# *Arthrex* and the Politics of Patents

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*The Supreme Court's decision in* Arthrex *is the latest in a growing set of decisions regarding administrative patent law. A close look at this entire series suggests that* Arthrex *is a culmination of a subtle shift in the Court's approach to such cases. Where the Court once lauded the Patent Office's expertise, the Court's more recent decisions have emphasized flexibility and political accountability in patent decision-making. This development is both significant and salutary. For one, it marks the ongoing maturation of administrative patent law as one branch of administrative law, subject to the influences of the myriad administrative law values beyond expertise. This shift, moreover, is constructive, subjecting innovation- and access-governing principles to more democratic constraints.*



## INTRODUCTION

Over two decades ago, the Supreme Court started to set the foundation of the administrative law of the nation's patent system. In a series of cases beginning with *Dickinson v. Zurko*, the Court has considered whether the decisions of the U.S. Patent and Trademark Office ought to be assessed against the standards set out in the Administrative Procedure Act,[1] how the Judiciary

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1. 527 U.S. 150, 152 (1999).

may review that agency's statutory interpretations,[2] and when the presumption of reviewability applies to its decisions,[3] among other administrative law questions. The Court's decision in *Arthrex* offers yet one more example of such a case, considering how the Constitution's Appointments Clause applies to members of the Patent Office and its Patent Trial and Appeal Board.[4]

A close look at this series of decisions reveals a subtle shift in the Court's reasoning—one that mirrors trends in the Court's administrative law jurisprudence more generally.[5] Where the Court once extolled the values of technocratic decision-making and lauded the Patent Office's expertise, the Court's more recent decisions have confirmed the agency's flexibility to change governing standards, have noted the possibility for varying patent policy preferences across administrations, and have emphasized the concomitant need for political accountability in the Patent Office. Compare, for example, the Court's decisions in *Dickinson* and *Arthrex*. In *Dickinson*, decided in 1999, the Court reasoned that the Patent Office "is an expert body [that] can better deal with the technically complex subject matter" of most patent applications and "consequently deserves deference."[6] But the Court's 2021 decision in *Arthrex* rests on a decidedly different ground. *Arthrex* stressed the need for political accountability, explaining that the agency's structure must ensure that the Patent Office's Director "take responsibility" for the agency's decisions, i.e., its policy choices and applications thereof.[7]

In short, as agency expertise has mattered less to the Court's decisions in such cases, values such as flexibility and accountability have proved more important to the Court's reasoning. Indeed, in *Arthrex*, the Court restructured the Patent Office's design, subordinating its board of expert, technical adjudicators to the policy judgments of the agency's political leadership.

This development is important. For one, it marks the ongoing maturation of administrative patent law—i.e., administrative law's application to our patent regime—as one branch of administrative law, subject to the influences of the myriad administrative law values beyond expertise.[8] Moreover, this shift is to administrative patent law's benefit: It is high time that we—the patent law community—embrace the need for greater accountability in patent administration. Such decisions are political, by which I mean they reflect some

2. *See*, *e.g.*, Cuozzo Speed Techs. v. Lee, 136 S. Ct. 2131, 2136 (2016); *see also* SAS Inst. v. Iancu, 138 S. Ct. 1348, 1352–53 (2018).

3. *See*, *e.g.*, Cuozzo, 136 S. Ct. at 2140–41; *see also* Thryv, Inc. v. Click-To-Call Techs., 140 S. Ct. 1367, 1370 (2020).

4. United States v. Arthrex, Inc., 141 S. Ct. 1970, 1978–81 (2021).

5. *See* Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748, 1755–57 (2021).

