The Supreme Assimilation of Patent Law

Peter Lee
UC Davis School of Law

Although tensions between universality and exceptionalism apply throughout law, they are particularly pronounced in patent law, a field that deals with highly technical subject matter. This Article explores these tensions by investigating an underappreciated descriptive theory of recent Supreme Court patent jurisprudence. Significantly extending previous scholarship, it argues that the Court's recent decisions reflect a project of eliminating "patent exceptionalism" and assimilating patent doctrine to general legal principles (or, more precisely, to what the Court frames as general legal principles). Among other motivations, this trend responds to rather exceptional patent doctrine emanating from the Federal Circuit in areas as varied as appellate review of lower courts, remedies, and the award of attorney's fees. The Supreme Court has consistently sought to eliminate patent exceptionalism in these and other areas, bringing patent law in conformity with general legal standards. Among other implications, this development reveals the Supreme Court's holistic outlook as a generalist court concerned with broad legal consistency, concerns which are less pertinent to the quasi-specialized Federal Circuit. Turning to normative considerations, this Article argues in favor of selective, refined exceptionalism for patent law. Although the Supreme Court should strive for broad consistency, certain unique features of patent law—particularly the role and expertise of the Federal Circuit—justify some departure from general legal norms. Finally, this Article turns to tensions between legal universality and exceptionalism more broadly, articulating principles to guide the deviation of specialized areas of law from transcendent principles.

Contents

"The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint at universal law."[1]

INTRODUCTION

Perhaps Justice Thomas is an intellectual heir to Gottfried Leibniz. Certainly, there is much separating the current Associate Justice of the Supreme Court and the Enlightenment philosopher and mathematician. But Justice Thomas's opinion in *eBay v. MercExchange*, which rejects a specialized rule to determine injunctive relief in patent cases in favor of a general equitable framework,[2] bears Leibniz's intellectual stamp. Leibniz made many contributions,[3] but he is perhaps best known as one of the most prominent systematizers of the seventeenth century.[4] Leibniz sought to find transcendent principles in natural and mathematical phenomena, thus

[1] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 478 (1897) [hereinafter Holmes, *Path*].
[2] eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006).
[3] Leibniz, perhaps not surprisingly, also wrote about law. *See* M.H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEG. HIST. 95, 99 (1986).
[4] *See* Robert McRae, *The Unity of the Sciences: Bacon, Descartes, and Leibniz*, 18 J. HIST. IDEAS 27, 27 (1957).

revealing the unified nature of the universe.[5] Leibniz's quest for universality and intellectual coherence impacted law, ultimately informing the notion of "legal science" associated with Christopher Columbus Langdell and other nineteenth century formalists.[6] This systemizing spirit is evident in Justice Thomas's *eBay* opinion, which frames itself as rejecting patent exceptionalism in favor of universal legal principles. This universalizing ethos is both substantive and rhetorical; indeed, the Court's *eBay* rule was actually quite novel, but the Court conscientiously framed it in generally applicable terms, and it has subsequently become the legal norm.[7] This universalizing ethos, moreover, represents an undertheorized feature of recent Supreme Court patent jurisprudence.

Although tensions between universality and exceptionalism apply throughout law, they are particularly relevant to patent law, which deals with highly technical subject matter. Drawing on these tensions, this Article explores an underappreciated descriptive theory of Supreme Court patent jurisprudence. Over the past decade and a half, the Supreme Court has significantly increased its review of patent decisions from the Federal Circuit. Commentators have offered several theories to interpret this development. First, many observers view these interventions as attempts to rein in expansive Federal Circuit patent doctrine that has made it too easy to obtain patents and unduly enhanced their power.[8] Second, commentators note that the Court has consistently adopted holistic standards to replace the bright-line, formalistic rules that are characteristic of Federal Circuit patent doctrine.[9]

This Article augments these prevailing interpretations by exploring an underappreciated descriptive theory of Supreme Court patent doctrine. Significantly extending previous scholarship, it argues that the Supreme Court's recent patent jurisprudence reflects a project of eliminating "patent exceptionalism" and assimilating patent doctrine to general legal principles. In substantial part, this trend responds to rather exceptional patent doctrine emanating from the Federal Circuit in areas as varied as appellate review of lower courts, remedies, and the award of attorney's fees. In these and other areas, the Supreme Court has consistently eliminated patent exceptionalism, bringing patent law in conformity with general legal standards.[10] However, the

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[5] Hoeflich, *supra* note , at 100.
[6] *See* Hoeflich, *supra* note , at 95.
[7] *See infra* notes – and accompanying text.
[8] *See infra* notes – and accompanying text.
[9] *See infra* notes – and accompanying text.
[10] This assimilationist drive encompasses, but extends well beyond, a more intuitive form of assimilation: the Court's reconciliation of patent law with other intellectual property doctrines, particularly copyright. The Court's interest in assimilating patent and copyright law is not surprising given their common constitutional foundations. *See* U.S. Const., art. I, cl. 8, § 8 (providing authority for Congress to create both patent and copyright systems); Global-Tech Appliances, Inc. v. SEB S.A., 131 S.Ct. 2060, 2067 (2011) (drawing on copyright doctrine to inform the mental state requirement for induced infringement in patent law); eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 392-93 (2006) (drawing on copyright law to support the use of a four-factor equitable test to determine injunctive relief in patent disputes); Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (drawing on patent law to inform the copyright standard for contributory infringement); Octane Fitness v. Icon Health & Fitness, Inc., 134 S.Ct. 1749, 1756 (2014) (citing Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 (1994)) (drawing on the "comparable context of copyright" to help determine the award of attorney's fees in patent cases); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 439 (1984) ("The closest analogy is provided by the patent law cases to which it is appropriate to refer because of the historic kinship between patent law and copyright law."); *see* Timothy R. Holbrook, *Explaining the Supreme Court's Interest in Patent Law*, 3 IP THEORY 62, 70-71 (2013) [hereinafter Holbrook, *Explaining*].

Supreme Court's assimilation is not limited to this pattern. Under the rubric of assimilation, the Court has created new doctrine and labeled it as mainstream, reversed the Federal Circuit on open questions of law as well as faithful application of precedent, and even stamped out "exceptional" patent doctrine from courts other than the Federal Circuit. Although previous scholarship has recognized individual elements of this phenomenon,[11] this Article represents the first comprehensive examination of doctrinal assimilation across myriad areas. Additionally, it addresses not just the most recent Supreme Court patent decisions of the past decade or so, but provides a more expansive interpretive theory encompassing cases since the establishment of the Federal Circuit. Furthermore, it delves deeper than descriptive accounts to provide a theoretical explanation for this development—highlighting substantive as well as rhetorical invocations of assimilation—and its broader implications for law in general.

This project of assimilating patent law to general legal principles has taken several forms. The Supreme Court has strictly applied "trans-substantive"[12] regulatory regimes such as the Federal Rules of Civil Procedure, the Administrative Procedure Act, and jurisdictional statutes to patent law. It has (somewhat imprecisely) invoked traditional equitable principles to displace specialized rules for patent disputes. The Court has reasoned by analogy, borrowing and applying concepts from legal fields unrelated to patent law. It has favored general, ordinary connotations of legal terms instead of specialized ones. And it has eliminated per se rules at the intersection of patent law and antitrust. Throughout, the Court has consistently assimilated patent law to its conception of broader legal concepts.

Turning from description to interpretation, this Article argues that much (but not all) of the Court's assimilationist project represents a direct response to exceptionalist patent doctrine from the Federal Circuit. Furthermore, the Court's rulings seek to rein in not only patent doctrine but the Federal Circuit itself, whose exceptional patent jurisprudence has tended to increase its own power. More broadly, the Court's assimilationist project reflects its holistic orientation as a generalist court concerned with legal consistency and policy considerations that range beyond the patent system. These observations reveal a deep institutional irony. Congress created the Federal Circuit to unify patent law; in doing so, that court has developed rather exceptional doctrine. In its recent patent rulings, however, the Supreme Court has played the role of unifier on a grander scale, eliminating such exceptionalism. Additionally, focusing on legal assimilation helps reduce the Supreme Court's cognitive burdens when engaging unfamiliar technical details of the patent system. Finally, the Court has utilized assimilation to rhetorical effect, sometimes framing novel doctrine as "mainstream" to enhance its legitimacy.

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[11] *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); Paul R. Gugliuzza, *The Federal Circuit as a Federal Court*, 54 WM. & MARY L. REV. 1791, 1817-18 (2013) [hereinafter Gugliuzza, *Federal Circuit*]; C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, 81 NYU L. REV. 1553, 1561 (2006); Holbrook, *Explaining*, *supra* note , at 71-72; Peter Lee*, Patent Law and the Two Cultures*, 120 YALE L.J. 2, 77-78 (2010) [hereinafter Lee, *Two Cultures*]; David O. Taylor, *Formalism and Antiformalism in Patent Law Adjudication: Rules and Standards*, 46 U. CONN. L. REV. 415, 473-80 (2013) [hereinafter Taylor, *Rules and Standards*].

[12] As I use it here, "trans-substantive" refers to a property of doctrine, rules, or principles that are intended to apply universally across multiple substantive fields of law. I adopt here a wider conception of trans-substantive law than that which focuses on the law of process and procedure. *See* Robert M Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975); David Marcus, *Trans-Substantivity and the Processes of American Law*, 2013 BYU L. REV. 1191, 1194 [hereinafter Marcus, *Trans-Substantivity*].

Turning to normative analysis, this Article then assesses the Supreme Court's assimilation of patent law. It argues against a strict conception of universalism and contends that the special nature of patent law—particularly the unique role and expertise of the Federal Circuit—justifies a certain degree of exceptionalism from general doctrine. Finally, this Article turns to tensions between legal universality and exceptionalism more broadly. It concludes by arguing that considerations of institutional specialization, policy, and the form of legal pronouncements can ensure valuable flexibility within unified legal regimes.

This Article proceeds in six parts. Part I examines the general tension between universality and exceptionalism in law. It explores the value of legal universality as articulated in formalistic "legal science" as well as its continuing influence in contemporary times. Part II considers the Supreme Court's recent patent jurisprudence. It describes prevailing interpretive theories of the Court's intervention, which focus on reining in overly expansive patent doctrine and replacing formalistic rules with holistic standards. Part III explores an underappreciated descriptive theory of Supreme Court patent jurisprudence, arguing that the Court has consistently assimilated patent doctrine to (what it characterizes as) transcendent legal principles in a wide array of doctrinal areas. Part IV analyzes the Court's assimilationist project, examining its scope and underlying motivations. Among other considerations, it argues that the Court's universalizing jurisprudence reflects its role as a generalist court atop the judicial hierarchy, particularly in contradistinction to the quasi-specialized Federal Circuit. Part V questions the Court's strict adherence to universalism and argues in favor of selective exceptionalism in patent law based on institutional expertise. Part VI revisits universality and exceptionalism more generally. It challenges the value of strict assimilation and articulates general principles to help determine when and how specialized areas of law should deviate from broad norms.

PART I. UNIVERSALITY AND EXCEPTIONALISM IN LAW

Law's aspirations for universal consistency and coherence have long roots. An important intellectual foundation of "legal universalism" is the formalist movement of the late nineteenth and early twentieth centuries,[13] which is often associated with Dean Christopher Columbus Langdell of Harvard Law School.[14] There are many dimensions to formalism, but most relevant for present purposes is a belief that "the law was comprised of principles … broad in their generality, few in their number, and clear enough to permit answers to the questions of law to be more or less directly deduced."[15] Formalism was part of Langdell's conception of "legal science,"[16] which held that "law can be reduced to a set of first principles, on the order of mathematical axioms, and that by the use of deductive method, these principles can yield all

[13] *See* Howard Schweber, *The "Science" of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education*, 17 L. & HIST. REV. 421, 421 (1999); Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View from Century's End*, 49 AM. U. L. REV. 1, 10-16 (1999).
[14] Wetlaufer, *supra* note , at 10-11.
[15] Wetlaufer, *supra* note , at 12; *see* Christopher C. Langdell, *Preface to the First Edition*, *in* A SELECTION OF CASES ON THE LAW OF CONTRACTS VI (Little Brown & Co. 1999) (1871).
[16] Hoeflich, *supra* note , at 95; *see* Thomas C. Grey, *Book Review, Modern American Legal Thought*, 106 YALE L.J. 493, 495 (1996) (describing "Langdellian legal science").

necessary consequences."[17] This systematizing spirit lent itself to logical and doctrinal consistency across legal domains[18] and discouraged tailoring doctrine to particular contexts and circumstances.[19]

Although the realists that followed were skeptical of decontextualized and hyperlogical formalism,[20] they were also committed to legal universalism in their own way. Writing in 1897, Oliver Wendell Holmes warned against a conception of law that "can be worked out like mathematics from some general axioms of conduct."[21] After all, for Holmes, "[t]he life of the law has not been logic; it has been experience."[22] Nonetheless, this accumulated body of experience provided a foundation for coherence and universality. Although progressives like Holmes rejected Langdellian formalism,[23] they "retained but reinterpreted in pragmatist fashion the structure of abstract legal concepts and principles that had been the primary focus of Classical legal thought."[24] For Holmes, the aim of legal thought was to render the teachings of centuries of reports, treatises, and statutes in the United States and England "more precise, and to generalize them into a thoroughly connected system."[25] Though rooted in experience more than formal logic, the realists also envisioned a coherent legal system in which legal practices could be distilled to a limited number of rules to help resolve myriad kinds of legal disputes.[26]

This systemizing spirit is evident in several legal reform projects,[27] such as the Federal Rules of Civil Procedure, which were established in 1938.[28] Although realism is often associated with skepticism of rules, realists embraced rules as valuable guides to how predecessors had resolved similar legal issues in the past.[29] The Rules distilled centuries of collective wisdom regarding the proper resolution of legal disputes, and they sought to bring greater consistency and coherence to the sprawling arena of modern litigation. This systemizing spirit is also evident

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[17] Hoeflich, *supra* note , at 96; *see* Grey, *supra* note , at 495-96 (noting that within Langdellian legal science, "rules descend deductively from a small number of coherently interrelated fundamental concepts and principles").
[18] *See* Schweber, *supra* note , at 453 ("In legal science the ideal of the grand synthesis meant that analogies could be drawn from one area of law to another.").
[19] Wetlaufer, *supra* note , at 12.
[20] Wetlaufer, *supra* note , at 18. Of course, demarcations of various historical phases differ. For instance, some legal historians distinguish between progressives and realists, locating Holmes in the former. *See* Grey, *supra* note , at 501.
[21] Holmes, *Path*, *supra* note , at 466.
[22] OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881).
[23] This is a conventional account of the transition between various schools. Other scholars, however, posit less of an oscillation between formalism and realism and emphasize overlapping patterns and themes among various schools. *See* Grey, *supra* note , at 508.
[24] Grey, *supra* note , at 498.
[25] Holmes, *Path*, *supra* note , at 457.
[26] Holmes, *Path*, *supra* note , at 458.
[27] Such projects include the Restatements of Law and the Uniform Law Initiatives. *See* Wetlaufer, *supra* note , at 12; Grant Gilmore*, Legal Realism, Its Causes and Cure*, 70 YALE L.J. 1037 (1961); WALTER P. ARMSTRONG, JR., A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1991).
[28] *See generally* Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1 (1989); David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform*, 44 GA. L. REV. 433 (2010) [hereinafter Marcus, *Federal Rules*]; Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).
[29] Marcus, *Federal Rules*, *supra* note, at 443; *see* Bone, *supra* note , at 12.

in the Administrative Procedure Act (APA), which Congress enacted in 1946. The burgeoning New Deal bureaucracy gave rise to a need for greater standardization of administrative practice,[30] and the APA quite clearly aimed "to achieve relative uniformity in the administrative machinery of the Federal Government."[31]

The value of universality is evident in other influential schools of legal thought as well. For example, the legal process school, which flowered in the 1950s,[32] prioritized the rule of law and emphasized "consistency with the broader legal fabric."[33] Particularly relevant to this Article, the legal process school championed general and neutral principles of procedure and institutional design,[34] particularly concerning judicial review and administrative law.[35] Themes of universality are also evident in the legal positivist/analytic tradition.[36] Legal positivists tend to emphasize law's coherence, integrity, and fit,[37] and they view language (especially legal terms) to be largely fixed and determinate.[38] This preoccupation with universality and uniformity continues into contemporary times.[39]

For centuries, universalism and broad consistency have been prized values in the law. This drive toward general coherence, however, frequently clashes with the sprawling, technical nature of law and a countervailing pull toward tailoring domains of law to their unique subject matter. The rise of the administrative state has challenged fundamental yearnings for universalism; in the modern technocratic landscape, it might seem odd to apply the same rules governing standing, procedure, and remedies to First Amendment challenges, environmental cases, and tax disputes.[40] This tension between universality and exceptionalism is especially acute in patent law, which is distinctive because of its highly technical nature as well as the unique role of the quasi-specialized Federal Circuit. To explore this tension, it is helpful to first examine the context of the Supreme Court's recent interventions in patent law, a topic to which the next Part turns.

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[30] Marcus, *Trans-Substantivity*, *supra* note , at 1211.
[31] *Introduction*, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 5 (1947); *see* Wong Yang Sung v. McGrath, 339 U.S. 33, 41 (1950) ("One purpose was to introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies whose customs had departed widely from each other."); *see also* Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 271 (1994) ("We do not lightly presume exceptions to the APA."); Marcus, *Trans-Substantivity*, *supra* note , at 1215.
[32] Wetlaufer, *supra* note , at 21.
[33] Simona Grossi, *A Modified Theory of the Law of Federal Courts: The Case of Arising-Under Jurisdiction*, 88 WASH. L. REV. 961, 969 (2013); *see also* Marcus, *Trans-Substantivity*, *supra* note , at 1217 ("[L]egal process jurisprudence … created a fertile intellectual environment for trans-substantivity's entrenchment.").
[34] Wetlaufer, *supra* note , at 28.
[35] Wetlaufer, *supra* note , at 24; Grey, *supra* note , at 504 ("[T]he Process jurists did for American jurisdiction and procedure what the Classical legal thinkers had done for substantive private law—they reduced it to a doctrinal system.").
[36] Wetlaufer, *supra* note , at 43-48.
[37] Wetlaufer, *supra* note , at 46.
[38] Wetlaufer, *supra* note , at 46.
[39] J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105, 116 (1993) ("The law (or a part of the law) is coherent if the principles, policies, and purposes that could justify it form a coherent set, which in turn means that all conflicts among them are resolved in a principled, reasonable, and nonarbitrary fashion.").
[40] *Cf.* Cover, *supra* note , at 732.

