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## How Can the Supreme Court Not “Understand” Patent Law?

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## HOW CAN THE SUPREME COURT NOT “UNDERSTAND” PATENT LAW?

GREG REILLY\*

### ABSTRACT

*The Supreme Court does understand patent law. This invited Essay responds to Federal Circuit Judge Dyk’s remarks at the Chicago-Kent Supreme Court IP Review, in particular, his observation that the patent “bar and the academy have expressed skepticism that the Supreme Court understands patent law well enough to make the governing rules” (a view Judge Dyk did not endorse). The idea that the Supreme Court does not understand the law of patents is implausible. Even more generous interpretations of this criticism – that the Supreme Court insufficiently understands innovation policy, insufficiently understands the patent system that Congress desired in creating the Federal Circuit, or insufficiently understands the technical facts to resolve patent issues – do not hold up under closer scrutiny. Rather, those leveling this charge against the Supreme Court are mistaking policy disagreement for a lack of understanding. This mistake, even if one primarily of rhetoric, has potentially negative consequences for understanding the role of patent law, promoting productive debates about patent law and policy, and preserving the Supreme Court’s legitimacy in patent law and patent law’s (perhaps limited) contribution to the constraints imposed by legal authority in our society.*

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## I. INTRODUCTION

The patent “bar and the academy have expressed skepticism that the Supreme Court understands patent law well enough to make the governing rules,” observed Judge Timothy B. Dyk of the U.S. Court of Appeals in his remarks at Chicago-Kent College of Law’s Supreme Court IP Review, reprinted in the last issue of this journal.<sup>1</sup> Judge Dyk’s comment was purely descriptive, not an endorsement.<sup>2</sup> To the contrary, Judge Dyk noted in his normal wry and understated way<sup>3</sup> that this view was “an attitude not likely to be endearing to the Supreme Court.”<sup>4</sup> Judge Dyk is certainly right about

1. Timothy B. Dyk, *Thoughts on the Relationship Between the Supreme Court and the Federal Circuit*, 16 CHI.-KENT J. INTELL. PROP. 67, 80 (2016).

2. Nor is Judge Dyk likely to share this view. He was a noted Supreme Court litigator before being appointed to the bench and is well-known for his efforts to more closely align Federal Circuit precedent with Supreme Court decisions.

3. The author served as a law clerk to Judge Dyk in 2006-2007.

4. Dyk, *supra* note 1.

that. But Judge Dyk's observation is worth further exploration, both because it is surprising that nine of the most talented legal minds in the country might not comprehend a certain body of law and because it is problematic *either* that this is true *or* that large segments of the patent community believe it to be true.

Judge Dyk's descriptive claim is undoubtedly correct. Popular voices within the practicing patent bar contend, for example, that "it is shocking that all nine Justices of the Supreme Court know so little about patent law, yet the collective fate of the industry rests with only a cursory understanding of patent law – and that is at best!"<sup>5</sup> Although more measured, academic commentary notes, for example, that "skeptics might doubt the technical competence of the Supreme Court to fully grapple with patent doctrine" and describes a perception in the patent community of "the Court's perceived incompetence in patent affairs."<sup>6</sup>

If these views are right, it is deeply troubling. For the patent community, "[t]he Supreme Court is the ultimate judicial authority on patent law,"<sup>7</sup> which raises serious concerns if it does not comprehend this area for which it is given so much power. For the legal community, more generally, the Supreme Court's inability to understand at least some areas of law would threaten the very idea of a generalist high court as the final arbiter of what the law is in our system of government.<sup>8</sup>

But we need not pause long on these dire consequences. The idea that the Supreme Court – nine of the most qualified and brilliant legal minds in the country – does not understand the *law* of patents is simply implausible. Even more generous interpretations of this criticism of the Supreme Court – that it insufficiently understands innovation policy, insufficiently understands the patent system that Congress desired in creating the Federal Circuit, or insufficiently understands the technical facts to resolve patent issues – do not hold up under the closer scrutiny provided in Part II. This is not to say that the Supreme Court always reaches the optimal, or even best-supported, outcome in patent cases. Instead, the point is that any "errors" it

5. Gene Quinn, *Killing Industry: The Supreme Court Blows Mayo v. Prometheus*, IPWATCHDOG (Mar. 20, 2012), <http://www.ipwatchdog.com/2012/03/20/supreme-court-mayo-v-prometheus/id=22920/>. This Essay cites IPWatchdog at various points as representative of segments of the patent community that contend the Supreme Court does not understand patent law. Although IPWatchdog often has a particularly strong viewpoint, it is repeatedly ranked among the top legal blogs and, after PatentlyO, is probably the most influential outlet for information about patent law. *See About, IPWATCHDOG*, <http://www.ipwatchdog.com/about/> (last visited Feb. 2, 2017).

6. Peter Lee, *Patent Law and the Two Cultures*, 120 YALE L.J. 2, 73, 75 (2010) (noting but not endorsing).

7. *Id.* at 74.

8. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.")

does make are the normal result of human decision making and/or generalist review of specialized areas of law, rather than a particular lack of understanding of patent law.

In short, this Essay is skeptical of the skepticism expressed by segments of the patent bar and academy about the Supreme Court’s ability to understand patent law. Rather, Part III suggests that those leveling the charge against the Supreme Court are mistaking policy disagreement for a lack of understanding. Even if this mistake is one of rhetoric, not substance, it is not harmless. Framing policy disagreement in the guise of an inability to understand patent law masks the extent to which patent law is a matter of public policy, incorrectly suggests an inherently “true” version of patent law, undermines patent law’s flexibility in responding to the changing needs of society, and encourages further polarization within an already divided patent community. It also threatens to delegitimize the Supreme Court’s authority in patent law and bolster efforts to circumvent the Supreme Court’s decisions, undermining (at least in a small way) the constraints law imposes in our society.

## II. DISSECTING THE CRITICISM THAT THE SUPREME COURT DOES NOT “UNDERSTAND” PATENT LAW

To evaluate the critics’ claim that the Supreme Court does not understand patent law, it is first necessary to explore what the critics mean. Perhaps they mean it literally – that the Supreme Court does not comprehend the legal doctrines and principles of patent law. Or perhaps they are being imprecise when they describe the Supreme Court’s alleged misunderstanding as being about the *law* of patents and instead mean that the Supreme Court does not sufficiently comprehend the innovation policy advanced by patent law, the patent system desired by Congress when it created the Federal Circuit, or the technical context of patent cases. This Part considers these possibilities in turn, finding each unconvincing.

