

## CERTIORARI, UNIVERSALITY, AND A PATENT PUZZLE

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*The most important determinant of a case's chances for Supreme Court review is a circuit split: If two courts of appeals have decided the same issue differently, review is substantially more likely. But practically every appeal in a patent case makes its way to a single court—the Court of Appeals for the Federal Circuit. How, then, does the Supreme Court decide whether to grant certiorari in a patent case?*

*The petitions for certiorari in the Court's patent docket suggest an answer: The Supreme Court looks for splits anyway. These splits, however, are of a different sort. Rather than consider whether two courts of appeals have decided the same issue differently, the Court looks to whether two fields of law conflict over the application of the same transsubstantive doctrine. Such "field splits" are unusual candidates for Supreme Court attention. After all, the Court's interest in circuit splits is motivated by a desire for geographic uniformity in federal law. But field splits, unlike circuit splits, do not give rise to forum shopping concerns, do not undermine the predictability of the law, nor otherwise implicate the legal values that counsel in favor of uniformity. Instead, the Supreme Court's attention to field splits may suggest that legal universality—consistency across substantive fields of law—is an important (but unstated) priority in certiorari decisionmaking.*

*The exercise of this universality interest through certiorari decisions in patent cases has several consequences for the Supreme Court's agenda. The Court must better explain why field splits merit review, and we must better understand how to distinguish those field splits that implicate the Court's universality-related concerns from those that do not.*

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## INTRODUCTION

In its 2016 Term, the Supreme Court dedicated nearly ten percent of its docket to patent cases.<sup>1</sup> The Court's decision to grant review in each of these cases—as well as almost every other patent case on its docket since 1982—presents a puzzle. This is because the most important determinant of a

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1. The Supreme Court decided six patent cases—*Sandoz Inc. v. Amgen Inc.*, 137 S. Ct. 1664 (2017); *Impression Prods., Inc. v. Lexmark Int'l, Inc.*, 137 S. Ct. 1523 (2017); *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017); *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954 (2017); *Life Techs. Corp. v. Promega Corp.*, 137 S. Ct. 734 (2017); *Samsung Elecs. Co. v. Apple Inc.*, 137 S. Ct. 429 (2016)—out of a total of sixty-two opinions released after argument. Kedar S. Bhatia, *Stat Pack for October Term 2016*, SCOTUSBLOG 1 (June 28, 2017), [http://www.scotusblog.com/wp-content/uploads/2017/06/SB\\_Stat\\_Pack\\_2017.06.28.pdf](http://www.scotusblog.com/wp-content/uploads/2017/06/SB_Stat_Pack_2017.06.28.pdf) [<https://perma.cc/9Q8X-MYMR>].

case's chance of getting on the Supreme Court's docket is a circuit split: When two appellate courts have decided the same issue in conflicting ways, the chances of Supreme Court review jump significantly.<sup>2</sup> But practically every appeal in a patent case makes its way to the United States Court of Appeals for the Federal Circuit.<sup>3</sup> This is by design: In 1982, Congress reformed the structure of patent appeals to provide uniform and expert decisionmaking in patent litigation.<sup>4</sup> This unusual appellate structure complicates the Supreme Court's process for setting its agenda. Because the Federal Circuit is the sole arbiter of patent appeals, there is no possibility of a circuit split.

How, then, does the Supreme Court decide whether to grant certiorari to review a patent case? Despite the apparent importance of the Supreme Court's docket management systems,<sup>5</sup> as well as the recent rapid rise in patent cases on the Supreme Court's docket,<sup>6</sup> the Court's agenda-setting process for patent cases has received only occasional attention.<sup>7</sup>

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2. E.g., H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 246 (1991) ("Without a doubt, the single most important generalizable factor in assessing certworthiness is the existence of a conflict or 'split' in the circuits."); Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1631–32 (2008) ("[T]he presence of a conflict remains by far the most important criteria in the Court's case selection . . ."); see also *infra* notes 69–84 and accompanying text.

3. See 28 U.S.C. § 1295(a)(1) (2012) ("The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction[ ] of an appeal from a final decision of a district court of the United States . . . in any civil action arising under . . . any Act of Congress relating to patents . . ."). The Federal Circuit also hears appeals from the Court of Federal Claims, the Court of International Trade, the International Trade Commission, and the Merit Systems Protection Board, among others. *Id.* § 1295(a)(2)–(14). But, as a practical matter, patent appeals constitute a significant majority of its docket. See U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, APPEALS FILED, BY CATEGORY FY 2016 (2016), [http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/FY16\\_Caseload\\_by\\_Category.pdf](http://www.cafc.uscourts.gov/sites/default/files/the-court/statistics/FY16_Caseload_by_Category.pdf) [<https://perma.cc/552Z-J535>].

4. See H.R. REP. NO. 97-312, at 23 (1981); S. REP. NO. 97-275, at 5–6 (1981).

5. See *infra* notes 58–61 and accompanying text.

6. E.g., Timothy R. Holbrook, *Explaining the Supreme Court's Interest in Patent Law*, 3 IP THEORY 62, 62–63 (2013) ("Starting in around 2000, the Supreme Court became active, if not even hyperactive, in patent law."); see also Lawrence Hurley, *Divided U.S. Supreme Court Turns to Less Sensitive IP Cases*, REUTERS (Sept. 21, 2016, 1:10 AM), <https://www.reuters.com/article/us-usa-court-cases/divided-u-s-supreme-court-turns-to-less-sensitive-ip-cases-idUSKC N11R0D0> [<https://perma.cc/6UDB-UVNQ>] ("[The Supreme Court, in its 2016 Term,] show[ed] a keen interest in more technical cases . . . such as disputes over intellectual property.").

7. In addition to the works described *infra* at notes 8–9 and accompanying text, see, e.g., Rebecca S. Eisenberg, *The Supreme Court and the Federal Circuit: Visitation and Custody of Patent Law*, 106 MICH. L. REV. FIRST IMPRESSIONS 28, 29–30 (2007), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2206&context=articles> (on file with the *Michigan Law Review*), which outlines five categories of Supreme Court patent cases, and Gary M. Hoffman & Robert L. Kinder, *Supreme Court Review of Federal Circuit Patent Cases: Placing the Recent Scrutiny in Context and Determining if It Will Continue*, 20 DEPAUL J. ART, TECH. & INTEL. PROP. L. 227, 241 (2010).

The Supreme Court's patent-related certiorari decisions seem still to be strongly influenced by the existence of a split. These splits, however, are of a different sort. Rather than consider whether two courts of appeals have decided the same issue differently, the Supreme Court appears to consider, at least in part, whether two fields of law apply the same transsubstantive doctrine differently. If the Supreme Court perceives patent law and copyright law to apply different standards for, say, the defense of laches, then the Court seems more likely to take the case. Other scholars have observed other variables that may portend the Supreme Court's interest in granting certiorari to review a patent case. John Duffy, for example, has examined the solicitor general's influence over the Supreme Court's certiorari decisions in patent cases.<sup>8</sup> Timothy Holbrook has likewise described a range of patent-specific and patent-agnostic explanations for the Court's interest in patent law.<sup>9</sup> My study of each petition for certiorari in the Supreme Court's patent docket from its 1982 Term through its 2016 Term builds from (and expands upon) this existing work. The new cue for certiorari that I have identified in this Article—the *field split*—is a significant, complementary explanation for the Court's behavior in patent cases.<sup>10</sup>

The Supreme Court's interest in resolving such field splits—conflicts between substantive applications of (potentially) transsubstantive doctrines—merits further scrutiny. After all, the Court's attention to circuit splits is usually justified by its preference for geographic uniformity in federal law. But the usual uniformity-related rationales for reviewing circuit splits are mismatched to field splits. The legitimacy of the federal law may be at stake when the meaning of statutes varies state-by-state,<sup>11</sup> but such stakes are not obvious when willfulness means something different in patent law than it does under the Fair Credit Reporting Act.<sup>12</sup> Field splits likewise do not give rise to forum shopping concerns, nor do they impose any special burden on multistate actors.<sup>13</sup>

Why, then, does the Court bother to take these cases—especially when space on the docket is at a premium?<sup>14</sup> The answer must lie outside the usual

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8. John F. Duffy, *The Federal Circuit in the Shadow of the Solicitor General*, 78 GEO. WASH. L. REV. 518, 529–38 (2010) (describing the solicitor general's influence over the certiorari process in patent cases).

9. Holbrook, *supra* note 6, at 65–77.

10. For more on the “cue theory” of certiorari, see *infra* notes 119, 284 and accompanying text.

11. See *infra* notes 79–81 and accompanying text; see also *Nichols v. United States*, 136 S. Ct. 1113, 1117 (2016). But see *Frost*, *supra* note 2, at 1596–97 (“[O]ur legal system accepts unequal treatment of similarly-situated individuals as a matter of course.”).

12. See *Petition for a Writ of Certiorari at 31, Stryker Corp. v. Zimmer, Inc.*, 136 S. Ct. 356 (2015) (No. 14-1520) (mem.) (granting certiorari), 2015 WL 3898662 [hereinafter *Stryker Petition for Writ of Certiorari*].

13. See *Frost*, *supra* note 2, at 1596 (summarizing theoretical justifications for uniformity).

14. See Kenneth W. Starr, Essay, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1385 (2006) (“The Court's docket is a scarce, indeed precious national resource.”).

explanations for the Court's certiorari decisions: Neither a general regard for uniformity nor these cases' substantive importance to core patent doctrine explains the Court's interest.<sup>15</sup> One possibility is that a process defect—something about the way the Court decides which cases to hear—leads it to err when making certiorari decisions in patent cases. That possibility, though potentially intriguing, quickly proves unpersuasive.<sup>16</sup>

The better hypothesis is that the Supreme Court values legal *universality*—general consistency across substantive fields of law—in addition to geographic uniformity. Three trails of evidence lead to this conclusion. First, this hypothesis comports with the Court's general trend for disciplining “patent exceptionalism.”<sup>17</sup> Indeed, the Court's apparent interest in universality expands this trend's ambit: Where other scholars have identified the Court's skepticism for patent exceptionalism in its merits decisions, a certiorari-centered model explains a broader set of the Court's decisions. Second, the universality hypothesis resonates with the Court's decisions beyond its patent docket. Scholars have noted the Supreme Court's concern for exceptionalism across doctrinal areas, including foreign relations, health care, immigration, labor, and tax.<sup>18</sup> Indeed, the Court has taken rules developed in

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15. See Paul R. Gugliuzza, *How Much Has the Supreme Court Changed Patent Law?*, 16 CHI.-KENT J. INTELL. PROP. 330, 331 (2017) (“[T]he Supreme Court's recent decisions, though substantial in number, have rarely involved the fundamental legal doctrines that directly ensure the inventiveness of patents and regulate their scope.”); see also Dan Epps & Ian Samuel, *In Recess #4: Stone Soup*, FIRST MONDAYS 56:45–57:30 (Sept. 11, 2017), <http://www.firstmondays.fm/episodes/2017/9/11/in-recess-4-stone-soup> [https://perma.cc/VE39-TRQG] (interviewing William Jay, who explains that the Supreme Court's recent patent cases do not present questions of “hardcore patent law” but rather focus on questions of “procedure,” “venue,” and “statutory interpretation”).

16. See *infra* Section IV.B.

17. See, e.g., Robin Feldman, *Ending Patent Exceptionalism and Structuring the Rule of Reason: The Supreme Court Opens the Door for Both*, 15 MINN. J.L. SCI. & TECH. 61 (2014); Peter Lee, *The Supreme Assimilation of Patent Law*, 114 MICH. L. REV. 1413, 1453–61 (2016); Christopher J. Walker, *Chevron Deference and Patent Exceptionalism*, 65 DUKE L.J. ONLINE 149 (2016), [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1017&context=dj\\_online](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1017&context=dj_online) [https://perma.cc/5W59-EXAR]; see also Paul R. Gugliuzza, *The Federal Circuit as a Federal Court*, 54 WM. & MARY L. REV. 1791, 1817–18 (2013). *But cf.* James Donald Smith, Foreword, *Patent Exceptionalism with Presidential Advice and Consent*, 65 DUKE L.J. 1551, 1552–53 (2016) (suggesting a historical basis for patent exceptionalism).

18. See, respectively, e.g., Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1935 (2015) (foreign relations); Abigail R. Moncrieff, Commentary, *Understanding the Failure of Health-Care Exceptionalism in the Supreme Court's Obamacare Decision*, 142 CHEST 559 (2012) (health care); Kevin R. Johnson, *Immigration in the Supreme Court, 2009–13: A New Era of Immigration Law Unexceptionalism*, 68 OKLA. L. REV. 57, 111 (2015) (immigration); Shruti Rana, *Chevron Without the Courts?: The Supreme Court's Recent Chevron Jurisprudence Through an Immigration Lens*, 26 GEO. IMMIGR. L.J. 313, 356 (2012) (same); Cynthia Estlund, *Are Unions a Constitutional Anomaly?*, 114 MICH. L. REV. 169 (2015) (labor); Paul L. Caron, *Tax Myopia, or Mamas Don't Let Your Babies Grow Up to be Tax Lawyers*, 13 VA. TAX REV. 517 (1994) (tax); and Kristin E. Hickman, *Response, Agency-Specific Precedents: Rational Ignorance or Deliberate Strategy?*, 89 TEX. L. REV. SEE ALSO 89, 108–10 (2010) (same).

patent law and applied them in other doctrinal contexts.<sup>19</sup> This explanation thus situates the Court's patent decisions within a more general jurisprudential framework. Finally, a universality-centered explanation correlates with changes on the Court that might explain the emergence of new priorities, namely, the appointment of new justices.

To the extent that the Court's apparent practice identifies such an institutional interest in universality, several implications may follow.

First, the Court's willingness to review a field split alone is itself notable. It suggests the sheer strength of that institutional interest. The Court's stringent standard for certiorari is sometimes satisfied by a decision to craft an exceptional legal rule—suggesting that, at least in patent cases, the Court's concern for legal universality is at least as important as other inputs to its certiorari decisionmaking process, including geographic uniformity and the views of the solicitor general. Indeed, the Court has even granted certiorari over the federal government's objections to resolve a field split.<sup>20</sup>

Second, though the Court's decisions always have the effect of imposing a uniform legal rule (a rule that is constant across jurisdictions), the Court does not always impose a universal legal rule (a rule that is constant across fields of law). Rather, the Court will sometimes preserve varying standards for, say, willful conduct. When, then, does the Court prefer universality? A closer examination suggests that the Court's concern peaks where it perceives a possible threat to the judiciary's neutrality and legitimacy. The Court seems to prefer neutral rules that deny judges the ability to favor certain substantive regimes and to thereby make political choices.<sup>21</sup> Hence, the Court's regard for universality is more likely to give way, on the merits, in the face of a doctrine-specific statute or other, preexisting doctrinal variation.

Third, universality plays no obvious part in the Court's certiorari decisions beyond its patent docket.<sup>22</sup> Indeed, the Court's apparent disinterest in reviewing field splits beyond patent law may highlight some important weaknesses in this certiorari standard. Unlike geographic uniformity, the Court's apparent interest in legal universality is not connected to any congressional grant of discretionary jurisdiction. Moreover, these universality-implicating patent cases may both fail to implicate the primary doctrines that regulate a patent's scope and distract from those important cases that do. Perhaps the Supreme Court sees its interest in universality—articulated only, if at all, in its merits decisions—as a sufficient basis for granting discretionary review. But that is a stark departure from past certiorari practice,

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19. See *infra* note 269 and accompanying text.

20. See *infra* notes 301–303 and accompanying text.

21. David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. REV. 1191, 1229–30 (2014); see Martin Shapiro, *The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles*, 31 GEO. WASH. L. REV. 587, 594–95 (1963); cf. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179–80 (1989).

22. See *infra* notes 317–319 and accompanying text.

one which merits further explanation, especially in light of its apparently narrow, patent-centered scope.

This study thus helps to illuminate the bundle of interests underlying the Court's concern for universality—namely, neutrality and legitimacy (as well as, perhaps, efficiency). This study also helps practitioners—petitioners and respondents alike—pinpoint petitions that are more likely to succeed (or fail). It also helps the courts of appeals, most notably the Federal Circuit, decide cases in a manner consistent with the Supreme Court's apparent (if unstated) values. And it suggests that the Supreme Court clarify the bases for certiorari in its patent docket.

This Article proceeds in five Parts. First, I set out an introductory example—*Samsung v. Apple*—that both highlights the Court's apparent interest in field splits and illustrates how the uncertain contours of this interest may affect the Court's patent-related decisions. Second, I expand from the opening example to describe the Article's titular puzzle in more detail. In particular, I highlight the discord between the institutional values that typically inform the Supreme Court's certiorari decisions and a set of patent cases that has come to occupy a prominent place on the Court's docket. Third, I identify a feature I call a field split—an alleged conflict among fields of law over the application of the same transsubstantive doctrine—that seems common to these cases. In doing so, I describe three general categories of field splits: splits across related fields, splits across unrelated fields, and outliers. Fourth, I consider why the field split may explain so many of the Court's certiorari decisions. One possibility—easily dismissed—is that the Court conflates field splits with circuit splits and thereby grants certiorari on a mistaken premise. Another, more persuasive possibility is that the Court's preference to hear such cases connects to an unstated institutional concern for legal universality. Finally, drawing on the taxonomy of field splits described above, I explore some implications of such an institutional concern for universality.

#### I. AN INTRODUCTORY EXAMPLE: SAMSUNG V. APPLE

In 2016, the Supreme Court issued a frustratingly vague decision in *Samsung v. Apple*, a case about damages for design patent infringement.<sup>23</sup> Commentators complained that the Court's "opinion tells us nothing at all about the correct answer to this case, because it offers no guidance . . . . [T]he opinion goes out of its way to emphasize that the justices intend to offer no direction on how to address or resolve the [case's] definitional problem."<sup>24</sup> Such criticism begs scrutiny: How did the Court issue such an open-ended opinion?

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23. *Samsung Elecs. Co. v. Apple Inc.*, 137 S. Ct. 429 (2016).

24. Ronald Mann, *Opinion Analysis: Justices Tread Narrow Path in Rejecting \$400 Million Award for Samsung's Infringement of Apple's Cellphone Design Patents*, SCOTUSBLOG (Dec. 6, 2016, 4:09 PM), <http://www.scotusblog.com/2016/12/opinion-analysis-justices-tread-narrow-path-in-rejecting-400-million-award-for-samsungs-infringement-of-apples-cellphone-design-patents/> [https://perma.cc/KP73-LW5F]. For similar criticism, see Gugliuzza, *supra* note 15, at

It helps to begin with the petition for a writ of certiorari, which is the primary mechanism by which almost any case earns a place on the Supreme Court's docket. Though the Court once had mandatory jurisdiction over every case properly before it, Congress has slowly given the Court increasing discretion—in the form of the writ of certiorari—to choose the cases it will decide.<sup>25</sup> The Judiciary Act of 1891, for example, made the decisions of the courts of appeals final in limited classes of cases, including those arising under the federal patent laws.<sup>26</sup> The Supreme Court could, however, review such decisions if it granted a writ of certiorari to bring the case within its discretionary docket.<sup>27</sup> Congress has since expanded this discretion to almost encompass the Court's entire caseload.<sup>28</sup>

Samsung's petition asked the Supreme Court to decide two questions. First, it asked the Court to decide the extent to which certain aspects of a device—such as the distinctively rounded corners of an iPhone—may be subject to design patent protection.<sup>29</sup> Second, Samsung asked the Court to decide the proper measure of damages for design patent infringement.<sup>30</sup>

In the petition's first question, Samsung contrasted the design patent statute, which limits protection to "ornamental" features, with the Federal Circuit's decision, which, in Samsung's view, enlarged the statute's scope "to include conceptual and functional features," such as soft corners, "that are beyond legitimate design-patent protection."<sup>31</sup> Samsung's contention—that it should be free to manufacture a device in the shape of a rounded rectangle without facing infringement liability—essentially asked the Court to clarify the boundaries of what, exactly, may be protected by a design patent.

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345 ("[T]he Court refused even to offer any legal guidance to the lower courts about how to determine what, precisely, is the relevant article." (emphasis omitted)); Adam Liptak & Vindu Goel, *Supreme Court Gives Samsung a Reprieve in Apple Patent Case*, N.Y. TIMES (Dec. 6, 2016), <https://www.nytimes.com/2016/12/06/technology/samsung-apple-smartphone-patent-supreme-court.html> (on file with the *Michigan Law Review*) (The Supreme Court did not "decisively resolv[e] the case," did not "offer . . . specific guidance," but rather, "punted." (quoting interview with Professor Mark A. Lemley, Director of the Stanford Program in Law, Science, and Technology)); and Melissa J. Sachs, *Lawyers Weigh in on Design Patent Defeat in Apple/Samsung Smartphone Case*, WESTLAW J. COMPUTER & INTERNET, Dec. 16, 2016, at \*1 (similar).

25. See Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 7–14 (2011) (detailing "a brief history of certiorari").

26. Act of Mar. 3, 1891, ch. 517, § 6, 26 Stat. 828.

27. See Watts, *supra* note 25, at 11.

28. See STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE § 2.1, at 76 (10th ed. 2013). I describe the Court's exercise of this discretion in more detail *infra*, in Section II.A. One notable exception is the Supreme Court's jurisdiction over direct appeals from three-judge district courts. 28 U.S.C. § 1253 (2012).

29. Petition for a Writ of Certiorari at i, *Samsung Elecs. Co. v. Apple Inc.*, 136 S. Ct. 1453 (2016) (mem.) (granting certiorari) (No. 15-777), 2015 WL 10013702 [hereinafter *Samsung Petition for Writ of Certiorari*].

30. *Id.*

31. *Id.* at 21.



In the petition's second question, Samsung challenged the \$399 million damages award, which accounted for its entire profits from the infringing devices.<sup>32</sup> Samsung asserted that this damages award "flies in the face of well-settled tort principles" applied in various fields, such as "securities law, employment law, RICO, and the Violence Against Women Act."<sup>33</sup> In particular, Samsung contended that the Federal Circuit had erred by awarding Apple *all* of Samsung's profits, thereby contravening the "cardinal principle" of damages law that compensation be limited to the injury actually caused by the violation.<sup>34</sup> This "conflic[t]" among fields of law on the application of "background principles of causation and equity" counseled in favor of certiorari.<sup>35</sup> Stated simply, Samsung asserted that the apparent split between patent law, on the one hand, and securities law and employment law (among others), on the other, meant that the Supreme Court should grant the petition for certiorari.