PART II. THE SUPREME COURT'S RECENT FORAYS INTO PATENT LAW

One of the most notable developments in patent law over the past decade and a half has been the Supreme Court's aggressive intervention in patent affairs. Congress created the Federal Circuit in 1982 as a quasi-specialized court to hear appeals in patent matters (and a limited set of other types of disputes[41]) from district courts and the Patent and Trademark Office (PTO). For the first decade or so of the Federal Circuit's existence, the Supreme Court rarely reviewed patent cases.[42] Instead, the Supreme Court allowed this new court to develop its institutional authority and legitimacy by deferring to its specialized expertise. However, the tide began to turn about a decade and a half ago as the Supreme Court began increasing its review of patent appeals from the Federal Circuit.[43] The Court's recent activity has sparked significant commentary regarding why the Court has become more active in patent adjudication and how it is reshaping patent doctrine. In particular, commentators have argued that the Supreme Court has sought to curb patent rights that had become too expansive under the Federal Circuit and to replace formalistic rules with holistic standards. These theories provide a backdrop for the descriptive theory advanced in this Article regarding the Court's elimination of patent exceptionalism.

A. Constraining the Power of Patents

In many ways, the Supreme Court's recent decisions have reined in patent rights that had become quite expansive under Federal Circuit jurisprudence.[44] Around the turn of the millennium, widespread concerns began to arise that in some contexts, patents may actually impede rather than promote technological progress. Influential reports from the Federal Trade Commission and the National Research Council questioned the perceived excesses of the patent system.[45] The PTO's penchant for issuing large numbers of "bad patents"—those that are undeserving of protection or at least warrant greater scrutiny—generated concerns over the innovation-dampening effects of patents.[46] Similarly, commentators warned of patent anticommons and thickets in which large numbers of exclusive rights thwarted innovative

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[41] *See* Hon. Paul. R. Michel, *Assuring Consistency and Uniformity of Precedent and Legal Doctrine in the Areas of Subject Matter Jurisdiction Entrusted Exclusively to the U.S. Court of Appeals for the Federal Circuit: A View from the Top*, 58 AM. U. L. REV. 699, 699 (2009) (listing other matters over which the Federal Circuit exercises appellate jurisdiction).

[42] Taylor, *Rules and Standards*, *supra* note , at 418 (finding that during the Federal Circuit's first decade, the Supreme Court only reviewed one case dealing with substantive patent law, in which it affirmed the Federal Circuit).

[43] In addition to other factors, the Solicitor General has helped spur the Supreme Court to hear more patent cases. *See* John F. Duffy, *The Federal Circuit in the Shadow of the Solicitor General*, 78 GEO. WASH. L. REV. 518, 536-37 (2010); Paul R. Gugliuzza, *IP Injury and the Institutions of Patent Law*, 98 IOWA L. REV. 747, 766-68 (2013).

[44] *See, e.g.*, Steve Seidenberg, *Reinventing Patent Law*, A.B.A. J., Feb. 2008, at 60.

[45] FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (2003), *available at* http://www.ftc.gov/os/2003/10/innovationrpt.pdf; NAT'L RESEARCH COUNCIL, A PATENT SYSTEM FOR THE 21ST CENTURY (Stephen A. Merrill et al. eds., 2004).

[46] *See* Jay P. Kesan & Andres A. Gallo, *Why "Bad" Patents Survive in the Market and How Should We Change?—The Private and Social Costs of Patents*, 55 EMORY L.J. 61 (2006); *but see* Mark A. Lemley & Bhaven Sampat, *Is the Patent Office a Rubber Stamp?*, 58 EMORY L.J. 181 (2008) (questioning the thesis that the PTO grants a high proportion of patent applications).

efforts.[47] In the eyes of many, these deficiencies related directly to Federal Circuit doctrine enhancing the power and prevalence of patents.[48]

Certainly, the Supreme Court's patent jurisprudence fits comfortably within this thesis of constraining patent rights. In the realm of patentable subject matter, the Court has invalidated patents on business methods,[49] processes of improving the therapeutic efficacy of drugs,[50] isolated DNA,[51] and software.[52] The Court has also elevated the nonobviousness standard[53] and the requirement of claim definiteness.[54] Turning from patentability to infringement, the Court has imposed constraints on the doctrine of equivalents,[55] liberally interpreted statutory exceptions to patent infringement,[56] narrowed the circumstances that qualify for foreign[57] and induced infringement,[58] and expansively interpreted the exhaustion of patent rights.[59] Turning to remedies, the Court has also rendered it more difficult for patentees to get injunctions.[60] Additionally, the Court has made it easier for licensees to challenge the validity of patents they are licensing.[61] Although there are some exceptions,[62] the vast majority of recent Supreme Court cases have constrained patent rights.[63]

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[47] *See, e.g.*, Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698 (1998); Peter Yun-hyoung Lee, *Inverting the Logic of Scientific Discovery: Applying Common Law Patentable Subject Matter Doctrine to Constrain Patents on Biotechnology Research Tools*, 19 HARV. J.L. & TECH. 79, 81 (2005); Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard Setting*, *in* 1 INNOVATION POLICY AND THE ECONOMY 119 (Adam B. Jaffe et al. eds., 2001).

[48] *See* Matthew D. Henry & John L. Turner, *The Court of Appeals for the Federal Circuit's Impact on Patent Litigation*, 35 J. LEGAL. STUD. 85, 87 (2006); Dreyfuss, *Federal Circuit*, *supra* note , at 26; Rai, *Facts and Policy*, *supra* note , at 1114 ("At bottom, then, the Federal Circuit's major decisions in recent years may have been influenced by bias toward patent holders.").

[49] Bilski v. Kappos, 561 U.S. 593 (2010).

[50] Mayo Collaborative Servs. v. Prometheus Labs. Inc., 132 S.Ct. 1289 (2012).

[51] Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 133 S.Ct. 2107 (2013).

[52] Alice Corp. v. CLS Bank Int'l, 134 S.Ct. 2347 (2014).

[53] KSR Int'l Co v. Teleflex, Inc., 550 U.S. 398 (2007).

[54] Nautilus, Inc. v. Biosig Instruments, Inc., 134 S.Ct. 2120 (2014).

[55] Warner-Jenkinson Co., Inc. v. Hilton Davis Chemical Co., 520 U.S. 17 (1997).

[56] Merck KGaA v. Integra Lifesciences I, Ltd., 545 U.S. 193 (2005); Eli Lilly & Co. v. Medtronic, Inc., 496 U.S. 661 (1990).

[57] Microsoft Corp. v. AT&T Corp., 550 U.S. 437 (2007).

[58] Limelight Networks, Inc. v. Akamai Technologies, Inc., 134 S.Ct. 2111 (2014).

[59] Quanta Computer, Inc. v. LG Elecs., Inc., 128 S. Ct. 2109 (2008); *but see* Bowman v. Monsanto, 133 S.Ct. 1761 (2013) (holding that exhaustion doctrine did not allow unauthorized replanting of patented genetically altered seeds).

[60] eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006).

[61] MedImmune, Inc. v. Genentech, 549 U.S. 118 (2007).

[62] *See, e.g.*, Microsoft Corp. v. i4i Ltd. Partnership, 131 S.Ct. 2238 (2011) (affirming that validity challenges to granted patents must be proven by clear and convincing evidence); Global-Tech Appliances, Inc. v. SEB S.A., 131 S.Ct. 2060 (2011) (holding that willful blindness can satisfy the mental state requirement for induced infringement); Festo Corp. v. Shoketsu Kinzoku Kogyokabushiki Co., 535 U.S. 722 (2002) (adopting a flexible bar approach to prosecution history estoppel, thus favoring patentees); *see* Holbrook, *Explaining*, *supra* note , at 76 (finding the notion that the Supreme Court has operated to counter the Federal Circuit's pro-patent bias "incomplete and ultimately unpersuasive").

[63] Commenting on a case that ultimately was not reviewed on the merits, Justice Breyer tellingly noted that "sometimes too much patent protection can impede rather than 'promote the Progress of Science and useful arts.'" Lab. Corp. of Am. Holdings v. Metabolite Labs., Inc., 548 U.S. 124, 126 (2006) (Breyer, J., dissenting from dismissal of the writ of certiorari) (quoting U.S. Const. art. I, § 8, cl. 8).

B. Favoring Holistic Standards over Formalistic Rules

In addition to constraining substantive patent rights, the Supreme Court has consistently embraced holistic standards over formalistic rules. As many commentators have observed, Federal Circuit patent doctrine generally takes the form of bright-line rules.[64] This preference for rules may be part and parcel of the court's mission to render patent law more unified, consistent, and predictable. In its recent patent decisions, however, the Supreme Court has consistently rejected formalistic rules in favor of holistic standards.[65] For example, the Court held that the Federal Circuit's rule-like "machine-or-transformation" test[66] did not categorically govern the patent eligibility of processes, instead invigorating the more holistic standard that abstract ideas are not patentable subject matter.[67] The Court also adopted a standard-like "flexible bar" approach to prosecution history estoppel,[68] a doctrine that constrains patentees' assertions of the doctrine of equivalents.[69] The Court also rejected the Federal Circuit's rule-based approach to nonobviousness,[70] instead establishing a more "functional," "expansive and flexible" approach to such inquiries.[71] In the remedies context, the Court rejected the Federal Circuit's syllogistic rule that heavily favored granting injunctions and instead established a four-factor equitable test to determine the appropriateness of such relief.[72]

Commentators have theorized that the Court's preference for holistic standards relates to its status as a generalist court. Among other implications, the Federal Circuit's bright-line rules tend to ease the administration of patent law by district courts[73] and the PTO,[74] in part by decreasing engagement with complex technologies. As a generalist court with very few patent cases on its docket, however, the Supreme Court is insulated from the day-to-day challenges of adjudicating technical patent disputes. As such, "the Court is free to announce broad, policy-oriented standards without considering the difficulties of applying them in myriad technological contexts."[75] The Supreme Court's perch at the top of a vast judicial hierarchy also affords it a

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[64] *See* Timothy R. Holbrook, *Substantive Versus Process-Based Formalism in Claim Construction*, 9 LEWIS & CLARK L. REV. 123 (2005) [hereinafter Holbrook, *Substantive Versus Process-Based Formalism*]; Timothy R. Holbrook*, The Supreme Court's Complicity in Federal Circuit Formalism*, 20 SANTA CLARA COMPUTER & HIGH TECH L.J. 1 (2003) [hereinafter Holbrook, *Supreme Court's Complicity*]; Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 COLUM. L. REV. 1035, 1040 (2003) [hereinafter Rai, *Facts and Policy*]; Thomas, *supra* note 15; *see also* Taylor, *Rules and Standards*, *supra* note , at 420 n.16 (collecting sources).

[65] Lee, *Two Cultures*, *supra* note ; Linn, *supra* note , at 7 ("For the Supreme Court, bright-line rules are seldom endorsed."); Taylor, *Rules and Standards*, *supra* note , at 440-41.

[66] *In re* Bilski, 545 F.3d 943 (Fed. Cir. 2008) (en banc).

[67] Bilski v. Kappos, 130 S. Ct. 3218, 3221 (2010); *see* Lee, *Two Cultures*, *supra* note , at 61-62.

[68] Festo Corp. v. Shoketsu Kinzoku Kogyokabushiki Co., 535 U.S. 722 (2002); *see* Lee, *Two Cultures*, *supra* note , at 47-51.

[69] *See* Warner-Jenkinson v. Hilton Davis Chemical Co., 520 U.S. 17 (1997) (addressing the doctrine of equivalents).

[70] *See In re* Dembiczak, 175 F.3d 994 (Fed. Cir. 1999) (articulating the Federal Circuit's "teaching, suggestion, and motivation" test for determining nonobviousness).

[71] KSR v. Teleflex, 550 U.S. 398, 415 (2007) (citing Graham v. John Deere Co., 383 U.S. 1, 12, 18 (1966)); *see* Lee, *Two Cultures*, *supra* note , at 51-56.

[72] eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006); *see* Lee, *Two Cultures*, *supra* note , at 56-60.

[73] Lee, *Two Cultures*, *supra* note , at 25-42; *cf.* Rai, *Facts and Policy*, *supra* note , at 1039.

[74] Kelly Casey Mullally, *Legal (Un)certainty, Legal Process, and Patent Law*, 43 LOY. L.A. L. REV. 1109, 1126-28 (2010).

[75] Lee, *Two Cultures*, *supra* note , at 63.

perspective that a more specialized court such as the Federal Circuit lacks. The Supreme Court's holistic, "big picture" perspective encourages it to consider how patents fit into the larger economy[76] and may inform its preference for holistic standards that consider factual details and context. These prevailing theories of Supreme Court patent jurisprudence—reining in patent rights and favoring holistic standards—provide a backdrop for understanding the Court's broad "assimilation" of patent law, a topic that the next Part examines in depth.

PART III. THE SUPREME ASSIMILATION OF PATENT LAW

This Article augments prevailing theories by arguing that the Supreme Court's recent jurisprudence also reflects an effort to eliminate patent "exceptionalism" and assimilate patent law to transcendent legal principles. At times, this effort operates substantively, and at times it operates rhetorically, framing new doctrine within the language of legal assimilation. This interpretive theory encompasses not only the most recent Supreme Court patent decisions, but also decisions dating back to the establishment of the Federal Circuit.

In providing a comprehensive theory of assimilation, this Article builds on previous work recognizing pockets of patent exceptionalism (and its rejection) in specific contexts.[77] For example, Paul Gugliuzza notes the Supreme Court's rejection of Federal Circuit patent exceptionalism in standing, remedies, and review of administrative agencies.[78] Similarly, Rochelle Dreyfuss observes that "the Supreme Court has made smallish doctrinal adjustments intended to keep patent law in the mainstream."[79] Tim Holbrook argues that the Supreme Court's recent patent jurisprudence seeks "to bring patent law back into the legal tapestry, rejecting any form of patent exceptionalism."[80] In the pharmaceutical realm, Scott Hemphill argues that the regulatory scheme of the Hatch-Waxman Act justifies some deviation from traditional patent principles[81] while Robin Feldman argues against an "exceptional" conception of patents as strict rights to exclude that trump antitrust concerns.[82]

Federal Circuit judges have also recognized the Supreme Court's wariness of patent exceptionalism. Judge O'Malley notes that the Supreme Court has made it "abundantly clear that neither the character of patent law nor the unusual character of our jurisdiction permits us to don

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[76] Lee, *Two Cultures*, *supra* note , at 79; Rochelle Cooper Dreyfuss, *What the Federal Circuit Can Learn from the Supreme Court—And Vice Versa*, 59 AM. U. L. REV. 787, 795 (2010) ("[The Federal Circuit] has little chance to see how patents fit into the economy as a whole. The Supreme Court does have that perspective.") [hereinafter Dreyfuss, *Learn*].

[77] *See, e.g.*, Lee, *Two Cultures*, *supra* note , at 77-78.

[78] Gugliuzza, *Federal Circuit*, *supra* note , at 1817-18.

[79] Dreyfuss, *Learn*, *supra* note , at 795.

[80] Holbrook, *Explaining*, *supra* note , at 71-72.

[81] Hemphill, *supra* note , at 1561.

[82] Feldman, *supra* note , at 67; *see id.* at 69.

David Taylor focuses on a different kind of "exceptionalism": patent law's exceptional need for certainty in defining property rights, which helps justify bright-line rules. Taylor, *Rules and Standards*, *supra* note , at 473-80. Somewhat in tension with this view, Oskar Liivak criticizes the "exceptional" deviation of patent law—as manifested in strong exclusive rights—from the modern uses and functions of property. Oskar Liivak, *Maturing Patent Law from Industrial Policy to Intellectual Property*, 5 TULANE L. REV. 1163, 1169-73 (2012).

a policy-making mantle or to create special rules for patent cases."[83] Furthermore, Supreme Court cases dealing with injunctions, standing, and nonobviousness "all contain unmistakable language and straightforward holdings reminding us that the Federal Circuit is an Article III court whose work is governed by the same rules of procedures and evidence, and the same restrictions on its interpretative function, that govern all other courts in this country."[84] Similarly, Judge Linn recognizes that the Supreme Court "is giving us guidance that promoting uniformity in patent decisions does not mean creating patent-specific, bright-line rules outside the mainstream of federal law."[85] Furthermore, "a consistent theme of the Court's opinions is the continual endorsement of past Supreme Court patent opinions and condemnation of patent-specific, bright-line rules in favor of flexible mainstream dogma."[86]

Beyond these high-level descriptions, this Part delves deeper into the Supreme Court's assimilation of patent law. It offers a comprehensive account of assimilation as well as highlights its substantive and rhetorical functions in a wide variety of doctrinal areas. First, the Court has rejected special rules for patent law in enforcing broad structural regimes such as the Federal Rules of Civil Procedure, the Administrative Procedure Act, and jurisdictional statutes. Second, it has (somewhat imprecisely) invoked equitable principles to eliminate specialized rules for patent suits. Third, the Court has reasoned by analogy from legal fields unrelated to patent law, borrowing concepts from other areas to inform patent doctrine. Fourth, the Court has favored general, ordinary connotations of legal terms instead of technical meanings specially adapted for patent law. Finally, the Court has eliminated per se rules regarding the antitrust implications of patents, subsuming such considerations within general antitrust principles. Throughout, the Court has consistently assimilated patent law to its conception of broader legal norms and sought to eliminate doctrinal exceptionalism.

A. Enforcing Trans-Substantive Regulatory Schemes and Maintaining Structural Relationships

i. The Federal Rules of Civil Procedure and Appellate Review of District Court Factual Findings

In two cases separated by almost thirty years, the Supreme Court assimilated patent law to a general regulatory scheme, the Federal Rules of Civil Procedure, to structure the relationship between district and appellate courts. In the 1986 case of *Dennison Manufacturing Co. v. Panduit Corp*,[87] the Supreme Court considered the appropriate standard of review of district court factual findings by the Federal Circuit. This infringement suit hinged on the nonobviousness requirement, which the Supreme Court had previously held is a legal issue informed by several factual inquiries.[88] In this case, the district court had examined the prior art, identified differences between the prior art and the claims at issue, and concluded that the patents

[83] Kathleen O'Malley, *An Expanded "Slim Volume" on the Limited Role of Courts in Shaping Patent Policy*, 22 FED. CIR. B.J. 91, 98 (2012).
[84] O'Malley, *supra* note , at 99.
[85] Richard Linn, *Changing Times: Changing Demands*, 15 SMU SCI. & TECH. L. REV. 1, 6 (2011).
[86] Linn, *supra* note , at 6.
[87] 475 U.S. 809 (1986).
[88] Graham v. John Deere Co., 383 U.S. 1, 17-18 (1966).

were invalid as obvious.[89] On appeal, the Federal Circuit reversed the district court's conclusion regarding obviousness.[90] In so doing, it disagreed with the district court's assessment of the prior art and ruled that the references cited by that court did not suggest creating the patentee's inventions.[91] In reviewing the district court, the Federal Circuit did not mention or explicitly apply a "clearly erroneous" standard when rejecting the lower court's factual findings.[92] Implicitly, the Federal Circuit applied a less deferential standard when reviewing the district court findings, perhaps informed by its own expertise in patent adjudication.