### A. *Does the Supreme Court Misunderstand the Law of Patent Cases?*

The critics of the Supreme Court within the patent community might mean exactly what they say – that the Supreme Court does not understand the *law* of patents: the statutory provisions, doctrines, and legal principles that govern patent cases.<sup>9</sup> Even aside from its technical facts, patent law is a

9. See, e.g., Quinn, *supra* note 5 (arguing that the Supreme Court showed an improper understanding of patent law by conflating the requirements of novelty and non-obviousness with the requirements of patent-eligible subject matter).

famously complex and difficult area of law to apply, with arcane and confusing doctrines.<sup>10</sup> It undoubtedly poses challenges for those without legal training – the scientists and business people who interact with the patent system – as well as those who are legally trained but inexperienced in patent law, like generalist lawyers and district judges.

For that reason, patent law is probably not among the easier legal subjects for the Supreme Court Justices and their law clerks, who are generalists handling at most a couple of patent cases a year. But there is little reason to think the Justices and their clerks are incapable of overcoming the complexity and challenges presented by the *law* of patents.<sup>11</sup> They are, of course, among the brightest legal minds in the country. Nor is patent law any more challenging than many of the other areas of law on the Supreme Court's docket, such as whether “[w]hen an ERISA-plan participant wholly dissipates a third-party settlement on non-traceable items, the plan fiduciary may . . . bring suit to attach the participant's separate assets”; whether “Section 903(1) of the Bankruptcy Code, which pre-empts state bankruptcy laws that enable insolvent municipalities to restructure their debts over the objections of creditors and instead requires municipalities to restructure such debts under Chapter 9 of the federal Bankruptcy Code, pre-empts the Puerto Rico Public Corporation Debt Enforcement and Recovery Act”; or whether the Federal Energy Regulatory Commission has the authority under the Federal Power Act to “regulate wholesale market operators’ compensation of demand response bids because the practices at issue directly affect wholesale rates.”<sup>12</sup> And the Justices and their clerks are aided in understanding patent law generally and the issues in any case specifically by an elite Supreme Court bar that is actively involved in patent cases, often on both sides, and extensive involvement by amici.

In fact, compared to other legally complex areas on the Supreme Court's docket, patent law issues are probably easier for the Supreme Court Justices and their clerks to grasp. Unlike detailed, intricate, and legally technical statutes that the Supreme Court frequently grapples with, like the tax code, bankruptcy statute, or ERISA, the Patent Act “sets the basic

10. Lee, *supra* note 6, at 12-13.

11. Cf. Michael Goodman, *What's So Special About Patent Law?*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 797, 829 (2016) (“[T]he Court has, I think correctly, called into question the notion that patent law expertise is necessary to decide patent cases . . .”). Occasional comments by some Justices, primarily Justice Scalia, about not knowing patent law generally or in its entirety should not be confused as saying that the Justices do not understand the specific issues that are presented to them in specific cases. See David O. Taylor, *Formalism and Antiformalism in Patent Law Adjudication: Precedent and Policy*, 66 SMU L. REV. 633, 636, 636 n.14 (2013) (citing comments by Justice Scalia).

12. See *October Term 2015*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/terms/ot2015/> (last visited Feb. 24, 2017) (listing cases from October Term 2015).

parameters for patentability and infringement” in broad and general terms – such as that the invention cannot be “obvious” or the patent must include a “written description of the invention” – but “it does not specify in detail how those basic principles are to be applied.”<sup>13</sup> Nor is it like other areas of law on the Supreme Court’s docket where the gaps in a statute have been filled by complex and detailed regulations promulgated by an expert administrative agency, such as environmental law regulations issued by the EPA or communications regulations issued by the FCC. The Patent Office lacks substantive rulemaking authority and plays a minor role in the development of substantive patent law.<sup>14</sup>

For these reasons, “the patent code, much like the Sherman Act, is a common law enabling statute, leaving ample room for courts to fill in the interstices or to create doctrine emanating solely from Article III’s province.”<sup>15</sup> Indeed, “a significant portion of U.S. patent law, including some of the most important and controversial patent law doctrines, is either built upon judicial interpretation of elliptical statutory phrases, or is devoid of any statutory basis whatsoever. Thus, while Congress and the courts each have a hand in constructing the latticework of patent law, judges . . . are the principal architects.”<sup>16</sup> Even if patent law is a complex and intricate area of law, it should be comparatively easier for the Supreme Court to understand than the complex statutory and regulatory schemes on the Supreme Court’s docket because patent law features *judge-made* complexity and intricacy. In fact, many of the patent law doctrines that critics charge the Supreme Court with misunderstanding are the creation of the Supreme Court itself (even if not necessarily this particular composition of the Court).<sup>17</sup> It defies reason to conclude that the Supreme Court – the top judges in the country – is incapable of understanding an area of law of which they, and their colleagues on the federal bench, are the principal authors.

Perhaps the critique is more muted. Perhaps the criticism is *not* that the Supreme Court is incapable in theory of understanding, or has always misunderstood, the law of patents. Rather, perhaps the critique is that the Supreme Court does not understand the current body of doctrines and legal principles that govern patent law. Since 1982, patent law has been

13. Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1638 (2003).

14. Craig Allen Nard, *Legal Forms and the Common Law of Patents*, 90 B.U. L. REV. 51, 76-77 (2010).

15. *Id.* at 53.