The Supreme Court agreed to review the case—but limited its certiorari grant to the damages-related question.<sup>36</sup> In its opening merits brief, Samsung contended that damages should be limited to the harm caused by its infringement.<sup>37</sup> It reiterated its argument that the Federal Circuit's approach—which awarded Apple damages equaling Samsung's total profits on the infringing devices—marked a "wholesale departure from traditional principles of causation and equity."<sup>38</sup> Samsung argued that the causation rule, which the Federal Circuit had rejected, was part of a "universal regime" that applied in a variety of contexts: The rule not only applied to cases arising under securities regulations, employment law, and assorted criminal statutes, as Samsung had alleged in its petition, it also "universally govern[ed] . . . elsewhere in intellectual property law."<sup>39</sup> Hence, in Samsung's view, it should have been held liable for only those losses that Apple could trace to Samsung's infringement.

Apple countered with an argument it made at the certiorari stage. It contended that the apparent inconsistency between design patents and these other areas of law was illusory. There was, in Apple's view, no "conflict[ ]" on the causation principle of damages because the design patent context was easily distinguished<sup>40</sup>: The damages statute at issue, 35 U.S.C. § 289, "create[d] a design patent infringement remedy that differed from" that which

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32. *Samsung Elecs. v. Apple Inc.*, 137 S. Ct. 429, 433–34 (2016).

33. *Samsung* Petition for Writ of Certiorari, *supra* note 29, at 32–33 (citations omitted).

34. *Id.* at 33 (quoting *Carey v. Phipus*, 435 U.S. 247, 254–55 (1978)).

35. *Id.* at 32–33.

36. *Samsung*, 136 S. Ct. 1453 ("Petition for writ of certiorari to the United States Court of Appeals for the Federal Circuit granted limited to Question 2 presented by the petition.").

37. Brief for Petitioners at 1–2, *Samsung*, 137 S. Ct. 429 (No. 15-777), 2016 WL 6599922 [hereinafter *Samsung* Brief for Petitioners].

38. *Id.* at 35.

39. *Id.* at 37–38.

40. Brief in Opposition at 32, *Samsung*, 136 S. Ct. 1453 (No. 15-777), 2016 WL 6599923 [hereinafter *Samsung* Brief in Opposition].

background causation principles might otherwise imply.<sup>41</sup> The federal government agreed. In its amicus brief on the merits, the solicitor general explained that “[t]he whole point” of § 289 “is to provide a measure of recovery different from, and in many cases more expansive than, the award that traditional causation principles would produce.”<sup>42</sup>

Samsung relented: At oral argument, Samsung “abandoned [the] theory” that damages for design patent infringement ought to be limited to the profit caused by and attributable to its infringement.<sup>43</sup> Though it is not entirely clear why Samsung waived this argument at such a late stage, this strategic decision seems to have affected the Court’s ultimate decision in the case. Without the causation rule to steer its analysis, the Court’s opinion appears rudderless in its search for a limiting principle on damages.<sup>44</sup> To be sure, the Court explained that § 289 awards the patent holder the “total profit” from the infringing “article of manufacture.”<sup>45</sup> And the Court rejected the Federal Circuit’s rule that the “end product sold to the consumer” is the only relevant article of manufacture for these purposes, explaining that the statutory phrase may, in some circumstances, also refer to “a component of the end product.”<sup>46</sup> But it went no further. The Court expressly declined “to set out a test for identifying the relevant article of manufacture.”<sup>47</sup> When is the relevant “article of manufacture” the product sold? When is it an internal component? How should a court apportion the profits when a component is at issue? These questions, critical to the dispute between Apple and Samsung, are unanswered. The causation rule offered one possible resolution to these queries: By applying a general causation-in-fact principle, the

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41. Brief for Respondent at 33, *Samsung*, 137 S. Ct. 429 (No. 15-777), 2016 WL 4073686 [hereinafter *Samsung* Brief for Respondent]; *Samsung* Brief in Opposition, *supra* note 40, at 33 (“[R]emedies governed by different statutory provisions or the common law cannot justify disregarding § 289’s plain language and clear legislative history.” (emphasis omitted)); *see also* Brief for the United States as Amicus Curiae Supporting Neither Party at 26–27, *Samsung*, 137 S. Ct. 429 (No. 15-777), 2016 WL 3194218 [hereinafter *Samsung* Amicus Brief for the United States] (“Congress deviated from that general rule of causation because it was concerned that applying that principle to design patents would often under-compensate patentees.”).

42. *Samsung* Amicus Brief for the United States, *supra* note 41, at 15.

43. *Samsung*, 137 S. Ct. at 434 n.2 (citing Transcript of Oral Argument at 6 (No. 15-777)).

44. To be sure, it is not at all obvious that Samsung’s strategic decision is the reason why the Court declined to endorse the causation rule. Even if Samsung had not abandoned this argument, the Court might have been persuaded by the arguments advanced by Apple and the solicitor general. My point, elaborated in greater detail *infra*, is that the simple choice that the Court thought it had—between the general causation rule, on the one hand, and the Federal Circuit’s special rule, on the other—was illusory. This unexpected complication seems to have affected the Court’s ability to offer useful guidance on the question. This is true no matter whether the complication arose because Samsung abandoned the argument or, as Apple argued, because § 289 supersedes the causation rule. *See infra* notes 47–49 and accompanying text, and Section III.B.2.

45. *Samsung*, 137 U.S. at 434–35.

46. *Id.* at 434–36.

47. *Id.* at 436.

Court might have limited damages to those marginal profits directly attributable to Samsung's infringement.<sup>48</sup> But absent this option (grounded, in Samsung's earlier view, in background principles of damages and equity) the Court struggled to guide the Federal Circuit's analysis on remand. The Court acknowledged that the solicitor general proposed a different test (without describing it), but it declined to adopt any alternative "in the absence of adequate briefing by the parties."<sup>49</sup>

This example illuminates several features of the Supreme Court's recent approach to its patent docket. For one, the views of the solicitor general (an especially important amicus, particularly at the certiorari stage) cannot explain the Court's decision to grant the petition. Though the Supreme Court has often sought the solicitor general's opinion about potentially important patent petitions before granting certiorari,<sup>50</sup> it declined to do so in this case. Hence, to the extent that the solicitor general's views signal an issue's importance to substantive patent doctrine—one criterion relevant to the Supreme Court's decision to grant certiorari—this petition for a writ of certiorari seems (on this metric) to fall short of the Supreme Court's usual bar.<sup>51</sup> Moreover, because of the Federal Circuit's national scope, the petition does not implicate the Supreme Court's oft-cited concerns for uniformity in federal law. Along these two critical axes, there is little that obviously distinguishes the petition as certworthy.

But one other possibility may seem intriguing. Samsung's petition for certiorari asserted that the Federal Circuit created a rift between damages rules for design patent cases and the remedies principles applied elsewhere in federal law—in securities law, in employment law, and in criminal law.<sup>52</sup> This distinctive feature of the petition offers one possible ground for the Court's decision to grant certiorari. The Court's attention to such a rift

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48. Justice Kennedy suggested at oral argument that a "sensible" rule would apportion damages according to a market study of the extent to which the infringing aspect of the design affected consumer choice. Transcript of Oral Argument at 4, *Samsung*, 137 S. Ct. 429 (No. 15-777); see RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 26 (AM. LAW INST. 2010) ("Conduct is a factual cause of harm when the harm would not have occurred absent the conduct."); cf. *Lucent Techs., Inc. v. Microsoft Corp.*, 837 F. Supp. 2d 1107, 1112–13 (S.D. Cal. 2011) (applying a similar rule in the context of an allegedly infringing feature of Microsoft's Outlook software).

49. *Samsung*, 137 S. Ct. at 436. *But see* Mann, *supra* note 24 ("[I]t may come as a surprise to Apple and Samsung that their briefs weren't 'adequate' to shed more light on the correct answer to their dispute.").

50. Duffy, *supra* note 8, at 529–30.

51. See David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 281 (2009) (explaining that the Court will often call for the views of the Solicitor General (CVSGs) in cases that "involve complex regulatory and statutory schemes" to determine whether the issues presented are "of sufficient importance to merit review"); see also *infra* notes 105–112 and accompanying text.

52. *Samsung* Petition for Writ of Certiorari, *supra* note 29, at 32–33 (citations omitted).

might be explained, for example, by an interest in transsubstantivity or, more generally, universality.<sup>53</sup>

Moreover, the Court's ultimate decision in the case may reinforce the conclusion that its decision to grant certiorari was motivated, at least in part, by such legal universality concerns: If the Court granted certiorari to resolve the rift between damages principles for design patent infringement and other areas of law, then its belated discovery (aided by Samsung's last-minute concession) that the statute itself embodies a unique rule may have upset the Court's initial view of the case—leading, ultimately, to the open-ended opinion described earlier (and, perhaps, some regret over the decision to grant review).<sup>54</sup> The Court thought the case presented a choice between a general doctrine and the Federal Circuit's specialized rule, but, in the end, the case asked the Court to craft a unique, context-sensitive rule under § 289. The Court demurred on this more technical (and more difficult) question, noting a lack of adequate briefing.<sup>55</sup>

This example thus suggests an institutional value that is not typically associated with the Supreme Court's certiorari practice: Neither uniformity concerns, nor the attention of the solicitor general, nor the fundamental importance of the case explains the Court's interest. It may ask too much to extrapolate about the Court's general priorities from this one example. Indeed, the universality hypothesis seems, at first blush, incomplete: If that theory explains the Supreme Court's decision to review the damages-related question presented in Samsung's petition, why did the Court decline to hear Samsung's first (and more foundational) question? After all, Samsung contended that the Federal Circuit's ruling regarding the proper scope of design

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53. I prefer the term *universality* (which may date as far back as to Aristotle) to represent the breadth of the Court's interest. See Douglas Laycock, *The Triumph of Equity*, L. & CONTEMP. PROBS., Summer 1993, at 53, 71 (quoting ARISTOTLE, *Nicomachean Ethics* 1137b, in 2 THE COMPLETE WORKS OF ARISTOTLE 1729, 1796 (Jonathan Barnes ed. & W.D. Ross trans., 1984)); see also Lee, *supra* note 17, at 1418–21 (describing the “intellectual foundation of ‘legal universalism’”). The term *transsubstantivity*, for example, has historically applied to rules of procedure, see Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975), and that term has been used by recent scholars to refer to “process law”—a range of “[p]rocedural, administrative, and interpretative doctrine [that] regulate the legal processes of public administration and court-based litigation,” Marcus, *supra* note 21, at 1197. The scope of the Court's interest described here extends beyond process law to include remedies, principles, and definitions for states of mind, among others. Other scholars have referred to similar concepts by other terms, such as *generality*, see, e.g., *id.* at 1214; Frederick Schauer, *The Generality of Law*, 107 W. VA. L. REV. 217, 218–24 (2004) (describing the spectrum between “generality” and “particularism”), or *coherence*, see, e.g., Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493, 495–96 (1996) (book review) (describing “Langdellian legal theory” as emphasizing a system in which “law [is] systematic, its rules descending deductively from a small number of coherently interrelated fundamental concepts” (emphasis omitted)); see also J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105, 115–16 (1993); Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1406 (2005).

54. See *supra* notes 23–24 and accompanying text.

55. See *supra* note 49 and accompanying text.

patents likewise “create[d] tension with other areas of intellectual property law,” including trademark and copyright law.<sup>56</sup>

A more complete examination of the Supreme Court’s patent docket addresses both objections. A closer look at the complete range of the Court’s decisions to grant certiorari in patent cases since 1982 appears to corroborate the universality hypothesis drawn from *Samsung v. Apple*. Moreover, a more complete understanding of the nature and scope of the Court’s universality value—and hence, the sorts of field splits that are implicated—may help to resolve the open issue about Samsung’s first question.<sup>57</sup>

## II. CERTIORARI’S PATENT PUZZLE

### A. *Certiorari and Circuit Splits*

The Supreme Court has wide discretion, in the form of the writ of certiorari, to design its own docket. The Court’s exercise of this discretion is a matter of great practical consequence and scholarly interest. Justice Brennan, for example, wrote that case selection “is second to none in importance.”<sup>58</sup> The decision to take a case simultaneously mirrors society’s “everchanging concerns” and shapes the nation’s political, social, and economic agenda.<sup>59</sup> This is true not only for the Court’s high-profile cases but also for those cases that may be less politically charged. For example, the Court’s decision to hear *Samsung v. Apple*<sup>60</sup>—its first case about design patents in over a century—both reflects the growth in that intellectual property regime and affects the extent to which design patents may be an effective form of intellectual property protection in the future.<sup>61</sup>

The Supreme Court’s ability to choose its own cases is also a scholarly aid. Case selection decisions help to reveal institutional preferences: The

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56. *Samsung* Petition for a Writ of Certiorari, *supra* note 29, at 23.

57. See *infra* Section V.A and note 296.

58. William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 477 (1973).

59. *Id.* at 483; see Katerina Linos & Kimberly Twist, *The Supreme Court, the Media, and Public Opinion: Comparing Experimental Observational Methods*, 45 J. LEG. STUD. 223, 224 (2016) (“Court rulings can change national public opinion, even on controversial issues that have been extensively debated beforehand and on which Americans have relatively firm views.”). But see generally Frederick Schauer, *Foreword: The Court’s Agenda—And the Nation’s*, 120 HARV. L. REV. 4, 41 (2006) (“But when we look at the world as ordinary Americans see it, we begin to understand that even when the Supreme Court is at its most influential and most visible, the American people quite often have other things on their minds.”).

60. *Samsung Elecs., Co. v. Apple Inc.*, 137 S. Ct. 429 (2016).

61. See Stephen McJohn, *Top Tens in 2012: Patent, Trademark, Copyright and Trade Secret Cases*, 11 NW. J. TECH. & INTEL. PROP. 173, 183 (2013); Adam Liptak, *Supreme Court to Hear Samsung Appeal on Apple Patent Award*, N.Y. TIMES (Mar. 21, 2016), <https://www.nytimes.com/2016/03/22/technology/supreme-court-to-hear-samsung-appeal-on-apple-patent-award.html> (on file with the *Michigan Law Review*).

decision to grant or deny a petition is one expression of the Court's "subjective notions of what is important or appropriate for review."<sup>62</sup>

Notably, however, the Court's decisions to grant or deny a petition are only rarely accompanied by an opinion or statement explaining its action.<sup>63</sup> The Supreme Court's opinions on the merits of a case sometimes explain its decision to grant certiorari in the first instance—though such intermittent explanations offer no hope to litigants whose petitions were denied.

Outside the occasional statement in a merits opinion and the rare "certsent,"<sup>64</sup> the Court's only other articulation of its certiorari-related priorities is in Supreme Court Rule 10. That Rule offers three categories, which "although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

- (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
- (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
- (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.<sup>65</sup>

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62. Margaret Meriwether Cordray & Richard Cordray, *Setting the Social Agenda: Deciding to Review High-Profile Cases at the Supreme Court*, 57 U. KAN. L. REV. 313, 313, 318 (2009) [hereinafter Cordray & Cordray, *Setting the Social Agenda*] (quoting Eugene Gressman, *The National Court of Appeals: A Dissent*, 59 A.B.A. J. 253, 255 (1973)); see DORIS MARIE PROVINE, *CASE SELECTION IN THE UNITED STATES SUPREME COURT* 2 (1980) ("Case selection . . . provides a good indication of the decision-making priorities of the Supreme Court . . ."); Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 421–22 (2004) [hereinafter Cordray & Cordray, *The Philosophy of Certiorari*] ("[A] Justice's feel for when an issue is sufficiently important to merit plenary review is necessarily informed by his or her conception of the essential nature of the Supreme Court's responsibilit[ies] . . ." (quotation marks omitted)); see also Ryan C. Black & Ryan J. Owens, *Agenda Setting in the Supreme Court: The Collision of Policy and Jurisprudence*, 71 J. POL. 1062, 1073 (2009) ("Justices have nearly total discretion to decide which cases the Court will hear, meaning they have freedom to pursue their raw policy goals . . ."); cf. Bert I. Huang & Tejas N. Narechania, *Judicial Priorities*, 163 U. PA. L. REV. 1719, 1721 (2015) (observing courts' revealed preferences through their decisions whether to publish an opinion in a case).

63. See PROVINE, *supra* note 62, at 42.

64. See Alex Kozinski & James Burnham, *I Say Dissental, You Say Concurral*, 121 YALE L.J.F. 601, 605–606 (2012), [https://www.yalelawjournal.org/pdf/1071\\_8a9amhrm.pdf](https://www.yalelawjournal.org/pdf/1071_8a9amhrm.pdf) [<https://perma.cc/7EW9-BEMA>] (defining "certsent"—a dissent from the denial of certiorari).

65. SUP. CT. R. 10.

Though scholars have criticized Rule 10 for being “hopelessly indeterminate,” or even “intentionally . . . murky,” some themes can be sifted out of its criteria.<sup>66</sup>

First, Rule 10 indicates that the Court demands more than an incorrect decision before granting certiorari. It is not enough that the decision is wrong on the merits.<sup>67</sup> This aspect of the Court’s practice is reflected in Justice Brandeis’s oft-repeated quip that “it is more important that the applicable rule of law be settled than that it be settled right.”<sup>68</sup> The Court may decline to intervene, even where it suspects a decision or rule of law is incorrect, for the sake of finality or predictability (among other considerations). Hence, to clear the Supreme Court’s high bar for certiorari, a case must present some additional, distinctive feature.

The predominant such feature is, as Rule 10 suggests, the presence of a “conflict” among lower courts on the question presented. Several qualitative and quantitative studies have confirmed the importance of such splits to the Supreme Court’s certiorari decisionmaking process. For example, H.W. Perry, in his seminal work, concludes that “the single most important generalizable factor in assessing certworthiness is the existence of a conflict or ‘split’ in the circuits.”<sup>69</sup> The leading treatise on Supreme Court practice likewise notes that in the 1993 Term, “approximately 70 percent of the cases in which certiorari was granted presented a conflict.”<sup>70</sup> Several additional

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66. Respectively, Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court’s Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 790 (1984), and Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1723 (2000) (quoting PERRY, *supra* note 2, at 34). See also THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 154 (Kermit L. Hall et al. eds., 2d ed. 2005) (“The Justices have been intentionally vague as to what makes a case certworthy. Rule 10 of the Rules of the Supreme Court of the United States purports to offer criteria, but it is of little help.” (cleaned up)).

67. See *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1780 (2015) (Scalia, J., concurring in part and dissenting in part) (“[W]e are not, and for well over a century have not been, a court of error correction.”); Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705, 716 (2018) (noting the Court’s general “refusal to engage in error correction”); cf. Brief for the United States as Amicus Curiae at 8, *Ivy v. Morath*, 136 S. Ct. 2545 (2016) (mem.) (granting certiorari) (No. 15-486), 2016 WL 2937223 [hereinafter *Ivy* Amicus Brief for the United States] (arguing that the “case does not warrant [the Supreme] Court’s review,” notwithstanding the government’s belief that the Court of Appeals’ decision was incorrect, because that decision “is fact-dependent and does not conflict with any decision of this Court, another federal court of appeals, or a state court of last resort”).

68. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting); see also *Sheet Metal Workers, Int’l Ass’n v. Carter*, 450 U.S. 949, 952 (1981) (Rehnquist, J., dissenting from denial of certiorari).

69. PERRY, *supra* note 2, at 246; see PROVINE, *supra* note 62, at 39 (“[C]onflict ‘remains by far the most frequent ground for granting the writ.’” (quoting Felix Frankfurter & Henry M. Hart, Jr., *The Business of the Supreme Court at October Term 1933*, 48 HARV. L. REV. 238, 267 (1934))).

70. SHAPIRO ET AL., *supra* note 28, § 4.3, at 241.

empirical studies reinforce the conclusion that such splits dominate the Court's agenda.<sup>71</sup>

Not all alleged splits, however, are created equal. Rather, the Court's attention is typically focused on sharp divides among the courts of appeals on the same issue.<sup>72</sup> It is not enough, in the usual case, that two cases simply "conflict in principle" because similar terms have different meanings.<sup>73</sup> Purported splits that may in fact be resolved by distinctions in statutory language, or by their different factual or doctrinal contexts, are significantly less likely to be reviewed.<sup>74</sup> Hence, a petitioner alleging a circuit split must hurdle a high bar to demonstrate that her case satisfies Rule 10's standards.

The Court's focus on such clear divisions among the lower courts reflects one of the institution's core values: It is acutely attuned to geographic uniformity concerns in federal law. The Court's own opinions, explaining decisions to resolve "longstanding disagreement[s]" among the courts of appeals, expressly reflect its view that "it is important to have a uniform interpretation of federal law."<sup>75</sup> Individual justices have likewise commented that the Court's "principal responsibility under current practice . . . is to ensure the integrity and uniformity of federal law."<sup>76</sup> Stated simply, preserving

71. See, e.g., Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 415–16 (showing results for 1993–1995 in a study that focuses exclusively on petitions from the federal Courts of Appeals); S. Sidney Ulmer, *The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable*, 78 AM. POL. SCI. REV. 901, 910 (1984) ("[T]here is little doubt that the Supreme Court in its 1947–1976 terms has been significantly influenced in making certiorari decisions by factors of conflict. Moreover . . . conflict is far and away the most significant predictor of certiorari decisions for [the Vinson and Warren] Courts."); David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 981–82 (2007) (book review).

72. See, e.g., Petition for a Writ of Certiorari at i, *Hawkins v. Cmty. Bank of Raymore*, 135 S. Ct. 1492 (2015) (mem.) (No. 14-520) (granting certiorari), 2014 WL 5762869.

73. SHAPIRO ET AL., *supra* note 28, § 4.3, at 242; Ulmer, *supra* note 71, at 906; see also PERRY, *supra* note 2, at 128 (explaining that significant effort is dedicated to "trying to determine if there is indeed the conflict that the petition alleges").

74. Ulmer, *supra* note 71, at 906 (finding "no significant correlations between claimed conflict," as compared to genuine conflict, "and the Court's decisions on certiorari"). *But cf.* SHAPIRO ET AL., *supra* note 28, § 4.4, at 245 ("Justices may not always agree as to whether there is a 'true,' 'genuine,' or 'current' conflict.").

75. *Bullock v. BankChampaign, N.A.*, 569 U.S. 267, 273, 276 (2013). Other decisions reflecting the view that the Court's certiorari practice is driven, at least in part, by uniformity concerns include *Thompson v. Keohane*, 516 U.S. 99, 106 (1995); *Key v. Doyle*, 434 U.S. 59, 67–68 (1977); *Tidewater Oil Co v. United States*, 409 U.S. 151, 170 (1972); *Hanna v. Plumer*, 380 U.S. 460, 463 (1965); *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923); and *Lau Ow Bew v. United States*, 144 U.S. 47, 58 (1892); *Cf. City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015) ("[C]ertiorari jurisdiction exists to clarify the law . . .").