On appeal, in *Dennison v. Panduit*, the Supreme Court vacated and remanded the Federal Circuit's judgment. The Supreme Court ruled that the district court's factual determinations were subject to Federal Rule of Civil Procedure 52(a)(6), which states that an appellate court may only set aside factual findings if it finds them "clearly erroneous."[93] Notably, the Supreme Court's opinion explicitly aimed to unify patent law with prevailing rules of civil procedure. The Court did not give weight to any of the unique attributes of the Federal Circuit in deciding the case.[94] Rather, the Court held (or even assumed) that Rule 52(a)(6) should govern Federal Circuit review of district court factual findings, just as with any other appellate court reviewing such findings.[95] In so doing, the Supreme Court not only constrained the Federal Circuit's review of district court factual findings, it also constrained the Federal Circuit's ability to interpret general rules—such as the Federal Rules of Civil Procedure—in an exceptional manner for patent cases.[96]

Almost thirty years later, the Federal Circuit's review of district court factual findings again confronted the Supreme Court, which again assimilated patent law to general legal principles. In 2015, in *Teva Pharms. v. Sandoz, Inc.*, the Supreme Court considered the appropriate standard of review of district court claim construction.[97] District courts perform claim construction to construe the meaning of key terms in patent claims, and it often determines the outcome of patent litigation.[98] In *Markman v. Westview Instruments*, the Supreme Court had held that judges rather that juries should construe claims.[99] However, the Court's opinion did not resolve the question of whether claim construction is a question of law or fact or the related question of whether appellate courts should review claim construction de novo or for clear

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[89] 475 U.S. at 808.
[90] Panduit Corp. v. Dennison Mfg. Co., 774 F.2d 1082,1100 (Fed. Cir. 1985).
[91] Panduit Corp., 774 F.2d at 1082.
[92] 475 U.S. at 812.
[93] 475 U.S. at 812; Fed. Rule Civ. Proc. 52(a)(6).
[94] Dreyfuss, *Federal Circuit*, *supra* note , at 52.
[95] Dreyfuss, *Federal Circuit*, *supra* note , at 51.
[96] Dreyfuss, *Federal Circuit*, *supra* note , at 52. Interestingly, upon remand, the Federal Circuit reinstated its prior ruling, though it did so expressly grounded in Rule 52(a)(6). Panduit Corp. v. Dennison Mfg. Co., 810 F.2d 1561, 1565-82 (Fed. Cir. 1987), cert. denied, 481 U.S. 1052 (1987). *See* Gregory A. Castanias et al., *Survey of the Federal Circuit's Patent Law Decisions in 2006: A New Chapter in the Ongoing Dialogue with the Supreme Court*, 56 AM. U. L. REV. 793, 799 (2007). Rochelle Dreyfuss contends that the Federal Circuit pushed back against the Supreme Court's emphasis on deference by creating rules to govern factual questions underlying legal issues (for example, in the case of nonobviousness) as well as classifying more technical issues as questions of law instead of fact. Dreyfuss, *Learn*, *supra* note , at 798; *see* Dreyfuss, *Institutional Identity*, *supra* note , at 802-03.
[97] Teva Pharms. v. Sandoz, Inc., 135 S.Ct. 831 (2015).
[98] *See infra* notes – and accompanying text.
[99] 517 U.S. 370 (1996).

error.[100] Amidst significant controversy, the Federal Circuit held in a series of rulings that claim construction should be considered a question of law that is reviewed de novo.[101] These rulings spawned significant debate, as several judges indicated that claim construction, which often involves hearing expert testimony and consulting outside treatises, involves factual determinations that warrant more deference on appeal.[102]

Conceptually problematic, de novo review was also troublesome because it exacerbated the uncertainty, length, and expense of patent litigation, particularly given high (though declining) reversal rates[103] of such constructions by the Federal Circuit.[104] Although the Federal Circuit extended greater informal deference to claim constructions following the clarification of claim construction methodologies in 2005,[105] as a matter of positive doctrine, the court still embraced de novo review. In 2015, the controversy over appellate review of claim construction finally reached the Supreme Court.

In *Teva Pharms. v. Sandoz, Inc.*, the Supreme Court held that appellate courts should review the factual findings that underlie a district court's claim construction for clear error, vacating the Federal Circuit's judgment and remanding the case.[106] Although the Court characterized the ultimate issue of claim construction as a question of law,[107] it rejected de novo review of the factual underpinnings of that issue.[108] Central to the Court's decision was a distinction between two types of evidence used in claim construction: intrinsic (information "internal" to the patent, such as the specification, claims, and prosecution history) and extrinsic (external information such as expert testimony, dictionaries, and scientific treatises).[109] The Supreme Court held that when courts construe claims based solely on intrinsic evidence, the resulting construction is a legal determination subject to de novo review.[110] However, when the

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[100] Markman, 517 U.S. at 378 (characterizing claim construction as neither a purely legal nor factual question but a "mongrel practice"). Indeed, the Supreme Court seemed to have acknowledged the appropriateness of greater deference to the factual components of claim construction, a point the Federal Circuit misapprehended. J. Jonas Anderson & Peter S. Menell, *Informal Deference: A Historical, Empirical, and Normative Analysis of Patent Claim Construction*, 108 NW. L. REV. 1, 66 (2014).

[101] *See* Lighting Ballast Control LLC v. Philips Electronics North Am. Corp., 744 F.3d 1272, 1276-77 (Fed. Cir. 2014) (en banc); Cybor Corp. v. FAS Technologies, Inc., 138 F.3d 1448, 1451 (Fed. Cir. 1998) (en banc); Rai, *Facts and Policy*, *supra* note , at 1058 (recounting the early history of Federal Circuit doctrine on appellate review of claim construction).

[102] *See, e.g.*, Phillips v. AWH Corp., 415 F.3d 1303, 1332 (Fed. Cir. 2005) (en banc) (Lourie, J., concurring in part and dissenting in part) ("While this court may persist in the delusion that claim construction is a purely legal determination, unaffected by underlying facts, it is plainly not the case."); Anderson & Menell, *supra* note , at 22 (noting that the Federal Circuit's opinion in *Markman* "masked the inherent factual nature of claim construction").

[103] *See* Anderson & Menell, *supra* note , at 39-41 (finding that reversal rates of claim construction fell after the Federal Circuit's 2005 decision in *Phillips v. AWH Corp.* from 37.2% to 24.0%).

[104] Cybor Corp. v. FAS Technologies, Inc., 138 F.3d at 476-78 (Fed. Cir. 1998) (en banc) (Rader, J., dissenting in part and concurring in part); *see* Dreyfuss, *Experiment*, *supra* note , at 785.

[105] Anderson & Menell, *supra* note , at 61; *see* Philips v. AWH Corp., 415 F.3d 1303 (Fed. Cir. 2005) (en banc).

[106] Teva Pharms. v. Sandoz, Inc., 135 S.Ct. 831, 842-83 (2015).

[107] *Id.* at 837. *See* Markman v. Westview Instruments, 517 U.S. 370, 388-91 (1996).

[108] This holding bears similarity to the "hybrid" standard advocated by Anderson and Menell. *See* Anderson & Menell, *supra* note , at 73-76.

[109] 135 S.Ct. at 840-41; *see* Philips, 415 F.3d at 1311-19.

[110] 135 S.Ct. at 840-41.

court consults extrinsic evidence and makes subsidiary factual findings, those findings must be reviewed for clear error.[111]

Notably, the Court rested its opinion solidly on conforming patent law to Federal Rule of Civil Procedure 52(a)(6).[112] The Court's assimilationist objective was quite explicit: it cited precedent (unrelated to patent law) indicating that this Rule creates a "clear command"[113] that factual questions are reviewed for clear error and that "[i]t does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous."[114] The Court even delved into the history of the Rules Advisory Committee, which warned that exceptions to this general scheme "would tend to undermine the legitimacy of the district courts."[115]

While the Supreme Court relied significantly on the Federal Rules of Civil Procedure, the Federal Circuit's most recent endorsement of de novo review of claim construction arose in significant part from a deep appreciation of the unique attributes of patent law. Just a year before the Supreme Court decided *Teva*, an en banc panel of the Federal Circuit reaffirmed de novo review of claim construction in *Lighting Ballast Control LLC v. Philips Electronics North America Corp.*[116] Although the opinion rested significantly on stare decisis, the majority also considered the unique dynamics of de novo review within the patent system. Drawing on fifteen years of patent practice, the court reasoned that de novo review would continue to provide "national uniformity, consistency, and finality to the meaning and scope of patent claims."[117] The Federal Circuit, considering issues internal to patent law, also found little evidence that more deferential review would achieve more accurate outcomes.[118] Furthermore, the majority opinion extensively considered amicus briefs from Google, Amazon, Hewlett-Packard, Red Hat, Yahoo!, Cisco, Dell, EMC, Intel, SAP, and the SAS Institute that supported de novo review.[119] The Federal Circuit's embrace of de novo review of claim construction was predicated on an intricate consideration of patent dynamics and the uniqueness of claim construction within patent litigation.

These considerations "internal" to patent law are largely absent from the Supreme Court's decision in *Teva*. While the opinion notes that "practical considerations" favor clear error review of factual components,[120] its discussion of the dynamics of patent law is much sparser than that of the Federal Circuit. Certainly, there is no lengthy engagement with amicus briefs from technology companies. Its primary prerogative is to conform patent law to the Federal Rules of Civil Procedure. As with its decision in *Dennison* three decades earlier, the Court

[111] 135 S.Ct. at 841.
[112] Teva Pharms., 135 S.Ct. at 836.
[113] 135 S.Ct. at 836-37 (citing Anderson v. Bessemer City, 470 U.S. 564, 574 (1985)).
[114] 135 S.Ct. at 837 (citing Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982)).
[115] 135 S.Ct. at 837 (citing Advisory Committee's 1985 Note on subd. (a) of Fed. Rule Civ. Proc. 52, 28 U.S.C. App. 908-909).
[116] 744 F.3d 1272 (Fed. Cir. 2014).
[117] 744 F.3d at 1277.
[118] 744 F.3d at 1284.
[119] 744 F.3d at 1286-88.
[120] 135 S.Ct. at 838.

sidestepped the uniqueness and technicality of patent law and sought to assimilate it to a general regulatory scheme.

ii. The Administrative Procedure Act and Appellate Review of PTO Factual Findings

The Supreme Court's assimilation of patent law extends beyond appellate review of district courts to another structural concern: appellate review of the PTO. In patent practice, if the PTO rejects an application, the applicant may (following the appropriate administrative proceedings) appeal to the Federal Circuit. In the 1998 case of *In re Zurko*, the Federal Circuit held that the appropriate standard of review for PTO factual findings was the "clearly erroneous" standard typical of district court-appellate court relations rather than the more deferential "substantial evidence" standard for reviewing formal agency proceedings under the APA.[121] Essentially, the Federal Circuit "denied that it is subject to the APA standard"[122] and allowed itself more leeway to review the PTO's factual findings "on its own reasoning" rather than the agency's reasoning.[123] In so doing, the court may have been motivated by a perception that, unlike traditional court-agency relations, deference to the PTO was not as justified because of the Federal Circuit's own expertise.[124]

Although the Federal Circuit acknowledged that Congress intended the APA to apply to agencies generally, it recognized an exception for patent law. It reasoned that existing common law standards and the peculiarities of patent practice meant that "Congress did not intend the APA to alter the review of substantive Patent Office decisions."[125] In so ruling, the Federal Circuit invoked Section 559 of the APA, an "exceptions" provision stating that the APA's judicial review provisions were not intended "to limit or repeal additional requirements … recognized by law" at the time of the APA's enactment.[126] The Federal Circuit reasoned that there was an "additional requirement" applicable to Patent Office review at the time of the APA's enactment—namely less deferential review than the substantial evidence standard—that qualified for the exemption.[127] Furthermore, the Federal Circuit cited over a century of courts reviewing Patent Office and PTO[128] factual findings on a standard more closely approximating "clear error" than "substantial evidence."[129] Relying on precedent and policy, the Federal Circuit ruled that the APA's general standard of review for agency factual findings did not apply to its review of the PTO.[130]

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[121] *In re* Zurko, 142 F.3d 1447, 1449 (Fed. Cir. 1998) (en banc).
[122] Rai, *Facts and Policy*, *supra* note , at 1052; Stuart Minor Benjamin & Arti K. Rai, *Who's Afraid of the APA? What the Patent System Can Learn from Administrative Law*, 95 GEO. L.J. 269, 285 (2007); Gugliuzza, *Federal Circuit*, *supra* note , at 1821.
[123] *See* 142 F.3d at 1450.
[124] Taylor, *Rules and Standards, supra* note , at 444; Ronald Zibelli & Steven D. Glazer, *An Interview with Circuit Judge S. Jay Plager*, 5 J. PROPRIETARY RTS., Dec. 1993, at 2, 5 ("I thought the PTO was an administrative agency. But we don't review it as if it is.") (statement of Judge S. Jay Plager).
[125] 142 F.3d at 1452.
[126] *Id.*; *see* 35 U.S.C. § 559.
[127] 142 F.3d at 1452.
[128] Congress changed the name of the Patent Office to the Patent and Trademark Office in 1975. Act of January 2, 1975, Pub. L. No. 93-596, §1, 88 Stat. 1949 (1975).
[129] 142 F.3d at 1455.
[130] Taylor, *Precedent and Policy*, *supra* note , at 660-61.

On appeal, however, the Supreme Court rejected such patent exceptionalism and imposed the APA's standard of review onto PTO factual findings.[131] In *Dickinson v. Zurko*, the Court reversed the Federal Circuit, holding that the appropriate standard of review of PTO factual findings is the "substantial evidence" standard of the APA.[132] The Court emphasized the value of legal universality and consistency, "[r]ecognizing the importance of maintaining a uniform approach to judicial review of administrative action."[133] According to Sarah Tran, "The Court was particularly perturbed by the Federal Circuit's brazenness in creating an administrative law anomaly."[134] The Court considered 89 pre-APA cases involving the United States Court of Customs and Patent Appeals (CCPA) review of Patent Office decisions and found that they did not establish a less deferential, court-court-like standard of review for agency factual findings.[135] Furthermore, many of these cases cited the Patent Office's expertise as counseling for more deferential review, a sentiment formalized in the APA.[136] The Court concluded that appellate review of PTO fact findings did not entail "additional requirements … recognized at law" at the time of the APA's enactment.[137] Based on policy and precedent,[138] the Court held that the APA standard applied to appellate review of PTO factual findings. Indeed, the Court chided the Federal Circuit for "believing that the PTO was somehow different from other administrative agencies in the executive branch."[139]

The Supreme Court's assimilationist drive in *Zurko* is particularly noteworthy given persuasive authority that Congress did not intend the APA to govern appellate review of PTO factfinding. This analysis is best illustrated in *In re Lueders*, a 1997 Federal Circuit case which *Zurko* implicitly overruled.[140] In *Lueders*, the Federal Circuit reversed several PTO findings regarding nonobviousness. In so doing, it utilized the "clearly erroneous" standard to review the PTO's factual findings rather than the more deferential "substantial evidence" or "arbitrary and capricious" standards of the APA.[141] In justifying its less deferential standard of review, the Federal Circuit noted the CCPA's long practice of reviewing PTO factual findings under the "clearly erroneous" standard.[142] More compellingly, it cited a 1947 Manual on the

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[131] *Cf.* Dreyfuss, *Experiment*, *supra* note , at 793 ("Until quite recently, it was not even clear that … [the PTO] was an agency within the meaning of the Administrative Procedure Act.").
[132] Dickinson v. Zurko, 527 U.S. 150, 151 (1999).
[133] 527 U.S. at 154; *see id.* at 155 ("The APA was meant to bring uniformity to a field full of variation and diversity."); Sarah Tran, *Administrative Law, Patents, and Distorted Rules*, 80 GEO. WASH. L. REV. 831, 835 (2012); Rai, *Facts and Policy*, *supra* note , at 1054; Benjamin & Rai, *supra* note , at 270.
[134] Tran, *supra* note , at 867.
[135] 527 U.S. at 155.
[136] 527 U.S. at 160-61.
[137] 527 U.S. at 155.
[138] *See* Taylor, *Precedent and Policy*, *supra* note , at 667.
[139] Kerr, *supra* note , at 173-74; *see* 527 U.S. at 154-55. Notably, even after *Zurko*, the Federal Circuit continued to push against deferential review of the PTO. *Zurko* did not specify if the appropriate APA standard to apply to the PTO was "substantial evidence" (for formal proceedings) or "arbitrary or capricious" (for informal proceedings). Gugliuzza, *Federal Circuit*, *supra* note , at 1821-22. Although the difference is slight, the Federal Circuit has selected the substantial evidence standard, which is generally perceived as less deferential. Rai, *Facts and Policy*, *supra* note , at 1055-56; Gugliuzza, *Federal Circuit*, *supra* note , at 1822; Long, *supra* note , at 1978; *see In re* Gartside, 203 F.3d 1305 (Fed. Cir. 2000); *In re* Zurko, 258 F.3d 1379 (Fed. Cir. 2001).
[140] *In re* Lueders, 111 F.3d 1569 (Fed. Cir. 1997).
[141] 111 F.3d at 1575.
[142] 111 F.3d at 1575.

