APA, AIA, and the PTO: The Changing Guard of Patent Law

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This Article argues that the American Invents Acts (AIA) significantly alters the legal landscape by which substantive patent law is developed. More specifically, it argues that AIA results in the PTO having the ability, for the first time, to announce legal determinations that carry the force of law. The source of this new power is not a grant of substantive rulemaking or the overruling the Federal Circuit's decision that the PTO's legal interpretations announced in the adjudication of patent denials receives no deference. Instead, this Article argues this novel power stems from the enactment of new administrative proceedings under the AIA.

After concluding that PTO legal determinations in these new administrative proceedings are likely entitled to *Chevron* deference, this Article begins to examine the ramifications of this observation. Finally, this Article explores the normative aspects of applying *Chevron* deference to PTO's legal decisions made during these new proceedings. In particular, this Article argues that the PTO's expansive take of substantive patent law issues are much more likely to receive *Chevron* deference than the agency's restrictive interpretations of substantive patent law. This asymmetry is likely to result in the systematic expansive of substantive patent law. The Article also explores the retroactive nature that PTO decisions will carry and why this type of retroactivity may be particularly problematic to the patent system.