16. *Id.*

17. See Mark D. Janis, *Patent Law in the Age of the Invisible Supreme Court*, 2001 U. ILL. L. REV. 387, 389-90 (2001) (describing role of the Supreme Court in developing patent law in 19<sup>th</sup> century).

significantly shaped by the U.S. Court of Appeals for the Federal Circuit, which has nationwide intermediate appellate jurisdiction in patent cases and has replaced and revised many patent law doctrines.<sup>18</sup> Maybe when critics say that the Supreme Court does not understand patent law, they mean that the Supreme Court does not understand the law of patents that the Federal Circuit has crafted over the past thirty-five years.<sup>19</sup>

As an initial matter, it is implausible that the Supreme Court is incapable of understanding the legal doctrines and principles crafted by the Federal Circuit. To be sure, the Federal Circuit has more knowledge of, and experience with, its version of patent law than the Supreme Court. The Supreme Court is a generalist court that handles, at most, a couple of patent cases a year, whereas the Federal Circuit is a specialized court that handles hundreds of patent cases a year.<sup>20</sup> But that does not mean that the Supreme Court is incapable of understanding the patent law principles that do come before it. As a generalist court with a limited docket, the Supreme Court frequently has less experience with legal doctrines than the lower courts it reviews, whether the issue be criminal sentencing, administrative law, or bankruptcy. But the Supreme Court Justices (and their clerks) are highly intelligent and skilled legal minds who are perfectly capable of learning the legal doctrines and principles relevant to the cases on their docket, and there is no reason to think this is less true with patent law principles originally crafted by the Federal Circuit. After all, these principles were crafted by other judges not much different than the Supreme Court Justices – the majority of Federal Circuit judges lack a scientific background and had limited experience with patent law before joining the bench.<sup>21</sup>

Moreover, the contention that the Supreme Court does not understand the Federal Circuit's version of patent law treats the Federal Circuit's version as the "correct" or "true" version of patent law and the Supreme Court's

18. Nard, *supra* note 14, at 74-75.

19. Chief Judge Paul Michel, *Lecture: Innovation, Incentives, Competition, and Patent Law Reform: Should Congress Fix the Patent Office and Leave Litigation Management to the Courts?*, 20 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 1135, 1157 (2010) (then-Chief Judge of Federal Circuit arguing that the Supreme Court struggles to "getting it right in patent law" because it "doesn't really understand the case law" and identifying some Federal Circuit case law the Supreme Court allegedly misunderstood).

20. John M. Golden, *The Supreme Court as "Prime Percolator": A Prescription for Appellate Review of Questions in Patent Law*, 56 *UCLA L. REV.* 657, 665 (2009).

21. Melissa F. Wasserman, *The Changing Guard of Patent Law: Chevron Deference for the PTO*, 54 *WM. & MARY L. REV.* 1959, 2010 (2013) ("Only a handful of the Federal Circuit judges hold scientific degrees."); Golden, *supra* note 20, at 666 ("Since the [Federal] Circuit's formation, only a minority of its judges have had notably substantial pre-Federal Circuit involvement with patent law.").



departure from it as a misunderstanding, mistake, or error.<sup>22</sup> But the Federal Circuit is an inferior federal court, and “[t]he Supreme Court is the ultimate judicial authority on patent law.”<sup>23</sup> Given the significant discretion Congress has given to federal courts to craft patent law, and the Supreme Court’s position at the top of the federal court system, for the most part, the Supreme Court cannot *misunderstand* patent law because Congress has delegated to the Supreme Court primary responsibility to define what patent law is, at least within the broad and unrestrictive boundaries of the statute and subject to normal constraints on common law decision making like *stare decisis*.<sup>24</sup> In truth, critics contending that the Supreme Court does not understand the Federal Circuit’s version of patent law really mean that they prefer the public policy choices made in the Federal Circuit case law to those made in the Supreme Court decisions, a point I return to in Part III.

### *B. Does the Supreme Court Misunderstand Innovation Policy?*

A second possibility is that the critics do not mean that the Supreme Court misunderstands the law of patents, but rather that it misunderstands what the law of patents is trying to achieve. That is, the complaint is that the Supreme Court misunderstands patent law’s underlying substantive objective – promoting innovation – and how patent doctrines relate to that objective.<sup>25</sup> To the extent the Supreme Court does not understand innovation policy and/or the effects of patent law on innovation, the Supreme Court is just like the rest of us. Economist Fritz Machlup famously evaluated the costs and benefits of the patent system in the 1950s and concluded: “if we did not have a patent system, it would be irresponsible, on the basis of our present knowledge of its economic consequences, to recommend instituting one. But since we have had a patent system for a long time, it would be irresponsible on the basis of our present knowledge, to recommend abolishing it.”<sup>26</sup> Despite a great deal of research and analysis regarding the patent system in the interim, Machlup’s conclusion still largely reflects the best

22. Michel, *supra* note 19, at 1157 (suggesting the reason the Supreme Court disagreed with Federal Circuit case law is that it misunderstood it).

23. Lee, *supra* note 6, at 74.

24. Hayden W. Gregory, *IP and the Romance with Its Policymakers*, 8 LANDSLIDE 16, 20 (2016) (rejecting the contention that the Supreme Court “simply does not understand patent law” because “Supreme Court decisions *are* patent law”).

25. See Gene Quinn, *Naked Emperors: A Supreme Court Patent Tale*, IPWATCHDOG (May 31, 2015), <http://www.ipwatchdog.com/2015/05/31/naked-emperors-a-supreme-court-patent-tale/id=58110/> (contending that Supreme Court’s lack of understanding in patent cases is hindering innovation and dissemination of information in the software field).

26. CRAIG ALLEN NARD, *THE LAW OF PATENTS* 39-40 (4th ed. 2016).

understanding of the relationship between the patent system and innovation and economic policy.<sup>27</sup>

Moreover, a suggestion that the Supreme Court does not understand innovation policy is particularly odd. Many commentators have praised the Supreme Court's recent intervention in patent law "for placing policy at the forefront of its decision making in patent cases," noting that "rather than relying solely on precedent to answer important disputes in patent cases, it welcomes amicus briefs addressing underlying policies and real-world effects of its decisions, vets matters of policy at oral argument, and articulates in its opinions policies supporting its resolution of patent law disputes."<sup>28</sup> In this regard, the Supreme Court compares favorably to the Federal Circuit, which is widely criticized "for failing to identify policies underlying patent-law doctrines, for omitting from their written opinions detailed analyses of competing interpretations and applications of these doctrines in light of these policies, and, ultimately, for adopting interpretations and applications based on either no stated policy analysis or a truncated one."<sup>29</sup> Thus, the Supreme Court is far more engaged with innovation policy and makes a far greater effort to explicitly craft doctrines and legal principles in light of the needs of innovation policy, at least compared to the Federal Circuit.

The critics' concern thus seems less that the Supreme Court *misunderstands* innovation policy as that the Supreme Court has a *different vision* of innovation policy than its critics. Indeed, those contending that the Supreme Court does not understand patent law tend to also criticize the Supreme Court's decisions as a policy matter for weakening patent rights to the detriment of inventors.<sup>30</sup> The Supreme Court's policy choices regarding patent law are certainly open to dispute, but that should not be conflated with the assumption that the Supreme Court does not understand these policy choices, as addressed in more detail in Part III. To the contrary, the evidence suggests that the Supreme Court is deeply engaged and carefully weighs innovation policy in reaching its patent decisions, even if its critics are unhappy with the results it reaches.<sup>31</sup>

27. *See id.* at 40.