6. Dickinson, 527 U.S. at 160–61.

7. Arthrex, 141 S. Ct. at 1981–82.

8. *Cf.* Tejas N. Narechania, *Defective Patent Deference*, 95 WASH. L. REV. 869, 903 (2020) (noting that accountability, expertise, flexibility, and reasoned public deliberation are among the values served by administrative law doctrines).

settlement of competing patent ideologies.[9] And so it is natural that our usual mechanisms of political control—transparency, participation, and electoral accountability (among others)—have begun to occupy a more prominent place in patent law. We should thus set aside the common fiction that administrative patent decisions flow from inexorable and neutral scientific and economic truths, and instead embrace modes of political governance that allow policymakers to better tailor innovation- and access-governing principles to democratic will.

## I.
## FROM TECHNOCRACY TO DEMOCRACY

Increasingly, patent law is administrative law. In many instances, administrative law principles govern where and how various patent-related decisions are made. The Leahy-Smith America Invents Act reimagined the Patent Office as the locus for a range of decisions once left largely to the courts,[10] and thus included several provisions empowering the agency to set policy.[11] Legal scholars have organized multiple symposia and authored countless articles about patent law's place in the administrative state.[12] And, as noted, the Supreme Court has dedicated significant attention to questions of administrative procedure at the Patent Office.[13]

Administrative law is informed by many (if sometimes competing) values—accountability, expertise, flexibility, and reasoned public deliberation, among others. Hence, the Court's decisions regarding the administrative law of our patent regime are beginning to reflect these multitudes, while also suggesting a shift away from expertise's primacy, increasingly favoring accountability and flexibility.

*Dickinson*, which set a cornerstone for the Court's administrative patent law jurisprudence,[14] is emblematic of the Court's prior focus on expertise. As noted above, the Court's opinion in *Dickinson* described the Patent Office as an "expert body" well-equipped to grapple with the "technically complex subject

9. *See* THE FEDERALIST NO. 10 (James Madison).

10. Saurabh Vishnubhakat, et al., *Strategic Decision Making in Dual PTAB and District Court Proceedings*, 31 BERKELEY TECH. L.J. 45, 48–49 (2016).

11. *See*, *e.g.*, 35 U.S.C. §6(a) (establishing the Patent Trial and Appeal Board); 35 U.S.C. §316(a)(4) (granting the Patent Office Director the power to issue regulations governing inter partes review); *see also* Cuozzo Speed Techs. v. Lee, 136 S. Ct. 2131, 2142 (2016) (explaining that the latter provision gives the Patent Office the power to set out substantive standards governing Patent Office proceedings that are entitled to deference under *Chevron U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984)).

12. *See*, *e.g.*, Symposium, *Administering Patent Law*, 104 IOWA L. REV. 2299–2734 (2019) (symposium issue comprising fifteen articles); Symposium, 65 DUKE L.J. 1551–1735 (2016) (symposium issue comprising five articles).

13. I describe several of these cases throughout the rest of this section.

14. Melissa F. Wasserman, *The Changing Guard of Patent Law:* Chevron *Deference for the PTO*, 54 WM. & MARY L. REV. 1959, 2002 (2013); Stuart Minor Benjamin & Arti K. Rai, *Who's Afraid of the APA? What the Patent System Can Learn from Administrative Law*, 95 GEO. L.J. 269, 270 (2007).

matter" at issue in many patent applications, and thus well-deserving of judicial deference.[15] Other decisions similarly emphasized the Patent Office's specialized expertise and the importance of such expertise in the construction of patent statutes.[16]

But even where the Court has confirmed the importance of agency expertise, it has also increasingly acknowledged limits on the Patent Office's ability to act on its specialized knowledge. In *Kappos v. Hyatt*, for example, the Court agreed that the agency held some "special expertise in evaluating patent applications," but it also noted limits on the Patent Office's ability to meaningfully apply that expertise to every patent application it reviews.[17]

Consider, also, the Court's brushes with the presumption of validity, which was—but is no longer—based on the Patent Office's expertise. An issued patent is presumed valid traditionally because an expert agency has reviewed and approved a patent application.[18] In *KSR*, the Court echoed arguments contending that limits on the Patent Office's ability to find and review all relevant prior art can undermine that presumption.[19] And four years later in *i4i*, the Court explained that agency expertise cannot sustain the presumption where a patent is alleged invalid in view of some new evidence never presented to the agency.[20] Indeed, in *i4i*, the Court expressly rejected the presumption's traditional basis in agency expertise, giving it a new foundation in common law constructions of statutory language.[21]

As expertise has become less important to the Court's administrative patent law decisions, other values—agency flexibility and political accountability—have begun to occupy a more prominent place in this still-emerging doctrinal space.