Administrative Procedure Act authored by then-Attorney General Tom Clark. The Manual explicitly stated that the operative provision of the APA, 5 U.S.C. § 704, did not apply to appellate review of PTO factual findings.[143] Combined with the longstanding history of the Federal Circuit and its predecessors, this historical evidence provides a compelling rationale for not extending enhanced deference to the PTO.[144] However, the Supreme Court did not address this argument for patent exceptionalism in *Zurko*, instead squarely bringing patent law within the APA's fold.[145] There, the Court subsumed patent law within a general trend of extreme skepticism toward exceptions from the APA.[146] As with appellate review of district court factfinding, the unique features of patent law—including a quasi-specialized appellate court—did not justify departing from general norms of appellate review of agency factfinding.

iii. Jurisdiction over Patent Matters

The Supreme Court's assimilationist project extends to another important structural consideration: jurisdiction. It has long been accepted that the Federal Circuit has jurisdiction over an appeal where the complaint pleads at least one patent issue. In 2002, however, in *Holmes Group v. Vornado Air Circulation*, the Supreme Court addressed the question of whether the Federal Circuit had jurisdiction over an appeal where the only patent issue arose from the defendant's *counterclaim* rather than the plaintiff's complaint.[147] In this litigation, the Federal Circuit had recognized jurisdiction and resolved the case on the merits.[148] On appeal, however, the Supreme Court vacated the judgment, holding that the Federal Circuit lacked jurisdiction.[149] In so doing, the Court applied the traditional well-pleaded-complaint rule governing whether a case "arises under" patent law for purposes of conferring jurisdiction on a district court, which is a predicate for appellate jurisdiction by the Federal Circuit.[150] Applying the well-pleaded-complaint rule, the Court concluded that an issue only "arises under" patent law if it "appears in

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[143] Attorney General's Manual on the Administrative Procedure Act 101 (1947) ("Furthermore, this provision does not apply to situations where the Congress has provided special and adequate review procedures.… Thus, the Customs Court and the Court of Customs and Patent Appeals retain their present exclusive jurisdictions."); *see* Steadman v. SEC, 450 U.S. 91, 102 (1981) (extending deference to the letters and statements of Attorney General Clark regarding the APA); Vermont Yankee Nuclear Power Co. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 546 (1978) (same). Early versions of proposed administrative law reforms from the Attorney General's Committee on Administrative Procedure exempted the Patent Office. Wm. Redin Woodward, *A Reconsideration of the Patent System as a Problem of Administrative Law*, 55 HARV. L. REV. 950, 950 n.1 (1942).

[144] *See also* Long, *supra* note , at 1976 ("Early drafts of the APA explicitly exempted the PTO from the APA's purview.").

[145] *See* Long, *supra* note , at 1977 ("The Court came out against anti-PTO exceptionalism….").

[146] *See* Wong Yang Sung v. McGrath, 339 U.S. 33, 41 (1950); Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 271 (1994); *cf.* Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345 (noting the Supreme Court's resistance to efforts by the D.C. Circuit (a kind of quasi-specialized court in the administrative law context) to graft additional procedural requirements onto the APA).

[147] 535 U.S. 826 (2002). In an earlier case addressing the well-pleaded-complaint rule, the Court had stated, in dicta, that "a case raising a federal patent-law *defense* does not, for that reason alone, 'arise under' patent law." Christianson v. Colt Indus. Operating Corp., 486 U.S. 808, 809 (1988) (citing Franchise Tax Board of California v. Construction Laborers Vacation Trust, 463 U.S. 1, 14 (1983) (emphasis added)).

[148] 13 Fed. Appx. 961 (Fed. Cir. 2001).

[149] 535 U.S. at 834.

[150] 535 U.S. at 831; *see* 28 U.S.C. § 1295(a)(1) (vesting exclusive jurisdiction in the Federal Circuit over "an appeal from a final decision of a district court ... if the jurisdiction of that court was based in whole or in part, on [28 U.S.C. §] 1338."); 28 U.S.C. § 1338 ("The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents."); Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152 (1908).

the plaintiff's statement of his own claim in the bill or declaration."[151] Because this was not the case, the Court ruled that the Federal Circuit lacked jurisdiction to hear the appeal.

Significantly, the Court rejected deviating from its conception of the well-pleaded-complaint rule based on the uniqueness of patent law or the Federal Circuit. Respondent argued that Congress's goal of promoting uniformity within patent law weighed in favor of allowing the Federal Circuit to have jurisdiction over *all* appeals involving patent issues, whether those issues arose in a complaint or counterclaim.[152] This is a fairly plausible argument given that patent law rulings from the regional courts of appeal (based on patent issues raised only by defendants) might clash with doctrine emanating from the Federal Circuit.[153] However, the Supreme Court rejected this argument, elevating the text of jurisdictional statutes and related doctrine above any speculation into Congress's intent regarding Federal Circuit jurisdiction.[154] Hewing close to the traditional well-pleaded-complaint rule and rejecting any patent exceptionalism, the Court held that the Federal Circuit lacked jurisdiction when a patent issue only arose in the defendant's counterclaim. In so doing, the Court not only assimilated patent law to more general jurisdictional canons, it also constrained the power of the Federal Circuit.

Notably, Congress statutorily overruled *Holmes Group* in the 2011 America Invents Act, which extends jurisdiction over patent appeals to the Federal Circuit when a patent issue arises in a compulsory counterclaim.[155] Illustrating a theme to which this Article will return, this demonstrates that the Supreme Court does not necessarily have the last word when it comes to patent assimilation. Though the Court appears to value assimilation significantly, Congress can legislate patent exceptionalism when it feels such action is warranted.[156]

More recently, the Supreme Court has continued to reject special consideration of patent interests in other areas of jurisdictional law. Whereas *Holmes Group* addressed the jurisdiction of the Federal Circuit relative to regional federal appellate courts, another important issue deals with the circumstances under which a state-law claim involving a patent can give rise to federal jurisdiction. Under the well-pleaded-complaint rule, cases involving only state-law claims can still "arise under" federal law—and thus confer jurisdiction to federal courts—if the complaint raises "a significant federal issue."[157] Longstanding doctrine holds that "to justify federal jurisdiction, the federal issue should have wider importance than the case at hand."[158] This is a difficult area of law with few clear guideposts, and in a series of cases, the Federal Circuit took a relatively broad view of federal "arising under" jurisdiction for cases involving state-law

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[151] 535 U.S. at 830 (quoting Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 809 (1988)).
[152] 535 U.S. at 831.
[153] *Cf.* 535 U.S. at 839-40 (Ginsburg, J., concurring in the judgment) (concluding that when a compulsory counterclaim "arises under" patent law and is adjudicated on the merits, the Federal Circuit enjoys exclusive appellate jurisdiction).
[154] 535 U.S. at 833 ("[Our] task here is not to determine what would further Congress's goal of ensuring patent-law uniformity, but to determine what the words of the statute must fairly be understood to mean."). The Court rejected a similar argument in *Christianson v Colt Industries*. 486 U.S. at 813.
[155] Leahy-Smith America Invents Act, Pub. L. No. 112-29 § 19(a), 125 Stat. 284, 331 (2011).
[156] *See infra* notes – and accompanying text.
[157] Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005); *see also* Empire HealthChoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 700-01 (2006) (rejecting federal jurisdiction because the state-law claim at issue was "fact-bound and situation-specific").
[158] Gugliuzza, *Federal Circuit*, *supra* note , at 1807.

allegations of patent malpractice. In a pair of cases, the Federal Circuit held that federal jurisdiction obtained where resolution of a malpractice claim required adjudicating the merits of an infringement claim[159] or determining the scope of a patent claim.[160] This is a rather expansive concept of "arising under" jurisdiction, and the Federal Circuit justified it in part on an understanding that Congress intended to unify patent law and make it more predictable.[161] Among other considerations, the court reasoned that federal courts' experience in claim construction and infringement matters counseled in favor of federal jurisdiction.[162] Furthermore, allowing federal jurisdiction over such malpractice claims would allow those appeals to go to the Federal Circuit, thus promoting uniformity in patent doctrine.[163]

In 2013, in *Gunn v. Minton*, the Supreme Court rejected the Federal Circuit's expansive conception of "arising under" jurisdiction and assimilated patent doctrine with its conception of prevailing jurisdictional norms.[164] In this case, the Texas Supreme Court, relying on Federal Circuit precedent, dismissed a state malpractice case involving an allegation of patent malpractice because of lack of jurisdiction.[165] On appeal, the Supreme Court reversed, holding that "state legal malpractice claims based on underlying patent matters will rarely if ever, arise under federal patent law." In so doing, the Court rejected the Federal Circuit's expansive conception of "arising under" jurisdiction, which was predicated in part on the Federal Circuit's perceived need for national uniformity in patent affairs. As Paul Gugliuzza observes, "The Supreme Court's opinion in *Gunn* is an emphatic rejection of the Federal Circuit's position that practically all cases requiring analysis of patent validity, enforceability, infringement, or scope are subject to exclusive federal jurisdiction."[166] The Supreme Court eschewed the argument that Congress's drive to unify patent law justified more expansive federal jurisdiction over patent malpractice claims and instead conformed this area of patent doctrine to its conception of prevailing jurisdictional norms. The implications of *Gunn* are significant, for it "applies to a full range of federal question cases in which a federal issue is embedded in a state-law claim."[167]

B. Applying Equitable Principles

i. Injunctive Relief

Legislative and quasi-legislative pronouncements, such as the Federal Rules of Civil Procedure, the APA, and jurisdictional statutes, are not the only trans-substantive legal norms to which the Supreme Court has assimilated patent law. Indeed, the Supreme Court has also drawn

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[159] Air Measurement Techs., Inc. v. Akin Gump Strauss Hauer & Feld, L.L.P., 504 F.3d 1262, 1269 (Fed. Cir. 2007).
[160] Immunocept, LLC v. Fulbright & Jaworski, LLP, 504 F.3d 1281, 1283 (Fed. Cir. 2007).
[161] Air Measurement, 504 F.3d at 1272 ("Congress considered the federal-state division of labor and struck a balance in favor of this court's entertaining patent infringement."); Immunocept, 504 F.3d at 1285-86; Gugliuzza, *Federal Circuit*, *supra* note , at 1811; Grossi, *supra* note , at 1006.
[162] Air Measurement, 504 F.3d at 1272; Immunocept, 504 F.3d at 1285; *see* Grable, 545 U.S. at 315.
[163] Air Measurement, 504 F.3d at 1272; Immunocept, 504 F.3d at 1285.
[164] *But see* Grossi, *supra* note , at 963 (criticizing the holding in *Gunn v. Minton* as applying a mechanical test instead of reasoned analysis).
[165] Minton v. Gunn, 355 S.W. 3d 634, 641 (Tex. 2011).
[166] Gugliuzza, *Federal Circuit*, *supra* note , at 1814.
[167] Grossi, *supra* note , at 962.

upon equitable principles to eliminate patent exceptionalism and, at least ostensibly, bring patent law within the broader legal fold.

A curious form of assimilation is evident in an important 2006 case, *eBay v. MercExchange*, which addressed the standard for granting an injunction in patent infringement suits. Prior to this case, the Federal Circuit had developed a "general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances."[168] On appeal, the Supreme Court reversed, rejecting the Federal Circuit's practice of virtually automatically granting injunctions to prevailing patentees.[169] Citing "well-established principles of equity," the Court articulated a four-factor equitable test to govern the award of injunctions.[170] The Court's opinion exhibits a systematizing tone that repudiates any form of patent exceptionalism. It notes that "[t]hese familiar principles apply with equal force to disputes arising under the Patent Act," and it cautions against "'a major departure from the long tradition of equity practice.'"[171] Further reflecting its systemizing orientation, the Court observed that patent law's intellectual property cousin, copyright law, also applies an equitable framework to determine the appropriateness of injunctive relief.[172]

In more ways than one, this was a rather revealing instance of legal assimilation. Although the Court framed its holding in "traditional equitable principles," commentators have pointed out that the Court's four-factor test actually departs from traditional injunction analysis in important ways.[173] For instance, the test only presents a limited set of traditional equitable concerns, duplicates similar policy interests in considering irreparable injury and the inadequacy of legal remedies, does not present each component as a true "factor" to be considered in a holistic analysis, and arguably discourages the use of rebuttable presumptions.[174] Thus, this "traditional" test is quite novel and displaces longstanding equitable practice. John Golden is more pointed in his criticism, noting that the test "appears to be something of a hoax."[175] In a sense, the Supreme Court replaced the Federal Circuit's exceptional rule with an exceptional one of its own creation, though one tied more closely to traditional equitable principles.

eBay is also a notable instance of patent assimilation because it reverses the usual polarity: a rule developed for patent law has become the standard for determining injunctions in a wide range of doctrinal areas, as opposed to vice versa. Notwithstanding its perceived defects, courts have widely adopted the *eBay* framework;[176] within a few years, *eBay* has become "the test" that federal courts apply to determine injunctive relief in cases spanning patent law, other forms of intellectual property law, governmental regulation, constitutional law, and state tort and

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[168] 401 F.3d at 1339.
[169] 547 U.S. 388, 391 (2006).
[170] 547 U.S. at 391 ("A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.").
[171] 547 U.S. at 391.
[172] 547 U.S. at 392-93.
[173] Mark P. Gergen et al., *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 207-08 (2012).
[174] Gergen et al., *supra* note , at 207-08.
[175] Golden, *supra* note , at 695.
[176] Gergen et al., *supra* note , at 215-19.

contract law.[177] *eBay* illustrates that patent assimilation can work in more than one direction; patent doctrine can export itself to other doctrinal areas rather than simply importing exogenous norms.

C. Analogizing from Other Areas of Law

As we have seen, the assimilation of patent law can take several forms. In some cases, the Court has focused on consistency with transcendent regulatory schemes like the Federal Rules of Civil Procedure, the APA, and jurisdictional statutes. In other cases, the Court has drawn from equitable principles to "assimilate" patent doctrine. In some cases, assimilationist tendencies are subtler and proceed at the level of legal reasoning.

i. Induced Infringement

In some contexts, the Supreme Court's desire for legal universality and coherence manifests itself in borrowing concepts from one area of law to illuminate another. Such was the case in *Global-Tech Appliances, Inc. v SEB S.A.*[178] There, the Court considered whether there is a mental state requirement for induced infringement, and if so, what are its contours.[179] Drawing primarily on commonalities with *contributory* infringement,[180] which clearly possesses an intent requirement, the Court held that induced infringement does as well.[181] In an assimilationist move, the Court looked to sources outside of patent law to corroborate its holding. According to the Court, the established link between induced infringement and an intent requirement in copyright law[182] provided support for a similar relationship in patent law.

Significantly, the Court ventured further afield and drew heavily on criminal law to flesh out the mental state requirement for induced infringement under patent law. Drawing on a "well established" principle of criminal law, the Court held that "willful blindness" satisfies the intent requirement of induced infringement.[183] This choice seems rather peculiar, particularly given that induced infringement is a civil rather than criminal matter, and indeed there is no criminal liability for any type of patent infringement. The dissent even recognized this, observing that the purposes of criminal law and patent law are very different.[184] Nevertheless, the majority states that "[g]iven the long history of willful blindness and its wide acceptance in the Federal Judiciary, we can see no reason why the doctrine should not apply in civil lawsuits for induced patent infringement under 35 U.S.C. § 271(b)."[185] Notably, such examination of legal areas beyond the civil context was absent from the Federal Circuit's consideration of the intent requirement for induced infringement.[186]

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[177] Gergen et al., *supra* note , at 205.
[178] 131 S.Ct. 2063 (2011).
[179] 35 U.S.C. §271(b) ("Whoever actively induces infringement of a patent shall be liable as an infringer.").
[180] 35 U.S.C. §271(c) (imposing liability on any party who distributes a specialized component of a patented invention knowing that it is "especially made or especially adapted for use in an infringement"); *see* Aro Mfg. Co. v. Convertible Top Replacement Co., 377 U.S. 476 (1964).
[181] 131 S.Ct. at 2066-67.
[182] Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).
[183] 131 S.Ct. at 2068.
[184] 131 S.Ct. at 2073 (Kennedy, J., dissenting).
[185] 131 S.Ct. at 2069.
[186] SEB S.A. v. Montgomery Ward & Co., Inc., 594 F.3d 1360, 1375-78 (Fed. Cir. 2010).

In the more recent case of *Limelight Networks, Inc. v. Akamai Techs., Inc.*, the Court indicated that although such conceptual borrowing has its limits, legal fields outside of patent law can illuminate questions of patent doctrine.[187] And this term, in *Commil USA, LLC v. Cisco Systems, Inc.*, the Court analogized from contract, property, and criminal law to illustrate that belief in patent invalidity does not eliminate liability for induced infringement.[188] Such conceptual borrowing and reasoning by analogy is characteristic of the Supreme Court's systemizing tendencies.

D. Eliminating Specialized Patent Rules in Favor of General Precedent and Ordinary Meanings

The Supreme Court has also eliminated specialized patent rules in a more straightforward fashion, conforming patent practice to general precedent and ordinary meanings of legal concepts. This phenomenon is evident in several trans-substantive areas that implicate not just patent litigation but litigation in general, such as the "actual controversy" requirement to bring a suit under the Declaratory Judgment Act as well as the standard by which a court will award attorney's fees to a prevailing party.

i. The "Actual Controversy" Requirement

The Supreme Court's assimilationist project extends to the "actual controversy" requirement to bring a suit under the Declaratory Judgment Act.[189] An important issue in patent law is the ability (or inability) of a licensee in good standing to challenge the validity of a patent that it is currently licensing. More specifically, courts have grappled with whether a licensee who has not repudiated a license can satisfy the "actual controversy" requirement of the Declaratory Judgment Act to confer jurisdiction on a court to adjudicate the case.[190] After all, if the licensee continues to pay royalties and does not repudiate the license, perhaps there is no actual controversy between licensee and the patentee. In a series of cases, the Federal Circuit developed a two-part "pragmatic inquiry" to determine the existence of an actual controversy for purposes of bringing a declaratory judgment action:

> There must be both (1) an explicit threat or other action by the patentee, which creates a reasonable apprehension on the part of the declaratory judgment plaintiff that it will face an infringement suit, and (2) present activity which could constitute infringement or concrete steps taken with the intent to conduct such activity.[191]

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[187] 134 S.Ct 2111, 2119 (2014) ("While we have drawn on criminal law concepts in the past in interpreting § 271(b), see *Global-Tech Appliances, Inc. v. SEB S.A.*, we think it unlikely that Congress had this particular [aiding and abetting] doctrine in mind when it enacted the Patent Act of 1952.") (internal citations omitted).
[188] Commil USA, LLC v. Cisco Systems, Inc., (May 26, 2015), slip op. at 13.
[189] Declaratory Judgment Act, 28 U.S.C. § 2201(a).
[190] Declaratory Judgment Act, 28 U.S.C. § 2201(a).
[191] Gen-Probe, Inc. v. Vysis, Inc., 359 F.3d 1376, 1380 (Fed. Cir. 2004) (quoting BP Chems. Ltd. v. Union Carbide Corp., 4 F.3d 975, 978 (Fed. Cir. 1993)); *see* Teva Pharm. USA, Inc. v. Pfizer, Inc., 395 F.3d 1324, 1333 (2005) (adding the requirement of a "reasonable apprehension of *imminent* suit").