28. Taylor, *supra* note 11, at 636.

29. *Id.* at 635.

30. *See, e.g.*, Donald S. Chisum, *The Supreme Court and Patent Law: Does Shallow Reasoning Lead to Thin Law?*, 3 MARQ. INTELL. PROP. L. REV. 3-4, (1999) (contending in same article that Supreme Court Justices have flawed reasoning in patent cases and have "certain assumptions about patent policy" that involve "skepticism and hostility about the patent system and about patents"); Quinn, *supra* note 25.

31. *See* Lisa Ouellette, *Cultural Cognition of Patents*, 4 IP THEORY 28, 30 (2014) ("[E]ven people who say they agree that the goal of the patent system is promote innovation often disagree on the existing facts.").

*C. The Supreme Court Misunderstands the Patent System Created by Congress?*

Related to the first two possibilities, perhaps the critics of the Supreme Court do not mean that the Supreme Court misunderstands patent law and innovation policy generally, but rather that it misunderstands the policy judgments, and patent law principles embodying them, made by Congress through enactment of the Federal Courts Improvement Act of 1982.<sup>32</sup> The FCIA created the Federal Circuit, the most significant event in the patent system in decades.<sup>33</sup> It emanated from two primary concerns: first, uncertainty in the scope and strength of patent rights resulting in variations among the regional circuits in their application of patent law and the resulting forum shopping; and second, an erosion in the value and incentives provided by patents as a result of this uncertainty and the frequent invalidation of patents in those circuits hostile to patent rights.<sup>34</sup>

In light of the FCIA, maybe the critics do not mean that the Supreme Court misunderstands patent law but rather that it misunderstands its place in shaping patent law. On this view, patent law is no longer (largely) what the Supreme Court says it is because the Federal Circuit now has primary responsibility for developing patent law and implementing patent policy.<sup>35</sup> But this view is unconvincing. The Federal Circuit is the primary driver of patent law only because of its centralized appellate jurisdiction and volume of cases, not because of any change to the hierarchy of the federal courts or the Supreme Court’s power and authority.<sup>36</sup> To the contrary, Congress purposefully created the Federal Circuit as an intermediate appellate court subject to the Supreme Court’s review, “so that a generalist tribunal would have ultimate authority over patent jurisprudence.”<sup>37</sup> Regardless of any doubts created by the FCIA, the Supreme Court remains the “tribunal with

32. Federal Courts Improvement Act of 1981, Pub. L. No. 97-164, 96 Stat. 25 (1982).

33. Nard, *supra* note 14, at 74.

34. Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 6-7 (1989).

35. Cf. Golden, *supra* note 20, at 658 (noting that the Supreme Court’s role as the “tribunal with the final say on ‘what the law is’ . . . is open to question when, as with patent law, the Court reviews the work of another appellate tribunal having virtually exclusive jurisdiction over initial appeals”).

36. See Michel, *supra* note 19 (noting that the Federal Circuit is in a “hierarchical system” and must follow “the precedents of the Supreme Court” but that the Supreme Court has “so few cases and so little experience” as compared to the Federal Circuit”).

37. Rochelle C. Dreyfuss, *Percolation, Uniformity, and Coherent Adjudication: The Federal Circuit Experience*, 66 SMU L. REV. 505, 506-507 (2013); see also Janis, *supra* note 17, at 392 (noting that “Congress also ensured that decisions of the Federal Circuit were reviewable at the Supreme Court by grant of certiorari” and that “proponents of the Federal Circuit legislation understood Supreme Court review to be important, at least symbolically”).

the final say on ‘what the law is’” for patent law no less than any other area of law.<sup>38</sup>

Alternatively, critics may believe the Supreme Court is ignoring a mandate from Congress in the FCIA to create patent law doctrines that promote certainty, predictability, and strong patent rights.<sup>39</sup> Uncertainty and weakened patent rights were the concerns motivating the creation of the Federal Circuit. But the tool Congress used to address these concerns was the Federal Circuit itself, not any mandates regarding the content of substantive patent law. The belief was that the Federal Circuit’s centralized appellate jurisdiction would improve certainty and predictability as compared to the divergent approaches of the regional circuits, which would in turn enhance the value and strength of patent rights.<sup>40</sup> Nothing in the FCIA or its legislative history changed the substantive statutory provisions to improve certainty and strengthen patent rights or otherwise constrained the courts’ discretion in filling in the broad statutory commands with a common law of patents.<sup>41</sup>

Thus, there is no basis to conclude that the Supreme Court misunderstands the patent system created by Congress in the FCIA, either in term of its role vis-à-vis the Federal Circuit or in terms of the scope of the Court’s discretion in developing a common law of patents.

#### *D. The Supreme Court Misunderstands the Technical Facts of Patent Cases?*

A final interpretation of the criticism that the Supreme Court does not understand patent law is that the critics really mean that the Supreme Court does not sufficiently understand the *technical facts* of patent cases to resolve issues of patent law.<sup>42</sup> This interpretation is more plausible because, unlike questions of law, where Supreme Court justices and their clerks are highly skilled, the Supreme Court justices and their clerks, for the most part, lack scientific or technical backgrounds and are neophytes when it comes to the technology in patent cases.<sup>43</sup>

38. See Golden, *supra* note 20, at 658.

39. See Quinn, *supra* note 25 (noting that Supreme Court decisions have resulted in uncertainty and weaker patent rights in software industry).

40. See Nard, *supra* note 14, at 75 (describing Federal Circuit’s effect in improving predictability and strengthening patent rights).

41. See *id.* at 74-77 (suggesting the creation of the Federal Circuit confirmed the dominance of the common law in patent cases).

42. See Quinn, *supra* note 25 (noting that “[t]he idea that the Supreme Court is at all capable of understanding – let alone deciding – issues of a technical nature is ridiculous.”).