*Cuozzo*, for instance, noted that patent applications are reviewed by examiners with relevant expertise—but then went on to emphasize agency flexibility in the form of a "second look" at particular patents and applications.[22] Moreover, while *Cuozzo* affirmed the Patent Office's decision to employ the "broadest reasonable construction" standard in inter partes review, it also suggested that the Patent Office is free to revisit this choice in view of new

15. Dickinson v. Zurko, 527 U.S. 150, 160–61 (1999) (highlighting expertise as one primary "reason[] . . . long invoked to justify deference to agency factfinding").

16. *See* J.E.M. Ag. Supply v. Pioneer Hi-Bred Int'l, 534 U.S. 124, 144–45 (2001).

17. Kappos v. Hyatt, 566 U.S. 431, 445 (2012); *see* Michael D. Frakes & Melissa F. Wasserman, *Is the Time Allocated to Review Patent Applications Inducing Examiners to Grant Invalid Patents?: Evidence from Micro-Level Application Data*, 99 REV. ECON. & STAT. 550, 554–55 (2017) (finding that patent examiners face binding time constraints that induce them to grant invalid patents).

18. KSR Int'l v. Teleflex Inc., 550 U.S. 398, 426 (2007) (explaining "the rationale underlying the presumption" as "that the [Patent Office], in its expertise, has approved the claim").

19. *Id*. at 426–27; *see also* Narechania, *supra* note 8, at 892–93.

20. Microsoft Corp. v. i4i Ltd., 564 U.S. 91, 108–11 (2011) ("Simply put, if the PTO did not have all material facts before it, its considered judgment may lose significant force.").

21. *Id*. at 101–07, 112–13.

22. Cuozzo Speed Techs. v. Lee, 136 S. Ct. 2131, 2144 (2016).

information, shifting preferences, or evolving expertise.[23] And, in 2018, the Patent Office did indeed revisit this standard under Director Andrei Iancu, replacing it with the ordinary meaning standard typically applied in litigation.[24]

*Oil States*, decided in 2018, is similar.[25] In affirming the Patent Office's constitutional power to review and rescind issued patents in inter partes proceedings, the Court endorsed Congress's power to create a more flexible patent examination regime.[26] Moreover, *Oil States*'s reasoning rests in part on *Newport & C. Bridge Co.*, which emphasized the need for administrative flexibility and, while recognizing the possibility that officials may abuse this power, explained that the recourse for unreasonable exercises of such discretion is at the polls rather than in the courts.[27]

*Arthrex* is a culmination of this shift away from expertise and toward accountability. *Arthrex* concerned the Patent Trial and Appeal Board, which hears inter partes review proceedings (among other matters). That Board is staffed by hundreds of Administrative Patent Judges, who are statutorily required to possess specialized expertise.[28] In *Arthrex*, the Court considered whether these Administrative Patent Judges are inferior officers (who may be appointed without the Senate's approval) or principal officers (who require the Senate's confirmation).[29] The Court concluded that so long as Administrative Patent Judges issue final patentability decisions on behalf of the United States, they carry out the duties of principal officers.[30] And so, in order to bring the scheme of inter partes review in line with its view of the Constitution's Appointments Clause, the Court granted the Patent Office's Director the power to review the decisions of the Patent Trial and Appeal Board.[31] This remedy, the Court reasoned, ensures that the powers exercised by Administrative Patent Judges are

23. *Id.* at 2146.

24. *See Changes to the Claim Construction Standard for Interpreting Claims in Trial Proceedings Before the Patent Trial and Appeal Board*, 83 Fed. Reg. 51,340, 51,340–41 (Oct. 11, 2018).