This "reasonable apprehension" test was particularly salient when a licensee maintained good standing (and continued to pay royalties) but sought to challenge the validity of a licensed patent. In such circumstance, it was difficult for the licensee to establish a reasonable apprehension of suit on the part of the patentee, thus failing to satisfy the actual controversy standard and foreclosing a patent validity challenge.[192] Indeed, Federal Circuit doctrine discouraged a licensee from "hedg[ing] its bets,"[193] compelling the licensee to stop paying royalties if it wanted to challenge the patent.

In *MedImmune v. Genentech*, the Supreme Court rejected the Federal Circuit's "reasonable-apprehension-of-suit" test in favor of broader precedent concerning the actual controversy standard.[194] At issue in this case was another instance where a licensee in good standing, MedImmune, sought to challenge the validity of a patent it was licensing. Reversing the Federal Circuit, the Court held that a licensee could still satisfy the actual controversy requirement without repudiating the license and ceasing to pay royalties, thus conferring jurisdiction on a federal court to adjudicate the patent challenge.[195] In so doing, the Court relied centrally on its own precedent rather than that of the Federal Circuit.[196] Furthermore, the Court explicitly emphasized that the Federal Circuit's reasonable-apprehension-of-suit test conflicted with settled Supreme Court doctrine regarding the actual controversy requirement.[197] In so doing, the Court not only made patents more vulnerable to challenge, it eliminated a specialized patent rule in favor of more general precedent.[198] As with *eBay v. MercExchange*, the implications of such assimilation are significant, as it creates a standard that extends beyond patent law to other legal fields as well.[199]

ii. Attorney's Fees

A pair of recent cases reflects the Supreme Court's assimilation of patent doctrine regarding the award of attorney's fees. Attorney's fees have attracted significant attention because they tend to be quite high in patent litigation, and some see the award of attorney's fees as a fruitful way to discourage suits by nonpracticing entities (also known as patent trolls).[200] The Patent Act authorizes district courts to award attorney's fees to the prevailing party "in exceptional cases."[201] The Federal Circuit had developed a line of doctrine establishing only two limited circumstances where a case could be deemed "exceptional": 1) "when there has been

[192] Gen-Probe, 359 F.3d at 1382.
[193] Gen-Probe, 359 F.3d at 1378.
[194] 549 U.S. 118 (2007).
[195] 549 U.S. at 138.
[196] *See* 549 U.S. at 130; Altvater v. Freeman, 319 U.S. 359 (1943) (holding that a licensee's challenge to licensed patents remained justiciable even though the licensee continued to pay royalties).
[197] 549 U.S. at 132 n.11 (collecting cases); Mullally et al., *supra* note , at 71 ("The footnote gets rid entirely of this 'reasonable apprehension of imminent suit' test.") (statement of Gregory Castanias); Holbrook, *Return of the Supreme Court*, *supra* note , at 18.
[198] *See* Kelly Casey Mullally et al., MedImmune v. Genentech, 4 J. BUS. & TECH. L. 59, 59 (2009) ("This case is very much a part of the trend that we have noted, the trend away from any kind of patent law exceptionalism.") (statement of Professor Mullally).
[199] Holbrook, *Return of the Supreme Court*, *supra* note , at 19.
[200] *See* Paul R. Gugliuzza, *Patent Litigation Reform: The Courts, Congress, and the Federal Rules of Civil Procedure*, 95 B.U. L. REV. 279, 286-87 (2015) (describing fee shifting provisions in several patent reform bills).
[201] 35 U.S.C. § 285.

some material inappropriate conduct," or 2) when the litigation is both "brought in subjective bad faith" and "objectively baseless."[202] In *Icon Health & Fitness v. Octane Fitness*, the Federal Circuit, ostensibly applying this standard without directly citing it, affirmed the district court's denial of attorney's fees to the prevailing defendant.[203]

On appeal, in *Octane Fitness v. Icon Health & Fitness, Inc.*, the Supreme Court explicitly rejected the Federal Circuit's "unduly rigid" framework for determining "exceptional" cases.[204] Rather, it assimilated the standard governing the award of attorney's fees in patent cases to general equitable principles. Rejecting the Federal Circuit's two-part definition, the Court construed the term "exceptional" according to its "ordinary meaning."[205] Doing so, the Court held that "an 'exceptional' case is simply one that stands out from others with respect to the substantive strength of a party's litigating position … or the unreasonable manner in which the case was litigated."[206] The Court also drew on the "comparable context of copyright," which also maintains a broader equitable test to determine the award of attorney's fees.[207] Furthermore, the Court buttressed its holding by situating patent law within more general legal principles: "We have long recognized a common-law exception to the general 'American rule' against fee-shifting—an exception, 'inherent' in the 'power [of] the courts'…."[208] Based in part on these transcendent principles, the Court rejected the Federal Circuit's narrow, specialized rule for identifying "exceptional cases" for the purpose of awarding attorney's fees.

The Supreme Court's assimilationist project continued with its ruling on the appropriate standard of review for a district court's determination of an "exceptional" case. The Supreme Court addressed this question in the companion case of *Highmark Inc. v. Allcare Health Management System*, which it decided on the same day.[209] In prior proceedings, the district court had held that the case was "exceptional" and awarded attorney's fees to Highmark.[210] On appeal, the Federal Circuit reviewed the district court's determination that the case was "objectively baseless" de novo and reversed in part.[211] Among other implications, de novo review tended to expand the power of the Federal Circuit in determining the appropriateness of awarding attorney's fees.

On appeal, the Supreme Court reversed the Federal Circuit, rejecting de novo review of elements of the "exceptional" case determination.[212] Drawing on its contemporaneous holding in *Octane Fitness*, the Court ruled that because "[d]istrict courts may determine whether a case is

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[202] Brooks Furniture Mfg., Inc. v. Dutailier Int'l Inc., 393 F.3d 1378, 1381 (Fed. Cir. 2005); *see* iLOR, LLC v. Google, Inc., 631 F.3d 1372, 1378 (2011) (clarifying that litigation is objectively baseless if it is "so unreasonable that no reasonable litigant could believe it would succeed").
[203] 496 Fed. Appx. 57, 65 (Fed. Cir. 2012).
[204] 134 S.Ct. 1749, 1755 (2014).
[205] 134 S.Ct. at 1756.
[206] 134 S.Ct. at 1756.
[207] 134 S.Ct. at 1756 (citing Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 (1994)).
[208] 134 S.Ct. at 1758.
[209] 134 S.Ct. 1744 (2014).
[210] Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc., 706 F.Supp.2d 713, 738-39 (N.D. Tex. 2010).
[211] Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc., 687 F.3d 1300, 1309 (Fed. Cir. 2012) (citing Bard Peripheral Vascular, Inc. v. W.L. Gore & Assocs., Inc., 682 F.3d 1003, 1004-06 (Fed. Cir. 2012)).
[212] 134 S.Ct. at 1748.

'exceptional' in the case-by-case exercise of their discretion,"[213] such determinations were subject to review for abuse of discretion upon appeal.[214] In so doing, the Court invoked the traditional framework in which courts review questions of law de novo, questions of fact for clear error, and discretionary matters for an abuse of discretion.[215] Furthermore, the Court drew upon cases unrelated to patent law to illustrate the notion that courts generally review discretionary decisions for abuse of discretion.[216] In so doing, the Court continued to eliminate exceptional patent rules in favor of more general legal principles.

E. Eliminating Presumptions and Per Se Rules at the Intersection of Patent and Antitrust Law

The Supreme Court's assimilation of patent doctrine also includes eliminating specialized presumptions and per se rules at the intersection of patent and antitrust law. This is fraught territory, for the Supreme Court has observed on occasion that the presence of a patent in an antitrust dispute may justify a deviation from traditional antitrust principles.[217] However, the trend in recent cases is to deny the "specialness" of patents, subsuming disputes involving patents within broader principles of antitrust analysis. The Court has thus integrated patents within a general shift away from per se rules and toward greater use of the rule of reason in antitrust cases.[218]

i. Tying Arrangements

The Supreme Court's assimilation of patent doctrine is evident in its evolving approach to tying arrangements. In general, a tying arrangement (which does not necessarily involve a patent) arises when a party makes the purchase of one good (the tied product) a mandatory condition of purchasing another good (the tying product). Such arrangements can arouse antitrust suspicions because the patentee may be leveraging market power in one market to restrain competition in another. In its early antitrust jurisprudence, the Supreme Court regarded tying arrangements (including those that did not involve patents) with deep skepticism, observing that "[t]ying arrangements serve hardly any purpose beyond the suppression of competition."[219] Over the years, however, this skepticism decreased, and the Court ultimately rejected a per se rule that

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[213] Octane Fitness, 134 S.Ct. at 1756.
[214] Highmark, 134 S.Ct. at 1748.
[215] 134 S.Ct. at 1748.
[216] 134 S.Ct. at 1748; *see* Pierce v. Underwood, 487 U.S. 552, 559 (1988) (holding that fee-shifting determinations under the Equal Access to Justice Act should be reviewed for an abuse of discretion); Cooter & Gell v. Hartmax Corp., 496 U.S. 384, 405 (1990) (holding that appellate courts should review sanctions under Federal Rule of Civil Procedure 11 for abuse of discretion).
[217] *See, e.g.*, FTC v. Actavis, Inc., 133 S.Ct. 2223, 2238 (2013) (Roberts, C.J., dissenting) ("A patent carves out an exception to the applicability of antitrust laws."); Simpson v. Union Oil Co., 377 U.S. 13, 24 (1965) ("The patent laws which give a … monopoly on 'making, using, or selling the invention' are *in pari materia* with the antitrust laws and modify them *pro tanto*."); United States v. General Electric, 272 U.S. 476, 488, 494 (1926) (holding that a patentee may agree to restrict prices in a license with a competitor); *see* Hemphill, *supra* note , at 1600-01.
[218] *See, e.g.*, State Oil Co. v. Khan, 522 U.S. 3 (1997) (rejecting a per se rule in favor of the rule of reason in the context of vertical maximum-price fixing); Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 880, 882 (2007) (rejecting a per se rule in favor of the rule of reason in the context of vertical minimum-price fixing).
[219] Standard Oil of Cal. v. United States, 337 U.S. 293, 305-06 (1949).

all tying arrangements constituted antitrust violations. Rather, parties must make a showing of market power in a tying arrangement in order to prevail on an antitrust claim.[220]

Tying arrangements involving a *patented* product, however, were somewhat specialized cases. In such tying arrangements, a patentee conditions the sale of a patented product on a buyer also purchasing a second, "tied" product. To understand the legal implications of tying arrangements involving patented products, one must consider the intersections and divergences of patent and antitrust law. In early patent cases, the Supreme Court expressed particular suspicion toward tying arrangements involving patents.[221] That skepticism became the basis for a judicially-created patent misuse defense (independent of any potential antitrust claim) when a patentee used its patent "as the effective means of restraining competition with its sale of an unpatented article."[222] In its patent doctrine, the Court developed a presumption that a patent conferred market power, and this presumption ultimately migrated from patent doctrine to the Court's antitrust jurisprudence.[223] In particular, in the 1984 case of *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, the Supreme Court held that, as a matter of antitrust doctrine, "if the Government has granted the seller a patent or similar patent monopoly over a product, it is fair to *presume* that the inability to buy the product elsewhere gives the seller market power."[224] Thus, for a while, patent and antitrust doctrine were unified in both recognizing a presumption of market power in tying arrangements involving patents. In 1988, however, Congress amended the patent laws to eliminate the presumption of market power in the patent misuse context.[225] A divide thus emerged between two related bodies of law, as the presumption that patents conferred market power continued in the antitrust context.[226]

In *Independent Ink, Inc. v. Illinois Tool Works Inc.*, the Federal Circuit addressed whether courts should continue to recognize a presumption of market power in antitrust cases involving tying arrangements featuring a patented item. In this case, the patentee conditioned sale of a patented printhead on the sale of unpatented ink.[227] Drawing on established precedent,[228] the Federal Circuit maintained the distinction between patent and antitrust approaches to patent tying regimes. The Federal Circuit drew on cases such as *International Salt* and *United States v. Loew's* holding that in instances of *patent* tying, "the necessary market power to establish a section 1 violation is presumed."[229] Thus, in antitrust cases involving patent tying, there need not be an affirmative demonstration of market power.[230]

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[220] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 28-29 (1984).
[221] Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917).
[222] Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 490 (1942); *see* United States v. Loew's Inc., 371 U.S. 38, 46 (1962).
[223] International Salt Co. v. United States, 332 U.S. 392 (1947) (holding that a patent tying arrangement violated Section 1 of the Sherman Act); Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 13-16 (1984).
[224] 466 U.S. at 16 (emphasis added).
[225] 35 U.S.C. § 271(d)(5).
[226] Illinois Tool Works, 547 U.S. at 40-43.
[227] 396 F.3d 1342, 1345 (Fed. Cir. 2005).
[228] Taylor, *Rules and Standards*, *supra* note , at 459; Taylor, *Precedent and Policy*, *supra* note , at 655.
[229] 396 F.3d at 1348-49; International Salt, 332 U.S. 392, 396 (1947); Loew's, 371 U.S. 38, 45 (1962).
[230] 396 F.3d 1342, 1348 (Fed. Cir. 2005), vacated and remanded, 547 U.S. 28 (2006).

On appeal, the Supreme Court reversed, eliminating the differential treatment of patent tying in the patent misuse and antitrust contexts.[231] In *Illinois Tool Works*, the Supreme Court considered whether this presumption of market power should continue to apply in antitrust law. Seeking uniformity in two related areas of law, the Court held that tying arrangements involving patented products should be evaluated for the existence of market power (as they are in patent misuse cases), and it eliminated the presumption of illegality in antitrust law.[232] Interestingly, although *Illinois Tool Works* deviated from established antitrust doctrine, the Court framed it in the language of assimilation and a desire to harmonize antitrust and patent law. The Court noted, "[G]iven the fact that the patent misuse doctrine provided the basis for the market power presumption, it would be anomalous to preserve the presumption in antitrust after Congress has eliminated its foundation."[233] In so doing, it further reveals a generalizing, systemizing trend at the Supreme Court, which eliminated the presumption of market power in antitrust law, thus achieving consistency between patent and antitrust doctrine.[234]

ii. Reverse Payment Settlements

A similar drive toward legal coherence and eliminating patent exceptionalism informs the Court's more recent opinion in *Federal Trade Commission v. Actavis*.[235] This case addressed "reverse payment" settlements in which a patentee pays an alleged infringer to not produce a patented product until the patent expires. Such reverse payment settlements are particularly prominent in the pharmaceutical field due to the Drug Price Competition and Patent Term Restoration Act of 1984,[236] commonly known as the Hatch-Waxman Act. The Act creates an Abbreviated New Drug Application (ANDA) that allows generic producers to "piggyback" on the regulatory approval of branded drugs, thus streamlining FDA approval for generics.[237] In submitting an ANDA, a generic manufacturer must assure the FDA that it will not infringe the branded manufacturer's patents. It can do this several ways, most relevantly by filing a "paragraph IV" certification stating that the branded company's patent is invalid or not infringed by the generic drug.[238] By law, such a paragraph IV certification represents an act of patent infringement. If the branded manufacturer brings an infringement suit within 45 days, the FDA must withhold approving the generic, usually for a 30-month period.[239] However, the Hatch-Waxman Act creates an incentive for a generic company to be the first to file an ANDA with a paragraph IV challenge to a branded company's patents; the first company to do so receives 180 days of exclusivity from the first commercial marketing of its drug.[240]

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[231] 547 U.S. 28 (2006).
[232] 547 U.S. at 42; Timothy R. Holbrook, *The Return of the Supreme Court to Patent Law*, 1 AKRON INTELL. PROP. J. 1, 9 (2007) [hereinafter Holbrook, *Return of the Supreme Court*].
[233] 547 U.S. at 42.
[234] *See* Shubha Ghosh, *Convergence?*, 15 MINN. J. L SCI. & TECH. 95, 100 (2014) (characterizing the decision as "a big move away from per se rules of illegality for tying arrangements involving patents").
[235] 133 S.Ct. 2233 (2013).
[236] 98 Pub. L. 417, 98 Stat. 1585.
[237] 21 U.S.C. §§ 355(j)(2)(A)(ii).
[238] *See* 21 U.S.C. § 355(j)(2)(A)(vii)((IV).
[239] *See* 21 U.S.C. § 355(j)(5)(B)(iii).
[240] 32 U.S.C. § 355(j)(5)(B)(iv).

This complicated statutory scheme encourages a patentee (which manufacturers branded pharmaceuticals) to pay off a generic company submitting a paragraph IV certification to prevent that generic firm from litigating the validity of a patent. Whether such reverse payment settlements constitute antitrust violations has become a topic of intense judicial and scholarly debate.[241] In the present case, the Eleventh Circuit had adopted a rule favorable to such settlements, holding that "absent sham litigation or fraud in obtaining the patent, a reverse payment settlement is immune from antitrust attack so long as its anticompetitive effects fall within the exclusionary potential of the patent."[242] The Eleventh Circuit acknowledged that "antitrust laws typically prohibit agreements where one company pays a potential competitor to not enter the market," but recognized a special rule for reverse payment settlements for patent litigation;[243] the Federal Circuit[244] and the Second Circuit[245] held similarly. While these courts developed rules tending to favor such arrangements, the Third Circuit held that "a reverse payment is *prima facie* evidence of an unreasonable restraint of trade" and presumptively unlawful.[246]

In *Actavis*, the Supreme Court eliminated any presumptions regarding reverse payment settlements involving patents. In so doing, the Court rejected unduly focusing on patent considerations in antitrust analyses, reasoning "it would be incongruous to determine antitrust legality by measuring the settlement's anticompetitive effects solely against patent law policy, rather than by measuring them against procompetitive antitrust policies as well."[247] Notably, while the dissent takes an explicitly exceptionalist approach to the patent-antitrust interface,[248] the majority's approach is decidedly integrative. Reviewing prior decisions involving the antitrust implications of reverse payment settlements involving patents,[249] the Court observed that "they seek to accommodate patent and antitrust policies, finding challenged terms and conditions unlawful unless patent policy offsets the antitrust policy strongly favoring competition."[250] Notably, the Court's opinion is directionally neutral; the Court rejects the Eleventh Circuit's presumption of legality as well as the FTC's proffered presumption of illegality.[251] Rather, the Court maintains the flexibility and case-by-case determination of traditional rule-of-reason inquiries in antitrust cases.[252] As Robin Feldman observes, *Actavis* represents a move away from patent exceptionalism in the context of pharmaceutical regulation and antitrust.[253] Shubha Gosh goes further, noting that the majority "rejected a sharp separation

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[241] *See, e.g.*, Hemphill, *supra* note ; Feldman, *supra* note .
[242] FTC v. Watson Pharms., Inc., 677 F.3d 1298, 1312 (11th Cir. 2012).
[243] 677 F.3d at 1307 ("[R]everse payment settlements of patent litigation present[] atypical cases because one of the parties owns a patent.").
[244] *In re* Ciprofloxacin Hydrochloride Antitrust Litigation, 544 F.3d 1323, 1332-1337 (Fed. Cir. 2008).
[245] *In re* Tamoxifen Citrate Antitrust Litigation, 466 F.3d 187, 212-13 (2d Cir. 2006).
[246] *In re* K-Dur Antitrust Litigation, 686 F.3d 197, 214-18 (3d Cir. 2012).
[247] Actavis, 133 S.Ct. at 2231.
[248] *See* Actavis, 133 S.Ct. at 2238 ("A patent carves out an exception to the applicability of antitrust laws.") (Roberts, C.J., dissenting).
[249] *See* Actavis, 133 S.Ct. at 2232-33.
[250] Actavis, 133 S.Ct. at 2233.
[251] 133 S.Ct. at 2237.
[252] 133 S.Ct. at 2238.
[253] Feldman, *supra* note , at 67.

between patent and antitrust" and "may even signal a convergence of these two battling areas of law."[254]

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In sum, the Supreme Court has consistently assimilated patent law to its conception of broader legal doctrines and concepts, thus stamping out patent exceptionalism. This project has taken several forms. First, the Court has policed structural concerns, rigorously applying cross-cutting, trans-substantive regulatory schemes like the Federal Rules of Civil Procedure, the APA, and jurisdictional statutes. Second, the Court has invoked equitable principles to reconfigure the law of patent infringement remedies. Third, the Court has borrowed concepts from unrelated areas of law to shape new patent doctrine. Fourth, the Court has rejected specialized patent rules in favor of general precedent and ordinary connotations of legal terms. Fifth, the Court has harmonized patent and antitrust doctrine, eliminating per se rules that categorically treat patent cases differently than other types of antitrust disputes. Reminiscent of nineteenth century formalists who saw law as a coherent, unified whole,[255] the Supreme Court has sought to assimilate patent law to broader legal principles.

