Question 2A

I. Introduction

Any suggestion that the current U.S. patent system is poorly designed to “promote progress” must be informed by a severely flawed understanding of domestic legal developments. Not only does the U.S. patent system closely mirror established regulatory frameworks in other highly complex administrative realms, but recent focuses of litigation and debate repeatedly suggest that amplified Congressional attention—not abandonment of the current patent system—is necessary to achieve meaningful intellectual property policy reform. The discussion that follows supports a position in favor of maintaining the existing U.S. patent system while advocating for increased participation by Congress in crucial policymaking for the next epoch of scientific and technological innovation.

II. Current Structure of the U.S. Patent System

As currently structured, the lifecycle of a U.S. patent begins with the U.S. Patent & Trademark Office (USPTO), a federal administrative agency beholden, generally speaking, to the Administrative Procedure Act and, more specifically, to various governing statutes enacted by Congress. The USPTO employs scientists and engineers who specialize in a vast range of highly complex subject areas and review patent filings within their particular realm of expertise. Working in a uniquely collaborative manner with inventors and assignees, the USPTO balances its express goal of public disclosure of innovation with private parties’ economic interests in subject-matter monopoly. The result is an administrative system that ensures that both the public and private industry remain apprised of the most crucial developments in emerging sciences and technology, much as the Framers of the U.S. Constitution originally envisioned.

Nevertheless, conflicts still arise. In cases of litigation, the U.S. federal courts may become embroiled in duly technical arguments that involve testimony from industry experts whose focused knowledge far exceeds that of judges and jury alike. These laypersons, presented with a dizzying amount of technical background evidence, may then be asked to use the newfound information as a basis for decisions of fact or law.

That, of course, is precisely the aim of judicial review. Having exhausted all specialized administrative measures, concerned stakeholders may yet rely on the courts to apply a uniform constitutional standard that is informed by judicial expertise in resolving conflicts of all kinds as a matter of law. This standard of judicial review thus promotes surety and assures confidence in subsequent proceedings.

III. Subject-Matter Complexity & Progress in Other Administrative Realms

The general framework detailed in Part II is far from unique to the realm of patent law. Federal agencies responsible for regulating extremely complex activities as diverse as international trade (International Trade Commission, or ITC), environmental management (U.S. Environmental Protection Agency, or EPA), and immigration (U.S. Immigration & Customs Enforcement, or ICE) are all subject to the Administrative Procedure Act, their own governing statutes, and, ultimately, the courts.
If the current U.S. patent system cannot reasonably promote progress because of protracted litigation or judicial ineptitude, what precisely does that say about the viability of other federal administrative agencies’ operations? The ITC facilities intricate negotiations and fosters fruitful relationships between economic stakeholders in the United States and hundreds of foreign nations. The EPA promulgates sweeping regulations in hopes of preserving endangered species, conserving dwindling natural resources, and protecting citizens against the dire risks of climate change. ICE balances extraordinarily divisive policies in hopes of promoting international relations while ensuring domestic security. Many would argue that these activities constitute “progress.”

Moreover, the U.S. courts do not seem particularly bothered by the prospect of continuing to hear litigation involving the ITC, EPA, or ICE that cannot be resolved in their own specialized administrative settings. Judges rarely bemoan their lack of expertise in matters like global economic infrastructure, climate change mitigation, or multinational humanitarian crises. They simply review the expert evidence presented to them, conduct clarifying inquiries as necessary, and make decisions in their own capacity as practiced legal arbiters. The claim that human ingenuity has surpassed the existing domestic framework for patent law merely belies a lack of confidence in the courts’ ability to discern matters of policy from those of fact or law and suggests that any federal administrative agency boasting relative subject-matter expertise could just as soon be resigned to the gallows. The proposal of razing the U.S. patent system is wholly untenable. There is, however, another solution.

IV. Current Realms of Contention in Patent Law & The Congressional Solution

Conternation about the state of patent law in the United States overwhelming revolves around policy—not factual or legal—matters. The scope of patentable subject matter, rising antitrust concerns in the pharmaceutical industry, and other hot-button intellectual property issues all persist at the forefront of national discourse because of Congress’ continual failure to enact meaningful clarifying legislation in those areas. Loath to circumvent the legislative process, the courts must then delicately sidestep matters of policy in decisions involving genetics (In re Roslin Institute; Myriad), artificial intelligence (Inventing AI), and a host of other innovative sectors that beg for Congressional input. These self-preserving practices collectively muddle the field of patent law, discouraging innovation in all but the most “familiar” technical arenas.

Judicial review exists to interpret questions of law that arise during the course of administrative proceedings, not to excuse Congress for dereliction of its own lawmaking duties. Instead of ousting expert administrators or the judiciary from the dominion of patent law, reformists should petition their Congress to satisfy its constitutional mandate and enact meaningful legislation in proven areas of legal uncertainty.

V. Conclusion

In 1958, Fritz Machlup argued that “it would be irresponsible, on the basis of our present knowledge, to recommend abolishing [the U.S. patent system].” That advice rings equally true today. Domestic patent law is the result of a long history in which the USPTO and the courts have habitually exercised diligence in remaining apprised of technically intensive and controversial subject matter. Congress, meanwhile has paled at every opportunity to resolve
questions of policy within its gamut. It is Congress—not the legal framework it has left adrift—that is to blame for the current listlessness of the domestic patent system.