Federal Circuit Case Selection at the Supreme Court: An Empirical Analysis

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TABLE OF CONTENTS

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INTRODUCTION

What happens to Supreme Court case selection when the Court is deprived of its most potent case-selection tool, the circuit split? The Supreme Court has identified two factors that guide its choice of which cases to hear: a split between the highest state courts or the federal courts of appeals on a matter of federal law, or an important federal law question necessitating Supreme Court review.[1] Because Congress has vested exclusive jurisdiction over federal claims, patents, and veterans' appeals in the U.S. Court of Appeals for the Federal Circuit, it is virtually impossible for federal appellate courts to split on interpretation of those federal statutes.[2] Absent circuit splits, and given the vague nature of whether a given issue poses "an important question of federal law," how does the Supreme Court decide which Federal Circuit cases merit review? Part I of this Note describes the general criteria the Supreme Court uses in deciding which cases it should hear and the unique concerns presented by Federal Circuit cases. Part II describes the Court's historical approach to reviewing the Federal Circuit and changes in recent years. Finally, Part III describes three factors that appear particularly important to the Court when considering which cases merit review, and which should provide those interested in the Federal Circuit's or Supreme Court's docket with helpful guidelines to determine which Federal Circuit cases will draw the Supreme Court's interest.

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1. SUP. CT. R. 10.

2. The Supreme Court does find circuit splits in cases granted on certiorari from the Federal Circuit on rare occasion, typically on matters of procedure or interpretation of federal statutes that can present a legal issue in both federal claims and private breach of contract actions. The Court has done so in eight cases heard by the Federal Circuit. *See* Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 575 (2008) (resolving a conflict between the Federal and Eleventh Circuits regarding interpretation of the Equal Access to Justice Act); Cherokee Nation of Okla. v. Leavitt, 543 U.S. 631, 635–36 (2005) (resolving a conflict between two inconsistent decisions between the Federal (agency appeal) and Tenth (breach of contract) Circuits on similar facts interpreting the Indian Self-Determination and Education Assistance Act); Scarborough v. Principi, 541 U.S. 401, 410–12 (2004) (resolving a conflict between the Federal and Third Circuits regarding interpretation of the Equal Access to Justice Act); United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 509–10 (1992) (resolving a conflict between the Federal and Seventh Circuits regarding interpretation of the National Firearms Act); Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 803 (1988) (resolving a conflict between the Federal and Seventh Circuits regarding which appellate court properly had jurisdiction over the case); O'Connor v. United States, 479 U.S. 27, 29–30 (1986) (resolving a conflict between the Federal and Eleventh Circuits on interpretation of the Panama Canal Treaty as related to taxation); United States v. Hughes Props., Inc., 476 U.S. 593, 598–99 (1986) (resolving a conflict between the Federal and Ninth Circuits on interpretation of a tax statute); United States v. Morton, 467 U.S. 822, 826 (1984) (resolving a conflict between the Federal and Fourth Circuits on an issue of when a state court had personal jurisdiction over a military officer for the purposes of wage garnishment).

I. SUPREME COURT CERTIORARI PRACTICE: THE UNIQUENESS OF THE FEDERAL CIRCUIT

The Supreme Court has nearly complete discretion to fill its docket with cases of its choice. Since the passage of the Judiciary Act of February 13, 1925,[3] and the Act's grant of certiorari jurisdiction to the Supreme Court, the Supreme Court has exercised increased discretionary control over its docket.[4] In 1988, legislation eliminated all mandatory appeals from state and federal appellate courts and left as mandatory only a few categories of appeals from district courts specifically authorized by federal statute.[5] Even before 1988, the Court had discretion to summarily decide cases on its mandatory appellate docket without briefing, oral argument, or signed opinion.[6] Because of this discretionary power, the Court can choose to hear only a fraction of the cases that petitioners submit to it.[7]

A. CIRCUIT CONFLICTS AS A PRIMARY CRITERION FOR CERTIORARI

Litigants looking at the Supreme Court's certiorari decision-making process rely on several guidelines published by the Supreme Court. In 1949, Chief Justice Vinson described how the Court views its own purpose in deciding cases:

> The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. . . . The debates in the Constitutional Convention make clear that the purpose [of this Court] was, in the words of John Rutledge of South Carolina, "to secure the national rights & uniformity of Judgmts [sic]." The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts.[8]

