AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 12: The Contemporary Era – Judicial Power and Constitutional Authority/Judicial Review

**Thryv, Inc., v. Call-to-Call Technologies, LP, 140 S. Ct. 1367** (2020)

*Thryv, Inc.. successful petitioned the U.S. Patent and Trademark Office (PTO) to cancel several patents granted to Click-to-Call Technologies concerning devices that could anonymize telephone calls. The particular procedure involved is referred to as inter partes review. Click-to-Call appealed that ruling on many grounds, including that Thryv had failed to ask for inter partes review in a timely fashion. Thyyv responded that federal courts had no power to review the PTO’s decisions on whether an appeal was timely. After weaving a complex path through the federal judiciary, the Supreme Court agreed to hear the case.*

 *The justices by a 7-2 vote declared that federal courts had no authority to hear appeals from PTO rulings on the timeliness of inter partes review proceedings. Justice Ruth Bader Ginsburg’s majority opinion discussed only statutory issues. Justice Neil Gorsuch’s dissent, by comparison, insisted that more fundamental constitutional issues were at stake. What are those constitutional issues? Does Gorsuch think the Constitution requires federal courts to hear appeals from inter partes review decisions or merely that constitutional principles should require federal courts to presume that Congress did not intend to bar federal judiciary review? What explains the unusual pairing of Gorsuch and Justice Sonya Sotomayor in this case? Are they the leading judicial activists on the Roberts Court? Are they more concerned with the rights of inventors than their colleagues? Is this pairing more consistent with behavioral or legal models of judicial behavior?*

Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=Idfe0d0c7828311ea8939c1d72268a30f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Idfe0d0c7828311ea8939c1d72268a30f) delivered the opinion of the Court.

Inter partes review is an administrative process in which a patent challenger may ask the U.S. Patent and Trademark Office (PTO) to reconsider the validity of earlier granted patent claims. This case concerns a statutorily prescribed limitation of the issues a party may raise on appeal from an inter partes review proceeding.

When presented with a request for inter partes review, the agency must decide whether to institute review. Among other conditions set by statute, if the request comes more than a year after suit against the requesting party for patent infringement, “[a]n inter partes review may not be instituted.” “The determination by the [PTO] Director whether to institute an inter partes review under this section shall be final and nonappealable.”

In this case, the agency instituted inter partes review in response to a petition from Thryv, Inc., resulting in the cancellation of several patent claims. Patent owner Click-to-Call Technologies, LP, appealed, contending that Thryv's petition was untimely.

The question before us: Does [the] bar on judicial review of the agency's decision to institute inter partes review preclude Click-to-Call's appeal? Our answer is yes. The agency's application of [the] time limit, we hold, is closely related to its decision whether to institute inter partes review and is therefore rendered nonappealable . . .

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Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=Idfe0d0c7828311ea8939c1d72268a30f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Idfe0d0c7828311ea8939c1d72268a30f), with whom Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=Idfe0d0c7828311ea8939c1d72268a30f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Idfe0d0c7828311ea8939c1d72268a30f) joins as to Parts I, II, III, and IV, dissenting.

Today the Court takes a flawed premise—that the Constitution permits a politically guided agency to revoke an inventor's property right in an issued patent—and bends it further, allowing the agency's decision to stand immune from judicial review. Worse, the Court closes the courthouse not in a case where the patent owner is merely unhappy with the merits of the agency's decision but where the owner claims the agency's proceedings were unlawful from the start. Most remarkably, the Court denies judicial review even though the government now concedes that the patent owner is *right* and this entire exercise in property-taking-by-bureaucracy was forbidden by law.

It might be one thing if Congress clearly ordained this strange result. But it did not. The relevant statute, the presumption of judicial review, and our precedent all point toward allowing, not forbidding, inventors their day in court. Yet, the Court brushes past these warning signs and, in the process, carries us another step down the road of ceding core judicial powers to agency officials and leaving the disposition of private rights and liberties to bureaucratic mercy.