76. *Kansas v. Marsh*, 548 U.S. 163, 183 (2006) (Scalia, J., concurring). Chief Justice Roberts, for example, has said that the Court's "main job" is to ensure that "federal law is uniform across the country." *Supreme Court Chief Justice Roberts*, C-SPAN 18:05–18:25 (June 19, 2009), <https://www.c-span.org/video/?286078-1/supreme-court-chief-justice-roberts&start=1077> [<https://perma.cc/CNL3-PVJG>]. Likewise, Justice Kagan recently said that the Court "think[s] that . . . [citizens] are entitled to the same body of federal law as somebody who lives in another state." Chi.-Kent College of Law at Ill. Inst. of Tech., *A Conversation with Justice Elena*



uniformity in federal law has been an essential aspect of the Supreme Court's certiorari jurisdiction since its earliest applications.<sup>77</sup>

The Court's emphasis on geographic uniformity reflects a bundle of underlying concerns.<sup>78</sup> First, uniformity helps to ensure that the law treats

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*Kagan*, Oct. 16, 2017, *Chicago-Kent College of Law*, YouTube 23:50–24:05 (Oct. 19, 2017), [https://www.youtube.com/watch?time\\_continue=4&v=MWKA79-3vHA](https://www.youtube.com/watch?time_continue=4&v=MWKA79-3vHA) [<https://perma.cc/2GJW-DUU5>]. Justice White similarly wrote that the Court should focus on “provid[ing] some degree of coherence and uniformity in federal law.” Byron R. White, *The Work of the Supreme Court: A Nuts and Bolts Description*, 54 N.Y. ST. B.J. 346, 349 (1982). Justice O’Connor also expressed this view. See SANDRA DAY O’CONNOR, *THE MAJESTY OF THE LAW* 211 (Craig Joyce ed., 2003). Chief Justice Rehnquist, too. See William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 11–12 (1986).

77. See Robert L. Stern, Comment, *Denial of Certiorari Despite a Conflict*, 66 HARV. L. REV. 465, 465 (1953) (citing REYNOLDS ROBERTSON & FRANCIS R. KIRKAM, *JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES* § 322, at 629 (Richard F. Wolfson & Philip B. Kurland eds., Matthew Bender & Co. 1951) (1936); ROBERT L. STERN & EUGENE GRESSMAN, *SUPREME COURT PRACTICE* 101 (1st ed. 1950)); see also the cases cited *supra* note 75; cf. *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 347–48 (1816) (Story, J.) (“[The Supreme Court’s appellate jurisdiction highlights the] the importance, and even necessity of *uniformity* of decisions throughout the whole United States,” as disuniformity “would be truly deplorable.”).

This view is rooted in the Judges’ Bill of 1925, which vastly expanded the Court’s certiorari jurisdiction: “[S]ome believe that the legislation was based on an explicit commitment that the Justices made to Congress to protect the uniformity of federal law in return for Congress’ ceding the Court so much control over case selection.” Cordray & Cordray, *The Philosophy of Certiorari*, *supra* note 62, at 436–437.

78. These underlying concerns help to explain why even some clear circuit splits are not reviewed: If, for example, an issue does not arise frequently enough to cause forum shopping, to create unpredictability, or to undermine the law’s legitimacy, then a split on that question is unlikely to be important enough to merit review. See SHAPIRO ET AL., *supra* note 28, § 4.3, at 242; Stern, *supra* note 77, at 470–72.

These concerns may likewise help to explain some grants of certiorari even absent a circuit split. Consider the Court’s distaste for forum shopping. The Court’s decision to grant the petition in *TC Heartland*, which alleged “rampant forum shopping” in patent cases, may be informed by this underlying interest, the absence of a circuit split notwithstanding. See *Petition for a Writ of Certiorari at 17–22, TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 614. (2016) (mem.) (granting certiorari) (No. 16-341), 2016 WL 4983136.

To be sure, the Court’s focus on uniformity is neither unassailable nor exclusive. Justice Stevens and Justice Ginsburg, for example, both have suggested that the benefits of percolation—experimentation with different legal rules across the circuits—can outweigh the costs of some period of disuniformity. Cordray & Cordray, *The Philosophy of Certiorari*, *supra* note 62, at 438. Justice Gorsuch has also hinted that he favors the benefits of percolation. See *Maslenjak v. United States*, 137 S. Ct. 1918, 1931 (2017) (Gorsuch, J., concurring in part and concurring in the judgment) (noting that “the experience of our thoughtful colleagues on the district and circuit benches, [can] yield insights (or reveal pitfalls)”). But even this view suggests that the Supreme Court should eventually intervene to establish a uniform federal rule based on regional experiences. Amanda Frost has also criticized the Supreme Court’s project of promoting “uniformity for [uniformity’s] own sake,” arguing that the endeavor is unnecessarily costly and that disuniformity may be preferable in some instances. Frost, *supra* note 2, at 1571.

For a more detailed description of the uniformity rationale (as well as critiques of the rationale), see Cordray & Cordray, *The Philosophy of Certiorari*, *supra* note 62, at 436–37, and, more generally, Frost, *supra* note 2.

citizens equally.<sup>79</sup> In *Nichols v. United States*, for example, the Court granted certiorari to resolve a circuit conflict that subjected a resident of Kansas City, Missouri, and a resident of Kansas City, Kansas, to two different legal rules.<sup>80</sup> Moreover, such equal treatment may help to protect the legitimacy of the law and of the federal courts by avoiding a public impression of arbitrariness.<sup>81</sup> Second, uniformity facilitates predictability.<sup>82</sup> Third, uniformity dampens forum shopping.<sup>83</sup> Finally, uniformity reduces costs for multistate actors.<sup>84</sup>

Rule 10 also indicates that the Court does not hear only those cases implicating uniformity values. First, it occasionally grants petitions where a court has “so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of th[e] Court’s supervisory power” or where a lower court has failed to follow the Supreme Court’s instructions.<sup>85</sup> Though the Supreme Court is, as noted above, famously unconcerned with regular error correction,<sup>86</sup> it will occasionally grant a petition to ensure accuracy and fidelity to its precedents. Such cases are often addressed in a summary reversal—a brief decision that “simultaneously grant[s] the petition and decide[s] the case on the merits.”<sup>87</sup> This device is reserved for “situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error,”<sup>88</sup> and it appears to be deployed in

79. See, e.g., O’CONNOR, *supra* note 76, at 211 (noting the “unfairness” that may result from disuniformity); see also Benjamin Johnson & Keith E. Whittington, *Why Does the Supreme Court Uphold So Many Laws?*, U. ILL. L. REV. (forthcoming) (draft at 7–8).

80. 136 S. Ct. 1113, 1117 (2016).

81. See, e.g., Amanda L. Tyler, *Setting the Supreme Court’s Agenda: Is There a Place for Certification?*, 78 GEO. WASH. L. REV. 1310, 1316 (2010) (“[B]oth fairness and rule-of-law principles strongly dictate that uniform rules should be a cornerstone of our federal scheme.”); see also Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 38–40 (1994).

82. See, e.g., Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 850–52 (1994); Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587, 622 (2009); Frost, *supra* note 2 at 1600.

83. See Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693, 754–56 (1995); see also JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 124–25 (1990), <https://www.fjc.gov/sites/default/files/2012/RepFCSC.pdf> [<https://perma.cc/ZVY2-LZYD>].

84. See Hellman, *supra* note 83, at 748–54; see also JUDICIAL CONFERENCE OF THE U.S., *supra* note 83, at 124–25.

85. SUP. CT. R. 10(a), 10(c); see William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 36 (2015) (quoting same in discussion of the Court’s summary reversal practice); see also *James v. City of Boise*, 136 S. Ct. 685, 686 (2016).

86. SUP. CT. R. 10; see *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1780 (2015) (Scalia, J., concurring in part and dissenting in part) (“[W]e are not, and for well over a century have not been, a court of error correction.”); SHAPIRO ET AL., *supra* note 28, § 4.17, at 278.

87. Baude, *supra* note 85, at 19.

88. *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting).

practice in connection with only a limited set of issues.<sup>89</sup> Second, the Court is also sometimes persuaded that a case presents “an important question of federal law” that demands its attention, even absent a circuit split.<sup>90</sup> Such exceptionally important cases, described in more detail below, often present questions about federal power, national policy, or constitutional rights.<sup>91</sup>

But regardless whether the uniformity rationale is the exclusive explanation for its certiorari decisions, or even whether the Court’s focus on geographic uniformity is desirable, it remains the dominant and most widely accepted explanation for a substantial majority of the Court’s decisions to grant certiorari.

### B. *Uniformity and the Patent Puzzle*

The Court’s emphasis on uniformity presents a puzzle for patent cases. This is because practically every patent appeal nationwide is directed to the Court of Appeals for the Federal Circuit.<sup>92</sup> Hence, there is almost no possibility that a circuit split will present in a patent case.<sup>93</sup> This is intentional. Congress created the Federal Circuit, in part, to ensure a uniform approach to patent adjudication.<sup>94</sup> Where it was previously possible for two circuits to

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89. Baude, *supra* note 85, at 31–33, 39, 41–45 (describing four general categories of summary reversals: (1) refusals to enforce arbitration agreements, (2) failures to give district courts sentencing discretion, (3) grants of writs of habeas corpus, and (4) determinations of liability under Section 1983); *see also* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 101, 139 (2018) (adding fifth category: denials of qualified immunity).

90. SUP. CT. R. 10(c); *see* Petition for a Writ of Certiorari at 29, 35, *FERC v. Elec. Power Supply Ass’n*, 135 S. Ct. 2049 (2015) (mem.) (granting certiorari) (No. 14-840), 2015 WL 217293 [hereinafter *FERC* Petition for Writ of Certiorari] (arguing that the case presented a “question of substantial national importance” over which “a circuit conflict [wa]s unlikely to develop”).

91. *See infra* notes 223–225 and accompanying text.

92. 28 U.S.C. § 1295(a)(1) (2012).

93. One notable exception arises where circuits disagree over whether the Federal Circuit has jurisdiction over a particular case. *See* *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 803 (1988) (“This case requires that we decide a peculiar jurisdictional battle between the Court of Appeals for the Federal Circuit and the Court of Appeals for the Seventh Circuit. Each court has adamantly disavowed jurisdiction over this case.”). Congress, however, has incrementally expanded the Federal Circuit’s jurisdiction over patent cases, *see, e.g.*, H.R. REP. NO. 112-98, pt. 1, at 81 (2011), making such jurisdictional disputes less likely. *But compare* *Ritz Camera & Image, LLC v. SanDisk Corp.*, 700 F.3d 503, 506 (Fed. Cir. 2012) (the Federal Circuit’s patent jurisdiction encompasses a *Walker Process* antitrust claim), *and* *Ritz Camera & Image, LLC v. SanDisk Corp.*, 463 F. App’x 921, 922 (Fed. Cir. 2012) (similar), *with In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 684–85 (2d Cir. 2009) (the Second Circuit has jurisdiction over the *Walker Process* antitrust claim).

94. *See, e.g.*, Donald R. Dunner, *Response to Judge Timothy B. Dyk*, 16 CHI.-KENT J. INTELL. PROP. 326, 326 (2017) (“[T]he *raison d’être* for the establishment of the Federal Circuit was to provide uniformity and certainty in patent law.”); Paul R. Gugliuzza, *Patent Law Federalism*, 2014 WIS. L. REV. 11, 21–24.

reach conflicting conclusions even about a single patent's validity, Congress's intercession helps to avoid such splits.<sup>95</sup> The Federal Circuit ensures uniformity—and so the Supreme Court need not.

The effect of the Federal Circuit's creation on the Supreme Court's docket is striking. In the decade following the Federal Circuit's creation, the Court decided only five patent cases (three of which presented unusual circumstances).<sup>96</sup> By contrast, the Supreme Court decided twelve patent cases in the decade immediately prior.<sup>97</sup> Several of those arose out of circuit

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95. See H.R. REP. NO. 97-312, at 23 (1981); S. REP. NO. 97-275, at 6 (1981); see also *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 315–317 (1971) (describing a patent held invalid in the Eighth Circuit, but later found valid in the Seventh Circuit); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 388, 392 (1923) (dismissing case as improvidently granted, explaining that “[t]here was no reason for granting the application for a writ of certiorari except upon the ground that the . . . Fifth and the Ninth Circuits had differed in respect to the validity and scope of the patent and that uniformity required a decision from this Court” but ultimately concluding there was no such conflict); *Federal Courts Improvement Act of 1979: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 96th Cong. 488–91 (1979) (suggesting the Federal Circuit would “provid[e] more uniformity of law” in view of an example wherein a patent was held invalid in the Sixth Circuit but later found to be valid in the Western District of Pennsylvania); Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 7 (1989) (Between “1945 [and] 1957, a patent was twice as likely to be held valid and infringed in the Fifth Circuit than in the Seventh Circuit, and almost four times more likely to be enforced in the Seventh Circuit than in the Second Circuit.”). *But cf.* *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2146 (2016) (noting the possibility that such splits may arise between judicial and administrative reviews of a patent).

96. Congress created the U.S. Court of Appeals for the Federal Circuit in 1982. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. From 1982 to 1992, the Supreme Court decided *General Motors Corp. v. Devex Corp.*, 461 U.S. 648 (1983), *Dennison Mfg. Co. v. Panduit Corp.*, 475 U.S. 809 (1986) (per curiam), *Christianson*, 486 U.S. at 803, *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989), and *Eli Lilly & Co. v. Medtronic, Inc.*, 496 U.S. 661 (1990). Of these five cases, the first three present special circumstances. First, the petition in *General Motors* was filed before Congress created the Federal Circuit (and granted in OT1981), 456 U.S. 988 (1982) (granting petition on May 24, 1982), and the case was decided only shortly thereafter (in OT1982), 461 U.S. at 650. Second, as noted *supra* note 93, *Christianson* presented a circuit split over the scope of the Federal Circuit's jurisdiction. 486 U.S. at 803. That is, *Christianson* presented a question particular to the very statute that gave rise to the Federal Circuit. *Id.* at 807. Third, the Court issued a summary disposition in *Dennison*, declining “to give plenary consideration to petitioner's claim” and preferring instead to “vacate the judgment, and remand the case to the [Federal Circuit] for further consideration in light of [Civil Procedure] Rule 52(a).” 474 U.S. at 811.

97. *Diamond v. Diehr*, 450 U.S. 175 (1981); *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176 (1980); *Diamond v. Chakrabarty*, 447 U.S. 303 (1980); *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257 (1979); *Parker v. Flook*, 437 U.S. 584 (1978); *Sakraida v. Ag Pro, Inc.*, 425 U.S. 273 (1976); *Dann v. Johnston*, 425 U.S. 219 (1976); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974); *United States v. Glaxo Grp. Ltd.*, 410 U.S. 52 (1973); *Gottschalk v. Benson*, 409 U.S. 63 (1972); *Brunette Mach. Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706 (1972); *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518 (1972); see also Lisa Larrimore Ouellette et al., *Supreme Court Patent Cases*, WRITTEN DESCRIPTION, <https://writtendescripton.blogspot.com/p/patents-scotus.html> [<https://perma.cc/64AM-CCX2>].

splits.<sup>98</sup> The creation of the Federal Circuit—and the consequent elimination of one key heuristic for certworthiness—temporarily tempered the Supreme Court’s direct involvement in the development of patent doctrine.<sup>99</sup>

That effect, however, has since faded: The Supreme Court has become “active, if not even hyperactive, in patent law.”<sup>100</sup> Indeed, the Court decided six patent cases—nearly ten percent of its docket—in its 2016 Term.<sup>101</sup> This reflects a relatively new normal. In its 2010 Term, for example, the Court granted certiorari in six patent cases.<sup>102</sup> So too in its 2013 Term.<sup>103</sup>

But the Federal Circuit’s uniformity-enforcing function has forced the Supreme Court to look beyond the existence of a circuit split to determine whether to grant certiorari. That is, the Court must rely on other signals (beyond circuit splits) to assess a petition’s certworthiness in light of its other institutional interests (beyond uniformity).<sup>104</sup> The Office of the Solicitor General (OSG) has, as John Duffy explains, helped to serve such a signaling function: Beginning in 1994, the Court turned to the OSG with increasing frequency to help decide which patent cases to review.<sup>105</sup> The Court often calls for the views of the solicitor general (CVSGs) in cases that “involve complex regulatory and statutory schemes” to determine whether

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98. See, e.g., *Kewanee*, 416 U.S. at 472; *Brunette Mach. Works*, 406 U.S. at 707; *Deepsouth Packing Co.*, 406 U.S. at 527–29, 532; see also *Dawson Chem. Co.*, 448 U.S. at 185 & n.4 (noting “tension,” but no “direct conflict,” on the question presented).

99. See, e.g., John M. Golden, *The Supreme Court as “Prime Percolator”: A Prescription for Appellate Review of Questions in Patent Law*, 56 UCLA L. REV. 657, 667–68 (2009).

100. Holbrook, *supra* note 6, at 62–63. Since the start of OT2006, the Court has granted certiorari in thirty-two patent cases. See Appendix Table 1.

101. Out of sixty-two merits opinions, the Court decided six patent cases: *Sandoz Inc. v. Amgen Inc.*, 137 S. Ct. 1664 (2017); *Impression Products, Inc. v. Lexmark International, Inc.*, 137 S. Ct. 1523 (2017); *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017); *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 137 S. Ct. 954 (2017); *Life Technologies Corp. v. Promega Corp.*, 137 S. Ct. 734 (2017); and *Samsung Electronics Co. v. Apple Inc.*, 137 S. Ct. 429 (2016). If “it is an extraordinary year when [the Court] manages to review as many as three patent cases” in one Term, Eisenberg, *supra* note 7, at 28, then it might be at least doubly extraordinary that the Court decided six in this Term.

102. See Appendix Table 1.

103. See *id.* This recurring pattern may also address concerns that the 2016 Term was an aberration, reflecting concerns unique to an eight-member Court (prior to Justice Gorsuch’s confirmation).

104. See Duffy, *supra* note 8, at 536 (the Federal Circuit’s unique designation as the sole arbiter of intermediate patent appeals means that the Supreme Court has “needed to find some novel way to evaluate certiorari petitions in patent cases”); see also SHAPIRO ET AL., *supra* note 28, § 4.21, at 288–89 (noting that though the Supreme Court “give[s] substantial deference to the views of the Federal Circuit,” it occasionally reviews cases “because of the intrinsic importance of the questions presented,” and explaining that such “[i]mportance may be found in the Federal Circuit’s treatment of patentability standards”); Rochelle C. Dreyfuss, *Percolation, Uniformity, and Coherent Adjudication: The Federal Circuit Experience*, 66 SMU L. REV. 505, 510–511 (2013) (suggesting that the Supreme Court’s focus on patent cases implies a concern about the Federal Circuit’s “accuracy” in decisionmaking).

105. Duffy, *supra* note 8, at 526 fig.4, 531 fig.5.

the issues presented are of “sufficient importance to merit review.”<sup>106</sup> Because such technical matters may lie outside the Supreme Court’s core competencies, it sometimes turns to the executive branch to supply additional expertise before agreeing to hear a case.<sup>107</sup> Some patent appeals fall inside this set of complex cases. Cases presenting questions about substantive patent doctrine, such as *KSR International Co. v. Teleflex Inc.* (regarding the nonobviousness requirement of patentability),<sup>108</sup> have frequently been the subject of CVSGs.<sup>109</sup> In such cases, the OSG has usually responded with its assessment of the importance of the case,<sup>110</sup> and its views have often proved persuasive. The Court, for example, granted the petition in *KSR* on the solicitor general’s recommendation (and it eventually rendered a decision that closely mirrored the solicitor general’s favored interpretation of the patent laws).<sup>111</sup> Hence, the Court may rely upon the solicitor general (as well as other amici) to help signal whether an issue is sufficiently important to the development of substantive patent law to warrant certiorari.<sup>112</sup>

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106. Thompson & Wachtell, *supra* note 51, at 281. Notably, the OSG will oppose certiorari in cases that do not, in its view, meet the standard for certiorari—even if the OSG believes the decision below was incorrectly decided. See *Ivy* Amicus Brief for the United States, *supra* note 67, at 8 (arguing that the “case does not warrant [the Supreme] Court’s review,” notwithstanding the government’s belief that the Court of Appeals’ decision was incorrect, because that decision “is fact-dependent and does not conflict with any decision of this Court, another federal court of appeals, or a state court of last resort”).

107. See Duffy, *supra* note 8, at 549 (suggesting that the Supreme Court “rel[ies] on the solicitor general’s views” to “determine importance” for certiorari purposes).

108. 550 U.S. 398 (2007).

109. See Duffy, *supra* note 8, at 536 (“Since the 2000 Term, the Court has referred to the Solicitor General many more certiorari petitions in patent cases than would be expected based on either (i) historical practice, or (ii) the percentage of patent cases on the Court’s merits docket.”).

110. See, e.g., Brief for the United States as Amicus Curiae, *KSR Int’l Co. v. Teleflex, Inc.*, 548 U.S. 902 (2006) (mem.) (granting certiorari) (No. 04-1350), 2006 WL 1455388 (explaining that the case “presents an important question of patent law that warrants [Supreme Court] review”).

111. Compare Brief for the United States as Amicus Curiae Supporting Petitioner at 23–24, *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398 (2006) (No. 04-1350) (“This Court should not adopt [the Teaching-Suggestion-Motivation (TSM)] test . . . .”), 2006 WL 2453601, with *KSR*, 550 U.S. at 402 (“[T]he TSM test is incompatible with this Court’s precedents.”); see also Duffy, *supra* note 8, at 539 (showing the Court’s tendency to agree with the solicitor general’s views).

112. Duffy, *supra* note 8, at 549 (suggesting that the Supreme Court “rel[ies] on the Solicitor General’s views” to “determine importance” for certiorari purposes); Timothy B. Dyk, *Thoughts on the Relationship Between the Supreme Court and the Federal Circuit*, 16 CHI.-KENT J. INTEL. PROP. 67, 82 (2016); Eisenberg, *supra* note 7, at 29 (“[W]henver in recent years the Solicitor General has urged the Supreme Court to grant certiorari in a patent case, it has done so . . . .”); see also SHAPIRO ET AL., *supra* note 28, § 4.21, at 288–89 (noting that the Supreme Court sometimes reviews patent cases because of the “intrinsic importance of the questions presented,” and explaining that such “[i]mportance may be found in the Federal Circuit’s treatment of patentability standards”); Cordray & Cordray, *The Philosophy of Certiorari*, *supra* note 62, at 408 (“[T]he key ‘importance’ criterion for review is almost necessarily met when the federal government seeks review . . . .”).