The Court has codified these views into its published rules. Supreme Court Rule Ten provides:

> Review on a writ of certiorari is [a matter of] judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following . . . indicate the character of the reasons the Court considers:

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3. Ch. 229, 43 Stat. 936 (1925).
4. EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 235–36 (9th ed. 2007).
5. *Id.* at 298.
6. *See id.* at 298–99 & n.78.
7. *See id.* at 236–37 (stating that out of 7,496 filed petitions for certiorari, only 80 were granted by the Court during the 2004 Term).
8. *Id*. at 236 (quoting Chief Justice Fred M. Vinson, Work of the Federal Courts, Address Before the American Bar Association (Sept. 7, 1949)).

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of [another court];
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.[9]

As many as 70% of the cases before the Court where certiorari has been granted present clear conflicts between either the federal courts of appeals or state courts of last resort.[10] At least one former Justice, when asked on condition of anonymity what single factor could make a certiorari petition an "obvious grant," mentioned the presence of a circuit conflict as that determining factor.[11] Several other former Supreme Court Justices and clerks have anonymously confirmed this view, with one Justice stating, "We see it as a job of the Court to resolve federal conflicts. It is intolerable to have a certain law for the people in the Second Circuit and something else for people in the Eighth."[12] H.W. Perry, relying on a detailed series of interviews of former Justices and law clerks to develop an explanation of the Court's certiorari process, called the presence or absence of a circuit split "the single most important criterion" governing the certiorari process, stating, "A circuit split is neither necessary nor sufficient, but it is almost both."[13]

Even when a case meets other criteria that would make it "certworthy," petitioners focus their petitions for certiorari on the presence of a conflict between the circuits. For example, in October Term 2011, the Court heard several cases that Court commentators noted raised "historic" and "deeply consequential constitutional disputes."[14] Even with the acknowledged importance of the cases in the legal press, the petitions for certiorari in these cases focused on the

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9. SUP. CT. R. 10.

10. GRESSMAN ET AL., *supra* note 4, at 241 (citing Justice Ginsburg, Address, Remarks and Addresses at the 71st ALI Annual Meeting 57 (1994)).

11. H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 246 (1991).

12. *Id.* at 247.

13. *Id.* at 251.

14. *See* Lyle Denniston, *Another Landmark Ruling in the Offing*, SCOTUSBLOG (Dec. 12, 2011, 11:51 AM), http://www.scotusblog.com/2011/12/another-landmark-ruling-in-the-offing/ (describing the his-

presence of a conflict between federal courts of appeals as a primary justification for certiorari. In *Arizona v. United States*, petitioner devoted five pages of a twenty-five page section of its petition for certiorari to present conflicts between the Ninth Circuit's opinion and prior opinions of the Tenth Circuit and other circuits.[15] The Solicitor General's petition for certiorari in the landmark cases determining the constitutionality of the Patient Protection and Affordable Care Act used three pages of its argument to outline a split between the Eleventh and Sixth Circuits on the issue.[16]

B. THE FEDERAL CIRCUIT: A LACK OF CIRCUIT CONFLICTS

When considering petitions to review cases decided by the Federal Circuit, the Court cannot rely on conflicts between appellate courts as it does with the rest of its docket. This is due to the Federal Circuit's unique jurisdiction—in 1982, Congress granted the Federal Circuit exclusive jurisdiction over appeals concerning patent claims; federal claims; decisions of the U.S. Court of International Trade; and decisions of several Article I tribunals, including the Patent Trial and Appeal Board, Merit Systems Protection Board, and any agency board of contract appeals.[17] Because the Federal Circuit has exclusive jurisdiction over these appeals, the Federal Circuit is, in most situations, the only federal appellate court interpreting statutes relating to patents, federal claims, and other matters within its exclusive jurisdiction. As a result, losing litigants at the Federal Circuit are rarely able to present a circuit conflict to the Supreme Court in their petitions for certiorari.