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The presumption of judicial review is deeply rooted in our history and separation of powers. To guard against arbitrary government, our founders knew, elections are not enough: “An elective despotism was not the government we fought for.” In a government “founded on free principles,” no one person, group, or branch may hold all the keys of power over a private person's liberty or property. Instead, power must be set against power, “divided and balanced among several bodies ... checked and restrained by the others.” As Chief Justice Marshall put it: “It would excite some surprise if, in a government of laws and of principle ... a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals,” a statute might leave that individual “with no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust.”

It should come as an equal surprise to think Congress might have imposed an express limit on an executive bureaucracy's authority to decide the rights of individuals, and then entrusted that agency with the sole power to enforce the limits of its own authority. . . .

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The Court's expansive reading . . . takes us further down the road of handing over judicial powers involving the disposition of individual rights to executive agency officials.

We started the wrong turn in *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC* (2018). There, a majority of this Court acquiesced to the AIA's provisions allowing agency officials to withdraw already-issued patents subject to very limited judicial review. As the majority saw it, patents are merely another public franchise that can be withdrawn more or less by executive grace. So what if patents were, for centuries, regarded as a form of personal property that, like any other, could be taken only by a judgment of a court of law. So what if our separation of powers and history frown on unfettered executive power over individuals, their liberty, and their property. What the government gives, the government may take away—with or without the involvement of the independent Judiciary. Today, a majority compounds that error by abandoning a good part of what little judicial review even the AIA left behind.

Just try to imagine this Court treating other individual liberties or forms of private property this way. Major portions of this country were settled by homesteaders who moved west on the promise of land patents from the federal government. Much like an inventor seeking a patent for his invention, settlers seeking these governmental grants had to satisfy a number of conditions. But once a patent issued, the granted lands became the recipient's private property, a vested right that could be withdrawn only in a court of law. No one thinks we would allow a bureaucracy in Washington to “cancel” a citizen's right to his farm, and do so despite the government's admission that it acted in violation of the very statute that gave it this supposed authority. For most of this Nation's history it was thought an invention patent holder “holds a property in his invention by as good a title as the farmer holds his farm and flock.” . . .

Some seek to dismiss this concern by noting that the bureaucracy the AIA empowers to revoke patents is the same one that grants them. But what comfort is that when the Constitution promises an independent judge in any case involving the deprivation of life, liberty, or property? Would it make things any better if we assigned the Department of the Interior the task of canceling land patents because that agency initially allocated many of them? The relevant constitutional fact is not which agency granted a property right, but that a property right was granted.

The abdication of our judicial duty comes with a price. The Director of the Patent and Trademark Office is a political appointee. The AIA vests him with unreviewable authority to institute (or not) inter partes review. Nothing would prevent him, it seems, from insulating his favorite firms and industries from this process entirely. Those who are not so fortunate proceed to an administrative “trial” before a panel of agency employees that the Director also has the means to control. The AIA gives the Director the power to select which employees, and how many of them, will hear any particular inter partes challenge. It also gives him the power to decide how much they are paid. And if a panel reaches a result he doesn't like, the Director claims he may order rehearing before a new panel, of any size, and including even himself.

No one can doubt that this regime favors those with political clout, the powerful and the popular. But what about those who lack the resources or means to influence and maybe even capture a politically guided agency? Consider Mr. DuVal, who 25 years ago, came up with something the Patent Office agreed was novel and useful. His patent survived not only that initial review but a subsequent administrative ex parte review, a lawsuit, and the initiation of another. Yet, now, after the patent has expired, it is challenged in still another administrative proceeding and retroactively expunged by an agency that has, by its own admission, acted unlawfully. *That* is what happens when power is not balanced against power and executive action goes unchecked by judicial review. Rather than securing incentives to invent, the regime creates incentives to curry favor with officials in Washington.

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Two years ago, this Court sanctioned a departure from the constitutional plan, one in which the Executive Branch assumed responsibilities long reserved to the Judiciary. In so doing, we denied inventors the right to have their claims tried before independent judges and juries. Today we compound that error, not only requiring patent owners to try their disputes before employees of a political branch, but limiting their ability to obtain judicial review when those same employees fail or refuse to comply with the law. Nothing in the statute commands this result, and nothing in the Constitution permits it.