

PATENT LAW’S (SHORT-LIVED?) ERA OF NORMALCY

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INTRODUCTION

An unusual and surprising thing is happening in patent law of late: very little. The four decades beginning in 1980 saw almost constant turmoil in patent law, with dramatic changes to the statute, a brand-new court in charge of patent appeals, Supreme Court interest not seen since before the invention of the writ of certiorari, dramatic growth in patent applications, patent grants, and patent lawsuits, and unprecedented media and public attention. It also saw two distinct swings in public policy, the first (in the 1980s and 1990s) strengthening patent rights after a period of perceived weakness and the second (in the 2000s and early 2010s) cutting back on the perceived excesses of the first. But in the last several years, since roughly 2018, patent law has settled down. That’s not to say there aren’t interesting and important questions still being addressed, or that there aren’t people pushing for policy changes. But patent law in the last several years has entered an era of normalcy.¹

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1. By normalcy, I mean the relative stability of legal rules and party behavior. That doesn’t mean every legal issue is resolved, much less that we know how every case will come out. But the fundamental rules and practices have been established.

This paper is about U.S. patent law. There are important changes happening in other countries, from the opening of the Uniform Patent Court in Europe to the rise of global fights over standard-essential patents and injunctions. They are outside the subject of this paper.

The normalcy may be short-lived, however; the Trump administration has emerged as an agent of chaos in patent law as in so many other things. More on that at the end of the paper. But first, some history on just how much has changed.

I. 1980–2017: THE WHIRLWIND OF CHANGE

1982 is often thought of as a fulcrum for change in patent law. The creation of the Federal Circuit marks the beginning of the modern era of patent law. But the changes go well beyond the creation of that court.

A. *The Evolving Practice and Procedure of Patent Law*

A lawyer who entered the patent profession in 1980 has seen changes to almost every aspect of their job. In 1980, patent law (not yet “intellectual property” in most circles)² was a relatively obscure backwater, the province of engineers who didn’t interact much with the legal system. Fewer than 50,000 patents had issued the year before.³ Those patents were primarily granted for mechanical inventions.⁴ They generally named a single inventor, usually from the United States.⁵ That inventor was unlikely to come from a university; universities rarely patented their inventions before 1980.⁶ If more than one person claimed to have invented the same technology, the winner was the first to invent a new technology who was entitled to a patent.⁷ A single invention was usually protected by one or at most a few patents.⁸ Those patents lasted for seventeen years from the date they issued.⁹

2. Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1033–34 (2005).

3. *Table of Issue Years and Patent Numbers, for Selected Document Types Issued Since 1836*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/web/offices/ac/ido/oeip/taf/issuyear.htm> [<https://perma.cc/4FC6-WGLD>].

4. John R. Allison & Mark A. Lemley, *Who’s Patenting What? An Empirical Exploration of Patent Prosecution*, 53 VAND. L. REV. 2099 (2000) [hereinafter Allison & Lemley, *Who’s Patenting What?*]; John R. Allison & Mark A. Lemley, *The Growing Complexity of the United States Patent System*, 82 B.U. L. REV. 77, 80 (2002) [hereinafter Allison & Lemley, *Growing Complexity*].

5. Allison & Lemley, *Growing Complexity*, *supra* note 4, at 95, 97.

6. The Bayh-Dole Act, which encouraged university patenting, was passed in 1980. Bayh-Dole Act, Pub. L. No. 96–517, § 6(a), 94 Stat. 3015, 3018–27.

7. 35 U.S.C. § 102(g) (2010) (amended 2011 by the America Invents Act).

8. Mark A. Lemley, *Ten Things to Do About Patent Holdup of Standards (and One Not to)*, 48 B.C. L. REV. 149, 150 (2007) (“[G]enerally, one patent covers one drug. By contrast, in the IT industries, there are usually multiple patents—sometimes hundreds or even thousands—on each new product.”); Edward J. Egan & David J. Teece, *Untangling the Patent Thicket Literature* (Tusher Ctr. for Mgmt. of Intell. Cap., Working Paper No. 7, 2015), <https://haas.berkeley.edu/wp-content/uploads/Tusher-Center-Working-Paper-7.pdf> [<https://perma.cc/36FU-KE8F>].

9. See 35 U.S.C. § 154 (1993) (amended 1994 by the Uruguay Round Agreements Act).

And if the Patent and Trademark Office (PTO) made a mistake in issuing a patent, there was no way for it to correct its error.¹⁰

Patents were unlikely to be enforced in court; only about 750 patent lawsuits were filed in 1980.¹¹ When they were enforced, it was almost always in a bench trial, not a jury trial.¹² It was usually by a company that made a product and was suing a competitor.¹³ Most of the patents litigated in court were invalidated.¹⁴ If a party appealed that decision, that appeal went to the regional circuits, some of which (like the Eighth Circuit) were notorious for never having upheld a patent.¹⁵

Four decades later, none of those things is true. Intellectual property is front-page news,¹⁶ and patent litigation is the province of both the top general practice law firms¹⁷ and of a new wave of plaintiffs' personal injury lawyers.¹⁸ The PTO issues more than 300,000 patents a year, six times what

10. The first administrative revocation system, *ex parte* reexamination, was passed on December 12, 1980. See Pub. L. No. 96-517, § 6(a), 94 Stat. 3015, 3018–27 (codified as amended at 35 U.S.C. §§ 301–307).

11. Gene Quinn, *Patent Litigation in the United States, 1980 to 2020*, IP WATCHDOG (Nov. 4, 2021), <https://ipwatchdog.com/2021/11/04/patent-litigation-in-the-united-states-1980-to-2020/> [<https://perma.cc/HGT5-CJCE>] (fig. 3). Over the longer term, both the rate of litigation and win rates fluctuated in the nineteenth century. Christopher Beauchamp, *The First Patent Litigation Explosion*, 125 YALE L.J. 848 (2016).

12. Quinn, *supra* note 11 (fig. 1); Mark A. Lemley, *Why Do Juries Decide If Patents Are Valid?*, 99 VA. L. REV. 1673, 1706 (2013) (citing data noting the rise in patent jury trials from 1978 to 1994).

13. E.g., David L. Schwartz & Jay P. Kesan, Essay, *Analyzing the Role of Non-Practicing Entities in the Patent System*, 99 CORNELL L. REV. 425, 426 (2014).

14. John R. Allison & Mark A. Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AIPLA Q.J. 185, 192 n.12 (1998) (noting 35% validity rate during the period before the creation of the Federal Circuit).

15. Neil Jones, *The Five Most Publicized Patent Issues Today*, ABA: BUS. L. TODAY (May 22, 2014), https://www.americanbar.org/groups/business_law/resources/business-law-today/2014-may/the-five-most-publicized-patent-issues-today/ [<https://perma.cc/Y6YS-GNZ9>] (noting that, as of 1982, the Eighth Circuit had not upheld the validity or infringement of a patent for twenty-five years).

16. E.g., Sheryl Gay Stolberg & Rebecca Robbins, *Moderna and U.S. at Odds Over Vaccine Patent Rights*, N.Y. TIMES (Nov. 11, 2021), <https://www.nytimes.com/2021/11/09/us/moderna-vaccine-patent.html> [<https://perma.cc/VMP4-PGCE>] (published in print on page A1); Rebecca Robbins, *How a Drug Company Made \$114 Billion by Gaming the U.S. Patent System*, N.Y. TIMES (Jan. 28, 2023), <https://www.nytimes.com/2023/01/28/business/humira-abbvie-monopoly.html> [<https://perma.cc/HKV2-JXCM>] (published in print on page A1).

17. See, e.g., Kathleen M. O'Malley, *The Intensifying National Interest in Patent Litigation*, 19 MARQ. INTELL. PROP. L. REV. 1, 6 (2015) (Federal Circuit Judge Kathleen O'Malley, stating that, as of 2015, "there are not more than a handful of large firms without vibrant patent litigation departments, and, of those few, most are probably actively trying to develop them"); Andrew Maloney, *Big Law Finds Growth Opportunities Through IP Hires*, AM. LAW. MAG. (Mar. 1, 2024), <https://www.law.com/americanlawyer/2024/03/01/big-law-finds-growth-opportunities-through-ip-hires/> [<https://perma.cc/3C7N-VQ44>]. Commentators have linked the Supreme Court's increasing interest in patent law to the elite bar's involvement in patent litigation. See generally Paul R. Gugliuzza, *The Supreme Court Bar at the Bar of Patents*, 95 NOTRE DAME L. REV. 1233 (2020).

18. Ronen Avraham & John M. Golden, "From PI to IP": *Litigation Response to Tort Reform*, 20 AM. L. & ECON. REV. 168, 171 (2018).

it did forty years earlier.¹⁹ Patents are increasingly concentrated not in mechanical arts, but in software, communications, and internet law.²⁰

Who files patents has also changed dramatically. Today, invention is increasingly done by teams.²¹ Those teams (and their employers) are increasingly global; more than half of all U.S. patents today issue to foreign inventors,²² and many of the companies that obtain the most patents each year are based outside the United States.²³ Universities are much more active in patenting than they were before the passage of the Bayh-Dole Act in 1980, though their share of all patents is still small.²⁴

The process of obtaining those patents has also changed. Patents now issue not to the first to invent but to the first inventor to file, meaning that if more than one person invents at around the same time (and they often do)²⁵ the person who gets to the patent office first is the one who gets the patent. Those patents last for twenty years from the date of filing, not seventeen years from the date of issuance,²⁶ lengthening the term for most patents but reducing abuse of “submarine patents” by some.²⁷ Patents increasingly come not alone but in large families, driven by the growth of continuation applications and the rise of double patenting.²⁸ That is particularly true in the life sciences.²⁹ Combined with the increased complexity of products in

19. *Table of Issue Years and Patent Numbers*, *supra* note 3.