43. Peter Lee, *Patent Law and the Two Cultures*, 120 YALE L.J. 2, 76 (2010).

But if the criticism of the Supreme Court is really about its lack of technical training and understanding, the criticism is both overly narrow and overly broad. The criticism is overly narrow because the Supreme Court justices are not the only technical neophytes resolving patent cases. The vast majority of federal district judges, law clerks, and jurors lack technical training.<sup>44</sup> Even “[o]nly a handful of the Federal Circuit judges hold scientific degrees,”<sup>45</sup> though the majority of their clerks are technically trained. If the Supreme Court lacks sufficient scientific or technical understanding to resolve patent issues, this is true of virtually the entire patent litigation system. This criticism, then, would be part of much larger concerns about the imperfect fit between law and science and the difficulties resolving scientific issues in court.<sup>46</sup> But it would tell us little about the comparative abilities and role of the Supreme Court in relation to other institutions in the patent system.<sup>47</sup>

The criticism of the Supreme Court’s supposed misunderstanding of technical issues is also overly broad. As compared to other lay decision makers in the patent system, the Supreme Court may actually be best situated to fulfill its role, which demands comparatively limited engagement with technical and scientific information. “Unlike district judges, Justices of the Supreme Court do not manage complicated factfinding” that requires substantial engagement with the technical facts.<sup>48</sup> By my count, at least 62% of Supreme Court patent decisions over the past decade required *no* engagement with the technical facts because they addressed either procedural issues (*e.g.*, the burden of proof, the standard for an injunction, etc.) or pure questions of law (*e.g.*, the scienter necessary for indirect infringement, the standard necessary to prove willful infringement, etc.).<sup>49</sup>

44. *Id.* at 10-11, 15-17.

45. Wasserman, *supra* note 21.

46. See Greg Reilly, *Rethinking the PHOSITA in Patent Litigation*, 48 LOYOLA U. CHI. L.J. 101 (2017) (summarizing connection between patent litigation and general concerns about science and litigation).

47. If anything, criticism of the Supreme Court’s lack of technical competence would counsel for a greater role in patent litigation for the comparative technical experts in the Patent Office.

48. Lee, *supra* note 43, at 77.

49. The Written Description blog identifies twenty-nine Supreme Court patent decisions between October Term 2005 and October Term 2015. See *Supreme Court Patent Cases*, WRITTEN DESCRIPTION, <http://writtendescription.blogspot.com/p/patents-scotus.html> (last visited Mar. 6, 2017). Of these, nine involved only procedural issues (*eBay*, *MedImmune*, *Carlsbad*, *Microsoft v. i4i*, *Caraco*, *Kappos*, *Gunn*, *Medtronic*, *Highmark*); nine involved pure questions of law that did not depend on any technical context (*Illinois Tool Works*, *Quanta*, *Global-Tech*, *Stanford*, *Actavis*, *Octane*, *Commil*, *Kimble*, *Halo/Stryker*); four involved legal questions that arguably required information about the technical context (*Microsoft v. AT&T*, *Bowman*, *Limelight*, *Cuozzo*); and seven involved issues that definitely required at least some information about the technical context (*KSR*, *Bilski*, *Mayo*, *Myriad*, *Nautilus*, *Alice*, *Teva*).

In the minority of cases where technical engagement is required, the technology is often undisputed and/or relatively simple.<sup>50</sup> Moreover, even when some technical context may be useful or necessary, the Supreme Court's job is to resolve big-picture questions of law that apply beyond the individual case to cases involving a variety of technologies. The Supreme Court rarely even applies its legal holding to the facts of the specific case, remanding to the lower courts to do so in the first instance.<sup>51</sup> Critics of the Supreme Court often assume the Supreme Court must perfectly understand the entire field of technology to resolve patent cases,<sup>52</sup> when in reality it only has to understand specific aspects of the (often undisputed) technology sufficiently well to provide the necessary context to resolve the primarily legal issues on its docket. It seems likely that the highly intelligent Supreme Court Justices and clerks, assisted by able briefing from the parties and amici, can handle this limited engagement with technology. In fact, I am only aware of one Supreme Court case over the past decade (*Association for Molecular Pathology v. Myriad Genetics, Inc.*) where the Supreme Court is said to have reached the wrong result because it misunderstood the technology at issue, as opposed to the statute, precedent, or policy.<sup>53</sup>

Even Justice Scalia's famous concurrence in the *Myriad* case, which is often taken as evidence that the Supreme Court insufficiently understands technology to resolve patent cases, makes exactly this point. Justice Scalia essentially criticizes the majority for providing more technical information than he believed necessary to resolve the question before the Court.<sup>54</sup> Justice

50. See Lee, *supra* note 43, at 77 ("For example, the Court may be somewhat shielded from the most complex inventions; one criterion for seeking Supreme Court review of patent cases is that the underlying technologies are relatively simple."). For example, the technologies in *Bilski* and *Alice* were business and financial concepts, with the use of generic computer components recited at a high level of generality. Nor does there appear to have been much dispute about what the underlying technology was or how it worked (as opposed to the legal consequences) in cases like *KSR*, *Mayo*, and *Nautilus*.

51. See *id.* at 63 ("[B]ecause of the Court's relatively small patent docket, Supreme Court Justices themselves rarely have to apply these standards.").

52. See, e.g., Steven Salzgberg, *Supreme Court Gets Decision Right, Science Wrong, on Gene Patents*, FORBES (June 13, 2013), <http://www.forbes.com/sites/stevensalzgberg/2013/06/13/supreme-court-gets-decision-right-science-wrong/#2e6ef58b12cc> (complaining about aspects of Supreme Court's background description of the technology without suggesting in any effect on the outcome).

53. See, e.g., Noam Prywes, *The Supreme Court's Sketchy Science*, SLATE (June 14, 2013), [http://www.slate.com/articles/health\\_and\\_science/science/2013/06/supreme\\_court\\_patent\\_case\\_science\\_the\\_justices\\_misunderstand\\_molecular\\_biology.html](http://www.slate.com/articles/health_and_science/science/2013/06/supreme_court_patent_case_science_the_justices_misunderstand_molecular_biology.html) ("The meaning of this [*Myriad*] ruling is complicated significantly by the court's sketchy understanding of molecular biology."); *but cf.* Timothy B. Lee, *The Supreme Court doesn't understand software, and that's a problem*, VOX (June 20, 2014), <http://www.vox.com/2014/6/20/5824426/the-supreme-court-doesnt-understand-software-and-thats-a-problem> (contending that the Supreme Court does not understand software, but really seeming to object to Supreme Court's policy decision allowing patenting of some software).

54. Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107, 2120 (2013) (Scalia, J., concurring) ("[S]ome portions of the rest of the opinion going into fine details of molecular biology. I am unable to affirm those details on my own knowledge or even my own belief.").

Scalia then noted that even if he did not understand the technology in its entirety, he sufficiently understood the technology to resolve the specific issue presented in the case after “having studied the opinions below and the expert briefs presented here.”<sup>55</sup>

The Supreme Court may struggle to understand complex technology. But that does not mean that it insufficiently understands the technology to fulfill its role in the patent system – resolving big-picture legal issues based on technical facts that are often undisputed. To criticize the Supreme Court as insufficiently understanding technology to resolve patent cases is to criticize the entire system of lay decision making in patent cases. This is an interesting theoretical discussion, but lay decision making is the practical reality in patent law.

### III. THE POLICY DISAGREEMENTS BETWEEN SEGMENTS OF THE PATENT COMMUNITY AND THE SUPREME COURT

#### *A. Recharacterizing the Criticisms of the Supreme Court as Policy Disagreements*

On closer inspection, the criticism that the Supreme Court does not understand patent law does not stand-up, or at least offers no stronger basis to criticize the Supreme Court’s handling of patent cases than to criticize the concept of generalist Supreme Court review as a whole. And, yet, this view is commonly held in significant portions of the patent community. What explains this? Is much of the patent community simply misunderstanding the Supreme Court’s understanding?

One possibility is that some in the patent community *do* reject the basic notion of a generalist Supreme Court with final authority to say “what the law is” in all areas of federal law, even those in which it is less experienced than the lower courts.<sup>56</sup> If that is the case, then the objection is not so much that the Supreme Court misunderstands patent law as that *Marbury* was wrongly decided, Congress’s structuring of the federal courts is flawed, and/or perhaps even the framers of the Constitution erred in providing that “[t]he judicial Power of the United States, shall be vested in one supreme

55. *Id.* (“It suffices for me to affirm, having studied the opinions below and the expert briefs presented here, that the portion of DNA isolated from its natural state sought to be patented is identical to that portion of the DNA in its natural state; and that complementary DNA (cDNA) is a synthetic creation not normally present in nature.”).

56. *See* Quinn, *supra* note 25 (“In a world becoming more complex and specialized by the day it is utter fantasy to believe that a homogenous group of senior citizens from Ivy League schools who have no scientific training possesses the breadth and depth of knowledge to wisely pontificate on any and every subject, particularly those relating to cutting edge technology.”).

Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>57</sup> Again, this is an interesting theoretical debate, but it is beyond the scope of this Essay.

The more likely possibility is that some in the patent community mistake disagreement for a lack of understanding. When they say that the Supreme Court does not “understand” patent law, they really mean that the Supreme Court’s decisions differ from their policy preferences regarding patent law and/or are unwise as a matter of public policy. I do not mean to claim any novel insight is this regard. I am sure many who follow debates over patent law, and even those who do not but have read the preceding analysis, easily recognize that arguments framed about the Supreme Court’s lack of understanding are really arguments about the wisdom of the Supreme Court’s policy choices. Nonetheless, it is important to recognize the language of misunderstanding for exactly what it is – rhetoric used to bolster the critics’ policy preferences.

The evidence of policy disagreement, not actual misunderstanding by the Supreme Court, follows largely from the analysis in Part II. As explained above, it is implausible that the Supreme Court does not understand the current legal doctrines and principles of patent law, at least those raised in the cases before it, nor does the Court’s work require deep engagement with technical facts that it more plausibly might misunderstand. Moreover, the Court is deeply engaged in exploring and analyzing the policy consequences of its decisions, rebutting the suggestion that it misunderstands innovation policy. What really bothers the critics seems unlikely to be the Supreme Court’s understanding of the issues and policy.

Instead, it seems that what really bothers the critics is the Supreme Court’s conclusions – how it resolves those issues and policy considerations. In particular, critics are concerned with two consequences of the Court’s decisions: that they have weakened patent rights and decreased certainty and predictability in the patent system.<sup>58</sup> The critics themselves intermingle claims of the Supreme Court’s misunderstanding with objections to the Supreme Court’s policy choices, treating the two as equivalent. For example, one popular commentator contended that the Supreme Court in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.* improperly “conflate[d] novelty and non-obviousness with patent eligibility” based on their “cursory understanding of patent law,” only to acknowledge a few paragraphs later that the Supreme Court was “well aware” of the different

57. U.S. CONST. art. III, § 1.

58. See Quinn, *supra* note 25 (noting that Supreme Court decisions have resulted in uncertainty and weaker patent rights in software industry).



patentability requirements and consciously intermingled (some) elements of novelty with patent eligibility.<sup>59</sup> Thus, the commentator’s real concern was not the Supreme Court’s lack of understanding of patent law but rather that the Supreme Court made an intentional decision to place significant weight on the patent eligibility inquiry of 35 U.S.C. § 101 in a way that the commentator believed would create uncertainty and unpredictability and weaken patent rights.<sup>60</sup> This is representative of other similar criticisms of the Supreme Court demonstrating that claims of lack of understanding are really proxies for policy disagreements.<sup>61</sup>

Perhaps it is inevitable that some critics of the Supreme Court would package their policy disagreements as misunderstanding by the Supreme Court. Commentators are capable of vigorously disagreeing with the Supreme Court’s policy choices without characterizing their disagreement as misunderstanding by the Court.<sup>62</sup> However, there is added rhetorical punch to contending that the Supreme Court does not understand patent law or got patent law wrong, rather than saying that the Supreme Court made the wrong choice as a matter of public policy. This is especially true because the Supreme Court essentially has the last word on patent law (subject to an unlikely legislative override by Congress). Rather than accept that the Supreme Court made a legitimate public policy choice within the authority granted to it by Congress, albeit one they believe is misguided, it may be cognitively easier for these critics to feel that their side of the public policy debate lost only because the Supreme Court did not understand the issues presented to it. This is particularly likely in expert communities, like the patent community arguably is, which attempt to retain control over their area of expertise by claiming a monopoly on the relevant knowledge and resisting input and authority of non-expert superiors.<sup>63</sup>

59. See Quinn, *supra* note 5.

60. *Id.* (contending that the Supreme Court’s intermingling of the doctrines resulted “in a ‘know it when you see it’” inquiry and meant “patentees and patent applicants get screwed!”). The Supreme Court’s analysis was not without any basis, as Section 101 of the Patent Act requires inventions to be “new and useful.” 35 U.S.C. § 101.

