

## POLICY TAILORS AND THE ROOKIE REGULATOR

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Commentators have long lamented the lack of policy tailoring in the patent system. But unlike other administrative agencies, who regularly tailor regulatory policies to the needs of specific industries, the U.S. Patent and Trademark Office (“PTO”) was widely believed to lack the authority and institutional competence for such policymaking.

The recent passage of major patent reform has empowered the PTO to have a much bigger say in patent law substance and policy than before. The question thus arises, to what extent is it good policy for a rookie regulator to make policy? I argue the courts should give the PTO broad flexibility to use its new powers, and the Agency should use this flexibility to tailor patent policy on an industry-by-industry basis.

In so arguing, I make two novel contributions to the literature. First, I show that, contrary to the conventional wisdom, the PTO is not a policymaking virgin but has tailored the patent review process to the needs of specific industries, such as the renewable energy and pharmaceutical industries. This creates a different baseline of expertise by which the Agency should be judged. Second, I demonstrate that the PTO would create economies of scale for the patent system and further its constitutional goals by tailoring policy on an industry-by-industry basis. Far from leading to agency capture, this proposal would improve information flow to the PTO, render PTO decisions more transparent, and fill a void in innovation policy.