20. Allison & Lemley, *Growing Complexity*, *supra* note 4, at 80; John R. Allison, Mark A. Lemley & David L. Schwartz, *Our Divided Patent System*, 82 U. CHI. L. REV. 1073, 1076 (2015).

21. Dennis Crouch, *The Team-Based Reality of Modern Innovation: Average Patent Now Lists More Than Three Inventors*, PATENTLY-O (Nov. 18, 2024), <https://patentlyo.com/patent/2024/11/reality-innovation-inventors.html> [<https://perma.cc/DZJ8-ED8P>] (“[T]he average number of inventors per utility patent has reached 3.2 in 2024, nearly double the 1.7 inventors per patent seen in 1976.”); Allison & Lemley, *Who’s Patenting What?*, *supra* note 4, at 2101–02.

22. *U.S. Patent Statistics Chart: Calendar Years 1963–2020*, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.htm [<https://perma.cc/DAC5-H6U6>] (noting that foreign inventors were 53.2% of utility patent grants in 2020).

23. *Top Organizations 2020*, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/web/offices/ac/ido/oeip/taf/topo_20.htm [<https://perma.cc/KCB4-JCZP>]. The top ten firms granted patents in 2020 were IBM (domestic), Samsung (foreign), Canon (foreign), Microsoft (domestic), Intel (domestic), LG (foreign), TSMC (foreign), Apple (domestic), Huawei (foreign) and Qualcomm (domestic). *Id.*

24. *U.S. Colleges and Universities—Utility Patent Grants 1969–2012*, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/web/offices/ac/ido/oeip/taf/univ/asgn/table_1_2012.htm [<https://perma.cc/4DGQ-2AWV>] (noting that, in 2012, 1.89% of patents granted were assigned to universities, as compared to 0.64% in 1980).

25. Mark A. Lemley, *The Myth of the Sole Inventor*, 110 MICH. L. REV. 709, 712 (2012).

26. 35 U.S.C. § 154.

27. Mark A. Lemley & Kimberly A. Moore, *Ending Abuse of Patent Continuations*, 84 B.U. L. REV. 63, 79–80, 84–85 (2004).

28. *Id.* at 81–83; Mark A. Lemley & Lisa Larrimore Ouellette, *Fixing Double Patenting*, 74 AM. U. L. REV. 1013, 1027–28 (2025).

29. Lemley & Moore, *supra* note 27; Robin Feldman, *May Your Drug Price Be Evergreen*, 5 J.L. & BIOSCIENCES 590, 597 (2018); Michael A. Carrier & Steve D. Shadowen, *Product Hopping: A New Framework*, 92 NOTRE DAME L. REV. 167, 171 (2016); S. Sean Tu & Mark A. Lemley, *What Litigators Can Teach the Patent Office About Pharmaceutical Patents*, 99 WASH. U. L. REV. 1673, 1682 (2022).

the IT industry, the result has been the proliferation of “patent thickets” in which hundreds, thousands, or even hundreds of thousands of patents may cover a single product.³⁰

The process of enforcing those patents is also very different than it was in 1980. Patent validity can now be challenged not just in court but in the PTO through a variety of administrative revocation systems, including ex parte reexamination (added in 1980), inter partes review (IPR) (added in 1999 but significantly expanded in 2011), and post-grant review (added in 2011).³¹ Patents can be enforced not just in court but in the International Trade Commission (ITC).³² Despite the increase in avenues to challenge patent validity, patents are much more likely to be held valid today than they were in the 1970s.³³

Patent litigation is much more common than it was in 1980, with roughly 3,000–4,000 suits per year filed in recent years, more than five times as many as in 1980.³⁴ And it looks very different than it did in 1980. Those suits are increasingly filed in a few favorite plaintiff venues such as the Eastern and Western Districts of Texas and the District of Delaware, which have become popular forum-shopping destinations and which in some cases affirmatively seek to attract patent suits;³⁵ none were common forums for patent cases before 1980. Forum shopping has persisted despite significant efforts by courts to rein it in.³⁶ But one opportunity for forum shopping at

30. Gideon Parchomovsky & R. Polk Wagner, *Patent Portfolios*, 154 U. PA. L. REV. 1, 62–63 (2005); Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard Setting*, in 1 INNOVATION POLICY AND THE ECONOMY 119, 122–23 (Adam B. Jaffe, Josh Lerner & Scott Stern eds., 2000).

31. 35 U.S.C. §§ 302 (reexamination), 311 (IPR), 321 (post-grant review).

32. 19 U.S.C. § 1337. While patent enforcement at the ITC was around before 1980, statutory changes in 1988 made it accessible to many more plaintiffs, not just domestic manufacturers. *See* 19 U.S.C. § 1337(a)(3) (amended 1988).

33. *See* Allison & Lemley, *Growing Complexity*, *supra* note 4, at 260. Compare the validity rate of 36% in the 1970s to a steady 55% validity rate for the last several decades. *Id.*; *see also* John R. Allison, Mark A. Lemley & David L. Schwartz, *Understanding the Realities of Modern Patent Litigation*, 92 TEX. L. REV. 1769, 19 (2014) (finding 42.4% invalidity rates in cases decided 2009–2013).

34. Table C-2—U.S. District Courts—Civil Statistical Tables for the Federal Judiciary, U.S. COURTS (Dec. 31, 2024), <https://www.uscourts.gov/data-news/data-tables/2024/12/31/statistical-tables-federal-judiciary/c-2> [<https://perma.cc/8S6Q-YEP4>].

35. J. Jonas Anderson & Paul R. Gugliuzza, *Federal Judge Seeks Patent Cases*, 71 DUKE L. REV. 419, 421–23 (2021); Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 247–80 (2016).

36. *See* TC Heartland LLC v. Kraft Foods Grp. Brands LLC, 581 U.S. 258, 261–62 (2017) (holding that corporations “reside” only in their State of incorporation under the patent venue statute); Order Assigning the Bus. of the Ct. as it Relates to Pat. Cases (W.D. Tex. May 30, 2024), <https://www.txwd.uscourts.gov/wp-content/uploads/2024/05/Order-re-Patent-Cases-05302024.pdf> [<https://perma.cc/AH5Y-HGMF>] (requiring cases filed in the Western District of Texas to be randomly assigned and requiring a motion to consolidate related cases).

the appellate level has disappeared. Since 1982, all appeals in patent cases go to the newly-created Court of Appeals for the Federal Circuit.

The nature of those suits has also changed. Patent suits in 1980 tended to be between competitors, generally in the mechanical or chemical industries. No longer. A large fraction of suits are in the computer and communications industries.³⁷ Many of those patent suits today are filed not just by companies seeking to prevent infringement by a competitor, but by “non-practicing entities” (NPEs)—companies that don’t make any products. NPEs now account for roughly half of all patent suits.³⁸ Most of these are “patent assertion entities” (PAEs), otherwise known as “patent trolls”—companies in the business of buying up patents from others in order to assert them, frequently against dozens of different defendants.³⁹

Another significant change in the subject matter of patent suits involves the pharmaceutical industry. Before 1984, patent suits over pharmaceuticals were rare because generic drugs were rare. The 1984 Hatch-Waxman Act changed that, making it easier to get approval for generic drugs and creating incentives to challenge patents on drugs.⁴⁰ It also created a complex regulatory scheme for evaluating drug patents,⁴¹ and the result has been a significant number of patent and related antitrust suits between pharmaceutical patent owners and generic competitors, something that didn’t exist before 1984.⁴² Congress has since created a somewhat different set of rules for biosimilars to biotechnology drugs.⁴³

Plaintiffs today generally try their cases before juries; the share of jury trials rose from 8.3% in 1978 to more than 70% by 1995.⁴⁴ With the rise of jury trials has come a new procedural mechanism for determining the meaning and scope of patent claims—the *Markman* hearing. Named for a 1996 Supreme Court decision that held that judges, not juries, decide the meaning of patent claims,⁴⁵ these hearings are ubiquitous in patent cases. They generally happen after the close of discovery but before summary judgment. And they are frequently dispositive of cases; once the meaning

37. Allison et al., *supra* note 20.

38. Shawn P. Miller et al., *Who’s Suing Us? Decoding Patent Plaintiffs Since 2000 with the Stanford NPE Litigation Dataset*, 21 STAN. TECH. L. REV. 235, 240 (2018). According to the Stanford NPE Litigation Dataset, of cases filed between January 1, 2015 and January 1, 2025, 7,925 were filed by patent-assertion entities out of 14,340 cases in total (55.3%). See *NPE Litigation Database*, STAN. L. SCH. <https://npe.law.stanford.edu/> [<https://perma.cc/N2VS-KGTY>] (filtering cases for categories 1, 4, 5).

39. See *NPE Litigation Database*, *supra* note 38.

40. 21 U.S.C. §§ 301–399.

41. *Id.*

42. Allison et al., *supra* note 20.

43. See Robin Feldman & Gideon Schor, *Dance of the Biologics*, 39 BERKELEY TECH. L.J. 841 (2024) (describing this system).