Notably, however, the Supreme Court has granted review in a substantial number of patent cases even without the OSG's input. Such decisions have often (though not exclusively) come in cases presenting patent-specific applications of transsubstantive doctrines. For example, in *Octane Fitness*, the Court agreed to consider when attorneys' fees awards to prevailing parties are appropriate in patent cases.<sup>113</sup> It did so absent any circuit split, without the OSG's input, and without noting any other reason for the decision to review the case.<sup>114</sup> There is no apparent signal reflecting an established or well-understood institutional interest to explain the Court's decision to grant certiorari in *Octane Fitness*. Indeed, in the first thirty-five Terms after the Federal Circuit's creation (OT1982 through OT2016, inclusive), the Supreme Court has agreed to review fifty-three patent cases—and it has done so twenty-seven times with neither the input of the OSG nor the presence of a circuit split.<sup>115</sup> Moreover, the OSG opposed certiorari in eight of the twenty-two cases in which it participated at the certiorari stage.<sup>116</sup> Overall, *two thirds*<sup>117</sup> of these decisions to grant certiorari seem neither to implicate the Court's concerns for geographic uniformity by way of a "conflict" nor to obviously satisfy the standard for "importance" under Rule 10 (given both the Court's apparent reliance on the solicitor general to signal importance in

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113. See *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1752–53 (2014).

114. See *id.* at 1755 (stating flatly, "We granted certiorari, and now reverse." (citation omitted)); see also *infra* note 186 and accompanying text (noting lack of other signals for certworthiness in *Octane Fitness*).

115. See Appendix Table 1, which details these features of the patent-related petitions for certiorari that were granted by the Court since the creation of the Federal Circuit. This table is based on—and expands upon—several sources, including John Duffy's work, see *supra* note 8, at 539 fig.8, Lisa Ouellette's list of Supreme Court Patent Cases, see *supra* note 97, the Supreme Court's own electronic docket, *Docket Search*, SUP. CT. U.S., <https://www.supremecourt.gov/docket/docket.aspx> [<https://perma.cc/A3RG-FJM3>], SCOTUSblog, see *Terms*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/terms/> [<https://perma.cc/9MPT-R2RM>], and the online archive of the Office of the Solicitor General, see Office of the Solicitor Gen., *Supreme Court Briefs*, U.S. DEP'T OF JUSTICE, <https://www.justice.gov/osg/supreme-court-briefs> [<https://perma.cc/LUY5-NJMD>].

116. See *id.*

117. See Appendix Table 1. The Court issued a CVSG before granting the petition for certiorari in fifteen cases, the United States was a party to the litigation in seven cases, and five cases presented a circuit split. See *id.* Of these, the United States was a party to one case that also presented a circuit split. See *id.* For these purposes, I do not consider differences between the Federal Circuit and the approaches employed in the regional circuits before 1982 to be live circuit splits, even though such divisions are sometimes alluded to as "splits" in petitions for certiorari. See, e.g., Petition for Writ of Certiorari at 9–10, *Pfaff v. Wells Elecs., Inc.*, 523 U.S. 1003 (1998) (mem.) (granting certiorari) (No. 97-1130), 1998 WL 34081020. This is because such "splits" do not implicate the uniformity concerns that would counsel in favor hearing such a case: The Federal Circuit's expansive jurisdiction means that the regional circuit's rule no longer applies.

patent cases and the substantive content of many of these cases).<sup>118</sup> Given these metrics, many of these cases are not obviously worthy of certiorari.

The observation that the Court grants certiorari in some patent cases that do not satisfy these benchmarks gives rise to one of the puzzles at the center of this Article: How does the Supreme Court decide whether to review a patent case? The Court's opinions in these cases do not directly address this certiorari-specific question, and, as noted, Rule 10 offers practically no help. I turn instead to an alternative source—the certiorari petitions themselves—to discern any cues that signal a case's certworthiness.<sup>119</sup>

### III. FIELD SPLITS

The Supreme Court's decisions to grant petitions for a writ of certiorari in patent cases—especially those presenting questions about the application of a transsubstantive doctrine—seem to be influenced by the existence of a *field split*. That is, rather than turn to whether two courts of appeals have decided the same issue differently, the Supreme Court considers whether two fields of law—say, patent law and securities law—appear to apply the same doctrine differently.

Consider, for example, the Supreme Court's decision to hear *eBay v. MercExchange*, a landmark decision—arising out of a patent context—regarding the standard for granting a permanent injunction.<sup>120</sup> The case was billed to the Supreme Court as one about the “Federal Circuit's wooden approach to injunctive relief.”<sup>121</sup> Though eBay conceded that there was no

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118. See Gugliuzza, *supra* note 15, at 331 (“[T]he Supreme Court's recent decisions, though substantial in number, have rarely involved the fundamental legal doctrines that directly ensure the inventiveness of patents and regulate their scope.”); see also *infra* text accompanying note 221.

119. The “cue theory” of certiorari suggests that the Court filters petitions by looking for particular cues (i.e., features) that alert it to a case's potential. See Joseph Tanenhaus et al., *The Supreme Court's Certiorari Jurisdiction: Cue Theory*, in JUDICIAL DECISION-MAKING 111, 118–19 (Glendon Schubert ed., 1963); see also PERRY, *supra* note 2, at 118–39. Notably, the cue theory does not attempt to predict which petitions will be granted. Rather, cue theory attempts to predict only those petitions that “will be studied with care.” Tanenhaus, *supra* at 127; see Stuart H. Teger & Douglas Kosinski, *The Cue Theory of Supreme Court Certiorari Jurisdiction: A Reconsideration*, 42 J. POL. 834, 835–36 (1980).

Discerning these cues can be of considerable value to scholars of and practitioners at the Supreme Court. This is because “the cues are, in fact, surrogates for the salient issues.” *Id.* at 845. Hence, identifying a cue can help both to identify which cases are more likely to receive the Court's extended attention and to explain why those cases demand such attention. See also PERRY, *supra* note 2, at 34 (“[T]he practitioner must rely best he can upon the history of grants and denials in the various types of cases” to discern the standard for certiorari (quoting ROBERT L. STERN & EUGENE GRESSMAN, SUPREME COURT PRACTICE § 4.3, at 264 (5th ed. 1978))).

120. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

121. Petition for a Writ of Certiorari at 21, *eBay Inc. v. MercExchange, L.L.C.*, 546 U.S. 1029 (2005) (mem.) (granting certiorari) (No. 05-130), 2005 WL 1801263 [hereinafter *eBay* Petition for Writ of Certiorari].



direct conflict among the courts of appeals in light of the Federal Circuit's exclusive jurisdiction over patent appeals, it explained that other circuit courts, in other contexts, would have employed a more flexible standard for assessing the propriety of injunctive relief.<sup>122</sup> That is, eBay contended that patent cases are (improperly) subject to a different standard for injunctive relief than, say, trademark cases.<sup>123</sup> The Supreme Court agreed to hear the case.<sup>124</sup> Its unanimous opinion makes clear its focus on this alleged divergence between patent law and other fields of law: "[T]he decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and . . . such discretion must be exercised consistent with traditional principles of equity, *in patent disputes no less than in other cases governed by such standards.*"<sup>125</sup>

This pattern is apparent in many of the Court's patent cases. In 2007, Rebecca Eisenberg noted the Supreme Court's proclivity to review cases that seem to put "patent jurisprudence . . . at odds with the treatment of similar issues in other fields of law."<sup>126</sup> Since then, the number of such cases has exploded. In some, the petitioner alleges a divergence between patent law and related intellectual property fields. In others, a petitioner highlights a distinction with some other selected set of substantive areas. Finally, petitioners sometimes allege a rift between patent law and all other fields of law. To be sure, as described below, many petitions belie such strict categorization: A petitioner may, for example, allege that patent law's interpretation of some procedural doctrine is a lonely outlier but highlight differences from copyright law in particular. Or the Supreme Court itself may recharacterize more broadly a split presented narrowly in the petition. Nevertheless, this rough taxonomy captures most of the Court's patent cases alleging field splits and may offer useful information for assessing the likelihood that a particular petition will (or should) catch the Court's attention.

#### A. *Splits Across Related Fields*

Some field splits allege divisions between a practice under the patent laws and a like practice under related intellectual property statutes. The Supreme Court has noted a "historic kinship between patent law and copyright law," for example, and has thus sometimes looked to one doctrine to guide

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122. *Id.* at 21–22.

123. *Id.* at 23.

124. *eBay*, 546 U.S. 1029.

125. *eBay*, 547 U.S. at 394 (emphasis added).

To be sure, some scholars have suggested that this universal standard appears to have been made out of whole cloth. See Mark P. Gergen, John M. Golden, & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 219–32 (2012); Lee, *supra* note 17, at 1439. But this doesn't bear on whether the Court intended to impose a universal standard, whether new or "traditional."

126. Eisenberg, *supra* note 7, at 29.

its decisions about the other.<sup>127</sup> Some petitioners have drawn upon the relationship among these fields of intellectual property law to suggest that this kinship not only allows for like treatment—rather, it demands it.

### 1. Laches

The Supreme Court's decision in *SCA Hygiene Products v. First Quality Baby Products* offers one such example.<sup>128</sup> *SCA Hygiene's* story begins with a different case that was decided a few years earlier: In its 2013 Term, the Court decided *Petrella v. MGM* “to resolve a conflict among the Circuits on the application of the equitable defense of laches to *copyright* infringement.”<sup>129</sup> In *Petrella*, the Court concluded that laches “cannot be invoked to preclude adjudication of a claim for damages” so long as the claim is within the Copyright Act's three-year statute of limitations.<sup>130</sup> The express statute of limitations superseded the discretion conferred by equity's laches doctrine.<sup>131</sup>

Shortly thereafter, in *SCA Hygiene*, the Federal Circuit considered a laches defense to a claim of *patent* infringement.<sup>132</sup> The Court of Appeals, sitting en banc, declined to adopt *Petrella's* rule.<sup>133</sup> Citing the distinctively “broad” and “inclusive language” of 35 U.S.C. § 282, as well as legislative history suggesting (in the circuit court's view) that Congress intended to codify the then-prevailing practice of admitting laches defenses to claims of infringement brought within the statute of limitations, the Federal Circuit concluded that the Supreme Court's interpretation of an altogether different statutory provision did not control its decision.<sup>134</sup> Indeed, the Federal Circuit reasoned that substantive differences between the copyright and patent laws explain the divergence: “Because copyright infringement requires proof of access, a potential defendant is typically aware of a risk that it is infringing . . . . In patent law, however, the calculus is different” because patent infringement is a strict liability offense.<sup>135</sup> That is, because the problem of unfair surprise may be more serious in patent litigation than in copyright litigation, equitable defenses are appropriately invoked in patent cases.

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127. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 439 & n.19 (1984); see also *Impression Prods., Inc. v. Lexmark Int'l, Inc.*, 137 S. Ct. 1523, 1536 (2017) (“[T]he bond between the two leaves no room for a rift of the question on international exhaustion.”).

128. *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954 (2017).

129. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1972 (2014) (emphasis added).

130. *Id.* at 1967.

131. *Id.*

132. *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 807 F.3d 1311 (Fed. Cir. 2015) (en banc), *vacated in part*, 137 S. Ct. 954.

133. *Id.* at 1333.

134. *Id.* at 1321–23 (citing 35 U.S.C. § 282(b)(1) (2012)).

135. *Id.* at 1330.

SCA Hygiene sought review of the Federal Circuit's decision to admit First Quality's laches defense to the infringement lawsuit. In its petition for certiorari, SCA Hygiene emphasized the "conflict" between *Petrella*'s rule for copyright cases and the Federal Circuit's rule for patent cases.<sup>136</sup> The petition contended that the Federal Circuit had "create[d] a unique patent-law rule," and it faulted the circuit court for refusing to "conform patent law to copyright law."<sup>137</sup> The Supreme Court agreed to hear the case.

*Petrella* and *SCA Hygiene* are critically different, notwithstanding their superficial similarities. In *Petrella*, two courts of appeals had interpreted the same statutory provision differently: The Ninth Circuit interpreted 17 U.S.C. § 507(b) to admit a laches defense, while the Fourth Circuit, for example, did not.<sup>138</sup> Hence, uniformity in federal law was at stake. The petition in *SCA Hygiene*, however, presented no such conflict. The Federal Circuit's decision offered a uniform interpretation of 35 U.S.C. § 286. There was no threat that a litigant would have faced a different legal rule based on an arbitrary geographic distinction that divides, say, Kansas City, Missouri, and Kansas City, Kansas, into different judicial circuits. Instead, the "split" that the Court agreed to review was between patent and copyright. Moreover, there is no obvious indication that the Court regards the question of the applicability of the laches defense to be an intrinsically important question—one that would justify the Court's attention absent a circuit split. Indeed, the Court has denied such petitions on several occasions—including petitions arising out of other intellectual property regimes.<sup>139</sup>

So why did the Court agree to hear *SCA Hygiene*? As in *eBay*, as well as other cases described below, the opinion in *SCA Hygiene* suggests that the Court's certiorari decision was motivated by an interest in a universal approach to civil litigation (here, to laches defenses raised to claims brought within the statute of limitations). The Court described the case as a "return to a subject [it] addressed in *Petrella*," and it concluded that "*Petrella*'s reasoning applies to a similar provision of the Patent Act."<sup>140</sup> Indeed, the opinion identified a "well-established general rule . . . that laches cannot be invoked to bar a claim for damages incurred within a limitations period specified by Congress," and it explained that "[p]atent law is governed by the same common-law principles, methods of statutory interpretation, and

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136. Petition for a Writ of Certiorari at 25–26, *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods.*, 136 S. Ct. 1824 (2016) (mem.) (granting certiorari) (No. 15-927), 2016 WL 324318 [hereinafter *SCA Hygiene* Petition for Writ of Certiorari].

137. *Id.* at 12, 17.

138. See *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1985 (2014) (comparing the judgment on review, *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 695 F.3d 946, 956 (9th Cir. 2012), with, e.g., *Lyons P'ship v. Morris Costumes, Inc.*, 243 F.3d 789, 798 (4th Cir. 2001)).

139. See *infra* note 221 and accompanying text.

140. *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 959 (2017).

procedural rules as other areas of civil litigation.”<sup>141</sup> Notably, the Court’s opinion recharacterized the field split, originally presented as one primarily between patent and copyright, as broadly implicating a rift with civil litigation practice generally.

Moreover, the Court’s opinion went even further than merely reversing the Federal Circuit’s laches-related rule. *SCA Hygiene* unanimously established a strict standard for implying a “patent-law-specific rule”: The Court now requires a “broad and unambiguous consensus of lower court decisions” in support of any such patent-specific approach.<sup>142</sup> Because that standard was not satisfied, the general principle regarding the interaction between laches and statutes of limitations (most recently stated in *Petrella*) governed the case’s outcome, rather than any patent-specific considerations (including those cited by the Federal Circuit).<sup>143</sup>

## 2. Declaratory Judgments

Similar splits seem to have motivated the Court’s decisions to grant various petitions about the application of the Declaratory Judgment Act in patent cases. *American Airlines v. Lockwood*, for example, asked the Court to consider whether the Seventh Amendment’s jury trial right applied to declaratory judgment actions testing the validity of a patent.<sup>144</sup> In support of its petition, American Airlines explained that “the Federal Circuit has created a conflict”: “Before the Federal Circuit’s decision, the circuit courts had uniformly held there is no right to a jury trial in actions to invalidate intellectual property rights, such as trademarks or copyrights.”<sup>145</sup> But after the Federal Circuit’s decision, American Airlines contended, the rules for the different fields of law now diverged.

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141. *Id.* at 963–64 (alteration in original) (quoting *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 807 F.3d 1311, 1333 (Fed. Cir. 2015) (Hughes, J., concurring in part and dissenting in part)).

142. *Id.* at 964 (“In light of the general rule regarding the relationship between laches and statutes of limitations, nothing less than a broad and unambiguous consensus of lower court decisions could support the inference that § 282(b)(1) codifies a very different patent-law-specific rule.”).

Notably, the Court was unanimous on this standard, and the only distinction between the majority and dissent was whether the standard is satisfied. *See id.* at 971 (Breyer, J., dissenting) (disagreeing on whether there was a “settled, national consensus”).

But the Court applied a different (though not inconsistent) standard in *Impression Products, Inc. v. Lexmark International, Inc.*, 137 S. Ct. 1523, 1538 (2017), noting only “sparse and inconsistent decisions” that are insufficient to form a basis for a practice different than the one under copyright.

143. *SCA Hygiene*, 137 S. Ct. at 964.

144. Petition for Writ of Certiorari at i, *Am. Airlines, Inc. v. Lockwood*, 515 U.S. 1121 (1995) (mem.) (granting certiorari) (No. 94-1660), 1995 WL 17048342 [hereinafter *Am. Airlines Petition for Writ of Certiorari*].

Before oral argument was scheduled, American Airlines withdrew its request for a jury trial. The Court consequently remanded the case for trial without issuing an opinion. *See Am. Airlines, Inc. v. Lockwood*, 515 U.S. 1182, 1182 (1995) (mem.).

145. *Am. Airlines Petition for Writ of Certiorari*, *supra* note 144, at 7.

Though the Court dismissed *Lockwood* as moot before hearing argument in the case,<sup>146</sup> a similar pattern presented in other cases seeking a patent-related declaratory judgment. *MedImmune v. Genentech*, for example, asked the Court to decide whether a patent licensee was required to breach its license before seeking a declaratory judgment to test the patent's validity.<sup>147</sup> *MedImmune*, like *American Airlines*, explained that the Federal Circuit's patent rules were inconsistent with the rules in other intellectual property regimes: While the Federal Circuit required a patent licensee "to put itself in material breach before challenging its licensor, a copyright licensee, for instance, may seek a declaratory judgment without any such burden . . . . Non-patent licensees routinely are permitted to bring declaratory judgment actions without first committing breaches of the licenses."<sup>148</sup>

Here, as in *SCA Hygiene*, the Court's decision to grant review does not appear to conform to the prevailing benchmarks for certiorari. No amicus filed a certiorari-stage brief (either in support of or in opposition to certiorari), and the Court did not seek the advice of the OSG. Moreover, the case did not present any circuit split that might implicate the Supreme Court's usual concern for geographic uniformity. To the contrary, the Federal Circuit had established a national set of rules for declaratory judgment plaintiffs in patent cases. Rather, apparently concerned by the rift between patent law's approach and that taken elsewhere in federal law, the Supreme Court agreed to review the Federal Circuit's interpretation of the Declaratory Judgment Act. This regard for a consistent approach across substantive areas marked the Court's decision: The Court's opinion set down a general rule (as in *eBay*) "regarding application of the Declaratory Judgment Act to situations in which the plaintiff's self-avoidance of imminent injury is coerced by threatened enforcement action of a private party."<sup>149</sup> That is, the Court's decision applies to all manner of private contracts—not just patent licenses.

### B. *Splits Across Unrelated Fields*

In other cases, the Supreme Court appears to have granted petitions for certiorari on the theory that patent doctrine conflicts with other, selected fields of law. There is, however, little that obviously connects patent law to these other areas. Rather, the alleged split implicates scattered doctrines—patent law vis-à-vis consumer credit regulations, or patent law vis-à-vis employment law, for example.

#### 1. Willfulness

The Supreme Court's opinion for two consolidated cases—*Stryker v. Zimmer* and *Halo Electronics v. Pulse Electronics*—offers an extreme example

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146. *Am. Airlines*, 515 U.S. at 1182.

147. *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 120 (2007).

148. Petition for a Writ of Certiorari at 14, *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 1169 (2006) (mem.) (granting certiorari) (No. 05-608), 2005 WL 3067195.

149. *MedImmune*, 549 U.S. at 130 (emphasis omitted).

of such a field split.<sup>150</sup> Stryker and Halo asked the Court to decide when a patent owner may receive treble damages under 35 U.S.C. § 284, which grants district courts wide discretion to “increase the damages up to three times the amount found or assessed.” Such enhanced damages were historically reserved for cases of “willful” infringement, and the Federal Circuit had imposed a two-part test for determining such infringement: The patent owner must establish that the infringer’s actions were both objectively unreasonable and taken in subjective bad faith.<sup>151</sup> Stryker’s petition for certiorari complained that this rigid interpretation of “willfulness” was “inconsistent with *Safeco*,” a case regarding the meaning of that term as used in the Fair Credit Reporting Act (FCRA).<sup>152</sup>

Besides the apparent divergence between the Federal Circuit’s interpretation of historical practice under the Patent Act and the Supreme Court’s statutory analysis of the FCRA, there was little else—in terms of the values expressed through Rule 10—to commend the petition for certiorari. There was, of course, no suggestion that there was a disuniform approach to § 284. Nor did the Court call for the views of the solicitor general. To be sure, the petition attracted the attention of Nokia and an industry trade group, the Independent Inventor Group, each of whom filed an amicus brief in support of the petition.<sup>153</sup> But even the Independent Inventor Group argued in favor of certiorari because the Federal Circuit’s “‘willfulness’ test . . . looks nothing like the traditional tort doctrine in civil cases,” citing *Safeco* as one example of the correct standard.<sup>154</sup> Hence, this split seems to have influenced, at least in part, the Court’s decision to grant the consolidated petitions.

Indeed, *Safeco* played a central (if not confusing) role in the Court’s ultimate decision in the case: *Halo* defined willfulness by reference to *Safeco* while simultaneously distinguishing *Safeco* from the patent context. On the one hand, the Court embraced *Safeco*’s definition of willfulness: Both *Safeco* and *Halo* agreed that a defendant acts willfully “if he acts ‘knowing or having reason to know of facts which would lead a reasonable man to realize’

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150. *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923 (2016) (reviewing *Stryker Corp. v. Zimmer, Inc.*, 837 F.3d 1268 (Fed. Cir. 2016), and *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 831 F.3d 1369 (Fed. Cir. 2016)).

151. *In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007), *abrogated by Halo Elecs.* 136 S. Ct. 1923.

152. *Stryker* Petition for Writ of Certiorari, *supra* note 12, at 31 (citing *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70 n.20 (2007)).

153. Combined Motion for Leave to File Brief of *Amici Curiae* and Brief of *Amici Curiae* Independent Inventor Groups in Support of Petitioner, *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 356 (2015) (mem.) (granting certiorari) (No. 14-1513), 2015 WL 4550364 [hereinafter *Indep. Inventor Grps. Combined Motion and Brief*]; Brief of Nokia Techs. Oy & Nokia USA Inc. as *Amici Curiae* in Support of Petitioners, *Halo Elecs.*, 136 S. Ct. 1923 (Nos. 14-1513, 14-1520), 2015 WL 9245651.

