AIA and the *Dickinson* Court's rejection of patent exceptionalism from administrative law, the Federal Circuit's current tradition of granting *no* deference is misguided. This Note suggests that perhaps the answer is not so binary—rather, the answer may lie somewhere between *Chevron* deference and the continuation of the no-deference regime.

Instead of subjecting the complex institutional design of the patent system to the rigid confines of the *Chevron* scheme, the Federal Circuit should rely on a flexible model of judicial deference that can accommodate policymaking of the many actors in the patent system and effectively accomplish the ultimate goal of innovation. First, this Part acknowledges that the courts will, and should, deviate from applying traditional *Chevron* deference when congressional intent necessitates an alternative scheme. Second, this Part seeks to establish that the patent system deserves a closer look into congressional intent before applying *Chevron*. Finally, this Part proposes the application of *Skidmore* as a sufficient, though not exclusive, deference regime to accomplish the goals of the patent system.

A. *Chevron Deference Does Not Always Apply*

Following the Supreme Court's unanimous decision in *Chevron*, courts have routinely upheld reasonable agency interpretations of statutory provisions under the theory that Congress leaves gaps as implicit delegations of interpretive power to administrative agencies, where not contrary to statute.¹⁶⁷ *Mead* limited *Chevron*, however, in creating "Step Zero"—a step that determines whether Congress intended for the agency to serve as the primary interpreter of its organic statute before triggering *Chevron* deference.¹⁶⁸ *Mead* infers such intent when Congress intends for (1) the agency to make "generalized determinations that may affect the rights of many," (2) the agency to make binding law and policy,¹⁶⁹ and (3) for the agency, not the court, to serve as the interpreter of the statute. *Mead* names two indicators in

167. Golden, *supra* note 74, at 547.

168. See *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001).

169. Wasserman, *supra* note 14, at 1991 (suggesting that granting an agency the authority to conduct formal adjudication "necessarily means that Congress intended the agency to make law and policy").

statutory grants of authority—rulemaking power and formal adjudication—as sufficient to infer congressional intent to delegate authority to the agency.¹⁷⁰

1. Holding the Trigger of *Chevron* Deference

Though these procedural indicators have been termed safe harbors,¹⁷¹ it remains disputed whether the existence, and execution, of either rulemaking power or formal adjudication is sufficient to automatically trigger *Chevron* deference.¹⁷² Notably, in his concurring opinion in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, Justice Breyer reasoned that procedural formality was “not a sufficient condition [for *Chevron* deference] because Congress may have intended *not* to leave the matter of a particular interpretation up to the agency, irrespective of the procedure the agency uses to arrive at that interpretation, say, where an unusually basic legal question is at issue.”¹⁷³ At first glance, Justice Breyer’s statement may appear remarkable. After all, *Mead* augments the *Chevron* doctrine to delineate two safe harbors for deferential review.

However, upon closer look, Justice Breyer’s statement reflects the inherent meaning of both *Mead* and *Chevron*. Consider the suggestion that *Chevron*, in instructing courts to defer to agency interpretations when Congress has implicitly delegated the appropriate authority, “rests on a rational reconstruction of congressional intent about local judicial deference to agency interpretations.”¹⁷⁴ While the inferences made from the traditional safe harbors of rulemaking and adjudication are strong, they may not be absolute if congressional intent suggests otherwise.

If rulemaking power and formal adjudication are thus viewed as proxies for congressional intent—instead of automatic triggers for *Chevron* deference—then the *Mead* inquiry requires a broad statutory context and any indicators of congressional intent to delegate to agencies.¹⁷⁵ In *Brand X*, for example, Justice Breyer joined the majority in applying *Chevron* deference *after* the court considered: agency expertise, “the interstitial nature of the legal question,” the “importance of the question,” “complexity of that administration,” and “careful

170. *Mead*, 533 U.S. at 230–31.

171. *Id.* at 246 (Scalia, J., dissenting).

172. Gersen, *supra* note 66, at 218.

173. 545 U.S. 967, 1004 (2005) (Breyer, J., concurring) (citing *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004)).