44. Lemley, *supra* note 12, at 1706.

45. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996).

of disputed claim terms is known, it is often clear whether the defendant's product infringes the patent.⁴⁶

Patent litigation today is also commonly accompanied by an IPR, an administrative challenge to the validity of the patent before the Patent Trial and Appeal Board (PTAB). The IPR proceeding didn't exist until 1999 and didn't exist in its current form until 2011, but it has become— at least until the second Trump administration came along— the way most patent validity disputes are resolved,⁴⁷ and appeals from the PTAB currently occupy a large fraction of the Federal Circuit's patent docket.⁴⁸

In short, the nature of patenting and of patent litigation— who participates and how it works— looks quite different today than it did forty-five years ago.

B. Revolutions in the Substance of Patent Law

Along with those changes in procedure and the patent marketplace have come perhaps even more dramatic changes in the substance of patent law. Almost every substantive patent doctrine has undergone significant changes since 1980.

1. The Reshaping of Patentability

In order to receive a patent for an invention, the inventor must satisfy various patentability criteria. These criteria created by Congress and interpreted by the courts all underwent either major revision or a complete revolution in doctrine during the last forty years.

- Initially, the scope of patentable subject matter was dramatically broadened by the Supreme Court beginning in 1980 with *Diamond*

46. "Claim construction is often dispositive of the other issues in the patent litigation." David L. Schwartz, *Courting Specialization: An Empirical Study of Claim Construction Comparing Patent Litigation Before Federal District Courts and the International Trade Commission*, 50 WM. & MARY L. REV. 1699, 1708 (2009). Indeed, "[o]f [cases] that make it to a *Markman* hearing, 50-80% settle thereafter but before trial." Mark A. Lemley, *Without Preamble*, 100 B.U. L. REV. 357, 360 n.8 (2020). And, even when litigants do not settle, they often stipulate to entries of judgment designed to test an adverse claim construction by the district court. See *BRK Brands, Inc. v. Nest Labs, Inc.*, 51 F. Supp. 3d 742, 744 (N.D. Ill. 2014) (Posner, J.) (recognizing that the Federal Circuit has reviewed claim construction from appeals of stipulated judgments, but questioning the practice).

47. From 2021–2023, the PTAB resolved 4,053 cases (primarily IPR cases, with a small number of PGR cases). LEX MACHINA, PATENT LITIGATION REPORT 2024, at 25 fig. 22 (2024). In contrast, district courts resolved 1,086 cases in that same period. *Id.* at 19 fig. 16.

48. In 2023, for example, 433 appeals from the PTAB were filed in the Federal Circuit. *Id.* at 26 fig. 23. Only 306 appeals from district courts were filed that year. *Id.* at 8 fig. 4.

*v. Chakrabarty*⁴⁹ and *Diamond v. Diehr*⁵⁰ the following year, a trend that continued until, by 1998's *State Street Bank* decision,⁵¹ "everything [was] patentable."⁵² It stayed that way for a decade, until the Supreme Court cut back on patentable subject matter in a series of four decisions from 2010 to 2014.⁵³

- The rules for novelty were significantly modified by Congress.. As mentioned above, the most dramatic change was the move from first to invent to first inventor to file in 2011, which changed both the process and the substance of prior art. Along with that change came the elimination of some categories of prior art⁵⁴ and the creation of a new prior user right defense.⁵⁵ But those weren't the only changes. Beginning in 1995 and again in 1999, Congress expanded the universe of prior art from U.S. activity to include some foreign activity.⁵⁶ It completed that expansion in 2011, and now prior art of all types can come from anywhere in the world.⁵⁷
- The law and practice of obviousness changed significantly over this period. Many courts were willing to find patents obvious in the 1970s. That changed with the creation of the Federal Circuit in 1982, which many (including judges on the court) saw as intended to strengthen patent rights by making it harder to invalidate patents.⁵⁸ And the Federal Circuit did indeed make it harder to

49. *Diamond v. Chakrabarty*, 447 U.S. 303 (1980).

50. *Diamond v. Diehr*, 450 U.S. 175 (1981).

51. *State St. Bank & Tr. Co. v. Signature Fin. Grp., Inc.*, 149 F.3d 1368 (Fed. Cir. 1998), *abrogated by*, *In re Bilski*, 545 F.3d 943 (Fed. Cir. 2008).

52. Michael Risch, *Everything Is Patentable*, 75 TENN. L. REV. 591 (2008).

53. *Bilski v. Kappos*, 561 U.S. 593 (2010); *Mayo Collaborative Servs. v. Prometheus Lab'ys, Inc.*, 566 U.S. 66 (2012); *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576 (2013); *Alice Corp. v. CLS Bank Int'l*, 573 U.S. 208 (2014).

54. Old 102(f) and (g) prior art no longer exist. *See* U.S. PAT. & TRADEMARK OFF., MANUAL OF PATENT EXAMINING PROCEDURE § 2151 (9th ed. rev. 1, Nov. 2024). That is probably also true of old 102(c), though the issue has not been resolved definitively. *See* Edward D. Manzo, *The Impact of the America Invents Act on Trade Secrets*, 13 J. MARSHALL REV. INTELL. PROP. L. 497, 515 (2014) ("Courts will need to consider the effect of the AIA in removing 35 U.S.C. Section 102(c) A question the courts will have to confront is whether the abandonment or forfeiture doctrines are nevertheless still available to protect the public interest against such patents.").

55. 35 U.S.C. § 273.

56. District of Columbia Appropriations Act, Pub. L. No. 106–113 app. I § 4806, 113 Stat. 1501, 1501A–590 (1999).

57. 35 U.S.C. § 102.

58. *See* Allison & Lemley, *supra* note 14, at 187 ("The Federal Circuit is pro-patent, according to some views, or anti-patent according to others."); H.R. REP. NO. 97-312, at 20–22 (1981) ("[S]ome circuit courts are regarded as 'pro-patent' and other 'anti-patent,' and much time and money is expended in 'shopping' for a favorable venue. . . . [T]he validity of a patent is too dependent upon geography (*i.e.*, the accident of judicial venue) to make effective business planning possible."); Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1 (1989).

prove obviousness, constructing new limits on the doctrine such as the “teaching-suggestion-motivation” requirement⁵⁹ and changing the validity rate significantly.⁶⁰ But the Supreme Court reversed that trend in *KSR v. Teleflex*,⁶¹ making it easier to prove obviousness again.⁶²

- A Supreme Court decision in the 1960s had set a high bar for showing that patents were “useful,” at least in the chemical industries.⁶³ However, Federal Circuit decisions in the 1990s made utility doctrine much less important in practice.⁶⁴
- The law of disclosure has changed significantly in multiple ways. The Federal Circuit has tightened the basic rules of enablement over the last two decades in ways that make it almost impossible to obtain patents on genus claims in the chemical arts, something that was once common.⁶⁵ Written description, which before 1980 was a doctrine that applied only in patent priority disputes, has developed into a second disclosure requirement with reach independent of the enablement doctrine.⁶⁶ And the doctrine of indefiniteness, which the Federal Circuit had held essentially never applied, was broadened by the Supreme Court,⁶⁷ though

59. Ryan T. Holte & Ted Sichelman, *Cycles of Obviousness*, 105 IOWA L. REV. 107, 113 (2019) (“Over time, critics of the TSM test claimed the Federal Circuit favored patentees in obviousness determinations . . .”); *see also* *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 419 (2007) (noting that the Federal Circuit had transformed the TSM test “into a rigid rule that limits the obviousness inquiry” in some cases).

60. Allison & Lemley, *supra* note 14, at 206 (finding that Federal Circuit’s 55% validity rate was “significantly higher” than the pre-Federal Circuit rate).

61. *KSR*, 550 U.S. at 427–28.

62. Holte & Sichelman, *supra* note 59, at 147 (“[T]he Federal Circuit’s increased likelihood of finding obviousness post-*KSR* was about 10%, compared to 20% for the district courts.”).

63. *Brenner v. Manson*, 383 U.S. 519 (1966).

64. *See, e.g., In re Brana*, 51 F.3d 1560, 1567 (Fed. Cir. 1995) (holding that post-filing evidence can demonstrate utility that existed at filing); *Juicy Whip, Inc. v. Orange Bang, Inc.*, 185 F.3d 1364, 1367 (Fed. Cir. 1999) (holding that a product’s ability to “imitate” some other product, as cubic zirconium imitates diamonds, constitutes utility).

65. Dmitry Karshtedt, Mark A. Lemley & Sean B. Seymore, *The Death of the Genus Claim*, 35 HARV. J.L. & TECH. 1, 13 (2021).

66. *Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1340 (Fed. Cir. 2010) (reaffirming that § 112 “contains a written description requirement separate from enablement”); *Gentry Gallery, Inc. v. Berkline Corp.*, 134 F.3d 1473, 1479 (Fed. Cir. 1998). In theory written description should apply in two sets of cases where enablement does not: “gun jumping” cases in which the patentee files before the invention is ready, as in *Ariad*, and “late claiming” cases in which the patentee changes its claims to cover things it had not actually thought of, as in *Gentry Gallery*.

67. *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 901 (2014) (changing the standard from “insolubly ambiguous” to “reasonable certainty”).

subsequent Federal Circuit cases suggest it may still apply only rarely.⁶⁸

2. *Changes to Infringement, Remedies, and Defenses*

The law surrounding the enforcement of a valid patent also underwent significant modification.