25. Oil States Energy Servs. v. Greene's Energy Grp., 138 S. Ct. 1365, 1374–75 (2018).

26. *Id.*

27. *Id.* at 1357 (citing Newport & C. Bridge Co. v. United States, 105 U.S. 470, 479–81 (1881)); *see* Oil States, 138 S. Ct. at 1380 (Gorsuch, J., dissenting). In *Oil States*, Justice Gorsuch seemed to lament the possibility that a political appointee may oversee this process of reviewing a patent's validity. *Id*. In *United States v. Arthrex*, however, Justice Gorsuch embraced such political accountability. 141 S. Ct. 1970, 1988–90 (2021) (Gorsuch, J., concurring in part). Taken together, Justice Gorsuch seems to believe (perhaps incongruously) that the independent judiciary is better suited to these matters vis-à-vis agencies—but that political (or politically-accountable) agency decisions are better than independent, technical-expertise-informed ones.

28. 35 U.S.C. §6(a).

29. 141 S. Ct. at 1976 (citing U.S. CONST., art. II, § 2, cl. 2).

30. *Id*. at 1979–81, 1985–86.

31. *Id*. at 1986; *see also* Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 188–90 (2019). An alternative might have been to require Senate confirmation of all Administrative Patent Judges. *Arthrex*, 141 S. Ct. at 1990 (Gorsuch, J., concurring in part). But the Court seems to have (implicitly, but rightfully) deemed that possibility too infeasible. *See* Richard Pierce, *Standing Law Is Inconsistent and Incoherent*, YALE J. ON REG. NOTICE & COMMENT (Sept. 7, 2021), https://perma.cc/987A-FAT7.

consistent with those of inferior officers, and vests the powers of a principal officer—namely, the power to issue final patentability decisions—with the Director, a political appointee confirmed by the Senate and removable by the President.[32]

The Court reasoned that this structure is necessary for reasons of political accountability. In its view, the Executive Vesting Clause and the Appointments Clause, read together, demand a chain of political accountability for Executive Branch decisions.[33] If an officer makes poor decisions, the President can fire him; and if the President fails to fire officers who make poor decisions, then the voting public can elect new leadership.[34] In short, the Court was willing—indeed, it felt commanded by the Constitution—to subordinate the Administrative Patent Judges' expertise to this particular species of political accountability.

Moreover, the dispute between the Court's majority opinion and Justice Thomas's principal dissent centered not on *whether* the Constitution demands political accountability, but rather *what sort* of political discipline it requires. Justice Thomas explained that though the Patent Office's Director could not, under the then-extant statutory scheme, directly review patentability decisions, the Director had several other means of controlling them—by de-instituting the proceeding altogether, by ordering rehearing, and by changing the composition of the presiding panel of Administrative Patent Judges.[35] This "functional power over the [Patent Trial and Appeal] Board," said Justice Thomas, should have been more than sufficient to satisfy the Constitution's demands for accountability.[36]

Meanwhile, Justice Breyer's separate dissent echoed the Court's approach in *Dickinson* (a majority opinion which he authored), reasoning that Congress was correct to offer some insulation between the Administrative Patent Judges and the political appointee at the head of agency. In his view, "the technical nature of patents, the need for expertise, and the importance of avoiding political interference . . . justify the restriction upon the Director's authority" to directly review the Board's decisions.[37] *Arthrex* thus offers a microcosm of the Court's evolving administrative patent jurisprudence: Though agency expertise might have been central to the Court's reasoning in earlier cases like *Dickinson*, the Court's focus has since moved slowly but decidedly away from expertise in favor of concerns such as flexibility and accountability.

32. Arthrex, 141 S. Ct. at 1986–87.
33. *Id*. at 1976, 1985–86.
34. *See id*. at 1985–86.
35. *Id*. at 2001–02 (Thomas, J., dissenting).
36. *Id*.
37. *Id*. at 1996 (Breyer, J., concurring in part).