PART IV. UNDERSTANDING THE SUPREME ASSIMILATION OF PATENT LAW

The Supreme Court's assimilation of patent law is not only descriptively striking, it raises important questions regarding the scope and motivations of the Court's behavior. Accordingly, this Part first analyzes the contours of this assimilationist project before offering various theories exploring its causes and implications.

A. The Scope and Contours of the Assimilationist Project

i. Transcendent Issues Versus the Heartland of Patent Law

In understanding the Supreme Court's assimilation of patent law, it is helpful to recognize its circumscribed nature. In general, assimilation does not implicate "heartland" issues of substantive patent doctrine, such as patentable subject matter doctrine,[256] nonobviousness,[257] prosecution history estoppel,[258] the on-sale bar,[259] and the doctrine of equivalents.[260] After all, these doctrines have little to no analog in other areas of law.[261] Unlike the decisions reviewed

[254] Ghosh, *supra* note , at 95. Ghosh, however, is cautious in his predictions, as he notes that convergence is still "far away." *Id.* at 112.
[255] *See supra* Part I.
[256] *See, e.g.*, Alice Corp. Pty. Ltd. v. CLS Bank Int'l, 134 S.Ct. 2347 (2014); Assoc. for Molecular Pathology v. Myriad Genetics, Inc., 133 S.Ct. 2107 (2013); Mayo Collaborative Servs. v. Prometheus Labs. Inc., 132 S.Ct 1289 (2011); Bilski v. Kappos, 561 U.S. 593 (2010).
[257] KSR Int'l v. Teleflex, Inc., 550 U.S. 398 (2007).
[258] Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 535 U.S. 722 (2002).
[259] Pfaff v. Wells Electronics, 525 U.S. 55 (1998).
[260] Warner-Jenkinson v. Hilton Davis Chemical Co., 520 U.S. 17 (1997).
[261] There is some conceptual similarity between subject matter doctrine in patent and copyright, though this has not manifested prominently in the doctrine. *See* Peter Lee, *The Evolution of Intellectual Infrastructure*, 83 WASH. L. REV. 39, 53-54 (2008).

above, Supreme Court opinions in these heartland areas notably lack citations to cases, concepts, and principles beyond patent law.

Rather, the Court's assimilationist project tends to focus on transcendent areas of law that touch upon patent doctrine as well as other doctrinal areas, such as appellate review of district courts and agencies, jurisdiction, and remedies. Much patent assimilation deals with procedural rules, and a consistent theme from the Supreme Court is that "the same rules apply to litigation involving patents as in ordinary, non-patent litigation."[262] Interestingly, even prior to the formation of the Federal Circuit in 1982, the Supreme Court's patent jurisprudence focused not on substantive patent law but on crosscutting issues, such as venue and procedure, preemption, the common law of patent licensing, and the relationship between patent law and antitrust.[263] Moreover, in the early years following the Federal Circuit's establishment, on the rare occasion that it reviewed the Federal Circuit, the Supreme Court tended to focus on similarly crosscutting issues of procedure and jurisdiction.[264] In significant part, the Supreme Court, a generalist institution, has been most confident intervening in patent affairs to enforce transcendent legal principles rather than delving into the technical details of substantive patent law.[265]

ii. Federal Circuit Exceptionalism and Beyond

As discussed further below, a significant proportion of the Supreme Court's assimilation of patent law involves conforming exceptional Federal Circuit doctrine to pre-existing legal standards.[266] However, the Court's project also extends beyond this pattern. First, under the rubric of assimilation, the Court has created new doctrine and labeled it as mainstream, as seen in its creative invocation of equitable principles in *eBay v. MercExchange*.[267] Second, the Court has reversed the Federal Circuit even when that appellate court has not "gone off the rails" to create an exceptional rule, but merely decided an open question of law. This is the case, for instance, with *Gunn v. Minton*, where the Federal Circuit adopted an expansive conception of federal jurisdiction over patent affairs, which the Supreme Court subsequently reversed.[268] Third, the Court has invoked principles of assimilation in reversing the Federal Circuit even when that appellate court had ruled consistently with binding precedent, as in *Independent Ink, Inc. v. Illinois Tool Works Inc.* Furthermore, the Court's assimilationist project extends to courts other than the Federal Circuit. For example, the Court's reconciliation of patent and antitrust principles in *FTC v. Actavis* resolved a circuit split involving the Second, Third, and Eleventh Circuits (as well as the Federal Circuit).[269] More broadly, the Court's assimilationist drive in the patent-

[262] Castanias et al., *supra* note , at 815.
[263] Duffy, *supra* note , at 294.
[264] *See* Holbrook, *Return of the Supreme Court*, *supra* note , at 1; Holbrook, *Explaining*, *supra* note , at 63 (noting that in the first twenty years of the Federal Circuit's existence, "[e]ven in the cases the [Supreme] Court did take, the issue was often tangential to substantive patent law, involving instead constitutional or procedural issues."); Dreyfuss, *Learn*, *supra* note , at 792 ("In the first twenty or so years, its review of the Federal Circuit was largely intermittent and confined to *procedural* issues….").
[265] *Cf.* Golden, *supra* note , at 700 ("When the Court addresses a question of substantive patent law, it tends to move outside a comfort zone where it can pick between alternative doctrinal formulations that lower courts have already adopted.").
[266] *See infra* Part IV.B.i.
[267] *See supra* notes – and accompanying text.
[268] *See supra* notes – and accompanying text.
[269] *See supra* notes – and accompanying text.

antitrust nexus has less to do with Federal Circuit exceptionalism and more to do with a general trend of eliminating per se rules in antitrust. Although Federal Circuit exceptionalism accounts for much of the Supreme Court's assimilationist project, it does not explain all of it.

iii. Intersections with Narrowing Patent Rights and Favoring Holistic Standards

In highlighting the Supreme Court's assimilation of patent law, it is important to consider its relationship to the two more established theories of Supreme Court patent jurisprudence: narrowing of patent rights and favoring holistic standards over bright-line rules. These three trends are not mutually exclusive, and in fact they frequently reinforce each other. For example, the Court's decision in *eBay v. MercExchange* reflects all three phenomena; the decision weakened patent rights, replaced a bright-line rule with a holistic standard, and sought to conform patent law to broader equitable principles.[270] In several ways, the Court's assimilationist project corroborates a trend of narrowing patent rights. To the extent that exceptional patent doctrine from the Federal Circuit has tended to expand patent rights, the Supreme Court's assimilationist project will constrain those rights. Furthermore, to the extent that exceptional patent doctrine has tended to expand the Federal Circuit's own power, for example by allowing less deferential review of district courts and the PTO, the Supreme Court's assimilationist project will constrain the authority of a pro-patent institution, thus indirectly narrowing patent rights as well.

The Court's assimilation of patent law also reinforces its preference for holistic standards over formalistic rules. As David Taylor observes, the Federal Circuit's rule-oriented jurisprudence stems at least in part from an exceptional need for certainty and predictability in patent law.[271] However, the Supreme Court does not appear to value certainty as much, thus contributing to its embrace of more holistic standards. As Taylor observes, "It is the role of a generalist court of last resort to view rule-based adjudication by a more specialized court with suspicion and, in the absence of well-reasoned justification for rule-based adjudication, to overturn the rule-based test created by the more specialized court."[272] Even Judge Linn of the Federal Circuit has recognized the Supreme Court's "condemnation of patent-specific, bright-line rules in favor of flexible mainstream dogma."[273] The Supreme Court's assimilation of patent law to general legal principles is thus not independent of its tendency to weaken patent rights and favor holistic standards. Rather, these trends reinforce each other.

B. Motivations behind Assimilation

Several motivations drive the Supreme Court's assimilation of patent doctrine. Among them, this Section argues that the Court's project reins in patent exceptionalism by the Federal Circuit, reins in the Federal Circuit's own self-aggrandizing doctrinal maneuvers, reflects policy interests that range beyond patent law, lowers cognitive burdens when engaging unfamiliar patent issues, and provides rhetorical legitimacy for new doctrine.

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[270] *See supra* notes – and accompanying text.
[271] *See* Taylor, *Rules and Standards*, *supra* note , at 466; *see supra* note – and accompanying text.
[272] Taylor, *Rules and Standards*, *supra* note , at 490.
[273] Linn, *supra* note , at 6.

i. Reining in the Federal Circuit's Doctrinal Exceptionalism

To understand the Supreme Court's assimilation of patent law, one must first consider the Federal Circuit, for in many ways (but not all) the Court's behavior is a response to the exceptional doctrine of that quasi-specialized court. When Congress established the Federal Circuit in 1982, it created a "court with a mission."[274] According to the legislative history of the Federal Courts Improvement Act, Congress had determined that there was "a special need for nationwide uniformity"[275] in patent law, and establishing the Federal Circuit aimed to "increase doctrinal stability" in the field. [276] In its conception, the Federal Circuit seemed attuned to a particular constituency—business people—and their unique need for certainty in patent law.[277] Indeed, the court's first chief judge emphasized the unique role and responsibility of the Federal Circuit in rendering patent law more certain.[278]

Although some early observers suggested that the Federal Circuit avoided "the entanglements and strictures of a specialized court,"[279] its subsequent history indicates otherwise. As demonstrated, the Federal Circuit has consistently produced exceptional doctrine in a wide variety of areas. Due to its limited subject matter jurisdiction, the Federal Circuit has developed a deep appreciation for the uniqueness of patents and sought to tailor (or ignore) general doctrines based on the particularities of patent litigation; in so doing, the court may give less shrift to the subtle policy balances already reflected in those general doctrines.[280] As further evidence of its narrow focus, the Federal Circuit rarely looks beyond statute and doctrine to consider myriad issues in innovation policy,[281] let alone academic and social science evidence,[282] in an explicit fashion. This seems particularly peculiar given the policy-oriented, utilitarian nature of the patent

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[274] *See* Control Res., Inc. v. Delta Elec., Inc., 133 F. Supp. 2d 121, 123 (Fed. Cir. 2001).
[275] S. Rep. No. 97-275, 97th Cong., 1st Sess., 1 (1981); *see* H.R. Rep. No. 97-312, 97th Cong., 1st Sess., 20 (1981); *see Gugliuzza, Federal Circuit*, *supra* note , at 1798; *see* Craig Allen Nard & John F. Duffy, *Rethinking Patent Law's Uniformity Principle*, 101 NW. U. L. REV. 1619, 1620 (2007).
[276] S. Rep. No. 97-275, 97th Cong., 1st Sess., 5 (1981).
[277] S. Rep. No. 97-275, 97th Cong., 1st Sess., 6 (1981).
[278] Howard T. Markey, *The Court of Appeals for the Federal Circuit: Challenges and Opportunity*, 34 AM. U. L. REV. 595, 595 (1985).
[279] Hon. Randall R. Rader, *Specialized Courts: The Legislative Response*, 40 AM. U. L. REV. 1003, 1014 (Fed. Cir. 1991).
[280] *Cf.* F. Scott Kieff & Troy A. Parades, *The Basics Matter: At the Periphery of Intellectual Property*, 73 GEO. WASH. L. REV. 174, 182 (2004) ("Courts that adopt special approaches to address matters at the periphery of IP law run the risk of crafting judicial doctrines that inappropriately override well-established bodies of law that are informed by longstanding judicial and scholarly thought and consideration of each area.").
[281] Dreyfuss, *Experiment*, *supra* note , at 782.
[282] Dreyfuss, *Experiment*, *supra* note , at 780; Dreyfuss, *Institutional Identity*, *supra* note , at 821; Craig Allen Nard, *Toward a Cautious Approach to Obeisance: The Role of Scholarship in Federal Circuit Patent Law Jurisprudence*, 39 HOUSTON L. REV. 667, 678-83 (2002); Paul R. Michel, *The Challenge Ahead: Increasing Predictability in Federal Circuit Jurisprudence for the New Century*, 43 AM. U. L. REV. 1231, 1245 (1994) [hereinafter Michel, *Challenge Ahead*]; *but see* Plager & Pettigrew, *supra* note , at 1751 (indicating that more academic commentary "finds its way into judicial thought than the absence of specific citation suggests").

system.[283] Although the Federal Circuit has created more (internal) doctrinal consistency,[284] it has also tended to "take patents out of the mainstream of legal thought."[285]

The Supreme Court is situated very differently. As a generalist court atop the judicial hierarchy, the Court has a wider purview than the quasi-specialized Federal Circuit. Justice Breyer explicitly acknowledged the value of the Supreme Court as a generalist check on the Federal Circuit, observing that "a decision from this generalist Court could contribute to the important ongoing debate, among both specialists and generalists, as to whether the patent system, as currently administered and enforced, adequately reflects the 'careful balance' that 'the federal laws … embod[y]'."[286] Perhaps unaware or unimpressed by the unique demands of patent law, the Supreme Court has instead integrated patents within the general legal frameworks with which it is familiar.

ii. Reining in the Federal Circuit

In considering the Supreme Court's assimilationist agenda, it is important to note not only the fact of the Federal Circuit's exceptionalism but its direction. The Federal Circuit produces doctrine that not only deviates from legal norms but also tends to enhance its own power. For example, the Federal Circuit's less deferential standard of review of district court and PTO factual findings both diverged from prevailing rules and increased its own authority.[287] This is particularly the case for the Federal Circuit's former practice of reviewing district court claim construction de novo.[288] Similarly, the Federal Circuit's expansive conception of jurisdiction over patent cases had the effect of increasing its own influence in patent affairs.[289]

Thus, in parallel to eliminating patent exceptionalism for its own sake, the Supreme Court has reined in an ambitious appellate court that has created self-serving doctrine.[290] Indeed, by asserting appellate jurisdiction over the Federal Circuit, the Supreme Court is helping to shift the balance of power between itself and that quasi-specialized court.[291] And in the particular

[283] Rai, *Facts and Policy*, *supra* note , at .
[284] Dreyfuss, *Federal Circuit*, *supra* note , at 24 ("[T]he court has begun to make patent law more accurate, precise, and coherent.").
[285] Dreyfuss, *Federal Circuit*, *supra* note , at 25l; *but see* Michel, *Challenge Ahead*, supra note , at 1232 (1994) ("The court has also done much to bring litigation of private patent cases … more into the mainstream of American civil litigation."); *cf.* Balkin, *supra* note , at 138 ("If we are not aware of the content of legal norms in many different parts of the law, they cannot figure into our awareness of possible sources of moral conflict and normative incoherence.").
[286] Lab. Corp. v. Metabolite Labs., Inc., 548 U.S. 124, 138 (2006) (Breyer, J., dissenting from dismissal of writ of certiorari).
[287] Rai, *supra* note , at 1065.
[288] *See* Rai, *supra* note , at 1059; Phillips v. AWH Corp., 415 F.3d 1303, 1332 (Fed. Cir. 2005) (Lourie, J., concurring in part and dissenting in part) ("[T]his court treats the district court as an intake clerk, whose only role is to collect, shuffle, and collate evidence.").
[289] *See supra* notes – and accompanying text.
[290] *See* Gugliuzza, *Federal Circuit*, *supra* note , at 1796 ("[T]he Federal Circuit has supplemented this already significant authority by impeding other government institutions from shaping patent law.").
[291] *Cf.* Lee, *Two Cultures*, *supra* note , at 43 ("The Supreme Court's deference to Federal Circuit jurisprudence, as well as its general indifference to patent matters, appears to have ended.").

structural doctrines enunciated, the Court is also elevating district courts and the PTO[292] in influence relative to the Federal Circuit. Thus, at a meta level, just as the Supreme Court has sought to bring patent doctrine in line with general legal standards, it has also sought to bring the Federal Circuit in line with what the Court perceives as its proper role in the federal judiciary. In addition to tamping down exceptionalist patent doctrine from the Federal Circuit, the Supreme Court's assimilationist project tamps down the Federal Circuit itself.

iii. Canvassing a Wider Array of Policy Interests

On related lines, the Supreme Court considers and responds to a wider set of policy interests than the Federal Circuit. Although the Federal Circuit has a reputation for not considering policy interests in its decisions,[293] that is not really the case. The writings and opinions of its judges consistently emphasize the policy interests of certainty, predictability, and clear notice in patent law,[294] which contribute to the Federal Circuit's embrace of bright-line rules. At least ostensibly, the Federal Circuit is also attuned to the patent system's overall policy objective "to promote the Progress of Science and useful Arts."[295] Indeed, the implicit assumption of much Federal Circuit doctrine is that strong patent rights, bright-line rules, and occasional exceptions from general legal norms will best promote technological progress.