- Infringement, for example, looks very different than it did in 1980. I have already discussed the rise of the *Markman* hearing to construe patent claims pretrial.⁶⁹ *Markman* has had a dramatic effect in practice on infringement cases. Once we know what a patent covers and doesn't cover, that is often the end of the infringement dispute, because if there is no dispute about how the defendant's product works, literal infringement is a simple matter of comparing the two. And indeed, parties often settle after *Markman*, or agree to a finding on infringement in order to prepare the case for appeal.⁷⁰ *Markman* has also affected the doctrine of equivalents, which went from being a central part of infringement analysis to something that is used only occasionally, in significant part because judges who had just construed claims were unwilling to reopen that decision for an equivalents analysis.⁷¹

Changes in infringement haven't been limited to the basics of direct infringement, however. The Supreme Court significantly revamped the law of inducement, making it easier to prove the mental state requirement for inducement in two cases in the 2010s.⁷² At the same time, courts developed a new doctrine to deal

68. As Jason Rantanen notes:

The Supreme Court's ruling in *Nautilus*, in short, appears to have produced no change at all. . . . In applying the *Nautilus* standard, the Federal Circuit is still treating claims as reasonably certain as long as the person construing the claim can arrive at a reasonable construction. And, although the Federal Circuit has not come out and said it (nor is it likely to), the only claims for which one cannot arrive at a reasonable construction are those that are not amenable to construction or are insolubly ambiguous..

Jason Rantanen, *Teva, Nautilus, and Change Without Change*, 18 STAN. TECH. L. REV. 430, 447 (2015). The exception involves means-plus-function claims in the software industry, where courts regularly invalidate claims for failure to disclose an algorithm implementing the claim. *See, e.g.*, *Fintiv, Inc. v. PayPal Holdings, Inc.*, 134 F.4th 1377 (Fed. Cir. 2025).

69. *See supra* text accompanying notes 45–46.

70. *See* sources cited *supra* note 46.

71. John R. Allison & Mark A. Lemley, *The (Unnoticed) Demise of the Doctrine of Equivalents*, 59 STAN. L. REV. 955, 958 (2007).

72. *Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 768 (2011); *Commil USA, LLC v. Cisco Sys., Inc.*, 575 U.S. 632, 642 (2015). Other changes resulted from the Supreme Court's "adoption"

with “joint” or “divided” infringement claims, significantly limiting the ability of patent owners to claim that two or more parties jointly infringed a patent even though no one of them performed all the steps of the patented process.⁷³

- The Federal Circuit wholly revamped the law of inequitable conduct, a defense that renders patents unenforceable if the patentee deceived the patent office. Responding to complaints about a “plague” of allegations of inequitable conduct, the en banc court tightened up the standards for proof of inequitable conduct,⁷⁴ with the result that counterclaims for inequitable conduct dropped from 17% of all cases to 8% in a matter of a few years.⁷⁵
- The law of remedies has seen even more dramatic changes. The Federal Circuit set out a bright-line rule beginning in the 1980s that if a patentee won its suit, it was entitled to an injunction. The Supreme Court reversed that rule in 2006, holding in *eBay v. MercExchange* that injunctions were available only after a case-by-case equitable analysis.⁷⁶ The result has been to significantly reduce the grant of injunctive relief, particularly for NPEs.⁷⁷ Courts also reintroduced and strengthened the doctrine of apportionment in patent damages⁷⁸ and gave judges an important gatekeeper role in weeding out dubious economic theories of

of the patent standard for inducement in copyright cases, which actually adopted a somewhat different test that has now been reimported into patent law. See Timothy R. Holbrook, *The Supreme Court's Quiet Revolution in Induced Patent Infringement*, 91 NOTRE DAME L. REV. 1007, 1010–25 (2016).

73. *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 572 U.S. 915 (2014); *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 797 F.3d 1020, 1023 (Fed. Cir. 2015) (en banc); Mark A. Lemley, David O'Brien, Ryan M. Kent, Ashok Ramani & Robert Van Nest, *Divided Infringement Claims*, 6 SEDONA CONF. J. 117, 119 (2005) (“Where there is no agency relationship or similar coordination - for example where the different actors do not know each other at all, or are in an arm’s-length business transaction - courts have not been willing to apply the law of inducement to aggregate the disparate acts of unrelated parties.”).

74. *Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1289 (Fed. Cir. 2011) (en banc); see also *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1327 (Fed. Cir. 2009) (applying heightened pleading standard to allegations of inequitable conduct).

75. Robert D. Swanson, Comment, *The Exergen and Therasense Effects*, 66 STAN. L. REV. 695, 714 tbl. 5 (2014).

76. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006).

77. Christopher B. Seaman, *Permanent Injunctions in Patent Litigation After eBay: An Empirical Study*, 101 IOWA L. REV. 1949, 1990 fig. 4 (2016).

78. See, e.g., *Virnetx, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1326 (Fed. Cir. 2014) (“[W]hen claims are drawn to an individual component of a multi-component product, it is the exception, not the rule, that damages may be based upon the value of the multi-component product.”); *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1315 (Fed. Cir. 2011) (rejecting the “25 percent rule of thumb” as “a fundamentally flawed tool for determining a baseline royalty rate in a hypothetical negotiation”).

damages.⁷⁹ They repeatedly changed the law for enhancement of damages for willful infringement during this period, varying the rule from one that effectively required anyone accused of patent infringement to get a written opinion of counsel,⁸⁰ to one that replaced opinion of counsel with a standard of “objective recklessness,”⁸¹ to one that threw out both tests in favor of a word salad of synonyms for willfulness that effectively gave the question to the jury without guidance,⁸² while separating and reserving for the judge the question of whether a showing of willfulness actually justified enhancing damages.⁸³ The Supreme Court also revamped the law of attorney’s fees, making it significantly easier for prevailing defendants to recover their fees.⁸⁴

By almost every measure, then, the substantive law of patents, like the users of the patent system and the process, have undergone dramatic changes since 1980.

II. 2018–2024: PATENT LAW’S ERA OF NORMALCY

It is notable that almost all these major changes happened before 2018. In recent years, by contrast, patent law has settled into a routine. That’s not to say there is nothing new, of course. The Supreme Court and the Federal Circuit continue to decide cases that matter to patent lawyers. But the kinds

79. See, e.g., *EcoFactor v. Google LLC*, 137 F.4th 1333, 1340 (Fed. Cir. 2025) (en banc); *Commonwealth Sci. & Indus. Rsch. Org. v. Cisco Sys., Inc.*, 809 F.3d 1295, 1301 (Fed. Cir. 2015) (“[G]iven the great financial incentive parties have to exploit the inherent imprecision in patent valuation, courts must be proactive to ensure that the testimony presented—using whatever methodology—is sufficiently reliable to support a damages award.”).

80. *Underwater Devices Inc. v. Morrison-Knudsen Co.*, 717 F.2d 1380, 1390 (Fed. Cir. 1983) (creating a duty to obtain an opinion of counsel when accused of infringement), *overruled by In re Seagate Tech., LLC*, 497 F.3d 1360 (Fed. Cir. 2007) (en banc). On the problems with this system, see Mark A. Lemley & Ragesh K. Tangri, *Ending Patent Law’s Willfulness Game*, 18 BERKELEY TECH. L.J. 1085, 1099–1109 (2003).

81. *In re Seagate Tech.*, 497 F.3d 1360, *abrogated by Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 579 U.S. 93 (2016).

82. *Halo Elecs.*, 579 U.S. at 104.

83. See, e.g., *Presidio Components, Inc. v. Am. Tech. Ceramics Corp.*, 875 F.3d 1369, 1382 (Fed. Cir. 2017) (finding that district court did not abuse discretion in refusing to award enhanced damages, despite jury finding of willfulness).

84. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545 (2014); *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559 (2014). The effect of these cases was to encourage defendants to fight weak patent suits and to encourage patentees to file stronger suits. See Tommaso Alba, Christian Helmers & Brian J. Love, *A Tale of Trolls and Fees: The Role of Fee-Shifting in Patent Litigation*, (Santa Clara Univ. Legal Stud. Rsch. Paper No. 5796263, Nov. 24, 2025), <https://ssrn.com/abstract=5796263> [<https://perma.cc/6A46-W56L>].

of sweeping reforms that had been the hallmark of the previous four decades seem a thing of the past.

The Supreme Court seems to have lost interest in substantive patent law, perhaps because the Justice most interested in it—Justice Breyer—is no longer on the Court.⁸⁵ While it still takes patent cases periodically, it takes somewhat fewer than it did in the previous two decades. While the Court has decided sixty-two patent cases since the creation of the Federal Circuit in 1982, and during the first two decades of the century decided “more patent law cases than in the prior three decades combined,”⁸⁶ it has decided only three substantive patent cases since 2018 and in the last two terms has taken no patent cases at all.⁸⁷

More importantly, most of those recent cases either aren’t about substance at all⁸⁸ or, if they are, don’t change the law or simply don’t matter very much in the real world. The Court’s last important change in patent law was in 2017, to restrict forum shopping—a procedural, not a substantive change.⁸⁹ It has decided only two important substantive cases in the last decade—*Amgen v. Sanofi* and *Helsinn v. Teva*—but both decisions were 9-0 affirmances of changes the Federal Circuit had made to enablement law over the prior two decades (*Amgen*)⁹⁰ or of the Federal Circuit’s conclusion that the America Invents Act (AIA) did not change the definition of prior art (*Helsinn*).⁹¹

Beyond that, recent Court patent cases have something of an instinct for the capillary. The Court is deciding fringe issues that don’t much matter in the real world. It narrowed the scope of assignor estoppel,⁹² an issue I personally care a lot about⁹³ but which no one would class as a central issue to patent law. The Court has issued *three* decisions in recent years on the scope of 35 U.S.C. § 271(f), a fairly obscure part of the infringement statute

85. Empirical evidence casts some doubt on how significant his role was in deciding patent cases, but he was certainly the Justice most interested in the field substantively. Paul R. Gugliuzza & Mark A. Lemley, *Myths and Reality of Patent Law at the Supreme Court*, 104 B.U. L. REV. 891, 937–42 (2024).