## II.
## ADMINISTRATIVE PATENT LAW'S NEW POLITICS

So what should we make of this shift in the Court's more recent administrative patent law jurisprudence?

For one, this shift is itself notable insofar as it signals the future of the Court's administrative patent law cases—and maybe even its administrative law jurisprudence more generally.[38] Other recent cases note that "[a]gency policymaking is not a rarified technocratic process," embracing instead a view that agency decisions are often and unavoidably informed by "unstated considerations of politics" as well as "the legislative process, public relations, interest group relations, foreign relations, and national security concerns (among others)."[39] And so the Court has concluded that reconciling these many competing concerns is more than a simple question of welfare. It is a question of values better left to politically-accountable actors. Looking ahead, then, administrative law—and administrative patent law—seems likely to continue to reflect these concerns in future matters,[40] and so patent scholars, policymakers, and practitioners should be mindful of the Court's new focus.

This shift, moreover, is not just important, it is to administrative patent law's benefit. We must embrace patent law's unavoidable politics. In my view, patent law and practice has too long embodied an implicit fiction that decisions about patentability flow from inexorable scientific rules, and that decisions about patent policy can rest on neutral principles of economic welfare. But many of these matters are decidedly not neutral, and they cannot be solved with the mere application of expertise. Indeed, expertise can be—and has been—made malleable. And so these matters are inherently ideological, and therefore demand some *political* settlement.[41] The view, for example, that patent rights ought to be stable to promote investment in innovative activity reflects an ideological judgment—a specific view about which patent policies are best for society. But stability and honoring investment-backed expectations are only two of the considerations that shape patent policy; others, such as access to technology and equity, may counsel in favor of a different policy regime. Reconciling these competing concerns is a question of values better left to modes of democratic settlement than to technocratic applications of expertise. The Court's recent shift, then, is welcome for its focus on the structure of patent's political institutions, with a particular eye to concerns such as accountability and transparency.

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38. *See* Peter Lee, *The Supreme Assimilation of Patent Law*, 114 MICH. L. REV. 1413, 1431–35 (2016) (explaining that the Supreme Court has declined to treat the administrative patent regime exceptionally, instead assimilating it into administrative law's mainstream). *But see* Eidelson, *supra* note 5, at 1757 (sounding a caution about predicting the Court's future performance from past behavior).

39. U.S. Dep't of Commerce v. New York, 139 S. Ct. 2551, 2573 (2019) (quotation mark omitted).

40. *See* Eidelson, *supra* note 5, at 1755–58.

41. *See* THE FEDERALIST No. 10 (James Madison); *see also* Paul Gugliuzza, *Patent Law's Deference Paradox*, 106 MINN. L. REV. (2022) (noting patent law's increasing polarization).

Consider, for example, three policies implemented by Director Iancu during the Trump Administration, which help to highlight the inherently ideological and political nature of administrative patent law decisions. One, Director Iancu promulgated new guidelines regarding the patentability of certain inventions,[42] guidelines that may seem inconsistent with the Supreme Court's decision in *Alice Corp. v. CLS Bank*.[43] Where these new guidelines permit patent examiners to approve more patent applications than under prior rules, that is a consequence that does not flow from objective facts about the invention or the relevant prior art, but rather from a policy choice regarding the appropriate scope of patent protection. Two, the Patent Office's decision (noted above) to adopt the ordinary meaning standard in inter partes review reflects a policy view about the scope of a patentee's (and the public's) reasonable reliance on the validity of an issued patent.[44] And three, Director Iancu's decisions to forgo instituting inter partes review in light of ongoing litigation reflect a view regarding the appropriate institutional arrangement of patent adjudication.[45] I do not mean to critique or endorse any of these new policies per se. I simply mean to highlight that each of these policies reflects embedded choices about respective trade-offs—between incentives for innovation and access to technology, between the reasonable reliance interests of patentees and the public's right to ensure that patent monopolies are kept within their lawful scope, and between judicial litigation and administrative adjudication. Insofar as these decisions evade public scrutiny or escape accountability, they merit an important process critique.[46] The patent law community should debate these decisions, each of which requires balancing competing values, and the Patent Office's policies should account for those public dialogues.[47] And so *Arthrex*'s embrace of political accountability is good for our administrative patent system. It helps to ensure that such significant decisions reflect the views of political leadership, informed by and accountable

42. *2019 Revised Patent Subject Matter Eligibility Guidance*, 84 Fed. Reg. 50, 55 (Jan. 7, 2019).