The Supreme Court, however, is attuned to a broader set of policy interests. To be sure, the Court frequently pledges fealty to the Constitutional objective of promoting technological progress,[296] though interestingly it often deploys weakened patent rights and holistic standards to achieve that aim. The Court is less explicit in valuing certainty as an overriding policy objective. In a broader sense, as Judge Linn of the Federal Circuit acknowledges, while the Federal Circuit tends to focus on providing bright-line rules for business people navigating patent law, the Supreme Court "deals with legal principles and the policy implications they engender."[297] As manifested in its assimilationist agenda, the Court cares not only about certainty and promoting technological progress but also about the macroscopic aim of ensuring coherence and consistency in diverse areas of federal law.

Implicitly, the Supreme Court also prioritizes the policy aims inhering in various trans-substantive statutory and doctrinal regimes. Thus, the Court appears to countenance the policy determination embodied in the Federal Rules of Civil Procedure that appellate courts should

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[292] *See* Clarisa Long, *The PTO and the Market for Influence in Patent Law*, 157 U. PENN. L. REV. 1965,1973 (2009) (characterizing *Zurko* as one of several attempts by which the PTO has sought to expand its influence).
[293] *See* Rai, *supra* note , at 1101; *supra* note and accompanying text.
[294] Taylor, *Precedent and Policy*, *supra* note , at 641-44, 680; *see* Gugliuzza, *Federal Circuit*, *supra* note , at 1819; Michel, *Challenge Ahead*, *supra* note , at 1241 (cautioning against the dangers of uncertainty in patent law).
[295] U.S. Const., art. I, sec. 8, cl. 8; *but see* Thomas, *supra* note , at 796 ("Innovation policy incorporates other values that present an uneasy fit with the Federal Circuit's chosen rules.").
[296] *See, e.g.*, LabCorp v. Metabolite Labs., Inc., 548 U.S. 124, 126 (2005) ("[S]ometimes *too much* patent protection can impede rather than 'promote the Progress of Science and useful Arts") (Breyer, J., dissenting from dismissal of writ of certiorari).
[297] Linn, *supra* note , at 7; *see also* Mullally, *supra* note , at 1126-28 (describing the value of bright-line rules to the PTO).

review factual findings for clear error.[298] The Court has given significant shrift to the policy rationale of the APA, which seeks "greater uniformity of procedure and standardization of administrative practice."[299] And the Court has signed on to a modest conception of "arising under" jurisdiction that, among other effects, serves interests of vertical federalism by ensuring a greater role for state courts to adjudicate legal disputes involving patents.[300] Due to its superior position and holistic perspective, the Supreme Court is better situated to weigh and address these various policy interests than the Federal Circuit. As Jack Balkin observes, "few people have considered all the possible conflicts among rules across different areas of law. Compartmentalization of law into different subject areas probably exacerbates this phenomenon."[301] As a generalist court at the top of the judicial hierarchy, the Supreme Court is more likely to value synthesis[302] and to identify, assess, and resolve divergences between various areas of law.

There is, of course, an interesting institutional irony in these dynamics. The Federal Circuit has largely succeeded in unifying patent law due to its near-exclusive jurisdiction over patent appeals.[303] However, in unifying patent law and rendering it more determinate, it has created an "exceptional" body of doctrine that deviates from general legal norms. The Supreme Court, animated by its generalist orientation and a wider array of policy interests, has sought to unify patent doctrine with general legal principles. In so doing, however, it has shorn the "unified" patent law arising from the Federal Circuit of much of its doctrinal exceptionalism and uniqueness.

iv. Relying on General Legal Principles to Navigate Technical Patent Issues

There are, of course, less charitable reasons to explain the Supreme Court's assimilation of patent law. Somewhat pessimistically, the Court may resort to general principles of law to ease cognitive burdens when engaging technical elements of the patent system. This can occur in several ways. First, analogical reasoning allows the Supreme Court to rely on familiar legal principles when navigating unfamiliar questions of patent doctrine. This is perhaps best illustrated by *Global-Tech v. SEB*, where the court drew on a completely unrelated field, criminal law, to elucidate the "willful blindness" standard for induced infringement.[304] Though this may appear incongruous, criminal law is probably more familiar than doctrines of indirect

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[298] *See generally* Anderson v. Bessemer, 470 U.S. 564, 574 ("The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise."); Wainwright v. Sykes, 433 U.S. 72, 90 (1977) (noting that the trial on the merits should be the "'main event,' so to speak, rather than a 'tryout on the road'").
[299] Wong Yang Sung v. McGrath, 339 U.S. 33, 41 (1950); Director, OWCP v. Greenwich Collieries, 512 U.S. 269, 271 (1994); *see* Scalia, *supra* note , at 363 ("[The Supreme Court has] regarded the APA as a sort of superstatute, or subconstitution, in the field of administrative process: a basic framework that was not lightly to be supplanted or embellished.").
[300] *Cf.* Grossi, *supra* note , at 973 (noting the importance of "structural interpretation" and federalism in legal process approaches to adjudication).
[301] Balkin, *supra* note , at 139.
[302] *Cf.* Holton, *supra* note , at 15 (describing great synthetic scientists like Darwin, Maxwell, and Einstein who "like to stand, as it were, on a high mountain from which they have, at a glance, the whole varied landscape below").
[303] Rochelle Cooper Dreyfuss, *In Search of Institutional Identity: The Federal Circuit Comes of Age*, 23 BERKELEY TECH. L.J. 787, 789 (2008) [hereinafter Dreyfuss, *Institutional Identity*].
[304] *See supra* note – and accompanying text.

infringement to the justices of the Supreme Court, including Justice Alito, a former United States Attorney who wrote the majority opinion.

Such invocation of the familiar is also evident in *Teva v. Sandoz*, which held that appellate courts should review district court factual findings informing claim construction for clear error.[305] The Court used an analogy to illustrate a framework in which claim construction remains an ultimate question of law while its subsidiary factual inquiries are reviewed for clear error. Drawing again on criminal law, it noted that appellate courts review de novo a district court's determination of the voluntariness of a confession while reviewing subsidiary factual questions, such as whether the police intimidated the defendant, for clear error.[306] Here again, recourse to an unrelated (but more familiar) area of law helped guide the Court. Reasoning by analogy is a hallmark of generalist common law courts, and it eases cognitive burdens by providing a familiar intellectual foundation for engaging unfamiliar patent doctrine.

Second, invoking broad legal principles—or even the rhetorical trope of legal consistency itself—can shield Supreme Court justices from engaging difficult technical details of patent law. Patent adjudication generates significant cognitive burdens, particularly for generalist courts, due in large part to the complex technologies often at stake.[307] Furthermore, patent law *itself*, which is rather arcane, can also be quite technically complex.[308] As Justice Scalia once observed in a patent case, "That point [of patent doctrine] is much less tied to general principles of law with which I am familiar, and much more related to the peculiarities of patent litigation, with which I deal only sporadically."[309] And more recently in oral argument in *Gunn v. Minton*, Justice Scalia further observed, "Federal judges … are not interested in … getting into the weeds of patent law."[310] And even if a particular patent doctrine is not especially complicated, such as the Federal Circuit's rule of de novo review of claim construction, understanding the importance and implications of such seemingly simple rules requires an intimate knowledge of the patent system and innovation dynamics. Faced with patent doctrine that raises technical challenges, it is not surprising that Supreme Court justices would grasp for more familiar legal concepts for guidance.

Along these lines, invoking trans-substantive legal principles allows Supreme Court justices to "short circuit" detailed doctrinal and contextual analyses of patent law, thus reducing cognitive demands. As I have explored in other work, the manner in which doctrine is structured, as well as particular modes of legal reasoning, can vastly impact the cognitive burdens of patent adjudication.[311] For instance, the Supreme Court's preference for holistic standards has, perhaps ironically, increased cognitive demands on generalist judges, for such standards often require detailed factual examinations of technologies and their context. The Supreme Court's assimilation of patent law represents an opposite phenomenon. By invoking general legal principles to resolve questions of patent law, the Supreme Court *decreases* its engagement with

[305] Teva Pharms. v. Sandoz, Inc., 135 S.Ct. 831 (2015).
[306] 135 S.Ct. at 842.
[307] Lee, *Two Cultures*, *supra* note , at 9-12.
[308] Lee, *Two Cultures*, *supra* note , at 12-13. The complexity of patent law, of course, depends on the particular doctrine at issue.
[309] Cardinal Chem. Co. v. Morton Int'l Inc., 508 U.S. 83, 103 (1993) (Scalia, J., concurring).
[310] Transcript of Oral Argument at 48, Gunn v. Minton, 133 S. Ct. 1059 (2013) (No. 11-1118).
[311] *See* Lee, *Two Cultures*, *supra* note .

the particularities of the patent system and thus decreases its own cognitive burdens.[312] The Supreme Court need not wrestle with the intricacies of patent law if a general rule is available to resolve the legal question at hand.

This dynamic is evident, for example, when comparing the differing approaches of the Federal Circuit and the Supreme Court to claim construction. The Federal Circuit had fashioned a specialized rule whereby claim construction, which encompasses factual determinations, was reviewed de novo on appeal.[313] This decision was the controversial outcome of years of debate among Federal Circuit judges, who were acutely aware of the unique role of claim construction in patent litigation and the ways that de novo versus more deferential review might impact the patent system. This decision also considered extensive input from the technology community. The Supreme Court's analysis in *Teva*, however, largely sidesteps these complex and nuanced debates.[314] In its brief opinion, the Court did not extensively examine the rather unique role of claim construction in patent litigation, relying instead on Federal Rule of Civil Procedure 52(a)(6) that appellate courts should review district court factual findings for clear error. Invoking the Federal Rules of Civil Procedure, the APA, or any other transcendent principle allows the Court to short circuit more nuanced analysis, obviating deep engagement with the particularities of patent doctrine and practice.[315]

v. Legitimizing New Doctrine through the Rhetoric of Assimilation

One of the most striking aspects of the Supreme Court's assimilation of patent law is that in some cases, it doesn't involve assimilation at all, at least in the traditional sense of conforming exceptional doctrine to some pre-existing norm. As noted above, the Court's assimilationist project has involved creating new doctrine and labeling it as mainstream as well as reversing the Federal Circuit on open questions of law or even when it had faithfully applied precedent.[316] These maneuvers reveal a rhetorical dimension to assimilation that transcends its value as a substantive jurisprudential goal. In short, the rhetoric of assimilating patent doctrine to some pre-existing standard can enhance the perceived legitimacy of new doctrine and obscure its exceptional nature. This is evident, for instance, in the Court's *eBay* decision, which framed a novel equitable test (which is well-tailored to the patent context) as a historical, general standard to govern all injunctions.[317] Framing this test in the language of assimilation and universality enhanced its legitimacy and may promote its faithful adoption by lower courts.

Ironically, the rhetoric of assimilation represents a powerful tool for justifying a significant departure from settled precedent. This is the case, for instance, in *Illinois Tool Works v. Independent Ink, Inc*. There, the Federal Circuit faithfully applied existing antitrust precedent in holding that the presence of a patent in a tying arrangement gave rise to a presumption of

[312] Such doctrine may also be easier to apply for lower courts, thus decreasing their cognitive burdens.
[313] *See* Lighting Ballast Control LLC v. Philips Electronics North America Corp., 744 F.3d 1272 (Fed. Cir. 2014); *but see* Anderson & Menell, *supra* note , at 61 (finding a trend of informal deference in more recent opinions).
[314] *See supra* notes – and accompanying text.
[315] *Cf.* Grossi, *supra* note , at 1010 ("[T]he application of mechanical tests is easier than going beneath the form to the substance of the matter.").
[316] *See supra* notes – and accompanying text.
[317] *See supra* notes – and accompanying text.

market power.[318] The Supreme Court, however, utilized the language of assimilation to shift the doctrine in a new direction. Citing the desire to conform patent and antitrust doctrine, the Court altered antitrust doctrine to eliminate the presumption of market power in tying arrangements involving patents. The Court thus invoked the legitimizing rhetoric of assimilation to help justify a new doctrinal innovation.

PART V. TOWARD A REFINED EXCEPTIONALISM FOR PATENT LAW

Turning to normative considerations, this Part questions the categorical value of universality and provides recommendations for a refined exceptionalism for patent law. It argues, not surprisingly, that the appropriateness of patent exceptionalism depends on context. While broad legal consistency and coherence are important values that the Supreme Court should uphold, the Federal Circuit's unique institutional expertise warrants bending traditional rules of deference in some areas. However, the Supreme Court should vigilantly police self-aggrandizing jurisdictional moves by the Federal Circuit. In general, the Court should use open-ended, holistic standards (with appropriate guidance) that allow for broad applicability while maintaining flexible elaboration for particular situations. Furthermore, while this Article has focused primarily on courts as articulators of law, it identifies specific roles for Congress to define patent-related exceptions from general principles when warranted.

There are, of course, strong arguments for conforming patent law to general legal norms. As described above, there is a long tradition of valuing broad consistency in the law.[319] Furthermore, principles of justice and horizontal equity demand that "equals be treated equally."[320] Additionally, several trans-substantive legal regimes discussed in this Article, such as the Federal Rules of Civil Procedure and the APA, have broad consistency and elimination of exceptionalism as their animating purpose.[321] Uuniversality advances judicial and legal economy by allowing judges and lawyers to master a limited set of central principles that they can apply in myriad settings. Finally, having the same rules apply to all substantive fields of law decreases opportunities for rent-seeking and interest group politics inherent in exceptionalism.[322]

These values, however, must be weighed against other policy interests. For better or for worse, patent law *is* different, and there are compelling reasons for selective doctrinal exceptionalism in particular areas. Before providing context-specific principles to guide patent exceptionalism, several words of constraint are in order. First, these prescriptions largely do not apply to the Supreme Court's engagement with "heartland" patent doctrine. As described above, the Court's assimilationist project is less apposite to technical doctrines such as patentable subject matter, nonobviousness, and the requirement of claim definiteness, which have little analog outside of patent law.[323] Second, any prescriptions must consider the Supreme Court's

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[318] *See supra* notes – and accompanying text.
[319] *See supra* Part I.
[320] *Cf.* Louis Kaplow, *Horizontal Equity: Measures in Search of a Principle*, 42 NAT'L TAX J. 139, 139 (1989) (exploring horizontal equity in tax law and policy).
[321] *See, e.g.*, Marcus, *Trans-Substantivity*, *supra* note , at 1194 ("Trans-substantivity is one of the most fundamental principles of doctrinal design for modern civil procedure.") (citing Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules"*, 2009 WIS. L. REV. 535, 536); Wong Yang Sung v. McGrath, 339 U.S. 33, 41 (1950).
[322] Benjamin & Rai, *supra* note , at 274; *see* Dreyfuss, *Learn*, *supra* note , at 789-90.
[323] *See supra* notes – and accompanying text.

institutional limitations in engaging patent law. Commentators have long criticized the Court's ability to understand patent law and craft effective doctrine.[324] The Supreme Court is also acutely aware of its limitations and is generally reluctant to "micromanag[e]" the Federal Circuit.[325] Accordingly, the following prescriptions advocate a rather modest role for the Supreme Court in shaping patent doctrine. Third and relatedly, however, it bears emphasizing that the procedural and "peripheral" areas of patent law subject to assimilation are those where the Supreme Court enjoys special institutional advantages. While the Court may struggle with the technical details of substantive patent law, its holistic, generalist nature renders it uniquely suited to fitting patent law (or any other specialized field of doctrine) into a broader legal fabric.

Where a legal standard exists for a discrete issue implicated in general litigation (including patent litigation), deviating from that norm is not usually warranted. Thus, for instance, the Supreme Court correctly rejected the Federal Circuit's exceptional definition of "exceptional" cases for purposes of awarding attorney's fees as well as the Federal Circuit's unusual practice of reviewing such determinations de novo.[326] Instead, the Supreme Court adopted a much more commonplace definition of an "exceptional" case as "simply one that stands out from others with respect to the substantive strength of a party's litigating position … or the unreasonable manner in which the case was litigated."[327] Illustrating a theme to which this Article will return, the Supreme Court's formulation is particularly helpful because of its open-ended, tailorable nature. The Court's flexible standard for attorney's fees allows district courts to address particular challenges in patent litigation (such as patent trolls) while not hamstringing courts in other types of litigation with a rigid rule.

Furthermore, subject to qualification, analogizing from unrelated areas of law to illuminate novel questions of patent doctrine may be helpful. This is the case, for example, with the Court's borrowing from criminal law to inform the mental state for induced infringement.[328] While such borrowing may seem incongruous at first glance, it also enhances understanding of a new standard. Rather than construct a sui generis rule, the Court can invoke a familiar concept for which reams of precedent exist.[329] Of course, analogies can obscure as much as they

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[324] *See, e.g.*, Donald S. Chisum, *The Supreme Court and Patent Law: Does Shallow Reasoning Lead to Thin Law?*, 3 MARQ. INTELL. PROP. L. REV. 1, 4 (1999); John F. Duffy, *The Festo Decision and the Return of the Supreme Court to the Bar of Patents*, 2002 SUP. CT. REV. 273, 76 (2002); John M. Golden, *The Supreme Court as "Prime Percolator": A Prescription for Appellate Review of Questions in Patent Law*, 56 UCLA L. REV. 657, 662, 720 (2009); Mark D. Janis, *Patent Law in the Age of the Invisible Supreme Court*, 2001 U. ILL. L. REV. 387, 408 (2001).

[325] Nautilus, Inc. v. Biosig Instruments Inc., 134 S.Ct 2120, 2130 (2014) (quoting Warner-Jenkinson Co. v. Hilton Davis Chemical Co., 520 U.S. 14, 40 (1997)). However, more recent pronouncements have been less deferential to expertise and the specialized nature of the Federal Circuit. Holbrook, *Explaining*, *supra* note , at 75. *See, e.g.*, Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 839 (2002) (Stevens, J., concurring in part and concurring in the judgment) ("[O]ccasional decisions by courts with broader jurisdiction will provide an antidote to the risk that the specialized court may develop an institutional bias."); Lab. Corp. of Am. Holdings v. Metabolite Labs., Inc., 548 U.S. 124, 128 (2006) (Breyer, J., dissenting) ("[A] decision from this generalist Court could contribute to the important ongoing debate, among both specialists and generalists, as to whether the patent system, as currently administered and enforced, adequately reflects the 'careful balance' that 'the federal patent laws … embod[y].'"). (quoting Bonito Boats, Inc., v. Thunder Craft Boats, Inc., 489 U.S. 141 (1989)).

[326] *See supra* Part III.D.ii.

[327] Octane Fitness, LLC v. ICON Health & Fitness, Inc., 134 S.Ct. 1749, 1756 (2014).