86. Christa J. Laser, *Certiorari in Patent Cases*, 48 AIPLA Q.J. 569, 571 (2020).

87. Lisa Larrimore Ouellette, Michael Risch & Camilla Hrdy, *Supreme Court Patent Cases*, WRITTEN DESCRIPTION, <https://writendescription.blogspot.com/p/patents-scotus.html> [https://perma.cc/S6SK-5FNH]. This isn’t disdain for IP issues more generally; the Court has taken a number of important copyright and trademark cases during the last few years. *E.g.*, *Jack Daniel’s Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140 (2023); *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 598 U.S. 508 (2023); *Google LLC v. Oracle Am.*, 593 U.S. 1 (2021).

88. Gugliuzza & Lemley, *supra* note 85, at 908 (noting the prevalence of procedural issues in the Court’s patent docket); Timothy R. Holbrook, *Explaining the Supreme Court’s Interest in Patent Law*, 3 IP THEORY 62 (2013) (noting the presence of administrative law issues in the recent patent docket).

89. *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 581 U.S. 258 (2017).

90. *Amgen Inc. v. Sanofi*, 598 U.S. 594, 597 (2023).

91. *Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc.*, 586 U.S. 123, 124 (2019).

92. *Minerva Surgical, Inc. v. Hologic, Inc.*, 594 U.S. 559, 561 (2021).

93. See generally Mark A. Lemley, *Rethinking Assignor Estoppel*, 54 HOUS. L. REV. 513 (2016).

that covers unusual circumstances in which an infringer makes component parts in the United States and ships them abroad to be combined.⁹⁴ Section 271(f) isn't used much; one would be hard-pressed to find three Federal Circuit cases applying the statute that *didn't* end up getting Supreme Court review.⁹⁵ The Court has also ruled on whether the PTO can recover its attorney's fees even if it loses when it is sued under 35 U.S.C. § 141, another obscure and rarely-used provision.⁹⁶ And it has decided whether the Post Office is a "person" that can participate in patent proceedings.⁹⁷ These are hardly decisions that shake the foundations of patent law.

The Federal Circuit, too, has settled into a period of normalcy. The prior four decades involved significant use of en banc review at the Federal Circuit, granting en banc review in patent cases at a rate more than double that of other regional circuits.⁹⁸ Those cases produced a number of fractured and bitterly divided en banc decisions⁹⁹ and judges lamenting the creation of other circuit splits that should have been resolved en banc.¹⁰⁰ By contrast, the Court has only taken two patent cases en banc in the past seven years.¹⁰¹ One was a design patent case—again one I personally care a lot about,¹⁰² but which is outside the realm of normal (utility) patent law—and it was decided unanimously.¹⁰³ The other, *EcoFactor Inc. v. Google LLC*¹⁰⁴ promised to offer significant substantive guidance on the law of damages

94. *WesternGeco LLC v. ION Geophysical Corp.*, 585 U.S. 407, 409 (2018); *Life Techs. Corp. v. Promega Corp.*, 580 U.S. 140, 142 (2017); *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 441 (2007).

95. The Federal Circuit has not applied § 271(f) in a case since *WesternGeco*. The case has, however, been (mis)interpreted to change the law of patent damages in other cases. *See Brumfeld v. IBG LLC*, 97 F.4th 854, 871 (Fed. Cir. 2024).

96. *Peter v. NantKwest, Inc.*, 589 U.S. 23 (2019).

97. *Return Mail, Inc. v. U.S. Postal Serv.*, 587 U.S. 618 (2019).

98. Ryan Vacca, *Revisiting the Federal Circuit En Banc*, 37 HARV. J.L. & TECH. 501, 508 & fig. 1 (2024).

99. *See, e.g., CLS Bank Int'l v. Alice Corp.*, 717 F.3d 1269, 1321 (Fed. Cir. 2013) (en banc) (en banc court splitting 5-5 on patentable subject matter), *rev'd*, 573 U.S. 208 (2014); *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 807 F.3d 1311, 1333 (Fed. Cir. 2015) (en banc court adopting, 6-5, a patent-specific doctrine of laches), *vacated in part*, 580 U.S. 328 (2017); *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 692 F.3d 1301, 1305 (Fed. Cir. 2012) (en banc) (per curiam) *rev'd*, 572 U.S. 915 (2014); *Aqua Products, Inc. v. Matal*, 872 F.3d 1290 (Fed. Cir. 2017). Ryan Vacca notes that until 2019 the Federal Circuit was "frequently hearing patent cases en banc." Vacca, *supra* note 98, at 501.

100. In dissent from a denial of rehearing en banc, Judge Rich commented on the panel's willingness to abandon prior Federal Circuit law due to intervening precedent: "[T]his is mutiny. It is heresy. It is illegal." *Atl. Thermoplastics Co. v. Faytex Corp.*, 974 F.2d 1279, 1281 (Fed. Cir. 1992) (Rich, J., dissenting from denial of rehearing en banc).

101. Vacca, *supra* note 98, at 503, 509 fig. 2 ("In 2018, the Federal Circuit suddenly, and without explanation, discontinued its en banc practice.").

102. Full disclosure: I represented the appellant in that case.

103. *LKQ Corp. v. GM Glob. Tech. Operations, LLC*, 102 F.4th 1280, 1287 (Fed. Cir. 2024) (en banc).

104. *EcoFactor, Inc. v. Google LLC*, 104 F.4th 243 (Fed. Cir.), *vacated per curiam, reh'g en banc granted*, 115 F.4th 1380 (Fed. Cir. 2024).

apportionment, but ended up only holding that judges had to faithfully apply Federal Rule of Evidence 702 in *Daubert* proceedings to exclude experts who didn't rely on a reasonable methodology.¹⁰⁵

The new normalcy at the Federal Circuit isn't limited to en banc cases. There are fewer dissents from denial of en banc review than there used to be.¹⁰⁶ There are fewer dissents in panel opinions. The Federal Circuit used to have the second-highest rate of dissents among the circuits, but it is now lower than average.¹⁰⁷ Indeed, the court is deciding fewer precedential decisions at all even as its patent docket has grown,¹⁰⁸ putting more reliance on nonprecedential decisions and one-line Rule 36 affirmances.¹⁰⁹ One unscientific measure of the decline in important new legal rules from the Federal Circuit is that my annual "patent year in review" summary of significant developments at the court regularly ran 100 or more pages last decade, but this decade averages only about fifty pages.¹¹⁰ Fifty pages isn't nothing; the court is still deciding cases that matter. But they aren't fundamentally rewriting the law in the way they have done in past decades.

Even the areas that patent lawyers frequently complain about as sources of uncertainty turn out to be a lot more stable and predictable than those

105. See *EcoFactor, Inc. v. Google LLC*, 137 F.4th 1333, 1346 (Fed. Cir. 2025). Even before oral argument, the Federal Circuit dashed the hopes of those who were looking for more guidance on apportionment, striking half of Google's brief as presenting too broad a question and signaling that it was going to decide only a very narrow and technical issue. See *EcoFactor*, 115 F.4th at 1380.

106. Vacca attributes this to the stark difference between older and newer judges; the six newest judges on the court dissent from denial of en banc rehearing at a much-reduced rate compared to their more senior colleagues. Vacca, *supra* note 98, at 539–41.

107. Christopher A. Cotropia, *Determining Uniformity Within the Federal Circuit by Measuring Dissent and En Banc Review*, 43 LOY. L.A. L. REV. 801, 803 (2010) (second highest from 1998–2009); Paul R. Gugliuzza, Jonathan Remy Nash & Jason Rantanen, *Expertise, Ideology, and Dissent*, 74 AM. U. L. REV. 877, 915 tbl. 4 (2025) (showing a drop in the dissent rate from a high of 10.2% in 2012 to 3.6% in 2024); Jason Rantanen, *Federal Circuit Dataset & Stats: January 2023 Update*, PATENTLY-O (Jan. 31, 2023), <https://patentlyo.com/patent/2023/01/federal-circuit-dataset.html> [<https://perma.cc/E3C2-GU4L>] (showing more recent data). Some of this change can be explained by the absence of Judge Newman, who was responsible for half of all the dissents on the court. Daryl Lim, *I Dissent: The Federal Circuit's "Great Dissenter," Her Influence on the Patent Dialogue, and Why It Matters*, 19 VAND. J. ENT. & TECH. L. 873, 901 (2017). Newman has not been hearing cases for the past eighteen months as the result of a dispute over her fitness to serve on the Court. *Id.*; see Blake Brittain, *US Appeals Court Questions 97-Year-Old Judge's Challenge to Her Suspension*, REUTERS (Apr. 24, 2025), <https://www.reuters.com/legal/government/us-appeals-court-questions-97-year-old-judges-challenge-her-suspension-2025-04-24/> [<https://perma.cc/2NC5-6ME5>].

108. Vacca, *supra* note 98, at 522 fig. 5.

109. *Id.* at 523 fig. 6; Rantanen, *supra* note 107; Paul R. Gugliuzza & Mark A. Lemley, *Can a Court Change the Law by Saying Nothing?*, 71 VAND. L. REV. 765, 765 (2018). This may be a result of the growth of PTAB appeals in its docket. See Vacca, *supra* note 98, at 517–19.