43. Alice Corp. v. CLS Bank Int'l, 573 U.S. 208 (2014); *see also* Pamela Samuelson (@PamelaSamuelson), TWITTER, (Sept. 26, 2018, 9:18 AM) [https://perma.cc/8XSP-ESDK] (suggesting that the Patent Office's new guidance attempts to "[o]verrule the Supreme Court").

44. *Changes to the Claim Construction Standard for Interpreting Claims in Trial Proceedings Before the Patent Trial and Appeal Board*, 83 Fed. Reg. 51,340, 51,349 (Oct. 11, 2018).

45. *See* NHK Spring Co. v. Intri-Plex Techs., IPR2018-00752, Paper 8 (PTAB Sept. 12, 2018) (precedential); Apple Inc. v. Fintiv, Inc., IPR2020-00019, Paper 15 (PTAB May 13, 2020) (precedential).

46. *See* Narechania, *supra* note 8, at 939–40 (critiquing the Patent Office's eligibility guidelines on process grounds); Petition for a Writ of Certiorari at 26–29, Mylan Labs. v. Janssen Pharms., (No. 21-202) (filed Aug. 9, 2021) (contending that the *NHK-Fintiv* Rule, *supra* note 44 and accompanying text, is procedurally defective for its failure to invite and reflect on public comment); Petition for a Writ of Certiorari at 3, Apple Inc. v. Optis Cellular Tech. (No. 21-118) (filed July 26, 2021) (similar).

47. *See* Kali Murray, *First Things First: A Principled Approach to Patent Administrative Law*, 42 JOHN MARSHALL L. REV. 29, 61–62 (2008) (suggesting that, to reconcile patent law with administrative law principles, patent administration must welcome participation by patent civil society); *see generally* Kali Murray, *Rules for Radicals: A Politics of Patent Law*, 15 J. INTELL. PROP. L. 63 (2006) (similarly arguing for greater participatory mechanisms in patent administration).

to the voting public (including the range of the patent community's constituencies).

I should be clear about the scope of my endorsement: One need not embrace *Arthrex*'s wooden approach to the Executive Vesting Clause and the Appointments Clause, or its tacit adoption of a unitary executive theory, to agree with the view that the Patent Office's political leadership must "take responsibility" for its "ultimate decision[s]."[48] It is possible both to believe that the Patent Office must be held to account for its policy decisions, and to imagine means of transparency and accountability—including accountability to congressional officials[49]—beyond the chain of presidential removal that *Arthrex* demands. As noted, Justice Thomas's dissent described the Director's pre-*Arthrex* "functional power[s]" of decisional control as sufficient.[50]

Setting aside its needless formalism, *Arthrex* reflects a shift in our administrative patent jurisprudence that is both significant and salutary. It signals a new consideration—political accountability—that, though long overlooked, now seems likely to inform the Court's decisions in future cases. A renewed focus on the politics, and the political institutions, of patent law can help to ensure that the trade-offs we make—between, say, innovation and access, or courts and agencies—better account for the public's views.

48. United States v. Arthrex, 141 S. Ct. 1970, 1981 (2021).

49. *Cf.* Rebecca Ingber, *Congressional Administration of Foreign Affairs*, 106 VA. L. REV. 395 (2020) (similar, but in the foreign affairs context).

50. Arthrex, 141 S. Ct. at 2001–02 (Thomas, J., dissenting).