174. Gersen, *supra* note 66, at 207.

175. *See* Bressman, *supra* note 57, at 2012.

consideration the Agency has given the question.”¹⁷⁶ Furthermore, given Congress’s usual silence on judicial review standards, *Chevron*, viewed as a purely judicial construction, is a “fictionalized statement of legislative desire,” which ultimately reflects the court’s own policy judgments about statutory interpretation.¹⁷⁷ Often the choice of procedural authority granted to the agency may sufficiently demonstrate Congress’s intent. But *Chevron* should not automatically apply in the presence of those formalities when congressional intent suggests the need for a different model of deference to support Congress’s legislative goals. Thus, if Congress intends a particular regulatory scheme, like within the patent system, courts should hesitate before applying *Chevron* deference.

2. Deviations from *Chevron* Are Not Uncommon

Although administrative law jurisprudence has long relied on *Chevron* deference, particularly its application in the presence of statutory rulemaking and formal adjudication, the presumption that statutory ambiguity implies congressional delegation has never applied uniformly across all cases.¹⁷⁸ Indeed, courts have often invoked a broad spectrum of deference when deciding whether and how much to defer to agencies’ statutory interpretations.¹⁷⁹ This is particularly true when Congress has designated more than one institutional actor as a policymaker in the field, as it has done with patents.¹⁸⁰

Scholars have suggested that the Court sometimes takes an ad hoc approach that considers statutory context and legislative history in determining whether to defer to an agency.¹⁸¹ One such example is *Martin v. Occupational Safety & Health Review Commission*, where the Court reviewed the Occupational Health and Safety Act of 1970, a “split-enforcement statute” delegating powers to both the Secretary of Labor (tasked with setting and enforcing workplace standards) and the

176. Gersen, *supra* note 66, at 218–19.

177. David J. Barron & Elena Kagan, *Chevron’s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 212 (2001).

178. Bressman, *supra* note 57, at 2016–17.

179. See generally William N. Eskridge Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008) (exploring the many deference regimes courts contemplate when discerning whether or not to defer to an agency’s statutory interpretations).

180. Gersen, *supra* note 66, at 206–07 (noting that courts have struggled in deciding whether *Chevron* should apply when statutes are administered by more than one agency); see generally Weaver, *supra* note 4, at 275 (proposing “ultra deference” instead of traditional *Chevron* deference should apply when there is overlapping agency jurisdiction).

181. Eskridge & Baer, *supra* note 179, at 1179.

Occupational Safety and Health Review Commission (tasked with adjudicatory functions).¹⁸² The Court made a “particularized inquiry of congressional delegation . . . examin[ing] the inferences that could be drawn about legislative intent from the statutory context and the legislative history.”¹⁸³ Similarly, *Chevron* seems difficult to apply when there is jurisdictional overlap—i.e., when Congress might allocate authority between different actors in potentially diverging or integrated ways.¹⁸⁴ The ad hoc approach is beneficial for complex regulatory schemes, as it allows the courts to consider the agency’s expertise and opinions, while also respecting congressional intent.

*B. The Patent System Requires a Second Look Before
Pulling the Chevron Trigger*

Though scholars use the term “jurisdictional overlap” to refer to overlapping or concurrent authority between two or more agencies,¹⁸⁵ the principle should extend to a system—such as the patent system—in which Congress has delegated significant authority to an agency to implement a statute and charged the agency with unifying the area of law to a semi-specialized federal court.¹⁸⁶ Neither the Federal Circuit nor the PTO are sole patent policymakers. Rather, Congress intentionally designed a shared model of patent law and policymaking, akin to overlapping jurisdiction. Thus, courts should take a closer look before applying *Chevron* deference to the aforementioned AIA provisions.

1. The Federal Circuit and the PTO as Sole Regulators

The Federal Circuit, despite its long-standing role as the expositor of substantive patent law,¹⁸⁷ encounters difficulty as a policymaker. In general, scholars point to both the limited resources to conduct complex economic inquiries and technical competence as two

182. 499 U.S. 144 (1991). Also see Bressman, *supra* note 57, at 2017 for a discussion of the Court’s approach in this case.

183. Bressman, *supra* note 57, at 2017.

184. Gersen, *supra* note 66, at 207–09; *see also* Weaver, *supra* note 4, at 276 (reasoning that “the traditional frameworks for review are inadequate” when Congress authorizes “joint rulemaking authority”).

185. Gersen, *supra* note 66, at 208.

186. Golden, *supra* note 12, at 1044 (describing the “distinct institutional structure” including a “non-comprehensive statute” with room for significant interpretation, a federal court with an exclusive hold on patent appeals, and an administrative agency without substantive rulemaking power, but a charge to examine and issue patents).