110. Compare Mark Lemley & Andrew McCreary, *Recent Developments in Patent Law 2019* (May 1, 2019) (unpublished manuscript), <https://ssrn.com/abstract=3384265> [<https://perma.cc/G4BE-N4HX>] (ninety-five pages long), with Mark Lemley, Jack Gleiberman & Mitchell Phelan, *Recent Developments in Patent Law 2025* (Dec. 1, 2025) (unpublished manuscript), <https://ssrn.com/abstract=5887123> [<https://perma.cc/F6CF-T7C4>] (forty-eight pages long).

complaints would suggest. Despite inaccurate complaints about the IPR procedure instituted in 2011 as “death squads, killing property rights”¹¹¹ and flatly false claims that the PTAB is invalidating the overwhelming majority of patents, the evidence shows that the PTAB from 2012 through 2024 made validity decisions at a consistent, predictable rate—42%—that is virtually indistinguishable from the invalidation rate in courts and from the rate that prevailed in the 1990s, decades before it was instituted.¹¹² IPRs are cheaper and quicker than jury trials, and so they are used more often and settle less than court cases, but they aren’t “death squads” any more than juries are.

The other thing patent lawyers consistently complain is unpredictable is the law of patentable subject matter since *Alice*.¹¹³ It is true that the two-part *Alice* test doesn’t offer particularly clear guidance for distinguishing unpatentable abstract ideas from patentable inventions. Nonetheless, the more than 1000 court decisions applying *Alice* in the last decade¹¹⁴ have settled into, if not a bright-line rule, a predictable standard under which (1) very few patents are invalidated outside the information technology (IT) sphere¹¹⁵ and (2) IT patents that seem to involve real technology survive a § 101 challenge, while those that simply claim the idea itself in functional terms without a new technological implementation are likely to fail. The rubric isn’t foolproof, and there are outliers, but it turns out lawyers are pretty accurate at predicting which claims will survive an *Alice* challenge and which ones will fail. Two empirical studies confirm this, showing that even taking a short look of no more than a minute, patent lawyers can guess the likely outcome of § 101 challenges.¹¹⁶ District judges also seem pretty

111. Tony Dutra, *Rader Regrets CLS Bank Impasse, Comments on Latest Patent Reform Bill*, BLOOMBERG L.: PAT. TRADEMARK & COPYRIGHT L. DAILY (Oct. 29, 2013), <https://www.bloomberglaw.com/product/blaw/document/X827Q1H0000000> [<https://perma.cc/85PJ-FC8F>].

112. See LEX MACHINA, www.lexmachina.com [<https://perma.cc/SF8E-8B97>]. One reason for the continued confusion is that “death squad” partisans point only to final written decisions, ignoring the large number of challenges that are denied before reaching a final decision.

113. Compare Matthew G. Sipe, *Patent Law 101: I Know It When I See It*, 37 HARV. J.L. & TECH. 447, 499 (2024) (showing that rulings on patentable subject matter are judge-specific), with Charles Duan, *Examining Patent Eligibility*, 97 ST. JOHN’S L. REV. 47, 47 & n.3 (2023) (citing but not agreeing with those complaints).

114. Mark A. Lemley & Samantha Zyontz, *Does Alice Target Patent Trolls?*, 18 J. EMPIRICAL LEGAL STUD. 47, 48 (2021).

115. *Id.* at 67 fig. 5 (showing that 90% of all decisions involve IT patents); *id.* at 67 (finding that the rate of post-*Alice* invalidation was 60% for IT patents compared with less than 45% for life sciences patents).

116. See Nikola L. Datzov & Jason Rantanen, *Predictable Unpredictability: The Surprising Administrability of Patent Subject Matter Eligibility*, 110 IOWA L. REV. 667, 691–92 (2025); Jason D. Reinecke, *Is the Supreme Court’s Patentable Subject Matter Test Overly Ambiguous? An Empirical Test*, 2019 UTAH L. REV. 581, 603–05; Matthew G. Sipe, *Patent Law 101: The View from the Bench*, 88 GEO. WASH. L. REV. ARGUENDO 21, 29 tbl. 4 (2020). Even Sipe, who documents some judge-specific variation in outcomes, calls his paper “I know it when I see it,” suggesting that the problem is not lack

good at it; the affirmance rate in § 101 cases is 85.3%,¹¹⁷ which compares favorably with the overall affirmance rate for patent cases at the Federal Circuit.¹¹⁸ And the empirical evidence shows that the fallout from *Alice* had virtually no measurable impact on innovation.¹¹⁹

Congress hasn't modified patent law since the AIA in 2011. And while there are perennial bills targeting both IPRs and *Alice*, they haven't gone anywhere. There is little reason to think that will change at a time when Congress can't seem to agree on anything.¹²⁰

III. NORMALCY AND RESILIENCE

This is the point in a law review article at which the author, having identified some significant issue with current law, is supposed to propose reform. This is not such an article. I personally think that equilibrium is a pretty fair compromise of competing interests, though not a perfect one.¹²¹ We haven't eliminated patent trolls, for instance, but they are a more manageable problem than they were twenty years ago. Others disagree, in both directions.¹²² But whether you like the current rules or not, my point is descriptive—the system is settling into an equilibrium. That means that going forward we are unlikely to see the sorts of substantive upheaval that have characterized the past several decades.

of predictability but the lack of a clear rule rather than a standard. See Sipe, *supra* note 113, at 447. Charles Duan notes that *Alice* itself wasn't a particularly notable departure from prior cases, but rather the culmination of several years of patentable subject matter decisions. See Duan, *supra* note 113, at 48–49.

117. Datzov & Rantanen, *supra* note 116, at 716–17.

118. Jason Rantanen, Charles Neff, Eweosa Owenaze & Allison Williamson, *Who Appeals (and Wins) Patent Infringement Cases?*, 60 HOUS. L. REV. 289, 317 (2022) (finding a 63% affirmance rate when accused infringers appeal and a 74% affirmance rate when patent owners appeal).

119. See, e.g., Christian Helmers & Brian J. Love, *Patent Protection and Software Firm Financing* 1 (Santa Clara Univ. Legal Stud. Rsch. Paper No. 5600070, Oct. 13, 2025), <https://ssrn.com/abstract=5600070> [<https://perma.cc/6SZC-2NUT>] (“Our findings suggest that software startups with relatively large exposure to *Alice* performed no better or worse than software firms with less exposure.”).

120. Congress in 2025 passed fewer bills than any previous Congress. Sarah Rumpf, *Congress Sets Records in 2025 for Longest Shutdown, Fewest Bills, Retirements*, YAHOO (Dec. 25, 2025), <https://www.yahoo.com/news/articles/congress-sets-records-2025-longest-180854756.html> [<https://perma.cc/AQD4-5WSQ>].

121. Among other things, I disagree with some of the substantive decisions on the merits, such as *Amgen Inc. v. Sanofi*, 598 U.S. 594 (2023). See Karshtedt et al., *supra* note 65, at 30; Mark A. Lemley & Jacob S. Sherkow, *The Antibody Patent Paradox*, 132 YALE L.J. 994, 1031–32 (2023).

122. Compare Mark A. Lemley, *The Surprising Resilience of the Patent System*, 95 TEX. L. REV. 1, 11 (2016) (“A growing number of commentators worried that the effect of patent reforms designed to curb abuses by patent trolls would be to weaken the patent system as a whole, and with it, American competitiveness”), with Anthony Ha, *Jack Dorsey and Elon Musk Would Like to ‘Delete All IP Law,’* TECHCRUNCH (Apr. 13, 2025), <https://techcrunch.com/2025/04/13/jack-dorsey-and-elon-musk-would-like-to-delete-all-ip-law/> [<https://perma.cc/VEW5-9DEP>].

In prior work a decade ago, I showed that even in the midst of significant substantive and procedural turmoil, many of the basic dynamics of the patent system proceeded apace, with consistent growth in the number of patent applications, the number of issued patents, the number of lawsuits, and a consistent patentee win rate across periods of significant substantive change.¹²³ I suggested that the patent system might be resilient to changes in the underlying law and that patents (and patent litigation) may be valued for reasons other than the statutory purpose of excluding competitors in order to encourage innovation.¹²⁴ That resilience, which was surprising given the upheavals I have discussed, will only strengthen as patent law settles into its era of normalcy.

The resilience of the patent system doesn't mean the outcome of cases is irrelevant; we should want people with meritorious cases to win and people with weak ones to lose. The same is true of legal doctrines. If too many people are engaged in the business of buying and asserting weak patents against entire industries, it makes sense to change the law to discourage trolling. Similarly, if too many defendants are alleging inequitable conduct, it makes sense to change the law to make opportunistic assertions of misconduct harder. Sorting out the substantive doctrines and the process by which they are applied has been the project of the last forty years. But those higher-level changes are unlikely to be the dominant story of the near future. Instead, patent law has entered its era of normalcy, resolving disputes on the individual merits. That doesn't mean there won't be new technologies to challenge patent law, as artificial intelligence is doing right now.¹²⁵

But those changes aren't likely to be nearly as significant as the ones we have been experiencing. AI may change how people invent, and it will certainly change the way they draft and examine patent applications. Perhaps it will change substantive legal doctrines,¹²⁶ though I'm skeptical that it will cause us to rethink those doctrines rather than just change the facts to which those doctrines apply.

123. Lemley, *supra* note 122, at 2.

124. *See id.* at 52–54.