61. See, e.g., Gregory, *supra* note 24 (noting that disagreements about patent policy are often phrased as “the Court simply does not understand patent law”); Chisum, *supra* note 30 (contending in same article that Supreme Court Justices have flawed reasoning in patent cases and have “certain assumptions about patent policy” that involve “skepticism and hostility about the patent system and about patents”).

62. See, e.g., Neal Solomon, *The Disintegration of the American Patent System*, IPWATCHDOG (Jan. 26, 2017), <http://www.ipwatchdog.com/2017/01/26/disintegration-american-patent-system/id=77594/> (contending that “an activist U.S. Supreme Court supplied a series of decisions from 2006 to 2016 that substantially eroded patent rights” and “had a profound adverse effect on the economy” without suggesting that the Court did not know what it was doing).

63. Laura Pedraza-Fariña, *Understanding the Federal Circuit: An Expert Community Approach*, 30 BERKELEY TECH. L.J. 89, 110-11, 123-27 (2015). Although the patent community has diversified over the past two decades with the increasing involvement of general litigators, it remains composed in

*B. The Danger of Using the Language of Ignorance and Error to Characterize Policy Disagreements.*

The difference between critics saying that the Supreme Court does not “understand” patent law and that it is making misguided public policy choices is largely one of rhetoric, not substance. Again, most informed readers probably understand exactly what the critics mean by the language of misunderstanding – the Supreme Court is making choices that are unwise as a matter of public policy and with which the critics disagree. Critics undoubtedly have a reasonable basis to disagree with the Supreme Court’s policy choices, and such disagreement is essential to a productive debate that ultimately improves the quality of patent law. Yet, the rhetoric of misunderstanding has at least four negative consequences that make it an undesirable feature of modern patent law debates.

*First*, the rhetoric of misunderstanding suggests that there is only one “true” or “correct” version of patent law and that departures from this version reflect misunderstandings or mistakes.<sup>64</sup> To the contrary, inventors have no inherent or “natural” right to exclusive control of their inventions, nor is there any inherent or natural set of rights for when a patent must issue or what rights it must provide.<sup>65</sup> Instead, patent rights only exist as an affirmative act of governmental power on the terms and conditions the government sets as a matter of public policy.<sup>66</sup> The United States Constitution expressly treats patents as a public policy tool that Congress may (but is not required to<sup>67</sup>) issue but only when, and to the extent, they promote progress of technological innovation.<sup>68</sup> Otherwise, the Constitution largely leaves it to Congress to decide what terms and conditions are necessary to insure that patents will promote technological innovation.<sup>69</sup> As explained above, Congress responded by writing the patent statutes in broad,

significant part of members of the patent bar. The patent bar can roughly be characterized as an expert community: “an institutionalized group of experts that develop and apply a system of abstract knowledge to address a specific set of questions” and “are largely autonomous from the state, with independent entrance exams, licensing procedures, and ethical guidelines.” *Id.* at 94, 116.

64. See Quinn, *supra* note 5 (“Clearly the claims at issue in this case are patent eligible subject matter. The Supreme Court is wrong . . .”).

65. See Edward C. Walterscheid, *Inherent or Created Rights: Early Views on the Intellectual Property Clause*, 19 *HAMLIN L. REV.* 81, 99 (1995).

66. *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966) (“Within the scope established by the Constitution, Congress may set out conditions and tests for patentability.”).

67. See Walterscheid, *supra* note 65.

68. *Graham*, 383 U.S. at 6 (“Nor may [Congress] enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby.”).

69. *Id.* at 8 (“Within the limits of the constitutional grant, the Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim.”).

general terms that delegated to the courts primary responsibility for defining the terms and conditions on which patents should issue. Thus, when the Supreme Court resolves an issue of patent law, it is making a policy choice (within the broad boundaries set by Congress) about the proper scope of patent protection and terms and conditions for obtaining patent protection.

The rhetoric that the Supreme Court misunderstands patent law oversimplifies the Supreme Court’s task. It suggests that there is a single “true” or “correct” outcome that can be discerned simply from the sparse language of the statute and the existing precedent. However, Congress’s choice to write the patent statutes largely in broad, general terms and withhold substantive rulemaking authority from the Patent Office leaves the courts, and ultimately the Supreme Court, with the difficult task of achieving patent law’s delicate balance between promoting innovation without unduly restricting competition or follow-on innovation.<sup>70</sup>

Acknowledging that the patent law issues confronted by the Supreme Court are matters of public policy, not efforts to identify some abstract “right” answer, will lead to a more honest and useful debate about the policy outcomes of various doctrinal choices, improving the quality of the information the Supreme Court receives and hopefully the quality of the choices it makes.<sup>71</sup> It will also shed more light on the difficult task the Supreme Court confronts. This may help explain some shortcomings commentators identify in its case law, including its tendency to adopt broad standards that must be fleshed out by the lowers in future case-by-case adjudication,<sup>72</sup> in a way that enhances the Court’s legitimacy.

*Second*, and relatedly, the rhetoric of misunderstanding treats the current state of patent law (or the state of patent law before the Supreme Court became active) as the baseline and departures from the status quo as misunderstandings or mistakes. For example, one commentator criticized the Supreme Court’s *Mayo* decision by saying that “[i]f a student were to write such nonsense in a patent law paper or on a patent law final exam they would receive little, if any, credit.”<sup>73</sup> This is an odd criticism of a Supreme Court decision. A student taking a patent law exam is explaining the current state of the law. But when an issue reaches the Supreme Court, the Supreme Court is trying to decide whether the current state of the law is correct (based on the statute, the stare decisis effect of prior decisions, and public policy

70. Nard, *supra* note 26, at 30-40 (describing complex economic balance of patent system).

71. *Cf.* Taylor, *supra* note 11, at 645-652 (noting extensive criticism of Federal Circuit for narrow focus on parsing precedent that ignores policy issues underlying its decision).

72. Lee, *supra* note 6, at 63-64.

73. Quinn, *supra* note 5.

considerations). Essentially, the criticism reflects status quo bias that assumes patent law necessarily must be its current version.