154. *Indep. Inventors Grps. Combined Motion and Brief*, *supra* note 153, at 10–11 (citing *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007)).

his actions are unreasonably risky.”<sup>155</sup> At the same time, the Court distinguished *Halo* from at least one aspect of *Safeco*: Though *Safeco* “explained that . . . a showing of bad faith was not relevant absent a showing of objective recklessness” under the FCRA, this is not so for patent cases.<sup>156</sup> Rather, *Halo* explained that other, patent-specific precedents hold that “bad-faith infringement” counts too.<sup>157</sup> Hence, bad-faith conduct alone is insufficient to satisfy the standard for willfulness under the FCRA, but may nevertheless be sufficient for the purposes of § 284. The Court summarized its decision to leave a rift between the FCRA and patent law on the meaning of willfulness by quoting from *Safeco* a statement that was omitted from all the case’s petition-stage materials: “‘Willfully’ is a word of many meanings whose construction is often dependent on the context in which it appears.”<sup>158</sup>

In sum, the Court appears to have granted the petition, at least in part, in light of an apparent rift between a consumer credit statute and the patent laws with respect to the meaning of willful conduct. But the Court’s ultimate decision leaves a split intact. To be sure, the Court’s decision affected the meaning of the term in the patent context—it crafted a new test for willful infringement to replace the Federal Circuit’s previous approach—but it expressly declined to fully embrace the view it articulated under the FCRA.<sup>159</sup> To the contrary, the Court reconciled its approach with *Safeco* only to the extent that *Safeco* conceded that doctrinal context matters when defining willful conduct.

## 2. Damages’ Causation Principle

I have already described another example of a petition that highlights divisions with an apparently random set of substantive doctrinal areas. In *Samsung v. Apple*, described earlier,<sup>160</sup> Samsung’s petition for a writ of certiorari contended that the Federal Circuit’s damages rule was inconsistent with the principles applied in select fields of law: “securities law, employment law, RICO, and the Violence Against Women Act.”<sup>161</sup> In particular, Samsung thought that, under the principles applied in these doctrinal areas, it should be liable for only those losses attributable to its infringement.<sup>162</sup> But the Federal Circuit reasoned that the patent statutes justified a design patent-specific approach to damages.<sup>163</sup>

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155. *Halo Elecs.*, 136 S. Ct. at 1933 (emphasis omitted) (quoting *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 69 (2007)).

156. *Id.* at 1933 & n.\*.

157. *Id.* (quoting *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 508 (1964)).

158. *Id.* (quoting *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007)).

159. *See id.* at 1935, 1933 & n.\*.

160. *See supra* Part I.

161. *Samsung* Petition for Writ of Certiorari, *supra* note 29, at 32–33 (citations omitted).

162. *See id.* at 33.

163. *See Apple Inc. v. Samsung Elecs. Co.*, 786 F.3d 983, 1001 (Fed. Cir. 2015), *rev’d* *Samsung Elecs. Co. v. Apple Inc.*, 137 S. Ct. 429 (2016).

The Supreme Court agreed to review the case.<sup>164</sup> On closer inspection, however, there seemed less to the alleged split than the petition asserted. Apple and the OSG (which had not been consulted at the certiorari stage) argued that the statute governing damages for design patent infringement supersedes any “background principles of causation and equity.”<sup>165</sup> The government, for example, contended that § 289 “provide[s] a measure of recovery different from, and in many cases more expansive than, the award that traditional causation principles would produce.”<sup>166</sup> And Samsung eventually “abandoned [the] theory” that damages for design patent infringement ought to be limited to the profits attributable to its infringement.<sup>167</sup> The basis for the field split thus evaporated: Apple and the solicitor general contended that § 289 should be read on separate terms, and Samsung waived its argument that background principles should inform this patent-related statute.

Once the field split had vanished, the case became significantly more difficult. The Court could no longer simply choose between a general doctrine and a patent-specific rule (as in, say, *SCA Hygiene*).<sup>168</sup> The Court was instead tasked with crafting a unique, context-sensitive rule under § 289. It declined to take this on: It “punted.”<sup>169</sup> Indeed, the Court’s opinion declined to describe, let alone endorse, any of the alternatives proposed by the parties or the solicitor general.

### C. Outliers

The Court has also frequently agreed to hear cases in which patent doctrine is an apparent outlier. That is, a patent-specific rule stands at odds with the approach employed in nearly every other substantive field. *eBay*, described above, is one such example. The petition for certiorari in *eBay* contended that the Supreme Court had consistently applied a general rule that absent an express statutory command, a plaintiff’s right to an injunction is governed by the “court’s traditional equitable discretion.”<sup>170</sup> As described earlier, the Court reversed the patent-specific rule in favor of “the

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164. *Samsung Elecs. Co. v. Apple Inc.*, 136 S. Ct. 1453 (2016) (mem.) (granting certiorari).

165. *Samsung* Brief for Respondent, *supra* note 41, at 33.

166. *Samsung* Amicus Brief for the United States, *supra* note 41, at 15.

167. *Samsung Elecs. Co. v. Apple Inc.*, 137 S. Ct. 429, 434 n.2 (2016) (citing Transcript of Oral Argument at 6 (No. 15-777)).

168. *See supra* Section III.A.1.

169. *Liptak & Goel*, *supra* note 24; *see supra* note 49 and accompanying text. The Court’s decision might be read less critically as having “disrupt[ed]” the Federal Circuit’s standard to prevent its “ossification”—that is, the Court helped to “percolat[e]” the standard for assessing damages under § 289. *See Golden*, *supra* note 99, at 700–01.

170. *See eBay* Petition for Writ of Certiorari, *supra* note 121, at 19; *supra* notes 121–125 and accompanying text.



traditional four-factor framework that governs the award of injunctive relief.<sup>171</sup> Other cases follow a similar pattern.

### 1. The Standard of Appellate Review

*Highmark Inc. v. Allcare Health Management System, Inc.* presents one such example.<sup>172</sup> Allcare, a patent assertion entity (or, to use the pejorative term, a “patent troll”), alleged that Highmark infringed its patent claiming an “information-management system[ ].”<sup>173</sup> The district court concluded that Highmark did not infringe the patent and, more significantly, it determined that Allcare’s infringement claims were baseless and made in bad faith. Indeed, the court found that the suit pursued “meritless allegations as . . . leverage” in settlement negotiations.<sup>174</sup> Hence, the district court awarded attorneys’ fees to Highmark under 35 U.S.C. § 285, reasoning that Allcare’s frivolous suit was an “exceptional case[ ]” in which it could (and should) “award reasonable attorney fees to the prevailing party.”<sup>175</sup>

The Federal Circuit reversed.<sup>176</sup> Notably, the Court of Appeals reviewed de novo the district court’s determination that the case was “exceptional.”<sup>177</sup> Such de novo review marked a sharp turn from the deferential standard that had previously governed such appeals.<sup>178</sup>

Highmark asked the Supreme Court to review the case. Its petition for certiorari contended that “the Federal Circuit’s decision to employ de novo review in this case splits with *every* other relevant authority” (emphasis in original).<sup>179</sup> The petition explained that the exceptional case determination is subject to deferential review under the Federal Rules of Civil Procedure, which apply broadly across federal civil litigation. The petition explained, for example, that Rule 52 “unequivocally” establishes a clear error review standard for all questions of fact.<sup>180</sup> Hence, the Federal Circuit had “no warrant” to make a patent-specific exception for exceptional case determinations under § 285.<sup>181</sup>

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171. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006).

172. 134 S. Ct. 1744 (2014).

173. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 706 F. Supp. 2d 713, 716–17, 727 n.5 (N.D. Tex. 2010).

174. *Id.* at 735.

175. *Id.* at 738 (quoting 35 U.S.C. § 285 (2012)).

176. *Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, 687 F.3d 1300 (Fed. Cir. 2012) *vacated*, 134 S. Ct. 1744.

177. *Id.* at 1308–09.

178. *See, e.g., Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1460 (Fed. Cir. 1998).

179. Petition for a Writ of Certiorari at 14, *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 570 U.S. 947 (2013) (mem.) (emphasis in original) (granting certiorari) (No. 12-1163), 2013 WL 1209137 [hereinafter *Highmark* Petition for Writ of Certiorari].

180. *Highmark* Petition for Writ of Certiorari, *supra* note 179, at 19–20 (citing FED. R. CIV. P. 52(a)); *see also* FED. R. CIV. P. 1.

181. *Highmark* Petition for Writ of Certiorari, *supra* note 179, at 19–20.

Moreover, the petition contended that the Federal Circuit's rule conflicted with decisions regarding the standard of review applicable to appeals in "analogous areas of law," including a similarly worded provision in the Lanham Act, fee awards under the Equal Access to Justice Act (EAJA), and motions for sanctions under Rule 11.<sup>182</sup> Highmark contended that the Federal Circuit's "novel, no-deference approach" split from the practice in each of these areas.<sup>183</sup>

Highmark's petition highlighted some of the few cases in which the Court granted certiorari to decide the appropriate standard of appellate review. But these cases implicated the Court's institutional interest in uniformity. *Pierce*, the case about fee awards under the EAJA, for example, attracted the Court's attention because of a circuit split.<sup>184</sup> So too with *Cooter*, the case about the standard of review for Rule 11 sanctions.<sup>185</sup> Highmark's petition, of course, could stake no claim to any such circuit split. And no amicus supported Highmark's petition, nor did the Court ask the solicitor general to weigh in. Perhaps the Court's interest in *Highmark* can be explained by its interest in *Octane Fitness*, a companion case (described earlier) about the meaning of the "exceptional case" standard.<sup>186</sup> But *Octane Fitness* itself can claim no circuit split, no solicitor general recommendation, nor any other amicus support. Neither *Highmark* nor *Octane Fitness* seems to satisfy the Court's usual certiorari standards.

The Court nevertheless granted Highmark's petition for certiorari, and, in a curt, five-page opinion—an opinion that took longer to describe the facts than to decide the question—it reversed the Federal Circuit's rule favoring de novo review.<sup>187</sup> The opinion flatly described the "traditional[ ]" practice of reviewing "matters of discretion . . . for 'abuse of discretion,'" and it illustrated that approach by reference to the examples cited in the petition—the EAJA and sanctions under Civil Rule 11.<sup>188</sup> That is, the Court yet again granted certiorari in light of a field split—this time, on the question of the standard of appellate review—and it decided the case in universality's favor.

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182. *Id.* at 23–24.

183. *Id.* at 21.

184. See *Pierce v. Underwood*, 487 U.S. 552, 555 (1988) ("We granted certiorari to resolve a conflict in the Courts of Appeals over important questions concerning the interpretation of the EAJA." (citations omitted)); see also *Highmark* Petition for Writ of Certiorari, *supra* note 179, at 14–15 (citing *Pierce*).

185. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 399–401 (1990) (describing the circuit split).

186. See *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1753–54 (2014).

187. *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1749 (2014).

188. *Id.* at 1748 (quoting *Pierce v. Underwood*, 487 U.S. 552, 558 (1988)).

## 2. The Presumption Against Extraterritoriality

*Microsoft v. AT&T* offers an additional example of an outlier.<sup>189</sup> AT&T alleged that an aspect of Microsoft Windows, once installed on a computer, infringed one of its patents.<sup>190</sup> AT&T thus sought damages for every personal computer manufactured to run the operating system.<sup>191</sup> Notably, AT&T's claim for damages extended to computers manufactured outside the United States: AT&T claimed that even where the computer's entire manufacture was abroad and all copies of the software were produced and installed on foreign soil, Microsoft had "supplie[d]" the infringing software "component" "from the United States."<sup>192</sup> The Federal Circuit agreed with AT&T.<sup>193</sup>

Microsoft sought certiorari. Its petition alleged that the Federal Circuit's decision "conflicts" with a principle "deeply rooted in th[e] Court's jurisprudence": the presumption against extraterritoriality.<sup>194</sup> In Microsoft's view, this "longstanding principle of American law" should preclude infringement liability (under U.S. patent law) for such foreign manufactures.<sup>195</sup> Citing cases arising under the National Firearms Act, the National Labor Relations Act, and the Sherman Act, among several others, Microsoft contended that the Supreme Court should grant certiorari to review the Federal Circuit's "complete disregard" of this basic and well-established principle of statutory interpretation.<sup>196</sup>

The Supreme Court granted certiorari. And on the merits, it agreed with Microsoft.<sup>197</sup> Just as Microsoft's petition contended, one portion of the Court's opinion explained that the presumption against extraterritoriality is a "principle of general application" that "tugs strongly against" the Federal Circuit's interpretation of the statute.<sup>198</sup> Turning instead to its precedents arising under the Federal Tort Claims Act and the Sherman Act, the Court ruled that AT&T's remedy lay, if at all, not in the U.S. Code but in foreign law.<sup>199</sup> These precedents, however, are markedly different from *Microsoft* in at least one respect: *Smith v. United States*, the FTCA case, for example, earned certiorari "to resolve a conflict between two Courts of Appeals."<sup>200</sup>

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189. *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007).

190. *AT&T Corp. v. Microsoft Corp.*, No. 01 CIV.4872(WHP), 2004 WL 406640, at \*2 (S.D.N.Y. Mar. 5, 2004).

191. *See id.*

192. *Id.* at \*2–3 (quoting 35 U.S.C. § 271(f)(1) (2012)).

193. *AT&T Corp. v. Microsoft Corp.*, 414 F.3d 1366, 1368 (Fed. Cir. 2005), *rev'd*, 550 U.S. 437.

194. Petition for a Writ of Certiorari at 22–23, *Microsoft Corp. v. AT&T Corp.*, 549 U.S. 991 (2006) (mem.) (granting certiorari) (No. 05-1056), 2006 WL 403897 [hereinafter *Microsoft* Petition for Writ of Certiorari].

195. *Id.* at 23.

196. *Id.* at 24, 26 & n.5.

197. *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 442 (2007).

198. *Id.* at 455.

199. *Id.* at 456.

200. 507 U.S. 197, 200 (1993).

This patent case, however, presented no such split. Rather, the Court was asked whether a principle of statutory interpretation applies with equal force in the patent context. It answered affirmatively.

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The examples described above illustrate three primary sorts of field splits—splits across related fields, splits across unrelated fields, and outliers. To be sure, the taxonomy is imperfect. *SCA Hygiene*, for example, was billed to the Court as presenting a field split that primarily implicated related fields of law: *Petrella*'s laches rule under the Copyright Act contrasted sharply with the Federal Circuit's interpretation of the Patent Act.<sup>201</sup> But the Court's majority recharacterized the split as one presenting an outlier: It pit the patent rule against a "well-established general rule" that applies broadly in civil litigation.<sup>202</sup> Likewise, one might read *Samsung*'s petition for certiorari not as presenting a field split between patent law, on the one hand, and the seemingly random collection of securities law, employment law, and criminal law, on the other, but rather as contending that the Federal Circuit's approach to damages for design patent infringement was an outlier.<sup>203</sup> (Indeed, *Samsung* appeared to pivot to that position in its merits brief—before abandoning the argument altogether.)<sup>204</sup> Nevertheless, this rough taxonomy may, as elaborated below, help to illuminate the institutional values that animate the Supreme Court's decisions to grant petitions for certiorari presenting field splits.

These certiorari decisions constitute a significant portion of the Court's patent docket, extending beyond the examples described above. In total, twenty-one petitions for certiorari (out of the fifty-three granted since the creation of the Federal Circuit) allege some form of a field split.<sup>205</sup> By contrast, only six petitions out of a random sample of fifty-three denied petitions in patent cases alleged a field split.<sup>206</sup>

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201. *SCA Hygiene* Petition for Writ of Certiorari, *supra* note 136, at 25–26 (citing *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014)).

202. *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 963 (2017).

203. *Samsung* Petition for Writ of Certiorari, *supra* note 29, at 33.

204. See *Samsung Elecs. Co. v. Apple Inc.*, 137 S. Ct. 429, 434 n.2 (2016); *Samsung* Brief for Petitioners, *supra* note 37, at 37–38.

205. See Appendix Table 1. I have coded the "Field Split" column in Appendix Table 1 by looking for two contentions. First, has the petitioner alleged that patent law differs in some notable respect from another field of law? Second, has the petitioner alleged that this difference is important enough to warrant the Court's attention? If both conditions are satisfied, then I coded the petition as having alleged a field split. I examined each petition for certiorari, and I had a research assistant independently read and code each petition to verify my inferences. We collectively revisited any petition where there was initial disagreement ( $n = 2$ ).

206. See Appendix Table 2. The random sample was generated by way of the Journal of the Supreme Court for OT1982 through OT2016, which notes every denied petition for a writ of certiorari. See generally *Journal*, SUP. CT. U.S., <https://www.supremecourt.gov/orders/journal.aspx> [<https://perma.cc/LRH3-QBPY>]. Each Journal's entries were filtered for petitions arising out of the Federal Circuit, and then limited to patent cases. Petitions that were not

For comparison, the solicitor general has participated in the petition-stage briefing in twenty-two cases, and it has supported certiorari in fourteen cases.<sup>207</sup> Hence, as one facet of the Supreme Court's patent docket, cases presenting field splits are more significant than those presenting circuit splits, and roughly on par with those important enough to merit review (as advised by the solicitor general).

I take care not to overstate the claim. The Court, for example, sought the solicitor general's advice in *Microsoft* notwithstanding the field split alleged in the petition. Hence, such a split is no guarantee of certiorari.<sup>208</sup> Indeed, it is not the Court's exclusive signal for certworthiness in patent cases.<sup>209</sup> As in the rest of its discretionary docket, the Court considers a variety of factors—a dissent at the circuit court, a hearing en banc, amicus support for the petition, among others—when deciding whether to grant a petition for a writ of certiorari.<sup>210</sup> My claim is that the presence of a field split seems to be, like a positive recommendation from the solicitor general, one significant factor that tends to favor certiorari. Either may cue a case's potential for review.

Notably, there is limited overlap between these categories: The United States was a party to only three cases presenting a field split, and the OSG itself brought the field split to the Court's attention in two of those cases.<sup>211</sup> Moreover, the Supreme Court asked for the OSG's advice in only five cases presenting alleged field splits.<sup>212</sup> This relatively slim intersection may suggest that the two heuristics serve distinct functions. As noted above, the Court often relies on the OSG for information as to whether a particular case presents a substantive issue of patent law important enough to warrant Supreme Court intervention.<sup>213</sup> But what institutional value (or defect) does the Court's attention to field splits reflect?

#### IV. FIELD SPLITS AND THE SUPREME COURT'S AGENDA

The Supreme Court's attention to field splits presents a puzzle of its own: There is a mismatch between the conventional understanding of the Supreme Court's certiorari practice and its decisions to hear cases related to

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available through commercial databases, such as Westlaw, were recovered from the U.S. National Archives and Records Administration. The petitions were coded using the same criteria as for Appendix Table 1. See *supra* note 205.

207. See Appendix Table 1.

208. See Petition for a Writ of Certiorari at 17–31, *ParkerVision Inc. v. Qualcomm Inc.*, 136 S. Ct. 1507 (2016) (mem.) (denying certiorari) (No. 15-1092), 2016 WL 806894.

209. See Eisenberg, *supra* note 7, at 29–30.

210. See, respectively, Diane P. Wood, *When to Hold, When to Fold, and When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court*, 100 CALIF. L. REV. 1445, 1454–57 (2012), and Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1936–40 (2016).

211. See Appendix Table 1.

212. See *id.*

213. See *supra* note 106–112 and accompanying text.

divergences among fields of law. Field splits do not implicate geographic uniformity. After all, even if the Federal Circuit creates a patent-specific rule for injunctions, that rule does not vary across jurisdictions. Moreover, the Supreme Court's attention to certain substantively important questions, as sometimes signaled by the solicitor general, cannot fully explain this wide range of patent decisions: The Court does not typically grant certiorari in cases presenting laches- or fees-related questions absent a circuit split.

Hence, the solution to the field split puzzle may lie outside the usual interests that inform the Court's certiorari decisions. One possibility is that the Supreme Court's appetite for field splits reveals a systemic defect in its internal procedures. But an institutional concern for legal *universality* seems to be a better explanation. That is, these decisions to grant certiorari are motivated by neither a desire for uniformity across jurisdictions nor a need to address a foundationally important question of patent law but rather an otherwise unstated interest in general consistency across varied legal fields, including patent law.

#### A. *Field Splits' Certiorari Mismatch*

The Supreme Court's focus on divergences among fields of law seems contrary to its usual certiorari practice.

First, field splits have no consequence for the Court's dominant concern for geographic uniformity. The Supreme Court helps to ensure a uniform application of federal law by resolving circuit splits—clear differences among circuits on the same question of law. The Court thus does not typically grant certiorari to hear cases that present mere conflicts in principle.<sup>214</sup> That is, trying to convince the Court to hear a case simply because lower courts have “construed related but not identical statutes differently,” or because “the decision below is wrong in light of general principles,” “is almost invariably futile.”<sup>215</sup> Such conflicts in principle do not implicate the uniformity-related concerns that drive the Court's focus on true circuit splits.

The Court's uniformity interest is motivated by several underlying values, including ensuring equal treatment (and thereby protecting the judiciary's legitimacy), facilitating predictability, preventing forum shopping, and reducing burdens on multistate actors.<sup>216</sup> None of these legal values are implicated by field split cases. Consider, for example, the Court's certiorari decision in *SCA Hygiene*. The “split” alleged, between patent and copyright, had no consequence for the Court's concern for equal treatment: Even if the Court had declined the case, all patent plaintiffs would be treated alike—they would all be subject to the Federal Circuit's rule.<sup>217</sup> The Supreme

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214. See *supra* notes 73–74 and accompanying text.

215. SHAPIRO ET AL., *supra* note 28, § 4.3, at 242–43; see Ulmer, *supra* note 71, at 906; see also PERRY, *supra* note 2, at 128 (explaining that significant effort is dedicated to “trying to determine if there is indeed the conflict that the petition alleges”).

216. See *supra* notes 78–84 and accompanying text.

217. See *supra* notes 136–139 and accompanying text.

Court's concern for predictability is likewise satisfied by the Federal Circuit's standard, as the circuit court's rule is the one by which every patent plaintiff can set her clock (or filing calendar). The split between the en banc opinion in *SCA Hygiene* and the Court's opinion in *Petrella* cannot lead to forum shopping.<sup>218</sup> No matter the forum, patent plaintiffs are subject to the same standard. Across the Court's field split docket—the scope of the laches defense, the meaning of § 289, and the standard for reviewing fee awards—these uniformity-related concerns are hardly implicated.<sup>219</sup> The Court's supreme interest in uniformity cannot explain these certiorari grants.

Second, field splits often implicate questions that do not seem important enough to warrant the Court's attention—at least absent a circuit split. Consider, again, the Supreme Court's decision to consider the split between copyright and patent law on the viability of laches defenses.<sup>220</sup> The Court does not appear to think that the applicability of laches defenses to intellectual property claims is, as a general matter, an intrinsically important issue. In cases prior to *Petrella*, such as *Harjo v. Pro-Football*, petitioners pressed similar claims, and the Supreme Court denied those petitions for certiorari.<sup>221</sup> To be sure, other vehicle problems may have prevented the Court from hearing those previous cases.<sup>222</sup> But these issues notwithstanding, there is little indication that the matters presented in these field split cases—laches, the definition of an exceptional patent case, or the standard for reviewing fee awards—belong in the same category as those usually presented in the Court's Rule 10(c) docket.<sup>223</sup> Such cases often involve issues as the extent to which States may lawfully regulate abortion providers, the scope of permissible warrantless searches under the Fourth Amendment, or the limits on the federal government's power to regulate the interstate power grid.<sup>224</sup>

218. See *id.*

219. See David Marcus, *The Past, Present, and Future of Trans-Substantivity in Federal Civil Procedure*, 59 DEPAUL L. REV. 371, 376 (2010) (“[T]rans-substantivity differs from uniformity.”).