187. Burstein, *supra* note 40, at 1757.

notable deficiencies in a judicial policymaking scheme.¹⁸⁸ Though the Federal Circuit avoids some of these concerns because of its specialization in patent law and prevalence of patent specialists on the bench,¹⁸⁹ the court is still limited to shaping policy through the lens of the cases and facts before it.¹⁹⁰

Meanwhile, the PTO has long been criticized for lacking the capacity to serve as the primary interpreter of the Patent Act. Scholars have pointed to the potential for industry capture (“the co-opting of regulatory agencies by [industry] groups”),¹⁹¹ pointing to the recent example of Covered Business Method Patents gaining an entirely separate post-issuance proceeding under the AIA in response to heavy bank lobbying.¹⁹² Similarly, the PTO (like other agencies) may be subject to political capture by other branches of the government using the agencies for their own ends.¹⁹³ Additionally, scholars point to the abundance of bad patents the PTO issues, perhaps as an indicator of the agency’s weakness.¹⁹⁴ Finally, some scholars suggest that the PTO structure itself, established long before the APA and *Chevron*, overly constrains PTO discretion and needs restructuring to allow the PTO to serve as a statutory interpreter. Thus, it is easy to conclude that the Federal Circuit and the PTO each lack the capacity to serve as the sole interpreter of the Patent Act.

2. A Shared Model of Patent Policymaking

The complexity of the patent system exists because Congress tasks both the PTO and the Federal Circuit, institutions from different sides of the governmental tracks, with significant objectives within patent law and policy. Neither appears capable of serving as the sole policymaker. The PTO routinely decides the patentability of patent

188. Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 COLUM. L. REV. 1035, 1102, 1131 (2003).

189. Kumar, *supra* note 21, at 244–45.

190. Rai, *supra* note 188, at 1122–23.

191. Sherkow, *supra* note 65, at 237 (quoting K. Sabeel Rahman, Note, *Envisioning the Regulatory State: Technocracy, Democracy, and Institutional Experimentation in the 2010 Financial Reform and Oil Spill Statutes*, 48 HARV. J. LEGIS. 555, 555 (2011)).

192. *Id.* at 240.

193. *Id.* at 241–44 (describing, as an example, Senators’ pressure on the NIH and PTO to provide increased access to HIV drugs).

194. Tran, *supra* note 2, at 871–72.

applications¹⁹⁵ with the goal of fostering technological innovation,¹⁹⁶ and the Federal Circuit reviews appeals of validity and patent infringement to provide for uniformity in patent law.¹⁹⁷

Further complicating the patent system, there are *multiple* agencies other than the PTO that deal with patent law and to some extent influence patent policy.¹⁹⁸ For example, the International Trade Commission, an independent agency governed by the Tariff Act of 1930, which excludes the importation of goods that infringe U.S. patents,¹⁹⁹ has influenced patent policy by implementing standards for infringement remedies that have been adopted by federal courts.²⁰⁰ While the Federal Trade Commission does not interpret patent law, it has demonstrated the ability to influence patent policy in the pharmaceutical field by coordinating the generic-drug-market entry process with the patent process.²⁰¹ The Food and Drug Administration formulates patent policy relating to drugs and therapeutic proteins.²⁰² The National Institutes of Health (“NIH”) is involved in influencing the evolution of DNA-patent jurisprudence.²⁰³ Given these shared roles in creating patent policy, it is clear that Congress intended to take an integrative approach to patent policymaking.

The patent system, viewed as a complex system with multiple policy actors in different contexts, benefits from diversification. The diversity, in competence, expertise, and scope of authority—as well as the competition between the primary actors, the PTO and the Federal Circuit—may be more likely to accomplish the goals of the patent system than either the PTO or the Federal Circuit alone.²⁰⁴ Thus, by allowing the Federal Circuit and PTO to continue their historically criticized interbranch competition,²⁰⁵ Congress is in fact using the

195. 35 U.S.C. § 131 (2012) (“The [PTO] Director shall cause an examination to be made on the application . . . and if on such examination it appears that the applicant is entitled to a patent under the law, the Director shall issue a patent therefor.”).

196. See Benjamin & Rai, *supra* note 79, at 274–75 (naming the “major normative goal of patent law” as innovation, including “initial invention and the commercialization of such invention”).