125. *See* Thaler v. Vidal, 43 F.4th 1207, 1210 (Fed. Cir. 2022) (holding that an inventor must be a natural person). The PTO has issued a series of guidelines concerning patentability and AI. *See* 2024 Guidance Update on Patent Subject Matter Eligibility, Including on Artificial Intelligence, 89 Fed. Reg. 58128 (July 17, 2024); Inventorship Guidance for AI-Assisted Inventions, 89 Fed. Reg. 10043 (Feb. 13, 2024). The first appellate case applying patent doctrines to machine learning saw no need to go beyond settled doctrines in other areas to resolve the case. *See* Recentive Analytics, Inc. v. Fox Corp., 134 F.4th 1205, 1216 (Fed. Cir. 2025) (holding a machine learning patent not to be patentable subject matter where the patent claimed only applications of existing technology rather than a new machine learning technology). For a review of scholarship covering the intersection of AI and patent law, see Gaétan de Rassenfosse, Adam B. Jaffe & Melissa Wasserman, *AI-Generated Inventions: Implications for the Patent System*, 96 S. CAL. L. REV. 1453 (2024).

126. *See* Ryan Abbott, *Everything Is Obvious*, 66 UCLA L. REV. 2 (2019).

Patent law has entered a period of normalcy.¹²⁷ I think that is something we should value even if we don't agree with all of the ways the law has settled. Businesses often talk about the importance of settled expectations: "Just tell us what the rules are," they might say, "so we can plan around them." There haven't been many settled rules in patent law. Now, for the first time in recent memory, there are.

IV. 2025-?: CHAOS COMES TO THE PATENT OFFICE

It may seem crazy to talk about normalcy in 2026, when literally nothing about our country is normal. Our constitutional democracy is collapsing around us, replaced by an authoritarian dictator who defies the rule of law and governs by whim and tweet. Trump has upended lots of norms that made our legal and political system work; he certainly wouldn't balk at upending the norms of patent law too if he thought it would benefit him somehow. And he seems to have found in the new PTO Director, John Squires, and Deputy Director, Coke Morgan Stewart, agents of chaos.

Some—but by no means all—of the chaos comes from the determination of Squires and Stewart to flat-out abolish the IPR process Congress enacted.¹²⁸ Since February 2025, the PTO Directors have arbitrarily denied nearly 75% of the IPR petitions filed without considering the merits.¹²⁹ And although most of those denials happened under Stewart, the new director has shown that he intends to make it essentially impossible to file an IPR challenging a patent, rejecting most applications without reaching the merits¹³⁰ and creating retroactive "rules" that prevent meritorious patent challenges.

127. Cf. Robert P. Merges, *Patent Markets and Innovation in the Era of Big Platform Companies*, 35 BERKELEY TECH. L.J. 53, 53 (2020) ("[T]he era of easy and extortionate patent litigation, traditionally associated with the secondary patent market, is coming to a close" because of "recent patent system reforms.").

128. Portions of this section are adapted from my op-ed. See Mark A. Lemley, *Patent Office's Inter Partes Review Restrictions Violate the Law*, BLOOMBERG NEWS (Oct. 27, 2025), <https://news.bloomberglaw.com/legal-exchange-insights-and-commentary/patent-offices-inter-partes-review-restrictions-violate-the-law> [<https://perma.cc/2NS2-3RS5>].

129. William A. Meunier, Peter J. Cuomo, Kevin C. Amendt & Amy LoBue, *The PTAB Pendulum Swings: How IPR Denials Are Reshaping Patent Owner and Challenger Strategies*, MINTZ (Aug. 28, 2025), <https://www.mintz.com/insights-center/viewpoints/2231/2025-08-28-ptab-pendulum-swings-how-ipr-denials-are-reshaping> [<https://perma.cc/KH88-B3QL>].

130. For a while the institution rate for IPRs was 0%; it rose to 4% by December 2025. See Dennis Crouch, *So You're Telling Me There's a Chance: IPR Institution Rate Rises to 4%*, PATENTLY-O (Dec. 1, 2025), <https://patentlyo.com/patent/2025/12/telling-theres-institution.html> [<https://perma.cc/A4W5-VUMB>]. The rate is somewhat higher at this writing, but it is less than a quarter of what it was before Trump. And this is just the decision to reach the merits at all; many cases that are instituted nonetheless uphold the patents.

The PTO has adopted a new, legally unsupported “settled expectations” rule that prevents filing a challenge at all against patents more than six years old, which includes two-thirds of issued patents and nearly three-fourths of the patents that are actually being enforced.¹³¹ It also has proposed a rule change that would refuse IPR petitions unless the challenger agreed to waive its validity challenges in litigation—even challenges it couldn’t bring in an IPR.¹³² That proposed rule is flatly inconsistent with the statute,¹³³ which sets out a much narrower scope of impermissible overlap, and with the cases interpreting that statute.¹³⁴

Further, Squires has refused to institute a meritorious claim—one that the PTAB judges and even his own deputy found worthy of review—because while some claims were likely invalid, other claims in the patent might not be.¹³⁵ That, too, directly contradicts the statute, which provides for review if at least one of the claims of the patent is likely invalid.¹³⁶ It also undermines the U.S. Supreme Court’s reading of the statute, which “suggests . . . a regime where a reasonable prospect of success on a single claim justifies review of them all.”¹³⁷

The PTO “propos[es] to sharply narrow when a patent’s validity can be challenged in administrative tribunal proceedings.”¹³⁸ It has tried to circumvent court appeals of its rulings by declaring that its final written decisions are not final, even when they are.¹³⁹ And it has required up-front disclosures of the real party in interest behind the proceedings—not problematic in itself, but troublingly coupled with a statement by Squires that he would use those disclosures to target foreign challengers to U.S.

131. Brief for *Amicus Curiae* Intellectual Property and Innovation Professors in Support of Petitioners, *In re Sandisk Techs., Inc.*, No. 2025-152, 2025 WL 3526507 (2025). For data on when patents are litigated, see Brian J. Love, *An Empirical Study of Patent Litigation Timing: Could a Patent Term Reduction Decimate Trolls Without Harming Innovators?*, 161 U. PA. L. REV. 1309 (2013).

132. Jason Engel & Erik Halverson, *USPTO Proposes Rule Changes to Refocus Inter Partes Review Proceedings*, K&L GATES IP LAW WATCH (Oct. 17, 2025), <https://www.iplawwatch.com/2025/10/17/uspto-proposes-rule-changes-to-refocus-inter-partes-review-proceedings/> [<https://perma.cc/T8B4-FXXL>].

133. See 35 U.S.C. § 315(e).

134. See, e.g., *Ingenico Inc. v. IoEngine, LLC*, 136 F.4th 1354 (Fed. Cir. 2025).

135. *Zhuhai Cosmx Battery Co. v. Ningde Ampere Tech.*, No. IPR2025-00405 (P.T.A.B. Oct. 15, 2025).

136. 35 U.S.C. § 314(a).

137. *SAS Inst. Inc. v. Iancu*, 584 U.S. 357, 358 (2018).

138. Michael Shapiro & Aruni Soni, *Patent Office Moves to Limit Validity Challenges at Board* (2), BLOOMBERG L. (Oct. 16, 2025), <https://news.bloomberglaw.com/ip-law/patent-office-moves-to-limit-patent-validity-challenges-at-board> [<https://perma.cc/G4JK-U7D8>].

139. *Patent Office Tees Up Appeals Fight over Unilateral Rulings*, BLOOMBERG L. (Oct. 31, 2025), <https://news.bloomberglaw.com/ip-law/patent-office-tees-up-fight-with-appeals-court-over-jurisdiction> [<https://perma.cc/2JUL-XZGT>].

patents.¹⁴⁰ And Squires and Stewart have done all this retroactively, applying their new doctrines to petitions filed before they even took office—petitions filed under very different rules.

Most dramatically, the director announced that he was removing the PTAB from the process of deciding whether to institute IPRs at all. Instead, Squires would decide all the petitions himself, perhaps in consultation with hand-picked PTAB judges in certain complex cases.¹⁴¹ Even if the director has the power to do this (and he may not),¹⁴² it isn't possible for him to make reasoned decisions in so many complex patent cases—unless the goal is to ignore the statute and get rid of IPRs altogether. And indeed, Squires later made it clear that he would not make any such reasoned decision, instead replacing an established procedure at the PTAB with unexplained yes-or-no decisions based on the Director's whim.¹⁴³ That, too, almost certainly violates the Administrative Procedures Act.¹⁴⁴ And in the rare cases where he has allowed an IPR to proceed, he has provided no guidance to the parties as to why the petition was instituted.

Eliminating IPRs created by Congress is illegal. It's also a terrible idea. As noted above, it will get us worse (or at best similar) decisions, but they will take longer and cost much more. That doesn't benefit anyone except the subset of patent owners who know they have weak patents and hope to

140. See Dennis Crouch, *USPTO Restores Strict RPI Requirements for IPR Petitions*, PATENTLY-O (Oct. 28, 2025), <https://patentlyo.com/patent/2025/10/restores-requirements-petitions.html> [<https://perma.cc/9PWB-UJ4M>]. That likely violates United States obligations under the TRIPs agreement. See Dennis Crouch, *National Security vs National Treatment: The USPTO's Ongoing China Problem*, PATENTLY-O (Oct. 30, 2025), <https://patentlyo.com/patent/2025/10/national-security-treatment.html> [<https://perma.cc/H8N4-C9VL>].