220. See *supra* Part III.A.1.

221. Compare, e.g., Petition for Writ of Certiorari at 16–17, *Harjo v. Pro-Football, Inc.*, 558 U.S. 1025 (2009) (mem.) (denying certiorari) (No. 09-326), 2009 WL 2953014 (arguing that the D.C. Circuit's laches decision “contravenes important public interest concerns” and thus “it [is] imperative that th[e] Court grant certiorari and clarify [the] applicability of laches in this context”), with Respondent's Brief in Opposition at 1, *Harjo*, 558 U.S. 1025 (2009) (mem.) (denying certiorari) (No. 09-326), 2009 WL 3368682 (“[T]here is no circuit conflict on whether the doctrine of laches is ever available as a defense to a petition . . . to cancel a trademark registration . . . [A]bsent a circuit split, there is no justification for this Court to grant certiorari.”).

222. See, e.g., SHAPIRO ET AL., *supra* note 28, § 4.4(d)–(h), at 247–49 (describing some possible such vehicle problems).

223. Cf. Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1989 (2003) (“[T]he perceived importance of the issue in light of our constitutional structure and tradition” may “justify independent review” under Rule 10(c)).

224. See, e.g., FERC Petition for Writ of Certiorari, *supra* note 90, at 29 (contending that the Court should grant review in a case presenting a “question of substantial national importance” that is “unlikely to be considered by another Court of Appeals”).

Though some patent cases may satisfy this standard because of their effect on innovation policy nationwide—particularly those that, as noted above, define the contours of patent protection and hence call out for the expertise of the Solicitor General—it seems unlikely that, say, *SCA Hygiene, Octane Fitness*, and *Highmark*, among others, also clear this bar.<sup>225</sup>

In sum, petitions that rest their hopes of certiorari on an alleged field split do not appear to satisfy the Court's usual standards for certiorari.<sup>226</sup> In practice, of course, most petitions assert a range of arguments. Petitioners highlight divisions among fields of law, attempt to characterize these divisions as splits between the Federal Circuit and the regional courts of appeals, enlist amici, and try to persuade the Court of the importance of the underlying doctrinal question. But where the “split” does not directly implicate geographic uniformity, where the issue presented is not obviously important enough to independently merit certiorari, and where the case does not merit summary reversal, all that is left is the discord between substantive areas of law—a conflict of general principles.

#### B. *A Process Defect Hypothesis*

The Supreme Court's attention to field splits thus invites further scrutiny: Why does the Court intervene when patent law's applications of a transsubstantive doctrine, such as laches, differ from those in another field of law?<sup>227</sup> One possibility may be that a defect in the Supreme Court's procedures explains its apparently misdirected appetite for such cases. This hypothesis, however, does not adequately explain the Court's certiorari decisions in patent cases.

The Supreme Court processes petitions, at least in part, through the “cert pool.” The seven justices that participate in the pool divide the petitions and assign their law clerks to write memos summarizing each one.<sup>228</sup> Richard Lazarus, among others, has argued that this system of distributed and delegated screening for certiorari petitions contributes to the “capture” of the Court's certiorari mechanisms.<sup>229</sup> Hence, the Court's attention to field

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225. See, e.g., SHAPIRO ET AL., *supra* note 28, § 4.3, at 241; see also Gugliuzza, *supra* note 15, at 331 (“[T]he Supreme Court's recent decisions, though substantial in number, have rarely involved the fundamental legal doctrines that directly ensure the inventiveness of patents and regulate their scope.”).

226. *But see infra* note 283 (considering the argument that the Court's apparent concern for universality can be framed in Rule 10's terms).

227. Cf. Golden, *supra* note 99, at 672 (noting the need for “a consistent institutional rationale . . . to justify Supreme Court review”).

228. See Adam Liptak, *Gorsuch, in Sign of Independence, Is Out of Supreme Court's Clerical Pool*, N.Y. TIMES (May 1, 2017), <https://www.nytimes.com/2017/05/01/us/politics/gorsuch-supreme-court-labor-pool-clerks.html> (on file with the *Michigan Law Review*). Justice Alito and Justice Gorsuch are not members of the pool. *Id.*

229. See Richard J. Lazarus, *Docket Capture at the High Court*, 119 YALE L.J.F. 89 (2009) [hereinafter Lazarus, *Docket Capture*], [https://www.yalelawjournal.org/pdf/841\\_89m7e6cx.pdf](https://www.yalelawjournal.org/pdf/841_89m7e6cx.pdf) [<https://perma.cc/L2KG-2SXU>]; Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1508–11



split cases—cases that do not appear to comport with Rule 10 and the values so embedded—might, under this view, be the product of such manipulation. In particular, the Supreme Court Bar may have learned “how to pitch their cases to the law clerks” to persuade them to recommend that the Court grant these petitions, despite falling short of the standards of the Supreme Court Rules.<sup>230</sup> Indeed, by casting these cases as presenting splits—echoing those circuit splits that fall squarely within the Court’s usual uniformity concerns—these practitioners may effectively bait the “limitations, susceptibilities, and tendencies of the clerks.”<sup>231</sup> In essence, this account suggests that the Court’s patent docket has been “captured by an elite group of expert Supreme Court advocates” that has learned to effectively influence (or, less charitably, game) the Court’s internal procedures.<sup>232</sup>

As applied to the Court’s patent docket, however, this theory proves to be incomplete in several respects. First, it inverts the typical account of the effects of the cert pool. Cert pool recommendations are typically cautious: Critics of the cert pool have detailed how pool memoranda authors face “a hydraulic pressure to say no”—that is, to recommend denying petitions for certiorari—even if doing so would “allow circuit conflicts to fester.”<sup>233</sup> Scholars have described how these incentives cause law clerks to seek out a variety of reasons to recommend against certiorari, including reasons related to waiver, forfeiture, procedural posture, and the possibility of distinguishing apparent splits on factual or statutory grounds.<sup>234</sup> That is, law clerks have strong incentives to distinguish true circuit splits from mere “conflict[s] in principle,” including field splits.<sup>235</sup> Hence, these dynamics yield a smaller docket—not one that ranges beyond its well-established focus.

Moreover, this theory’s focus on the cert pool and the law clerks unduly minimizes the role of the justices themselves. Even where law clerks can be persuaded to recommend that the Court grant certiorari, that recommendation is strictly limited to the cert pool or to a justice.<sup>236</sup> The decision to grant a petition ultimately lies with the justices themselves, who are rather adept at distinguishing true circuit splits—those that implicate the Court’s longstanding concern for uniformity—from mere conflicts in principle.<sup>237</sup>

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(2008) [hereinafter Lazarus, *Advocacy Matters*]; see also Joan Biskupic et al., *The Echo Chamber*, REUTERS (Dec. 8, 2014), <https://www.reuters.com/investigates/special-report/scotus/> [<https://perma.cc/A39B-8P96>].

230. Lazarus, *Docket Capture*, *supra* note 229, at 94.

231. See *id.*; Lazarus, *Advocacy Matters*, *supra* note 229, at 1525.

232. Lazarus, *Docket Capture*, *supra* note 229, at 89.

233. Starr, *supra* note 14, at 1376–77.

234. See PERRY, *supra* note 2, at 218–20; Carrington & Cramton, *supra* note 82, at 631–32; Stras, *supra* note 71, at 975; see also SHAPIRO ET AL., *supra* note 28, § 4.3, at 242.

235. SHAPIRO ET AL., *supra* note 28, § 4.3, at 242.

236. See PROVINE, *supra* note 62, at 25 (noting that law clerks typically have “disavowed influence on the Court’s review decisions”).

237. Ulmer, *supra* note 71, at 906 (finding “no significant correlations between claimed conflict” (as compared to genuine conflict) “and the Court’s decisions on certiorari”).

Finally, even if the Supreme Court Bar could effectively exploit cert pool dynamics to gain review in a handful of cases, it is improbable that this explanation accounts for the sheer volume of field split cases. If the Court found that it was not truly interested in these cases or that it had inadvertently granted some of these petitions, then it is more likely that the Court would have uncovered this internal defect and stopped granting review long ago. Instead, the Court's review in such cases appears to have accelerated.<sup>238</sup>

### C. *The Universality Hypothesis*

The Court's repeated decisions to grant petitions alleging a field split thus seem to uncover an unstated institutional interest.<sup>239</sup>

One possibility is that the Court simply perceives the Federal Circuit to be giving the wrong answers to the questions presented in these cases.<sup>240</sup> But for the Supreme Court to dedicate this volume of its docket to correcting (putative) errors arising out of one circuit would be an extraordinary, unexplained departure from its usual practice disfavoring error correction.<sup>241</sup> Moreover, an explanation that focuses on the likelihood of legal error would seem to ignore the Court's apparent attraction, described above, to field splits in particular—as opposed to any other case where the Federal Circuit (or another court) may have erred.

Hence, something else must account for the Court's special attention to this particular set of cases. That something else seems to be a certain regard for questions related to legal universality—general consistency across substantive fields of law.

Such consistency is not preordained but rather reflects a conscious institutional choice.<sup>242</sup> Early common law, for example, was characterized by “substance-specific procedure,” in which practically every cause of action demanded its own writ.<sup>243</sup> By contrast, the Court seems now to treat the Civil Rules (among other governing structures, such as the Administrative Procedure Act) as transsubstantive.<sup>244</sup>

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238. See Appendix Figures 1a and 1b.

239. Cf. Larsen & Devins, *supra* note 210, at 1958–64 (indicating skepticism for a process defect or capture theory and preferring instead a theory that focuses on the justices' own priorities).

240. See Epps & Ortman, *supra* note 67, at 728 (“[S]plitless-but-erroneous circuit court rulings can also result from specialized venue rules.”); cf. Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. (forthcoming 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3064443](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3064443) [<https://perma.cc/VU7X-SNMA>].

241. See *supra* notes 67–68 and accompanying text.

242. See Marcus, *supra* note 21, at 1218.

243. See Marcus, *supra* note 219, at 381–83.

244. See *id.* at 401–15 (“[T]he Supreme Court has . . . refus[ed] to accept the judicial revision of procedural rules to meet perceived substantive needs. The trans-substantivity principle plays a starring role.”); Marcus, *supra* note 21, at 1207–18; see also Cover, *supra* note 53, at 718.

These structures traded much of the context-sensitive direction and case-specific discretion inherent to substance-based procedure and traditional equitable power for several benefits of their own.<sup>245</sup> For one, they improved judicial efficiency by simplifying procedure for lawyers and judges alike. Moreover, these structures were intended to be value neutral: They do not vary across types of plaintiff or causes of action.<sup>246</sup> This neutrality may also buttress the legitimacy of the judiciary, as such transsubstantivity “denies judges the authority to discriminate among substantive regimes and thus to make arguably political choices.”<sup>247</sup>

The Court takes a similarly transsubstantive approach to some of the matters at issue in these patent cases—state of mind, rules of statutory interpretation, and remedies, among others. This suggests that at least some of these same underlying concerns—efficiency, neutrality, and legitimacy—may also comprise the apparent concern for universality that informs the Court’s approach to petitions for certiorari in patent cases.

At least three strands of evidence suggest that the Court’s certiorari decisions in patent cases resonate with such an interest in the costs and benefits of universality. First, this hypothesis comports with the Court’s patent decisions described above, which themselves exemplify a general trend for disciplining “patent exceptionalism.” Indeed, viewing this trend through a certiorari lens both helps to explain a broader range of the Supreme Court’s patent-related decisions and reveals the strength of the interest underlying the Court’s focus on patent exceptionalism. Second, the Court’s apparent

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Indeed, these governing structures appear to have been intended to be transsubstantive. Legal theorists, such as Jeremy Bentham and Christopher Columbus Langdell, and legal reformers, including David Dudley Field and Charles Clark, believed that “the means for . . . giving execution and effect to the ordinances of substantive law [should be] the same in all cases,” and they derided the “grotesque” “net of forms” that “entangled” the courts. *See, respectively, e.g.,* 2 JEREMY BENTHAM, *Principles of Judicial Procedure, reprinted in THE WORKS OF JEREMY BENTHAM* 15 (John Bowring & Richard Doyne eds. 1839); David Dudley Field, *Law Reform in the United States and Its Influence Abroad*, 25 AM. L. REV. 515, 519 (1891), and DAVID DUDLEY FIELD, *WHAT SHALL BE DONE WITH THE PRACTICE OF THE COURTS? SHALL IT BE WHOLLY REFORMED?* 7 (1847). Universality norms thus emerged alongside the development of the Field Code and, subsequently, the Federal Rules of Civil Procedure, among other transsubstantive governing structures (such as the Administrative Procedure Act, 5 U.S.C. § 500 (2012)).

245. *See, e.g.,* Scalia, *supra* note 21, at 1177 (comparing a “discretion-conferring approach” with one that “establishes a general rule of law”); *see also* *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1979 (2014) (Breyer, J., dissenting) (“‘[T]he nature of the equitable,’ Aristotle long ago observed, is ‘a correction of law where it is defective owing to its universality.’” (quoting ARISTOTLE, *THE NICHOMACHEAN ETHICS* 99 (Lesley Brown ed., David Ross trans., Oxford University Press 2009))); *cf.* Marcus, *supra* note 21, at 1238 (describing “fidelity” to the antecedent substantive regime as a goal of substance-specific procedure).

246. *See* Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067 (1989); Kent Greenawalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 1013 (1978).

247. Marcus, *supra* note 21, at 1229–30; *see also* Shapiro, *supra* note 21, at 594–95; *cf.* Scalia, *supra* note 21, at 1179–80.

interest in legal universality is consistent with a more general project of addressing doctrinal exceptionalism across substantive fields of law. Finally, the rise of the Court's interest in universality (as indicated by patent field split cases) coincides with personnel changes that might usher in new judicial priorities.

### 1. Patent Exceptionalism

The Court's apparent interest in consistency across legal doctrines flows directly from its decisions in the cases described above. Recall, for example, the Court's decision in *SCA Hygiene*. There, the Court highlighted the importance of general rules—"common-law principles, methods of statutory interpretation, and procedural rules"—that apply across civil litigation.<sup>248</sup> This view informs the Court's approach to laches,<sup>249</sup> as well as its approach to the presumption against extraterritoriality (in *Microsoft*) and to the standard of appellate review (in *Highmark*),<sup>250</sup> among others. In many (though not all) of its field split cases, the Court supplants a patent-specific standard with a broadly applicable rule—one that would be familiar to any judge or lawyer, and one that is stripped of policy concerns particular to patent law. That is, the new rule is cheap to master and to apply, and it does not favor patent litigants vis-à-vis their counterparts in, say, a copyright case.

This universality hypothesis for certiorari thus connects to the Supreme Court's apparent project of reining in patent exceptionalism. The Federal Circuit's proclivity to craft patent-specific doctrine—and the Supreme Court's repeated rebuffs of these rules—has been the subject of scholarly and popular commentary.<sup>251</sup> Indeed, commentators have suggested that many of the Court's patent-related merits decisions are directed at eliminating exceptionalism (and reprimanding the Court of Appeals for producing patent-specific doctrine).<sup>252</sup> These studies offer some evidence that the Court's attention to field splits is motivated by an interest in legal universality. Peter Lee, for example, has described the "Supreme Court's assimilation

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248. *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 963–964 (2017) (quoting *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 807 F.3d 1311, 1333 (Fed. Cir. 2015) (Hughes, J., concurring in part, dissenting in part)).

249. *See id.*

250. *See* discussion *supra* Section III.C.

251. *See, e.g., Lee, supra* note 17, at 1453–61; Andrew Chung, *Supreme Court and Top Patent Court Rarely See Eye to Eye*, REUTERS (June 19, 2017, 7:54 PM), <https://www.reuters.com/article/us-usa-court-patents/supreme-court-and-top-patent-court-rarely-see-eye-to-eye-idUSKBN19A34I> [<https://perma.cc/A9UF-4Q3Y>] ("Duke University law professor Arti Rai said the high court seemed to disapprove of treating patent law differently from other areas of law."); *see also* Epps & Samuel, *supra* note 15, at 56:45–57:30 (interviewing William Jay, Partner, Goodwin Procter LLP, who explains that the Supreme Court's recent patent cases do not present questions of "hardcore patent law" but rather focus on questions of "procedure," "venue," and "statutory interpretation"); *id.* at 58:30–59:15 (noting a recent "theme" in the Court's patent cases "about applying ordinary rules from every other context").

252. *See, e.g., Lee, supra* note 17, at 1458.

of patent law to general legal principles.”<sup>253</sup> The universality hypothesis offers additional context for these projects in several ways.

First, the Court’s attention to field splits begins at the certiorari stage.<sup>254</sup> The Supreme Court’s willingness to grant certiorari on these terms alone is itself noteworthy. Recall that the Court does not typically grant certiorari to simply correct a court of appeals’ error.<sup>255</sup> A decision to craft a given legal rule may be wrong—but that does not mean that it is certworthy. But the Court seems to think that a decision to craft an *exceptional* legal rule—one that seems out of place when compared to similar rules in other fields of law—merits a place on its docket. The universality hypothesis explains the Court’s attention to one sort of petition for certiorari (or one sort of risk of legal error). The Court thus appears to have a significant, heightened interest in the balance between exceptionalism and universality. Indeed, this concern seems (at least in the patent context) analogous to its interest in uniformity: When a case piques either, certiorari appears more likely.

But, as described above, a successful petition does not guarantee success on the merits. In *Samsung v. Apple*, for example, the Court declined to adopt the causation standard that Samsung initially advanced.<sup>256</sup> Similarly, as in *Halo* and *Stryker*, the Court’s rule for willfulness does not readily conform to the approach it has taken in other areas of law, including the Fair Credit Reporting Act.<sup>257</sup> These varied results suggest also that the Court is interested not simply in reining in exceptionalism but in the more general question of how to balance universal rules with substance-specific standards.

This focus on the certiorari stage thus helps to explain a wider range of the Court’s patent decisions, including those that may seem, at first blush, outside the antiexceptionalism trend. Consider *Kappos v. Hyatt*.<sup>258</sup> *Hyatt* is typically excluded from discussions of patent exceptionalism. But like the cases described in Part III, *Hyatt*, a case about district court review of a Patent and Trademark Office decision to deny a patent application under 35 U.S.C. § 145, fits the mold.<sup>259</sup> The government’s petition for certiorari emphasized background principles of administrative law, arguing that these rules, which do not expressly contradict § 145, should govern the scope of the district court’s review.<sup>260</sup> The Supreme Court, however, “reject[ed] the [government’s] contention that background principles of administrative law govern the admissibility of new evidence.”<sup>261</sup> That is, the Court ultimately

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253. *Id.* at 1453–61.

254. *See supra* Part III.

255. *See supra* notes 67–68 and accompanying text.

256. *Samsung Elecs. Co. v. Apple Inc.*, 137 S. Ct. 429, 436 (2016); *see supra* Part I, Section III.B.2.

257. *See supra* Section III.B.1.

258. 566 U.S. 431 (2012).

259. *Hyatt*, 566 U.S. at 435.

260. *See* Petition for a Writ of Certiorari at 11–16, *Kappos v. Hyatt*, 564 U.S. 1036 (2011) (No. 10-1219) (mem.) (granting certiorari), 2011 WL 1336431.

261. *Hyatt*, 566 U.S. at 438.

determined—as it apparently did in *Samsung v. Apple*—that a patent-specific statute granted some license to stray from generally applicable background legal principles.<sup>262</sup>

The Supreme Court has a strong interest in universal rules—so much so that it is willing to dedicate rare space on its docket to cases implicating such questions. Moreover, the Supreme Court is surely less interested than the Federal Circuit in preserving exceptional status for patent law. But it does so on occasion. This suggests that the Court's motives range beyond a bare desire to discipline a Court of Appeals or even an interest in eliminating exceptionalism altogether. Rather, the Supreme Court seems genuinely interested in the question of *how much* patent exceptionalism to accept, seeking some balance between context-sensitive adjudication and the efficiency, neutrality, and legitimacy benefits conferred by universal legal rules. This subtle interest informs its review of petitions for a writ of certiorari to the Court of Appeals for the Federal Circuit.

## 2. Antiexceptionalism Across Fields

The Court also expresses this interest in its merits decisions in other parts of its docket. These decisions thus offer further evidence of an institutional interest in legal universality (even if it is not, at least in these contexts, expressed at the certiorari stage<sup>263</sup>).

The Court's 2011 decision in *Mayo Foundation for Medical Education & Research v. United States*,<sup>264</sup> for example, appears to reject the notion of “tax exceptionalism” or “tax myopia.”<sup>265</sup> In *Mayo Foundation*, the Court unanimously brought IRS and Treasury Department regulations back into the fold of mainstream administrative law, finding “no reason why [its] review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as our review of other regulations.”<sup>266</sup> It rejected the argument that tax was, at least in this regard, special. And scholars have further

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262. Another aspect of the Court's decision, however, comports with general administrative law principles. Once the Court concluded that the reviewing court may admit new evidence, general principles of administrative law would suggest that the court should not defer to the agency's decision, but rather, should review the decision *de novo*. See 5 U.S.C. § 706(2)(F) (2012) (allowing for “trial *de novo* by [a] reviewing court”). Indeed, the Supreme Court notes that applying a “*de novo* standard” in this context would “adhere[ ] to . . . the ordinary course of equity practice and procedure.” *Hyatt*, 566 U.S. at 444–45 (quoting *Butterworth v. United States ex rel. Hoe*, 112 U.S. 50, 61 (1884)). Hence, the government and the Court both sought to apply a universal rule. But they disagreed as to which rule should apply, as the government's position was predicated on the belief that the reviewing district court may not admit new evidence.

263. See *infra* notes 317–319 and accompanying text.

264. 562 U.S. 44 (2011).

265. See, respectively, Hickman, *supra* note 18, at 108–10, and Caron, *supra* note 18. For additional commentary on tax exceptionalism, see also, e.g., Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 466 (2013), and Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221 (2014).