197. Wasserman, *supra* note 50, at 380.

198. Rai, *supra* note 5, at 1239–42 (considering the other agency actors that make patent policy, including the International Trade Commission and the Federal Trade Commission).

199. Kumar, *supra* note 21, at 238.

200. Rai, *supra* note 5, at 1239.

201. *Id.*

202. Stuart M. Benjamin & Arti K. Rai, *Fixing Innovation Policy: A Structural Perspective*, 77 GEO. WASH. L. REV. 1, 13, 19 (2008).

203. Rai, *supra* note 5, at 1241.

204. Cf. Gersen, *supra* note 66, at 212 (explaining how competing agencies can bring policy more in line with congressional preferences).

205. Gugliuzza, *supra* note 27, at 1828.

competition to “bring policy closer to [its preferences] than would delegation of a single agent.”²⁰⁶

Given the complexity of the patent system, the traditional deference framework, namely *Chevron* deference, is a poor fit for understanding the relationship between the Federal Circuit and the PTO. Further, it fails to provide a sufficiently flexible deference regime that promotes the integrative administration of patent law. The first step of *Chevron*, which asks whether there is ambiguity in the statute left for the agency to fill, calls for the mechanical grant of deference when such ambiguity exists. The Patent Act is undoubtedly ambiguous—Congress has continuously written the substantive patent laws broadly, leaving several gaps.²⁰⁷ Thus, the *Chevron* step two inquiry turns on whether Congress *intended* the PTO alone to fill those gaps, which, under the traditional deference scheme, calls for the *Mead* analysis.

Even considering the addition of the PGR proceedings in the AIA, there is reason to conclude that congressional intent warrants deviation from the *Chevron* analysis. *Chevron*'s first step appears to assume that Congress either is or is not implicitly delegating to an agency, but it does not account for the many other actors in the patent system. Thus, the near-automatic application of deference inappropriately ignores Congress's intent to delegate patent policymaking to a diverse group of agencies and courts, each with unique, yet interdependent, contributions to patent law.

Chevron's second step directs the court to defer to the agency's statutory interpretation as long as it is reasonable. But this step similarly fails the patent system because the reasonableness inquiry is incomplete. The court should look not only to the justifications provided by the agency, but also to concerns of other patent actors and the greater policy concerns implicated by substantive patent law interpretations. Because *Chevron* is inflexible and inadequate for this task, granting strong judicial deference to the PTO undermines the goals and structure of the patent system. Accordingly, the court must select an appropriate deference regime that accounts for rightful contributions of and competition among the many patent players.

206. Gersen, *supra* note 66, at 212.

207. Wasserman, *supra* note 50, at 380–81.

*C. Skidmore Is Sufficient and Ideal for Integrated Reform
of the Patent System*

Given the complex and collaborative nature of patent regulation and policymaking, *Skidmore* provides a strong example of a deference regime capable of contouring to the needs of the patent system. Although *Skidmore* deference may be considered the second choice for agencies under *Mead* Step Zero, only granted upon the denial of *Chevron* deference, the doctrine is “far from meaningless.”²⁰⁸ In practice, courts applying *Skidmore* often are highly deferential in favor of government agencies.²⁰⁹ The primary difference between *Chevron* and *Skidmore* is the court’s discretion to acknowledge the expertise of the agency while still considering other important factors involved in congressional delegation, ultimately providing for a more holistic view of policymaking and the interpretation of substantive law.

Applying *Skidmore* deference to the PTO’s interpretations of substantive law would provide courts with the flexibility to determine the necessary deference by considering the PTO’s rationale alongside broader patent policy issues. Importantly, it would do this without compromising the concerns enumerated in Professor Wasserman’s calls for judicial deference. In addition to the traditional considerations under *Skidmore*,²¹⁰ a court has latitude to consider other factors that demonstrate the persuasiveness of the agency’s interpretation. Thus, in patent cases, the court can give weight to: the PTO’s expertise and prior practices, its collaboration with other patent actors, the practical effects of the interpretation on other patent agencies and in other patent technologies, and broader goals within patent policy. This approach enables courts to consider the PTO’s interpretation in the context of the entire patent system, promoting collaboration in the accomplishment of patent policy goals and providing more consistency and uniformity across the entire field of patent law.