141. See DEP'T OF COM., U.S. PAT. & TRADEMARK OFF., OPEN LETTER AND MEMORANDUM, BRINGING THE USPTO BACK TO THE FUTURE: RETURN OF INSTITUTION AUTHORITY UNDER 35 U.S.C. §§ 314 AND 324 TO THE DIRECTOR (Oct. 17, 2025), https://www.uspto.gov/sites/default/files/documents/open-letter-and-memo_20251017.pdf [<https://perma.cc/CDP2-9X5Y>].

142. See Open Letter from Tom W. Krause, Former Solicitor and Director Review Exec., U.S. Pat. & Trademark Off. to John A. Squires, Director, U.S. Pat. & Trademark Off. (Oct. 20, 2025), <https://krauseonpatents.substack.com/p/open-letter-to-director-squires-re> [<https://perma.cc/WNC5-7S8B>].

143. See Michael Shapiro, *Patent Chief Takes Over Validity Challenge Screening Role (1)*, BLOOMBERG L. (Oct. 17, 2025), <https://news.bloomberglaw.com/ip-law/patent-chief-takes-over-institution-decisions-on-validity-trials/> [<https://perma.cc/ZBU6-3KML>].

144. Sec. & Exch. Comm'n v. Chenery Corp., 318 U.S. 80 (1943); accord Sec. & Exch. Comm'n v. Chenery Corp., 332 U.S. 194 (1947) (requiring that administrative agencies explain their decisions and refusals to supply reasons for them). Unfortunately, the Federal Circuit has refused to review any of the challenges to institution denials, relying on the statute, which says institution decisions are unreviewable. 35 U.S.C. § 314; e.g., *In re Intel Corp.*, No. 2026-113, 2026 WL 506045 (Fed. Cir. Feb. 24, 2026) (per curiam) (nonprecedential). The Federal Circuit has refused to apply the exception the Supreme Court created for agency "shenanigans" of the sort the Trump administration is engaged in. See *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261 (2016).

use the cost and uncertainty of litigation to drive nuisance settlements.¹⁴⁵ Everyone else should want more clarity at less cost.

The chaos doesn't end with IPRs, however. Even patent owners who might rejoice at the elimination of IPRs still have plenty to worry about from the new PTO leadership. The PTO has aggressively targeted its own employees, laying people off even though the agency is fully funded,¹⁴⁶ breaking the union that represents patent examiners on spurious national security grounds,¹⁴⁷ increasing examiner workload and giving them less credit for the work they do,¹⁴⁸ and laying the groundwork for a "return"-to-office mandate for patent examiners¹⁴⁹—even though the vast majority have worked from home for years¹⁵⁰ and no office exists for them to return to.¹⁵¹ Unsurprisingly, morale at the PTO is collapsing and people are leaving in droves.¹⁵² Patent owners won't end up happy with a system where they can't get patents because the PTO can't hire or keep examiners.

And if inventors do get those patents, the Trump administration is planning ways to make them pay. These include an unworkable (and since withdrawn) proposal that inventors pay a fee based on the total amount they hope to make from their invention,¹⁵³ a 100% tariff on patented

145. Max Baucus, *It's Time for the U.S. to Tackle Patent Trolls*, HARV. BUS. REV. (Sept. 16, 2022), <https://hbr.org/2022/09/its-time-for-the-u-s-to-tackle-patent-trolls> [<https://perma.cc/3DLH-SHT3>]; Mark A. Lemley & A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 COLUM. L. REV. 2117, 2126 (2013).

146. Aruni Soni, *Patent Office Lays Off Staff as Government Shutdown Begins (2)*, BLOOMBERG LAW (Oct. 1, 2025), <https://news.bloomberglaw.com/ip-law/patent-office-lays-off-some-staff-as-government-shutdown-begins> [<https://perma.cc/Z6RF-W2CS>].

147. Eileen McDermott, *Trump Order Bars USPTO Patents Employees from POPA Membership but Will Not Yet Affect Telework*, IP WATCHDOG (Sept. 2, 2025), <https://ipwatchdog.com/2025/09/02/trump-order-bars-uspto-patents-employees-popa-membership-will-not-yet-affect-telework/> [<https://perma.cc/ZH5Q-GWYT>].

148. See Dennis Crouch, *A First Look at the USPTO's FY2026 Examiner Performance Plan (PAP): What's Changed and Why It Matters*, PATENTLY-O (Oct. 3, 2025), <https://patentlyo.com/patent/2025/10/examiner-performance-changed.html> [<https://perma.cc/6H9T-HWT4>].

149. Dennis Crouch, *Detailed Return-to-Office Implementation Guidance: Potentially Major Disruption for USPTO Operations*, PATENTLY-O (Jan. 23, 2025), <https://patentlyo.com/patent/2025/01/implementation-potentially-disruption.html> [<https://perma.cc/94C4-5RQS>].

150. Dennis Crouch, *USPTO Faces Twin Challenges: Return-to-Office Mandate and Hiring Freeze Could Significantly Impact Patent Operations*, PATENTLY-O (Jan. 21, 2025), <https://patentlyo.com/patent/2025/01/challenges-significantly-operations.html> [<https://perma.cc/RXD6-3PB3>].

151. See Press Release, U.S. Pat. & Trademark Off., *USPTO Announces Closure of Rocky Mountain Regional Outreach Office* (Oct. 1, 2025), <https://www.uspto.gov/about-us/news-updates/uspto-announces-closure-rocky-mountain-regional-outreach-office> [<https://perma.cc/R62P-KHUP>].

152. Aruni Soni, *Morale Craters at Patent Office in Unusually Strained Transition*, BLOOMBERG L. (June 9, 2025), <https://news.bloomberglaw.com/ip-law/morale-craters-at-patent-office-in-unusually-strained-transition> [<https://perma.cc/T5WC-9XKQ>].

153. Victor H. Boyajian, Joel N. Bock, Ira L. Kotel & Natalie Hoeper, *USPTO Considers Major Shift to Value-Based Patent Fees: What Businesses Need to Know*, DENTONS (Aug. 19, 2025), <https://www.dentons.com/en/insights/alerts/2025/august/19/uspto-considers-major-shift-to-value->

pharmaceuticals,¹⁵⁴ and a proposal to seize the patents of people the administration doesn't like.¹⁵⁵ Even if we need to raise taxes, singling out innovators to tax seems like a particularly bad idea.

It's not clear that there is much rhyme or reason to this. There is no obvious connection between ideology and support for stronger or weaker patent rights,¹⁵⁶ and so no reason to think Trump is more likely than Biden (or the first Trump administration) to favor one side or the other in patent disputes. And it's not clear how much it will disrupt the pattern of normalcy patent law has settled into. Even if IPRs go away, the law has settled down, the Supreme Court has lost interest, and it's not clear that is going to change. The chaos at the PTO will primarily affect the PTO.¹⁵⁷ This will in turn affect how lawyers strategize and practice patent law. But these changes will not impact substantive patent law doctrine.

If there is a broader threat to the normalcy of patent practice, it is likely not Trump as policymaker but Trump as chaos agent. His seeming determination to destroy the U.S. economy with tariffs, hamstringing universities, and end government funding for scientific research may fundamentally change whether innovation happens (and whether it happens in the United States or elsewhere) and so reduce the rate of patented inventions.¹⁵⁸

But those external changes, like the current chaos at the PTO, will happen, if at all, against the backdrop of a patent system that is likely to look next year pretty much like it did last year, something we haven't been able to say for a very long time.

based-patent-fees [https://perma.cc/9G4E-VTKC]. The Secretary of Commerce disavowed this proposal in February 2026. Eileen McDermott, *Lutnick Tells Coons He Will Not 'Harm Innovation' with Patent Tax Proposal*, IP WATCHDOG (Feb. 10, 2026), https://ipwatchdog.com/2026/02/10/lutnick-tells-coons-he-will-not-harm-innovation-with-patent-tax-proposal/ [https://perma.cc/WHE9-9F4D].

154. Lim Hui Jie & Annika Kim Constantino, *U.S. to Impose 100% Tariff on Branded, Patented Drugs Unless Firms Build Plants Locally, Trump Says*, CNBC (Sept. 26, 2025), https://www.cnbc.com/2025/09/26/us-to-impose-100percent-tariff-on-branded-patented-drugs-unless-firms-build-plants-locally-trump-says.html [https://perma.cc/X9RF-GQUL].

155. Clare Zhang, *Commerce Moves to Take Cut of Research Patents*, AM. INST. PHYSICS (Oct. 21, 2025), https://www.aip.org/fyi/commerce-moves-to-take-cut-of-research-patents [https://perma.cc/YB4H-XZWS].

156. See, e.g., Jason Reinecke, *Decisionmaking in Patent Cases at the Federal Circuit*, 81 WASH. & LEE L. REV. 169, 187–97 (2024); John R. Allison & Mark A. Lemley, *How Federal Circuit Judges Vote in Patent Validity Cases*, 27 FLA. ST. U. L. REV. 745, 765 (2000).

157. Admittedly, the agency has more power than it used to, and so it may have more influence on the overall patent system. See Paul R. Gugliuzza, *Our New Old Patent System*, 106 B.U. L. REV. (forthcoming 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5399385 [https://perma.cc/DEL8-NJJZ]. But the PTO has no power to change the law.

158. See, e.g., J. Bradford Jensen and Scott J. Wallsten, *Trump's Tariffs Also Threaten US Innovation*, PETERSON INST. FOR INT'L ECON., (Apr. 17, 2025), https://www.piie.com/blogs/realtime-economics/2025/trumps-tariffs-also-threaten-us-innovation [https://perma.cc/6STN-37CE].