[328] *See supra* Part III.C.i.

[329] *See, e.g.*, Commil USA, LLC v. Cisco Systems, Inc., (May 26, 2015), slip op. at 13.

illuminate.[330] In drawing analogies, the Supreme Court (as well as all courts) must be aware of the differences between the bridged concepts and the limitations of comparisons.

In some contexts, however, the unique role of the Federal Circuit justifies some deviation from general legal norms. In particular, the exceptional nature of the Federal Circuit pushes against the general scheme of appellate review embodied in the Federal Rules of Civil Procedure. Commentators have argued that because the Federal Circuit is a quasi-specialized court, it should not be subject to general principles of deferential review of district court factual findings.[331] As Rochelle Dreyfuss observes, "it seems somewhat peculiar to allow a layman's decision to stand on a technical issue such as the content of prior art, when the experienced judges of the CAFC, and the experts they employ, think that the finding is wrong, but not 'clearly erroneous.'"[332] Responding to the Supreme Court's holding in *Dennison*, she argues in favor of the Federal Circuit enjoying a broader role in fact finding "or at least, an ability to require both juries and trial judges to find facts with greater particularity."[333]

Although this article has focused on court-made doctrine, Congress has an important role to play in considering high-level questions of patent law and institutional design. As noted, Congress has already demonstrated its willingness to statutorily overrule assimilationist doctrine and legislate patent exceptionalism.[334] This is evident in Congress's overruling of *Holmes Group* in the 2011 America Invents Act, which extends jurisdiction over patent appeals to the Federal Circuit when a patent issue arises in a compulsory counterclaim.[335] In the present context, legislation may be warranted to allow the Federal Circuit greater authority to review facts found by district courts given the Federal Circuit's expertise and familiarity with patent litigation.[336] Furthermore, although the Supreme Court's *Teva* decision resolves the question of appellate review of claim construction (at least for now), there are defensible reasons for favoring more authority for the Federal Circuit in this domain, again because of its specialized expertise. It would be useful for Congress to weigh in on this issue given the uniqueness and importance of claim construction in patent litigation.

The expertise of the Federal Circuit also pushes against traditional canons of agency deference in the APA. As explored above, Attorney General Clark's 1947 Manual on the Administrative Procedure Act explicitly stated that the operative provision of the APA, 5 U.S.C. § 704, did not apply to appellate review of Patent Office factual findings by the Court of Customs and Patent Appeals.[337] More broadly, traditional canons of deference to specialized agencies are less relevant when applied to a quasi-specialized appellate court, for that court also

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[330] *See* Jacob S. Sherkow, *Patent Infringement as Criminal Conduct*, 19 MICH. TELECOMM. & TECH. L. REV. 1, 31-39 (2012) (criticizing *Global Tech*'s importation of a criminal law concept into patent law).
[331] Dreyfuss, *Federal Circuit*, *supra* note , at 47-53; Rai, *Facts and Policy*, *supra* note , at 1088.
[332] Dreyfuss, *Federal Circuit*, *supra* note , at 48.
[333] Dreyfuss, *Federal Circuit*, *supra* note , at 61-62.
[334] *See supra* notes – and accompanying text.
[335] Leahy-Smith America Invents Act, Pub. L. No. 112-29 § 19(a), 125 Stat. 284, 331 (2011).
[336] Dreyfuss, *Institutional Identity*, *supra* note , at 824 ("Congress could effectuate an even more dramatic change by revising the Federal Rules of Civil Procedure to give the Federal Circuit more power to review facts or power to decide when to review facts.").
[337] *See supra* note .

possesses subject-matter expertise.[338] Notably, while the Supreme Court applied the APA to Federal Circuit review of PTO factual findings in *Dickinson v. Zurko*, it conceded that the Federal Circuit, due to its expertise in patent law, could review PTO fact finding "through the lens of patent related experience."[339] Even if the Court were not willing to recognize an exception to the APA, Congress could step in to legislate a less deferential standard of review by the Federal Circuit based on its evaluation of relative institutional expertise.

Although the Federal Circuit's expertise in patent affairs is an asset to be exploited, the court's ambitions must be properly cabined. Thus, the Supreme Court has been rightly vigilant to reject the Federal Circuit's attempts to expand its own jurisdiction, and federal jurisdiction more generally, over legal disputes involving patents.[340] For instance, while the Federal Circuit has expressed fealty to traditional principles of jurisdiction and federalism, it is not surprising that it has embraced a broad conception of federal jurisdiction over patent disputes, based partly on rationales of expertise and uniformity.[341] In this regard, the principles of trans-substantivity and the general applicability of law are useful mechanisms to police potentially self-aggrandizing doctrine.[342] While the Supreme Court may not enjoy any comparative advantage in the technical details of patent doctrine, it enjoys a particular advantage in balancing various institutional actors given its position at the top of the judicial hierarchy.[343] A more parsimonious conception of "arising under" jurisdiction, for example, serves interests of vertical federalism that the Federal Circuit may not consider sufficiently.[344]

Turning to rhetorical uses of assimilation, such doctrinal maneuvers may be quite problematic. First, they tend to obscure the exceptional nature of new doctrine, providing more legitimizing cover than may be warranted. Second, such assimilation may be problematic when the Court designs rules specifically for patent disputes but frames them in the language of universality, thus ensuring their application to other contexts. For instance, the Court's four-factor test in *eBay* is well-crafted to limit the availability of injunctions for patent trolls, but it may cause unintended problems in other areas of law.[345] Furthermore, the Court's holding in *Teva* that factual findings are to be reviewed for clear error is well-suited to the relatively crisp

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[338] Benjamin & Rai, *supra* note , at 317 ("[A] normatively attractive level of deference [to the PTO] could differ in certain ways from the deference provided by administrative law doctrine."); Arti K. Rai, *Growing Pains in the Administrative State: The Patent Office's Troubled Quest for Managerial Control*, 157 U. PA. L. REV. 2051, 2056 (2009) ("[The Federal Circuit] can lay claim to specialization and expertise—two characteristics that administrative law scholars typically see as the exclusive attributes of agencies.") [hereinafter Rai, *Growing Pains*].

[339] Dickinson v. Zurko, 527 U.S. 150, 163 (1999).

[340] *See supra* Part III.A.iii. *Cf.* Christianson v. Colt Indus. Operating Corp., 486 U.S. 797, 812 (agreeing with the Federal Circuit that it lacked jurisdiction to hear a case where the well-pleaded-complaint did not contain a patent issue and there was an alternative, non-patent theory available for the claims); Grossi, *supra* note , at 996.

[341] *See, e.g.*, Air Measurement Techs., Inc. v. Akin Gump Strauss Hauer & Feld, L.L.P., 504 F.3d 1262, 1272 (Fed. Cir. 2007).

[342] *Cf.* Marcus, *Trans-Substantivity*, *supra* note , at 1195 ("Trans-substantivity . . . responds to a set of institutional deficits that can degrade the quality of procedural, interpretive, and administrative doctrine *that judges fashion*.").

[343] Mark D. Janis, *Patent Law in the Age of the Invisible Supreme Court*, 2001 U. ILL. L. REV. 387, 408 (2001); *cf.* Marcus, *Trans-Substantivity*, *supra* note , at 1218 ("[T]rans-substantivity has to do with the proper allocation of decision-making power among government institutions based on their respective competencies.").

[344] *See* Paul R. Gugliuzza, *Patent Law Federalism*, 2014 WISC. L. REV. 11, 69-70 (describing certain benefits to state court involvement in patent affairs); *but see* Grossi, *supra* note , at 1017 (criticizing the Court's decision in *Gunn v. Minton* because it renders it too easy to deny federal jurisdiction).

[345] *See* Gergen et al, *supra* note .

distinction between intrinsic and extrinsic evidence in patent claim construction.[346] However, this distinction may not be as crisp in other areas of law, thus complicating applications of *Teva* elsewhere.

In general, the Supreme Court should aim for an "intermediate" form of legal assimilation that situates patent law within the general legal fold while still retaining flexibility to tailor doctrinal application to particular circumstances. This is the case with the Supreme Court's adoption of the "rule of reason"—the quintessential open-ended standard—in antitrust cases involving patents.[347] The Court's decision in *eBay v. MercExchange* comes close in this regard, though it somewhat misses the mark. There, the Court created a broad, equitable framework for determining the appropriateness of injunctive relief. It rejected the Federal Circuit's exceptional rule that virtually automatically granted an injunction after a finding of infringement and created a new (arguably, exceptional) standard to govern all injunctions.[348] However, as Gergen et al. observe, the Court may have gone too far in concretizing an analytical framework for injunctions that eliminated rebuttable presumptions that had served other areas of law so well.[349] In such cases, the Court should clearly strike down an offending rule but utilize open-ended language when articulating a new standard intended to apply to myriad contexts.[350]

These observations shed further light on the dynamic interplay of the Supreme Court and the Federal Circuit. Though the Federal Circuit and the Supreme Court both have their critics, commentators have recognized significant value in the ongoing dialogue between these two courts.[351] For example, the Federal Circuit's enthusiasm for expanding patent rights has been usefully tempered by the Supreme Court, whose bright-line rules also counterbalance the Federal Circuit's penchant for formalistic rules. The dichotomy between legal universality and exceptionalism is another axis along which the Supreme Court and the Federal Circuit can engage in fruitful dialogue. Like science itself, law progresses though a "kneading" process of expansion and contraction, generalization and division.[352] The Federal Circuit—and specialized bodies more broadly—plays a useful role in appreciating the uniqueness of its subject matter and tailoring rules accordingly. But the Supreme Court plays a useful role in checking such specialization and resituating specialized doctrine within the broader fabric of legal thought and practice.

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[346] *See supra* notes – and accompanying text.
[347] *See* Ghosh, *supra* note , at 102 ("The accommodation of patent and antitrust law occurs through the rule of reason standard."); *but see* Ghosh, *supra* note , at 102 (cautioning against the open-ended nature of the rule of reason); Andre I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 743-44 (2012) (same).
[348] *See supra* notes – and accompanying text.
[349] Gergen et al., *supra* note , at .
[350] *Cf.* Dan L. Burk & Mark A. Lemley, *Is Patent Law Technology-Specific?*, 17 BERKELEY TECH. L.J. 1155, 1156 (2002) (observing that courts have applied the same patent doctrine somewhat differently in different technological contexts).
[351] *See, e.g.*, Dreyfuss, *What the Federal Circuit Can Learn*, *supra* note 15, at 794 ("Sharing their views—learning from one another—could enhance the operation of the patent system, shed light on the costs and benefits of specialization, ease the path for other specialized courts, and improve judicial administration more generally."); Lee, *Two Cultures*, *supra* note , at 81.
[352] *Cf.* Holton, *supra* note , at 15-16 ("Indeed, the advancement of science has depended on the interaction and alternation of [lumpers and splitters]—as if science moves on two feet.").

PART VI. UNIVERSALITY AND EXCEPTIONALISM REVISITED

Drawing on the forgoing analysis, this Part expands the focus to provide new insights on the tension between legal universality and exceptionalism more generally. Certainly, the values of universality and broad legal coherence still hold much sway, as evidenced by the Supreme Court's repeated assimilation of patent law to general legal principles. However, all rules have exceptions, and this Article reveals some principles to guide occasional divergences from norms to achieve greater individualization and specialization.

At the outset, one must question the desirability of strict legal consistency and universality as a normative end. Of course, the elegant, integrated systems of the formalists and realists possess much aesthetic and logical appeal. However, in a modern, fragmented, highly specialized society, where legal fields differ in substantial and technical ways, the value of strictly applying the same rules to all legal contexts is debatable.[353] Furthermore, laws and the subject matter they regulate are highly dynamic, further casting doubt on the appropriateness of rigid, one-size-fits-all frameworks.[354] This Article takes the position that universality is a qualified good;[355] it represents a worthy overarching objective, but one that should admit of exceptions when warranted. The following principles can guide and limit such exceptionalism.

First, courts and other decision makers must balance a general preference for consistency against considerations of specialized institutional competence. For instance, the presence of the Federal Circuit, a quasi-specialized appellate court, substantively differentiates patent law from other areas of legal practice. It was this difference in institutional structure (manifested in one of the Federal Circuit's predecessor courts) that informed Attorney General Clark's recommendation that the APA should *not* apply to the Patent Office. The Federal Circuit's review of the PTO is simply not like the Ninth Circuit's review of the Bureau of Immigration and Customs Enforcement. In other areas of law, where a specialized, expert institution upsets familiar agency and court relationships, general rules predicated upon those familiar relationships need not necessarily apply.

Second, a program of universality must be attentive to the rationale justifying a particular set of general rules. Where that rationale does not apply, or does not apply with significant force, there may be reason to deviate from the rule. Like the realists of the early twentieth century, such an approach to universalism avoids a "mechanical jurisprudence" in favor of tying rules to their animating rationales and theories.[356] An example of this type of functionalist reasoning arises in *Markman v Westview Instruments*.[357] There, the Supreme Court confronted the question of whether judges or juries should perform claim construction. The Court acknowledged that claim construction rests on factual inquiries; ordinarily, this would counsel toward assigning this task

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[353] *See* Grossi, *supra* note , at 1010-11 ("Today, however, legal systems have become too complex to be managed by narrow rules and tests."). Ironically, of course, it was precisely the growth of legal complexity that motivated earlier calls for greater uniformity in federal law, such as the APA. *See* Marcus, *Trans-Substantivity*, *supra* note , at 1211.
[354] *Cf.* Scalia, *supra* note , at 375-77 (noting post-APA legal developments that have undermined the value of strict adherence to the APA).
[355] *Cf.* Marcus, *Trans-Substantivity*, *supra* note , at 1221 ("[T]rans-substantivity is not 'sacred.'"). (citation omitted.)
[356] *See* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 604, 620-21 (1908); Grossi, *supra* note , at 965.
[357] 517 U.S. 370 (1996).

to juries based on the general rule that juries are entrusted with evaluating the demeanor of witnesses, sensing "the mainsprings of human conduct," and reflecting community standards.[358] However, the Supreme Court observed that these considerations were less relevant to patent litigation compared to other forms of litigation, and "are much less significant than a trained ability to evaluate the testimony in relation to the overall structure of the patent."[359] In this instance, the Court recognized that the rationale behind a general rule did not apply with great force to claim construction, and so the rule need not apply as well.[360] The Court's attentiveness to the rationale behind a rule—rather than mechanical adherence to the rule itself—provides a model for legal assimilation writ large.

Third, a program of doctrinal assimilation should take advantage of open-ended standards capable of context-specific differentiation rather than rigid rules. Thus, as mentioned, the four-factor framework for injunctive relief in *eBay v. MercExchange* represents a promising approach, though it comes up short.[361] In its ideal form, this framework would comprise a more open-ended standard that courts could tailor to individual legal areas, though with appropriate guidance for applying it in the context in which it arose—patent litigation.[362] Thus, for instance, a violation of a physical property right might give rise to a presumption of irreparable harm, but infringement of a patent might not. In a similar vein, the Court's decision in *Octane Fitness* regarding how to identify "exceptional" cases for awarding attorney's fees usefully eliminates the Federal Circuit's narrow, overly specialized rule while leaving enough flexibility to apply a broad standard to myriad litigation contexts. Through following these principles, the Supreme Court can effectuate the longstanding objective of legal consistency while accommodating the particularities of a complex legal landscape.

CONCLUSION

This Article has used the tension between universality and exceptionalism to shed new light on the Supreme Court's recent forays into patent law. It has argued that, in addition to reining in expansive patent doctrine and favoring standards over rules, the Supreme Court's recent decisions (including those since the establishment of the Federal Circuit) reveal a consistent drive to eliminate doctrinal exceptionalism and assimilate patent doctrine to general legal concepts. This assimilationist project has taken several forms, including: conforming patent law to trans-substantive regulatory frameworks like the Federal Rules of Civil Procedure, the APA, and jurisdictional statutes; invoking general equitable principles to eliminate exceptional patent rules; borrowing from unrelated areas of law to illuminate patent doctrine; adopting ordinary understandings of legal concepts rather than specialized ones; and eliminating specialized per se rules and presumptions at the intersection of patent and antitrust law. In various ways, both substantively and rhetorically, the Supreme Court has brought patent law within its conception of mainstream legal norms and standards.

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[358] 517 U.S. at 389-90.
[359] 517 U.S. at 390.
[360] The Court has tempered its holding somewhat in the more recent *Teva* decision, which more fully acknowledges the factual underpinnings of claim construction by extending deferential review to such findings. Teva Pharms. USA, Inc. v. Sandoz, Inc., 135 S.Ct. 831 (2015).
[361] *See supra* notes – and accompanying text.
[362] *See* Lee, *Two Cultures*, *supra* note , at 65-71.

The Court's assimilationist project arises from a diverse set of motivations. In large part, it responds to the exceptionalist patent doctrine generated by the Federal Circuit. Assimilation also serves the related purpose of reining in the Federal Circuit itself, which has tended to produce rather self-serving doctrine. More broadly, the Court's assimilationist project reflects the Supreme Court's consideration of a wider array of policy interests than typically occupies the Federal Circuit. It also eases cognitive burdens by allowing the Court to invoke familiar legal concepts and sidestep deep engagement with the technicalities of patent law. Finally, assimilating (or appearing to assimilate) patent law to existing norms has rhetorical value, lending greater legitimacy to new doctrine.

Turning to normative considerations, this Article has argued for a refined, selective exceptionalism for patent doctrine. In some contexts, the Court has appropriately conformed patent law to general legal concepts. However, the unique nature of patent law, particularly the role and expertise of the Federal Circuit, warrants deviation from general legal principles in some areas. For instance, the presence of a quasi-specialized appellate court pushes against traditional canons of deference to district court and agency factfinding. In this realm, congressional intervention would be helpful to determine and legislate an appropriate degree of patent exceptionalism. Notwithstanding the Federal Circuit's unique strengths, the Supreme Court has been appropriately vigilant in policing attempts to expand its jurisdiction. However, applying patent-tailored doctrine to other legal areas under the rubric of assimilation may be problematic. For this and other reasons, the Supreme Court would be well-served to utilize flexible standards rather than rigid rules when assimilating patent doctrine to broader legal concepts.

More generally, the Supreme Court's assimilation of patent doctrine sheds light on the wider challenge of maintaining coherence and consistency across diverse areas of law. Through considering institutional expertise, focusing on the rationales underlying general rules, and articulating open-ended standards rather than rigid rules, the Supreme Court can bind diverse areas of law within a coherent set of transcendent principles while still maintaining flexibility for field-specific delineation. Ultimately, perhaps even Leibniz would approve.