The application of *Skidmore* in the patent field potentially raises two important concerns: (1) binding judicial interpretation and (2) excessive judicial discretion. First, because the court is exercising its interpretation powers under *Skidmore* instead of granting strong

208. Golden, *supra* note 74, at 553.

209. *Id.*

210. See *United States v. Mead*, 533 U.S. 218, 228 (2001) (“The fair measure of deference . . . var[ies] with circumstance, and courts have looked to the degree of the agency’s care, its consistency, formality, and relative expertness and to the persuasiveness of the agency’s position.”); see also Jim Rossi, *Respecting Deference: Conceptualizing Skidmore within the Architecture of Chevron*, 42 WM. & MARY L. REV. 1105, 1128 (2001) (noting that the Court considers the “thoroughness of the agency’s consideration and consistency of the agency’s position”).

judicial deference, the court's determination of the organic statute's meaning is binding.²¹¹ Despite the force of the court's interpretation, however, it is potentially reversible. The agency can propose changes to the court's interpretation, and the court will again consider the relevant *Skidmore* factors. Though this erects a barrier to the PTO not present under *Chevron*, its effect is not undesirable—the PTO should be prepared to assert and defend its reasoning whenever it seeks deference. Second, the flexibility of *Skidmore* may provide courts, particularly the Federal Circuit which has refused to grant any deference, with too much latitude in rejecting an agency's argument as unpersuasive.²¹² Though this is an important concern, the benefits of applying *Skidmore* to PTO interpretations overcome the risk. As the court would be required to consider several factors to determine “persuasiveness,” a *Skidmore* analysis forces transparency of both the court and the agency, ultimately bolstering the legitimacy and uniformity of both patent actors without sacrificing necessary flexibility. Therefore, *Skidmore* is better suited than *Chevron* to give due deference to the PTO's expertise and contour to the unique structure of the patent system.

Consider again the dilemma presented by patent-eligible subject matter: the PTO must make daily determinations of patentability to issue each patent, yet its interpretations of the AIA's provisions receive no deference from the Federal Circuit.²¹³ Under the current regime, the Federal Circuit largely underestimates the PTO's expertise and perspective. Under *Chevron*, the court would stop after evaluating the reasonableness of the PTO's sole interpretation. If the court instead applied *Skidmore*, it would consider the PTO's experience, long-standing practices, and expertise in making these frequent decisions, while also considering whether the agency's reasoning addresses other concerns of patent policy. For example, the Federal Circuit might decide whether the PTO considered how the interpretation would apply across the different patentable technologies, whether the measure of patentability is consistent with the NIH's concerns about patenting DNA, or whether the proposed standard furthers the overall patent goal of innovation. This level of individualized inquiry well supports Congress's complex and integrated design of the patent system. Thus, the Federal Circuit should end its ongoing practice of denying (or avoiding) deference to the PTO and adopt a *Skidmore* inquiry when faced with agency interpretations of the Patent Act.

211. Rossi, *supra* note 210, at 1145.

212. *Id.* at 1124–27.

213. *See supra* Section I.C.

CONCLUSION

In constructing the patent system to facilitate the ultimate goal of technological innovation, Congress created a uniquely hybrid legal structure. After Congress enacted the America Invents Act of 2011, greatly expanding the responsibilities of the PTO (including the addition of new adjudicatory proceedings), the balance of power between the PTO and the Federal Circuit became ripe for reexamination.

Despite some scholars' renewed calls for the PTO to receive *Chevron* deference for its statutory interpretations of substantive patent law, such a grand shift in the policymaking power within the patent system seems more like an elephant, not a mouse. *Chevron* deference to the PTO is inappropriate given the complexity of the institutional design of patent law intended by Congress. *Chevron*, perhaps, is too binary—asking the question of whether or not Congress intended the agency to be the primary interpreter of its organic statute. In the patent regime, Congress did not intend to delegate the interpretive and policymaking task solely to the PTO. Instead, Congress intentionally appointed several institutions, primarily the Federal Circuit and PTO, with overlapping jurisdiction and potentially competing approaches, to best foster the patent system's goal of encouraging innovation.

Thus, though some deference is surely deserved, courts should make a particularized, ad hoc inquiry into the interpretative process of the agency, a concept familiar to *Mead*, before deciding how much deference is appropriate. This Note recommends the application of *Skidmore* deference as appropriate for such a task, given its sliding-scale deference approach, but leaves for later consideration other possible deference models that may fit the patent system. The Federal Circuit should thus abandon its historical no-deference approach and conduct the particularized inquiry necessary to properly maintain the balance among the patent system's many actors.

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