To the contrary, because patent law is a tool of public policy, it is dynamic and can adjust to the changing needs of society. The original 1790 Patent Act provided for examination by high level cabinet officers to determine if the invention was both useful and “important,” but quickly proved infeasible and gave way to a registration system in the 1793 Act that granted patents for mere compliance with clerical requirements.<sup>74</sup> Because it was adopted when the country was largely agricultural, the registration system proved insufficient as the country developed manufacturing and national markets, ultimately being replaced by an examination system in 1836.<sup>75</sup> The courts also have used the significant discretion conferred on them by the broad terms of the statute to adjust patent law to a changing society, from the needs of the Industrial Revolution to the needs of war mobilization during World War II.<sup>76</sup> In fact, it is ironic to criticize the Supreme Court for departing from the status quo of patent law. The status quo only resulted from the significant changes introduced into patent law by the Federal Circuit since 1982.<sup>77</sup> The creation of the Federal Circuit, and the changes it introduced, were an express effort to accommodate patent law to the then-current policy needs, particularly the concern that American technological progress had stagnated in the 1970s and the United States was losing its dominance in the world economy.<sup>78</sup>

By ignoring the dynamic nature of patent law, the rhetoric of Supreme Court misunderstanding hinders the tailoring of patent law to the changing needs of society. The result could be the lock-in of a particular version of patent law that was good for needs of society at one point in time but does not reflect the current circumstances.

*Third*, the rhetoric of Supreme Court misunderstanding suggests that there are right and wrong answers to patent law questions. This causes competing interests within the patent system to believe their position is “right” and the other side is “wrong,” making them less willing to engage with the ideas of others with whom they disagree, to recognize the ambiguities and uncertainties in innovation policy and patent reform

74. Nard, *supra* note 26, at 20-22.

75. *Id.* at 22-23

76. ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, PATENT LAW AND POLICY: CASES AND MATERIALS 9-10 (6th ed. 2013).

77. Nard, *supra* note 14, at 74-75.

78. *See* Dreyfuss, *supra* note 34, at 6-8.

proposals, and to compromise on questions of patent policy.<sup>79</sup> The result is further polarization within a patent community that is already highly polarized between those who believe in expanding patent rights and those who believe in limiting patent rights.<sup>80</sup> This creates a poisonous atmosphere for patent policy debates and stagnates patent reform as competing interest groups cancel each other out.

**Fourth**, the contention that the Supreme Court does not understand patent law delegitimizes the Supreme Court’s decisions in patent law and encourages efforts to circumvent them. The Federal Circuit has shown “a pattern of resistance to implementing Supreme Court decisions overruling Federal Circuit precedent.”<sup>81</sup> The rhetoric from segments of the patent community that the Supreme Court does not understand patent law encourages this type of resistance from the Federal Circuit and the lower courts. For example, one commentator labeled the Supreme Court’s *Mayo* decision as “lawless”<sup>82</sup> and called upon the Federal Circuit to “overrule” the decision by “work[ing] to moderate (and eventually overturn) this embarrassing display by the Supreme Court.”<sup>83</sup> Similarly, the United States District Court for the Eastern District of Texas has been widely criticized for attracting nearly half of the country’s patent litigation by consistently skewing the way it handles patent cases in favor of patentees.<sup>84</sup> Yet, some have defended the Eastern District of Texas for resisting what they perceive as recent anti-patent trends, including Supreme Court decisions.<sup>85</sup>

79. See Ouellette, *supra* note 31, at 28 (“[A]dvocates and policymakers on both sides of the patent wars often fail to acknowledge the ambiguity of evidence on issues such as whether patents promote innovation.”).

80. See generally *id.* (describing polarization within patent community).

81. Pedraza-Fariña, *supra* note 63, at 124.

82. Gene Quinn, *Mayo v. Prometheus: A lawless decision by an omnipotent Court wreaking havoc on patents*, IPWATCHDOG (Jan. 23, 2017), <http://www.ipwatchdog.com/2017/01/23/mayo-v-prometheus-lawless-decision-wreaking-havoc-patents/id=77438/>.

83. Quinn, *supra* note 5.

84. See generally Daniel M. Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241 (2016) (summarizing issues with Eastern District of Texas).

85. See Peter Harter & Gene Quinn, *Politics of Patent Venue Reform: SCOTUS Taking TC Heartland to Delay Push for Venue Reform*, IPWATCHDOG (Jan. 9, 2017), <http://www.ipwatchdog.com/2017/01/09/politics-patent-venue-scotus-tc-heartland-dela-venue-reform/id=76639/> (“Patent owners have resisted venue reform because it has largely felt like infringers were trying to foreclose the one district court where they were given a fair chance to prevail.”); Michael Rosen, *VENUE Act would tighten leash on patent litigation, but draws criticism*, TECHPOLICYDAILY (Mar. 30, 2016), <http://www.techpolicydaily.com/technology/venue-act-would-tighten-leash-on-patent-litigation-but-draws-criticism/> (describing popularity of Eastern District of Texas based on “the relative unwillingness of judges in the district to grant” motions based on Supreme Court’s *Alice* decision); Gene Quinn, *Patent Reform Returns: Venue Reform Bill to be introduced in Senate*, IPWATCHDOG (Mar. 7, 2016), <http://www.ipwatchdog.com/2016/03/07/patent-reform-returns-venue-reform-bill-introduced-senate/id=66849/> (saying Eastern District of Texas is “increasingly viewed as one of the few courts where the little guy has at least a fair opportunity to prevail”).

However, the Supreme Court is at the top of the judicial hierarchy and the Federal Circuit and district courts are bound by its decisions, whether they like them or not. The suggestion that the Federal Circuit or district courts should circumvent Supreme Court decisions due to the Supreme Court's supposed misunderstanding of patent law ignores the proper role of these courts within the hierarchy of the judiciary. It also suggests that actors are free to ignore binding authority simply because they disagree with it. This undercuts the authority of law in our society, encouraging actors to instead substitute their own policy judgments for the decisions that they are bound to implement. In this way, the rhetoric of Supreme Court misunderstanding undermines the constraints law imposes in our country, albeit in a minor way given patent law's limited salience in society.

#### IV. CONCLUSION

On the whole, there is no reasonable basis to contend that the Supreme Court does not understand patent law. Rather, the segments in the patent community pushing this contention seem to mistake policy disagreements for misunderstanding by the Supreme Court. This mistake, even if one primarily of rhetoric, has potentially negative consequences for understanding the role of patent law, promoting productive debates about patent law and policy, and preserving the Supreme Court's legitimacy in patent law and patent law's (perhaps limited) contribution to the constraints imposed by legal authority.