266. *Mayo Found.*, 562 U.S. at 56.

explained that *Mayo Foundation* seems to have sounded tax exceptionalism's death knell.<sup>267</sup>

Other scholars have noted a similar trend in the immigration context, finding that “the Court’s recent cases suggest that [it] may be moving toward reviewing immigration cases under a general administrative law framework, moving away from its traditional treatment of immigration law as an ‘exceptional’ area of law.”<sup>268</sup> The Court also doubled down on its decision in *eBay*, ending exceptional rules for injunctions under environmental statutes.<sup>269</sup> And in its first landmark decision on the Patient Protection and Affordable Care Act, the Court rejected the federal government’s arguments in favor of health care exceptionalism.<sup>270</sup>

These examples offer further evidence of an institutional concern for legal universality: The Court appears to view a variety of matters, including those related to administrative and judicial process, state of mind, statutory interpretation, and remedies, as susceptible to universal rules. The breadth of the expression of this value situates the Court’s patent jurisprudence within a more general framework, connecting this part of the Court’s patent docket with decisions arising out of tax, health care, and immigration, among others.<sup>271</sup> Indeed, this suggests that the Court’s certiorari decisions in patent cases implicate institutional interests beyond its suspicion of the Federal Circuit or any particular interest in patent law.<sup>272</sup> These certiorari decisions resonate with a more fundamental universality-centered value that animates the Court’s decisions across a variety of fields and that even informs the Court’s approach to the Federal Rules.<sup>273</sup>

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267. See, e.g., Hoffer & Walker, *supra* note 265, at 222–24.

268. Rana, *supra* note 18, at 356; see also *id.* at 321& nn.39–40 (citing Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1363 (1999)) (“The Court appears to be moving away from what has been called ‘immigration exceptionalism’ and is instead increasingly placing immigration cases into a larger public law framework. In other words, the Court appears to be moving immigration cases more firmly into the mainstream of administrative law.”).

269. See *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20–24 (2008).

270. Moncrieff, *supra* note 18, at 559.

271. Cf. Rana, *supra* note 18, at 357–58 (linking the demise of immigration exceptionalism to the demise of tax exceptionalism).

272. See John F. Duffy, *The Festo Decision and the Return of the Supreme Court to the Bar of Patents*, 2002 SUP. CT. REV. 273, 282–83; cf. Timothy R. Holbrook, *Is the Supreme Court Concerned with Patent Law, the Federal Circuit, or Both: A Response to Judge Timothy B. Dyk*, 16 CHI.-KENT J. INTELL. PROP. 313, 314–15 (2017); Lee, *supra* note 17, at 1453–55.

To be clear, these considerations may also influence the Court’s decision to grant certiorari. But even if the Supreme Court exhibits some suspicion of the Federal Circuit or general interest in patent law, the Court’s apparent interest in universality may help explain the pattern described in this Article. That is, universality helps explain why the Court granted the petitions discussed in Part III, instead of any other of the myriad petitions for a writ of certiorari to the Federal Circuit.

273. See Marcus, *supra* note 219, at 410–13 (describing the role of the transsubstantivity principle to the Supreme Court’s “[c]onstruction of the Federal Rules”); Elizabeth G. Porter, *Pragmatism Rules*, 101 CORNELL L. REV. 123, 124, 171–72 (2015); cf. Cover, *supra* note 53, at 718.

### 3. New Priorities for a New Court

The apparent rise of this interest in universality also appears to correlate with changes on the Court that can usher in new judicial priorities. The vast majority of patent-related field splits admitted onto the Court's docket had their tickets punched after the start of the 2005 Term.<sup>274</sup> This timing of the move towards field split patent cases is significant: Chief Justice Roberts and Justice Alito assumed the bench in the Court's 2005 Term.<sup>275</sup> This personnel change may explain the Court's swift shift to cases implicating universality concerns: New justices bring to the bench their own "individual subjective notions of what is important or appropriate for review."<sup>276</sup> Chief Justice Roberts and Justice Alito may have particular preferences favoring legal universality that have since informed the Court's practice.

This would not be the first time that a change in personnel has occasioned a shift in patent-related practices and priorities. The Court's 1994 Term marked both a "significant turning point" after which patent cases comprised a more significant portion of the Court's agenda as well as the start of the Justice Breyer's tenure on the Court.<sup>277</sup> John Duffy has suggested that "Justice Breyer's appointment in 1994 appears to be at least partly responsible for the Court's increased number of certiorari grants in patent cases."<sup>278</sup> Analogous shifts in patent-related practices (among other areas of law), based on individual preferences, appear to have recurred throughout the Court's history.<sup>279</sup>

Examples from beyond patent law seem also to follow the pattern.<sup>280</sup> In the immigration context, for example, scholars have explained that "the Roberts Court has consistently applied conventional methods of statutory

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274. See Appendix Figures 1a and 1b. Appendix Figures 1a and 1b are graphic representations of the "Field Split" column in Appendix Table 1.

275. *Current Members*, SUP. CT. U.S., <https://www.supremecourt.gov/about/biographies.aspx> [<https://perma.cc/EJW2-MV69>].

276. Cordray & Cordray, *Setting the Social Agenda*, *supra* note 62, at 318 (quoting Gressman, *supra* note 62, at 255).

277. Duffy, *supra* note 8, at 523–24.

278. *Id.* at 525; see also I. Glenn Cohen, Essay in Honor of Justice Stephen G. Breyer, *Make it Work! Justice Breyer on Patents in the Life Sciences*, 128 HARV. L. REV. 418, 428 (2014) ("Justice Breyer has become the patent law judge on the Court.").

279. See Mark D. Janis, *Patent Law in the Age of the Invisible Supreme Court*, 2001 U. ILL. L. REV. 387, 393–94 (detailing examples, dating to Justice Story in 1818, of how "the Supreme Court's role in patent law . . . may be defined significantly through the sensibilities of one dominant justice"); see also Hoffman & Kinder, *supra* note 7, at 265–74 (considering "how newly confirmed Justice Sonia Sotomayor will impact the Supreme Court's view on intellectual property rights and patent enforcement"); David R. Stras, *The Supreme Court's Declining Plenary Docket: A Membership-Based Explanation*, 27 CONST. COMMENT. 151, 161 (2010) ("[T]here is no question that membership changes had some influence on the . . . Supreme Court's plenary docket.").

280. See Sitaraman & Wuerth, *supra* note 18, at 1903 ("The [Roberts] Court has increasingly jettisoned exceptionalism" in various foreign-relations-related areas).



interpretation and doctrines of administrative deference.”<sup>281</sup> Moreover, Chief Justice Roberts decided to author the opinion in *Mayo Foundation*, the tax case described earlier.<sup>282</sup> These shifts towards universality across doctrinal areas may thus be a product of the Roberts Court.

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The Court’s attention to field splits at the certiorari stage seems mismatched with conventional understandings of the Court’s certiorari practices and the scope of Supreme Court Rule 10. The timing of the Court’s swing towards petitions alleging field splits suggests that the shift in practice may have been informed by the priorities of the Court’s newest members (rather than, say, a process defect related to the cert pool). The nature of a field split, the content of these petitions for certiorari, the Court’s opinions in these patent cases, and its decisions in other doctrinal areas all suggest that the Supreme Court’s agenda is partially driven by an interest in universality.<sup>283</sup>

#### V. UNIVERSALITY AND CERTIORARI

The solution to certiorari’s patent puzzle appears to lie in an institutional concern for universality that is triggered by petitions that allege a field

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281. Johnson, *supra* note 18, at 111; see Rana, *supra* note 18, at 356.

282. *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 46 (2011); see also *supra* notes 265–267 and accompanying text.

283. Some readers might object to my characterization of universality as a stand-alone certiorari concern that is not incorporated in Rule 10. Some readers might, for example, counter that the Court’s decisions to hear these cases are consistent with Supreme Court Rule 10(c)’s proviso favoring certiorari when a court “has decided an important federal question in a way that conflicts with relevant decisions of this Court.” *But see* Golden, *supra* note 99, at 672 (“[C]laims of a square conflict often constitute little more than rhetorical posturing.”). Even if this were true, what about these cases would make the Federal Circuit’s decision inconsistent with the Court’s preexisting jurisprudence? The answer is universality—the view, apparently endorsed by the Court, that certain doctrines ought to be applied consistently regardless their doctrinal context. This is not a necessary outcome: One could easily imagine a legal system where, say, the same procedural doctrine takes on context-sensitive features. *Cf.* *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1933 & n.2 (2016). The “conflict” exists only because the Court has decided to extend its jurisprudence in one field of law to the patent context.

Likewise, other readers might suggest that the Court’s decisions to hear these cases are consistent with Supreme Court Rule 10(c)’s proviso that certiorari may be warranted when a court of appeals “has decided an important question of federal law that has not been, but should be, settled by this Court.” If this were true, what about these cases would make them so “important” as to warrant the Court’s attention? The answer, again, seems to be an institutional interest in universality. These cases only present “important questions” because the Court has decided that the consistent, cross-doctrinal application of certain procedural doctrines is “important.” Hence, universality seems to be at issue—regardless whether it is understood to be outside the conventional view of Rule 10’s ambit or comfortably within Rule 10’s existing ambiguities.

split.<sup>284</sup> This hypothesis, however, raises further questions about the nature of the Court's universality interest.

The first is a practical concern: Taking the Court's interest in universality as given, when will (and when should) it grant certiorari? Recall that the Court is not interested in merely eliminating exceptionalism altogether. Rather, it aims to strike a balance between universal rules and doctrine-specific standards. It is thus not immediately evident which field splits will implicate the Supreme Court's implicit institutional interests and which splits the Court will countenance. But a closer look may help reveal which petitioners are more likely to succeed, both at the certiorari stage and on the merits.

The second is a more foundational concern: Is universality an appropriate lodestar for certiorari-stage decisionmaking? Unlike geographic uniformity, the Court's apparent interest in legal universality is not connected to any congressional grant of discretionary jurisdiction. Moreover, many of these universality-implicating cases do not "involv[e] the fundamental legal doctrines that directly ensure the inventiveness of patents and regulate their scope."<sup>285</sup> The Court may thus wish to reconsider—or at least better explain—its certiorari standard.

#### A. *Assessing the Court's Certiorari Decisions*

The Court's decisions on the merits offer some clues as to which petitions resonate (and which do not) with its interest in advancing universality. Where the Court leaves patent-specific doctrine in place, it has done little to promote either uniformity or universality. We can thus assess the Court's certiorari decisions by examining its opinions on the merits to discern which cases belonged on the Supreme Court's docket and which may not have been worth the candle.

The Court's willingness to entertain patent-specific doctrine suggests that efficiency is not its leading concern. Moreover, the Court's willingness to countenance such divergences in field splits marked by a patent-specific statute or preexisting doctrinal variation aligns with a regard for neutrality and legitimacy. The Court thus seems more likely to intervene where it finds an outlying procedural doctrine or a common policy concern across related fields of law.

##### 1. Outlying Procedural Doctrines

Outliers—especially those that implicate matters of procedure—seem to characterize the core of the Court's concern for legal universality. Indeed, transsubstantivity scholars have noted that the Court is especially concerned

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284. Put in the terms of cue theory, universality is a "salient issue" for which a field split is a reliable "cue." *Supra* note 119 (quoting Teger & Kosinski, *supra* note 119, at 845).

285. Gugliuzza, *supra* note 15, at 331.

for universality in these contexts to preserve neutrality (as well as institutional legitimacy through impressions of neutrality) and to promote judicial efficiency.<sup>286</sup>

Consider *SCA Hygiene*. This case was, as noted, originally billed to the Court as a split among related fields—between the Federal Circuit’s patent rule and the Court’s copyright decision in *Petrella*.<sup>287</sup> But the Court recharacterized the split as an outlier: in its view, the patent rule for laches conflicted with a “well-established general rule.”<sup>288</sup> The Court emphasized patent law’s membership in the club of civil litigation, all “governed by the same common-law principles, methods of statutory interpretation, and procedural rules.”<sup>289</sup> The Court’s decision to grant certiorari thus seems aligned with its interest in advancing a universal set of standards for litigation practice in general and procedure in particular.<sup>290</sup>

## 2. Common Concerns Across Related Fields

SCA Hygiene’s petition for certiorari also helps to explain Justice Breyer’s dissent. Unlike the majority, Justice Breyer did not appear to view the case as presenting an outlier. Rather, he characterized the split as the petitioners originally did. In his view, the majority’s best argument was for “consistency” between the Copyright Act and the Patent Act.<sup>291</sup> Here, the majority and dissent wrote past each other. Justice Alito’s majority opinion focused on the broad structures governing civil litigation while Justice Breyer’s dissent explored the intricacies of intellectual property law.<sup>292</sup> On these terms, Justice Breyer was unpersuaded: He noted several “relevant differences . . . between patent law and copyright law.”<sup>293</sup> He explained, for example, that copyright plaintiffs must prove wrongful intent on the part of the defendant, while patent infringement is a strict liability offense.<sup>294</sup> Unfair surprise is thus more likely in patent disputes, and so equitable defenses, such as laches, may be appropriately invoked given the context.<sup>295</sup>

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286. See Marcus, *supra* note 219; Marcus, *supra* note 21.

287. See *supra* notes 136–137 and accompanying text.

288. *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 963 (2017).

289. *Id.* at 963–64 (quoting *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 807 F.3d 1311, 1333 (Fed. Cir. 2015) (Hughes, J., concurring-in-part, dissenting-in-part)).

290. See *e.g.*, Marcus, *supra* note 219, at 410–13 (describing the Court’s “particular concern for the legitimacy of court-crafted procedural rules” in which a “trans-substantivity principle plays a starring role”).

291. *SCA Hygiene*, 137 S. Ct. at 971 (Breyer, J., dissenting).

292. Compare, *e.g.*, *supra* note 289 and accompanying text, with *infra* notes 293–295 and accompanying text.

293. *SCA Hygiene*, 137 S. Ct. at 971 (Breyer, J., dissenting).

294. *Id.* at 972.

295. *Id.*

Justice Breyer's dissent thus highlights one important limit on the set of field splits consistent with the Court's interest in legal universality: Splits among related fields merit review only where the split regards a matter of concern common to these distinct fields (here, of intellectual property). There was, in Justice Breyer's view, no common concern with copyright to warrant consistent treatment.<sup>296</sup>

*Impression Products, Inc. v. Lexmark International, Inc.* offers a contrasting example.<sup>297</sup> Impression Products asked the Court to consider whether a patentholder may exercise her rights against a secondhand owner—that is, after the patented product has been resold.<sup>298</sup> The Court faced a similar question in the copyright context a few Terms earlier. There, it had decided against the copyright holder, holding that the copyright is statutorily exhausted by the first sale of the protected product, even if that sale is executed abroad.<sup>299</sup> Impression Products' petition for certiorari noted a split between patent and copyright on this question and urged the Court to align the approaches among these related fields.<sup>300</sup> Lexmark and, more notably, the solicitor general argued the contrary: Copyright, the OSG said, "does not illuminate the proper international-patent-exhaustion rule."<sup>301</sup>

The Court sided against Lexmark and the OSG, noting a concern for patent law's effects on copyright policy:

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296. *Id.* at 971–73. This "common concern" limit to the Court's interest in consistency across related fields of law also relates to the Court's decision to decline to hear the first question presented in Samsung's petition, described *supra* Part I. Recall that this petition suggested "tension" among fields of intellectual property law on the proper scope of protection for design patents. See *supra* note 56 and accompanying text. But if the Court believes that these distinct regimes have distinct scopes of protection—see, for example, Christopher Bucafusco & Mark A. Lemley, *Functionality Screens*, 103 VA. L. REV. 1298–1306 (2017), noting the consequences of allowing IP regime scopes to overlap; Mark P. McKenna & Christopher Jon Sprigman, *What's In, and What's Out: How IP's Boundary Rules Shape Innovation*, 30 HARV. J.L. & TECH. 491, 540–42 (2017), discussing how IP regimes interact to create coherent, or incoherent, incentive frameworks thereby shaping investment and innovation; Pamela Samuelson, *Strategies for Discerning the Boundaries of Copyright and Patent Protections*, 92 NOTRE DAME L. REV. 1493, 1513–16 (2017), noting the consequences of allowing IP regime scopes to overlap—then this argument may have had little sway. That is, in the Court's view, such tension is a natural product of these distinct intellectual property regimes, and thus does not require harmonization.

297. 137 S. Ct. 1523 (2017). In addition to *Impression Products*, see also Petition for a Writ of Certiorari at 13, *Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 137 S. Ct. 2239 (2017) (mem.) (granting certiorari) (No. 16-712), 2016 WL 6995217 (noting split between patent and copyright and explaining that the two are "indistinguishable . . . in this regard").

298. *Impression Prods.*, 137 S. Ct. at 1536.

299. *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 528–30 (2013).

300. Petition for a Writ of Certiorari at 24–27, *Impression Prods., Inc. v. Lexmark Int'l, Inc.*, 137 S. Ct. 546 (2016) (mem.) (granting certiorari) (No. 15-1189), 2016 WL 1130030 [hereinafter *Impression Prods.* Petition for Writ of Certiorari].

301. Brief for the United States as Amicus Curiae at 21–22, *Impression Prods.*, 137 S. Ct. 546 (mem.) (granting certiorari) (No. 15-1189), 2016 WL 5957534 [hereinafter *Impression Prods.* Amicus Brief for the United States]; Brief for the United States as Amicus Curiae Supporting Reversal in Part and Vacatur in Part at 30, *Impression Prods.*, 137 S. Ct. 1523 (No. 15-1189), 2017 WL 371923.

Differentiating the patent exhaustion and copyright first sale doctrines would make little theoretical or practical sense: The two share a “strong similarity . . . and identity of purpose,” and many everyday products—“automobiles, microwaves, calculators, mobile phones, tablets, and personal computers”—are subject to both patent and copyright protections. There is a “historic kinship between patent law and copyright law,” and the bond between the two leaves no room for a rift on the question of international exhaustion.<sup>302</sup>

That is, the Court’s decision in this patent case is informed by a copyright statute and the related fields’ “historic kinship”—notwithstanding the absence of an analogous patent statute.<sup>303</sup> Notably, this may give courts of appeals other than the Federal Circuit a measure of power over patent law’s path: Where copyright and patent intersect, a court’s decision in the former may ultimately affect the latter.

These examples help to illuminate the interest that informs the Court’s agenda-setting decisions in its patent docket. In some cases, the decision to grant review implicates the Court’s interest in preserving the judiciary’s status as a neutral litigation forum. Indeed, where the Federal Circuit is seen to be captured,<sup>304</sup> the Court’s imposition of universal, value-neutral rules offers a restraint on apparent patent activism. I do not mean to suggest that the Federal Circuit is in fact captured—but what matters, at least for the purposes of the Court’s apparent legitimacy concern, is the perception of capture. The Court’s interventions thus help to assure that the judiciary is not seen as discriminating among related fields of law, such as patent and anti-trust,<sup>305</sup> or patent and copyright, among others.<sup>306</sup> Hence, as a purely practical matter, petitioners seeking certiorari may thus find better success by highlighting outlying procedural (and procedure-like) doctrines and by noting incongruence between rules in related fields of law.<sup>307</sup>

### 3. Variation Among Unrelated Fields

In other cases, by contrast, the Court seems to eventually admit a degree of inconsistency across fields of law. In *Stryker*, for example, the Court

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302. *Impression Prods.*, 137 S. Ct. at 1536 (cleaned up).

303. *Impression Prods.* Petition for Writ of Certiorari, *supra* note 300, at 24–27; *cf. Impression Prods.* Amicus Brief for the United States, *supra* note 301, at 21–22 (noting lack of an analogous patent statute).

304. See, e.g., Rochelle Cooper Dreyfuss, Lecture, *What the Federal Circuit Can Learn from the Supreme Court—and Vice Versa*, 59 AM. U. L. REV. 787, 789–90 (2010). *But cf. id.* at 790–91.

305. See Feldman, *supra* note 17, at 66–71.

306. See Rochelle Cooper Dreyfuss, *In Search of Institutional Identity: The Federal Circuit Comes of Age*, 23 BERKELEY TECH. L.J. 787, 808 (2008) (“[T]he Supreme Court occasionally appears impatient with the [Federal Circuit] for not . . . changing the law to conform to decisions on related issues.”); *cf. POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2238 (2014).

307. Except, perhaps, as described *infra* Section V.A.3.

maintained a patent-specific approach in light of existing doctrinal variation. As described above, Stryker complained that the Federal Circuit's definition of "willfulness" was "inconsistent with *Safeco*"<sup>308</sup>—without acknowledging that *Safeco* itself noted that "'willfully' is a word of many meanings whose construction is often dependent on the context in which it appears."<sup>309</sup> The Court's decision ultimately acknowledged *Safeco*'s view on the meaning of willfulness and crafted a patent-specific approach. To be sure, the Court reversed the Federal Circuit, finding the previous test "unduly rigid."<sup>310</sup> But Justice Breyer's concurrence explained that the Court's new patent-specific approach should be shaped by "the Federal Circuit[']s] . . . own experience and expertise in patent law."<sup>311</sup> Given the Court's willingness to countenance a patent-specific approach informed by patent-specific concerns (as articulated by the Federal Circuit), the Court's decision to grant certiorari seems questionable. The Court did little to advance either uniformity or universality, preferring instead to preserve a standard responsive to doctrinal context.

The examples implicating patent-specific statutes present a special case of such context sensitivity. The petition in *Samsung*, for example, alleged a split on damages principles, but the Court seems to have eventually agreed with the OSG that 35 U.S.C. § 289 "provide[d] a measure of recovery different from, and in many cases more expansive than, the award that traditional causation principles would produce."<sup>312</sup> Such examples, which also include *Hyatt*,<sup>313</sup> highlight patent-specific statutes that, in the Court's ultimate view, may supersede an otherwise applicable background principle.

The Court's practice further illuminates the contours of the underlying values that form its apparent concern for universality. The Court's willingness to admit doctrinal variation suggests that efficiency is not its primary concern. After all, the Court could have easily construed § 289 to include a causation limit, simplifying the statute's remedy to the standard applied in other fields of law. Rather, where the Court can explain distinctions among substantive regimes by reference to statutory text, it seems to prefer context-sensitive adjudication.<sup>314</sup> That is, where doctrinal variation may not threaten the judiciary's neutrality or legitimacy by, say, embodying policy choices clearly made by the courts (rather than ascribed to Congress), the Supreme

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308. *Stryker* Petition for Writ of Certiorari, *supra* note 12, at 31 (citing *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70 n.20 (2007)).

309. *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1933 n.\* (2016) (quoting *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 57 (2007)).

310. *Id.* at 1932.

311. *Id.* at 1938 (Breyer, J., concurring).

312. *See supra* Part I.

313. *See supra* notes 258–262 and accompanying text.

314. *But see* Stephen B. Burbank, *Summary Judgment, Pleading, and the Future of Transsubstantive Procedure*, 43 AKRON L. REV. 1189, 1194 (2010) (noting the "judiciary's refusal to acknowledge that statutory procedure is legitimate").

Court is more responsive to the differences among fields of law and benefits of context-sensitive adjudication.<sup>315</sup>

This pattern has clear implications for practice. Opponents to a petition for certiorari may thus wish to pay careful attention to existing doctrinal variation and patent-specific statutes. Where these factors—common in splits among random fields, as in both *Halo* and *Stryker* as well as *Sam-sung*<sup>316</sup>—explain the alleged field split, the Court is more likely to let a patent-specific rule stand. It should do so at the certiorari stage by simply denying the petition and declining to review the case.

#### B. Assessing the Court's Certiorari Standard

The Court's decisions to review patent cases presenting an outlying procedural doctrine or a conflict with a related field of law on a matter of common concern seem consonant with the apparent scope of its interest in universality. Should the Court agree to review nonpatent cases under such circumstances too? There is no obvious indication that it has granted review in a nonpatent case on such terms.<sup>317</sup> Patent cases may thus appear to occupy a privileged place in the Supreme Court's certiorari practice. Consider the Court's decision to grant certiorari in *Mayo Foundation*. That tax case, described earlier, presented a new circuit split created by judgment on review.<sup>318</sup> But the field split at issue—an outlying standard for reviewing tax regulations vis-à-vis other regulations—was much older than this circuit split. The Court might have addressed the field split sooner, if it were a cue for certiorari across doctrinal areas.<sup>319</sup>

But it might not have. Indeed, the Court's apparent disinterest in reviewing field splits beyond patent law may highlight some important weaknesses in this apparent certiorari standard.

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315. Robert G. Bone, *Securing the Normative Foundations of Litigation Reform*, 86 B.U. L. REV. 1155, 1159 (2006); Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV. 535, 562; Cover, *supra* note 53, at 718.

316. The inference does not, of course, run both ways. Alleged splits among random fields are susceptible to being explained by general doctrinal variation or patent-specific statutes. But these factors may also be present in other types of splits. *Hyatt*, for example, was billed to the Court as an outlier, but may be explained by a patent-specific statute. *See supra* notes 258–262 and accompanying text.

317. There is, of course, room for a more robust exploration of this question via, say, an examination of petitions for certiorari arising out of the other circuit courts, or petitions arising out of other fields of law—such as tax or immigration—where exceptionalism appears to have been a concern, *see supra* Section IV.C.2, or even petitions arising out of other aspects of the Federal Circuit's docket, *see supra* note 3. I hold such further study for future work, noting only that in several nonpatent cases that sound in universality, the Court's field split review seems to be triggered by a circuit split. That is, in these other areas of law, the Court seems content to let the field split fester—at least until it gives rise to a circuit split. *See, e.g., infra* notes 318–319 and accompanying text.

318. *See supra* notes 264–267 and accompanying text.

319. *See Hickman, supra* note 18, at 108–10; *see also* Lawrence Zelenak, *Maybe Just a Little Bit Special, After All?*, 63 DUKE L.J. 1897, 1909 (2014).

For one, the Court's attention to, say, the application of the laches defense in patent cases or the standard of review for fee awards in such cases, is not connected to any usual basis for certiorari. As described earlier, these sorts of questions do not seem to implicate the Court's longstanding, traditional function of deciding "important question[s] of federal law."<sup>320</sup>

To be sure, the Court has heard cases presenting questions such as these, as in *Petrella*, or *Cooter & Gell* and *Pierce*.<sup>321</sup> But these cases implicated the Court's uniformity-enforcing function: The Supreme Court addressed circuit splits. And the Court's focus on geographic uniformity is founded in the 1925 Judges' Bill, in which the Court implicitly traded with Congress a promise to ensure geographic uniformity in federal law for greater discretion over its own docket (in the form of certiorari).<sup>322</sup> But there is no analogous congressional basis for the Court's focus on legal universality. To the contrary, Congress's creation of the Federal Circuit may suggest that the Court ought to take extra care before agreeing to review a patent case. After all, the Federal Circuit was created to supplement—if not supplant entirely—the Supreme Court's uniformity-enforcing function in patent cases.<sup>323</sup>

But while the Federal Circuit was created to ensure uniformity in patent decisions, that says little about the authority to resolve important questions of patent law. Such questions remain in the Supreme Court's purview. Indeed, consistent with Rule 10(c), the Court should review important patent law questions. Instead, the Court's present focus may divert its attention from cases presenting important patent law questions in need of resolution. Though the Court agreed to review five patent cases in its 2015 Term, it declined to hear *Sequenom*—despite the presence of over twenty certiorari-stage amicus briefs, a separate panel opinion, and divided opinions on the petition for rehearing en banc.<sup>324</sup> The Court's docket is a limited resource,

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320. SUP. CT. R. 10(c); see also *supra* notes 221–225 and accompanying text.

321. *Petrella v. Metro-Goldwyn-Mayer*, 134 S. Ct. 1962 (2014); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990); *Pierce v. Underwood*, 487 U.S. 552 (1988).

322. See *supra* note 77 and accompanying text; see also Hartnett, *supra* note 66, at 1685, 1697–98 (2000).

323. See, e.g., S. REP. NO. 97-275, at 3 (1981) (explaining that “there are areas of the law in which the appellate courts reach inconsistent decision[s] on the same issue” but “the Supreme Court’s capacity to review cases cannot be enlarged significantly” and so “the remedy lies in some reorganization at the intermediate appellate level”). Indeed, some early petitions for certiorari concede that “restraint in reviewing Federal Circuit decisions on patent law is appropriately grounded in the confidence that . . . the Federal Circuit has authoritatively settled a question of patent . . . in light of its accumulated expertise in the area . . .” Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit at 19, *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 516 U.S. 1145 (1996) (mem.) (granting certiorari) (No. 95-728). Notably, now-Judge Taranto (of the Federal Circuit) co-authored this petition. See also *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1938 (2016) (Breyer, J., concurring) (noting the importance of “the Federal Circuit[’s] . . . own experience and expertise in patent law”).

324. *Sequenom, Inc. v. Ariosa Diagnostics, Inc.* 136 S. Ct. 2511 (2016) (mem.) (denying certiorari). For these indicia of certworthiness, see, respectively, *Proceedings and Orders*, SUP. CT. U.S., <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/15-1182.htm> [<https://perma.cc/LN2S-AHYD>]; *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 788 F.3d 1371,



and its bandwidth for patent cases is surely even more constrained. And though it is impossible to say why the Court denied *Sequenom's* petition, these resource constraints may have limited the Court's attention for an important and potentially foundational case. If the Court is to hear a case where there is a chance that the Federal Circuit erred, it should hear a case where the risk of error regards a foundationally important patent law issue—not laches.

I should state clearly the scope of my critique. I do not mean to suggest that universality should not inform the Court's merits decisions. But as a standard for certiorari, legal universality seems dissonant with the traditional and congressional bases for the exercise of its discretionary appellate jurisdiction.<sup>325</sup> And it may distract the Court from matters in greater need of its attention. To be sure, the Court may see the values informing its apparent interest in universality—neutrality and institutional legitimacy—as sufficient for certiorari.<sup>326</sup> But if that is so, the Court should more clearly explain why. And it should explain why these values take on added importance in the patent context vis-à-vis, say, its tax docket. Or else it should agree to review field splits across any doctrinal areas. Stated simply, if the Supreme Court cannot clearly articulate the values informing a decision to grant certiorari, then, perhaps, it should decline to review the case.

\* \* \*

The Court's interest in universality thus seems a bit fainthearted. This is so along at least two dimensions. First, the Supreme Court's commitment to consistency across fields falters in the face of existing doctrinal variation or a patent-specific statute. This, of course, is not given: The Court could have announced a transsubstantive standard for willful conduct in *Halo* and *Stryker*, and it might have read a causation limit into the text of § 289 in *Samsung v. Apple*. I do not mean to suggest that the Court should necessarily adopt a stronger (or weaker) form of universality in its merits decisions.<sup>327</sup> But either approach has consequences for the path of the law. A further shift toward universality might buttress the gains in efficiency, neutrality, and legitimacy that existing transsubstantive rules have wrought, while a shift away might better protect the courts' ability to take context- and case-specific considerations into account. The Supreme Court's choice along this spectrum will affect jurisprudence in patent, tax, and immigration cases,

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1380 (Fed. Cir. 2015) (Linn, J., concurring); *Ariosa Diagnostics, Inc. v. Sequenom, Inc.*, 809 F.3d 1282, 1284 (Fed. Cir. 2015) (Lourie, J., concurring in the denial of the petition for rehearing en banc); and *Sequenom*, 809 F.3d at 1293 (Newman, J., dissenting from the denial of the petition for rehearing en banc).

325. Cf. THE FEDERALIST NO. 82 (Alexander Hamilton) (Clinton Rossiter, ed., 1961) (The Supreme Court "is destined to unite and assimilate the principles of national justice and the rules of national decisions.")

326. See SUP. CT. R. 10(c); see also *supra* note 283. Indeed, legitimacy is sometimes cited as one value served by a geographically uniform interpretation of federal law. See *supra* note 81 and accompanying text.

327. I plan to address this in future work.

among others. It will also set the tone for lower courts—nationwide and in all areas of law—either pushing them toward decisions based upon universal standards or upon case- and context-specific features.

Second, the Supreme Court's interest in legal universality appears at its apex in the patent context. In other doctrinal areas, the Court's universality value plays no obvious part in a case's first act, coming on stage only after review has been granted. This seems odd and may highlight some important weaknesses in the Court's standard for granting review. As a basis for certiorari, universality has no apparent foundation in either the Court's traditional practice or congressional grants of discretionary jurisdiction. And the Court's focus on field splits directs its docket away from questions closer to the core of patent doctrine. Perhaps the Court sees the values underlying its interest in universality as equally urgent. But the Court has not explained why that is so, and why it is especially so in its patent docket. Hence, if the Court cannot articulate the basis for review in these cases, it may be better served by reserving its focus for questions in greater need of its limited attention.

#### CONCLUSION

The Supreme Court's patent docket presents a puzzle. In the vast majority of its docket, the Court emphasizes circuit splits—cases that implicate the Court's oft-noted role in ensuring the uniform application of federal law. In another corner of the Court's docket, it focuses on fundamental questions of constitutional design, federal power, and national policy. But many of the Court's patent cases fit neither description. The Federal Circuit's exclusive jurisdiction over patent appeals ensures uniformity in patent law. And many recent patent cases implicate neither constitutional questions nor core patent doctrine. How, then, does the Court decide which patent cases to hear?

My hypothesis is that the Court is motivated by an institutional concern for legal *universality*: The Supreme Court seems concerned about consistency across fields of law. Such consistency helps to ensure a neutral and legitimate judicial forum. This interest triggers review in cases presenting *field splits*—allegations that patent law somehow stands apart from other areas of law in some important respect. This theory is consistent with the petitions for certiorari in these cases. It is consistent with the mode of the Supreme Court's reasoning in these patent cases, and its decisions in other areas in its docket. And the timing of the Court's interest in such cases coincides with the investitures of Chief Justice Roberts and Justice Alito, who may have a special interest in such universality.

The Supreme Court's apparent interest in universality has important strategic implications for both petitioners and respondents—in both patent cases and beyond. The petitions for certiorari (and opinions on the merits) in the Court's patent docket suggest that petitioners ought to highlight outlying procedural doctrines and discord with related fields of law. Opponents to certiorari may likewise find success by highlighting existing doctrinal variation and patent-specific statutes that supersede background principles.

Moreover, the Court can quickly address any outstanding questions regarding its standard for certiorari. It could, for example, amend Rule 10 to clarify the standard for certiorari in patent cases, setting out a rationale for review. But even if the Court is loath to set out a patent-specific standard in this general rule of practice (or otherwise amend the rule at all), an even easier answer awaits: The Court can describe the basis for certiorari in its merits decisions. As I noted earlier, the Court sometimes describes the reason for certiorari in its opinions. In *Petrella*, *Safeco*, *Pierce*, *Cooter*, and *Smith*—all cited above—the Supreme Court described the uniformity-related rationale for agreeing to review the case. But it has not offered a similar service in its patent docket. Correcting this anomaly is simple. Consider the following addition to the Court’s opinion in *SCA Hygiene*:

SCA [Hygiene] appealed to the Federal Circuit, but before the Federal Circuit panel issued its decision, this Court decided *Petrella*. The panel nevertheless held, based on a Federal Circuit precedent, *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, that SCA’s claims were barred by laches.

The Federal Circuit then reheard the case en banc in order to reconsider *Aukerman* in light of *Petrella*. But in a 6–to–5 decision, the en banc court reaffirmed *Aukerman*’s holding that laches can be asserted to defeat a claim for damages incurred within the 6–year period set out in the Patent Act. As it had in *Aukerman*, the en banc court concluded that Congress, in enacting the Patent Act, had “codified a laches defense” that “barred recovery of legal remedies.” . . . We granted certiorari [*in light of the conflicting approaches to the defense of laches among patent law and other areas of law*].<sup>328</sup>

Such a straightforward description of the basis for certiorari (regardless whether it reflects universality or some other value) will help the academy better understand the Court’s institutional values, will help the Supreme Court Bar better identify cases that resonate with the Court’s concerns, and will help the Court itself avoid cases that do not merit its limited attention. Indeed, if the Court cannot articulate such a basis for certiorari, then perhaps it should never have agreed to hear the case at all. That is, the Supreme Court can help itself find the cases it will want to decide—in patent law, and beyond.

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328. *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 959–60 (2017) (cleaned up and modified to describe a basis for the grant of certiorari).

## APPENDIX

APPENDIX TABLE 1: CERTIORARI GRANTS IN PATENT CASES  
(OT1982–OT2016)

Case Name	Term Cert. Granted	Petition for Writ of Certiorari			
		SG a Party?	CVSG?	Court Split?	Field Split?
Dennison Mfg. Co. v. Panduit Corp.	OT1985				
Christianson v. Colt Indus. Operating Corp.	OT1987			Y	
Bonito Boats, Inc. v. Thunder Craft Boats, Inc.	OT1987			Y	
Eli Lilly & Co. v. Medtronic, Inc.	OT1989				
Cardinal Chem. Co. v. Morton Int'l, Inc.	OT1992				
Asgrow Seed Co. v. Winterboer	OT1993				
Am. Airlines, Inc. v. Lockwood	OT1994				Y
Markman v. Westview Instruments, Inc.	OT1994				
Warner-Jenkinson Co. v. Hilton Davis Chem. Co.	OT1995				
Pfaff v. Wells Elecs., Inc.	OT1997				
Dickinson v. Zurko	OT1998	S			Y
Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank	OT1998				Y
J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.	OT2000		O		Y
Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.	OT2000				
Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.	OT2001				Y
Merck KGaA v. Integra LifeSciences I, Ltd.	OT2004		S		
Ill. Tool Works, Inc. v. Indep. Ink, Inc.	OT2004			Y	
eBay Inc. v. MercExchange, L.L.C.	OT2005				Y
Lab. Corp. of Am. Holdings v. Metabolite Labs., Inc.	OT2005		O		
MedImmune, Inc. v. Genentech, Inc.	OT2005				Y
KSR Int'l Co. v. Teleflex, Inc.	OT2005		S		
Microsoft Corp. v. AT&T Corp.	OT2006		S		Y
QuantaComput., Inc. v. LG Elecs., Inc.	OT2006		S		
Bliski v. Kappos	OT2008	O			
Global-Tech Appliances, Inc. v. SEB, S.A.	OT2010				Y
Bd. of Trs. of the Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.	OT2010		S		
Microsoft Corp. v. i4i Ltd. P'ship	OT2010				
Mayo Collaboratives Servs. v. Prometheus Labs, Inc.	OT2010				
Caraco Pharm. Labs. v. Novo Nordisk	OT2010		S		
Kappos v. Hyatt	OT2010	S			Y
Gunn v. Minton	OT2012			Y	
Bowman v. Monsanto Co.	OT2012		O		
Ass'n for Molecular Pathology v. Myriad Genetics, Inc.	OT2012				
FTC v. Actavis, Inc.	OT2012	S		Y	
Medtronic, Inc. v. Mirowski Family Ventures, LLC	OT2012				Y
Octane Fitness, LLC v. ICON Health & Fitness, Inc.	OT2013				Y
Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.	OT2013				Y
Limelight Networks, Inc. v. Akamai Techs., Inc.	OT2013		S		Y
Nautilus, Inc. v. Biosig Instruments, Inc.	OT2013				
Alice Corp. v. CLS Bank Int'l	OT2013				
Teva Pharms. USA, Inc. v. Sandoz, Inc.	OT2013				Y
Commil USA, LLC v. Cisco Sys., Inc.	OT2014		S		Y
Kimble v. Marvel Entm't, LLC	OT2014		O		
Halo Elecs., Inc. v. Pulse Elecs., Inc.; Stryker Corp. v. Zimmer, Inc.	OT2015				Y
Cuozzo Speed Techs., LLC v. Lee	OT2015	O			
Samsung Elecs. Co. v. Apple Inc.	OT2015				Y
SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC	OT2015				Y

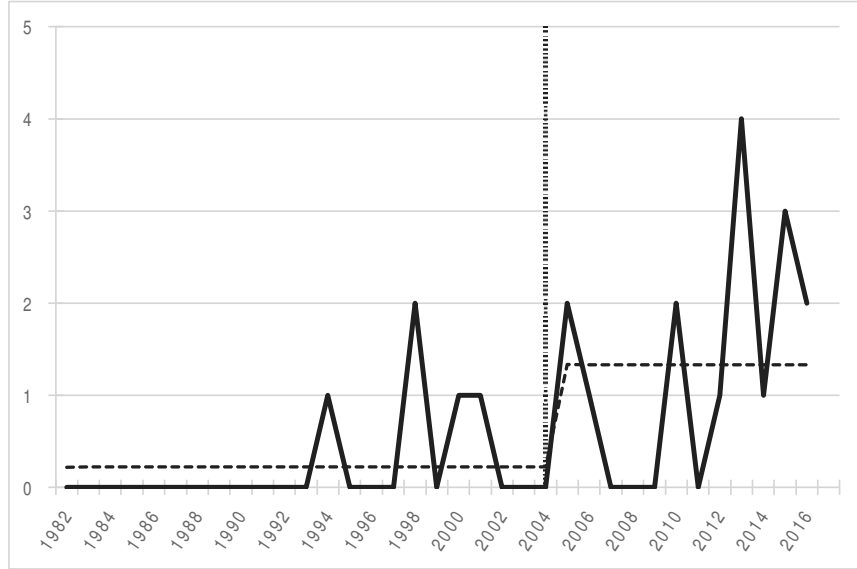
Life Techs. Corp. v. Promega Corp.	OT2015		S		
TC Heartland LLC v. Kraft Foods Grp. Brands LLC	OT2016				
Impression Prods., Inc. v. Lexmark Int'l, Inc.	OT2016		S		Y
Sandoz Inc. v. Amgen Inc.	OT2016		S		
SAS Inst., Inc. v. Lee	OT2016	O			
Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC	OT2016	O			Y

O—OSG Opposed Review. S—OSG Supported Review. Y—Yes.

APPENDIX TABLE 2: FIELD SPLITS IN DENIED PETITIONS  
(RANDOM SAMPLE, OT1982–OT2016)

Case Name	Term Cert. Denied	Petition for Writ of Certiorari
		Field Split?
Nestler Corp. v. Menasha Corp.	OT1984	
Roll Mfg. Co. v. Nickson Indus., Inc.	OT1985	
Woods v. Tsuchiya	OT1985	
Mor-Flo Indus., Inc. v. State Indus., Inc.	OT1987	
Calco, LTD. v. Water Techs. Corp.	OT1988	
Constant v. Advanced Micro-Devices, Inc.	OT1988	
Stagner v. U.S. PTO	OT1989	
Halas v. Quigg	OT1990	
Pomini Inc. v. Farrel Corp. and U.S. Int'l Trade Comm'n	OT1991	Y
Shat-R-Shield, Inc. v. Trojan, Inc.	OT1992	
Intel Corp. v. ULSI Sys. Tech., Inc.	OT1993	
Mendenhall v. Cedarapids, Inc.	OT1993	
Sunburst Prods., Inc. v. Cyrk Inc.	OT1996	
Advanced Semiconductor Am., Inc. v. Applied Materials, Inc.	OT1996	
Oiness v. Walgreen Co.	OT1996	
CAT Contracting, Inc. v. Insituform Techs., Inc.	OT1996	
Stun-Tech, Inc. v. R.A.C.C. Indus., Inc.	OT1998	
Karavan Trailers v. Midwest Indus.	OT1999	
Sign-A-Way, Inc. v. Mechnonics Corp.	OT2000	
Am. Imaging Servs. v. Intergraph Corp.	OT2000	Y
Constant v. U.S. PTO Bd. of Patent Appeals & Interferences	OT2001	
Kimberly-Clark Corp. v. Tyco Int'l (US), Inc.	OT2001	
Dow Chem. Co. v. Astro-Valcour, Inc.	OT2001	
Orange Bang, Inc. v. Juicy Whip, Inc.	OT2002	Y
Thomason v. Monsanto Co.	OT2002	
Arrow Commc'n Labs v. Eagle Comtronics	OT2002	
The Toro Co. v. White Indus.	OT2004	
Caterpillar Inc. v. Sturman Indus.	OT2004	
Int'l Rectifier Corp. v. Samsung Elecs. Co.	OT2005	
Ross v. State Contracting & Eng'g Corp.	OT2006	
Bruckelmyer v. T.H.E. Machine Co.	OT2006	
Bender v. Dudas	OT2007	
Saint-Gobain Calmar, Inc. v. Arminak & Assoc.	OT2007	
Capital Bridge Co. v. IVL Techs. LTD.	OT2007	
Alphapharm Proprietary Co. v. Takeda Chem. Indus., LTD.	OT2007	
Acushnet Co. v. Callaway Golf Company.	OT2009	
Microsoft Corp. v. Lucent Techs.	OT2009	Y
SAP AG v. Sky Techs.	OT2009	
Mettke v. Kappos	OT2009	
Baden Sports, Inc. v. Molten USA, Inc.	OT2009	
Kozachuk v. Medpointe Healthcare, Inc.	OT2010	
Wong v. United States	OT2010	
Lockwood v. Sheppard, Mullin, Richter & Hampton, LLP.	OT2011	Y
Apotex, Inc. v. Otsuka Pharm. Co.	OT2012	
Ditto v. U.S. PTO	OT2012	
Hyundai, Motor Am., Inc. v. Clear with Comps., LLC	OT2013	Y
Wilkins v. Gen. Elec. Co.	OT2014	
Pulse Elecs., Inc. v. Halo Elecs., Inc.	OT2015	
Bodum, Inc. v. Meyer Intellectual Proprs.	OT2015	
Neev v. Alcon Lensx, Inc.	OT2016	
Cox Commc'ns v. Sprint Commc'n	OT2016	
MacDermid Printing v. E.I. DuPont de Nemours & Co.	OT2016	
TDE Petroleum Data Sols., Inc. v. AKM Enter., Inc.	OT2016	

APPENDIX FIGURE 1A: CERTIORARI GRANTS IN FIELD SPLIT PATENT CASES SINCE 1982 (PER TERM, PRE- AND POST-2005 AVERAGES)



APPENDIX FIGURE 1B: CERTIORARI GRANTS IN FIELD SPLIT PATENT CASES SINCE 1982 (DISPLAYED CUMULATIVELY)