The exclusive nature of Federal Circuit jurisdiction does not mean that a circuit conflict is never present. In fact, the Supreme Court found a conflict in eight of the sixty-nine cases it decided on certiorari or appeal from the Federal Circuit.[18] *United States v. Morton*, the first Federal Circuit appeal decided by the Supreme Court, involved an Air Force officer's challenge to the military's garnishment of his wages following a garnishment order by a state court lacking personal jurisdiction over the officer.[19] The Federal Circuit found that the garnishment order was improperly served on the officer, creating a conflict with a prior decision of the Fourth Circuit.[20] The Supreme Court granted certiorari in

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toric importance of the *Arizona v. United States* and *National Federation of Independent Businesses v. Sebelius* decisions).

15. *See* Petition for Writ of Certiorari at 24–29, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182), *available at* http://www.azgovernor.gov/dms/upload/PR_020612_1070FilingOpeningBrief.pdf.

16. *See* Petition for Writ of Certiorari at 29–32, U.S. Dep't of Health & Human Servs. v. Florida, 132 S. Ct. 2566 (2012) (No. 11-398), *available at* http://www.justice.gov/osg/briefs/2011/2pet/7pet/2011-0398.pet.aa.pdf.

17. 28 U.S.C. § 1295 (2006 & Supp. V 2012).

18. *See* cases cited *supra* note 2.

19. 467 U.S. 822, 824–26 (1984).

20. *See id.* at 826 & n.3 (citing Calhoun v. United States, 557 F.2d 401 (4th Cir. 1977)).

part "because the decision below created a conflict in the Circuits."[21]

Suits for recovery of taxes in the Court of Federal Claims have presented circuit conflicts in early Federal Circuit decisions. In *United States v. Hughes Properties, Inc.*, the Supreme Court reviewed a Federal Circuit opinion (incorporating a Court of Federal Claims opinion) that presented a conflict with the Ninth Circuit.[22] The Ninth and Federal Circuits had reached different conclusions on the question of whether Nevada slot-machine progressive jackpots would be considered liabilities for tax purposes during the fiscal year that the jackpot accrued or the year that a customer actually won the jackpot.[23] The Supreme Court granted certiorari "[b]ecause of the clear conflict between the two Circuits."[24] Additionally, in a group of three consolidated cases argued and decided in one opinion, the Supreme Court reviewed Federal Circuit decisions failing to find salaries of members of the Panama Canal Commission exempt from taxation, which were in direct conflict with a decision of the Eleventh Circuit.[25]

In *Christianson v. Colt Industries Operating Corp.*, the Supreme Court found a conflict between the Federal Circuit and Seventh Circuit when each court concluded that a proper reading of the Federal Circuit's jurisdictional statute required the other court of appeals to hear the case.[26] In *United States v. Thompson/Center Arms Co.*, the Supreme Court reviewed a Federal Circuit opinion presenting a conflict between the Federal and Seventh Circuits on the interpretation of the phrase "making" a "firearm" within the meaning of the National Firearms Act.[27] In *Scarborough v. Principi*, the Court resolved a conflict between the Federal Circuit and the Third and Eleventh Circuits on a question of interpretation of the Equal Access to Justice Act.[28] The Court resolved a similar conflict between the Federal and Eleventh Circuits concerning the same statute in *Richlin Security Service Co. v. Chertoff*.[29] Finally, in *Cherokee Nation of Oklahoma v. Leavitt*, the Court reviewed two cases involving identical claims and opposite results reached by the Tenth and Federal Circuits.[30] The Supreme Court took both cases to ensure uniform interpretation

21. *Id.* at 826. The Court did not, however, acknowledge that the Fourth Circuit's "conflicting" result was the product of pre-Federal Circuit jurisdictional rules placing federal claims before regional circuits on appeal. *See* 28 U.S.C. § 1295 (2006 & Supp. V 2012); *Calhoun*, 557 F.2d at 401 (stating that appellant's claim involved a suit against the government, which would, following 1982, be brought to the United States Claims Court or, following 1992, the United States Court of Federal Claims).

22. 476 U.S. 593 (1986).

23. *See id.* at 597–99 (citing Nightingale v. United States, 684 F.2d 611 (9th Cir. 1982)).

24. *Id*. at 599.

25. *See* O'Connor v. United States, 479 U.S. 27, 29–30 (1986) (citing Harris v. United States, 768 F.2d 1240 (11th Cir. 1985)).

26. 486 U.S. 800, 803 (1988).

27. 504 U.S. 505, 509–10 (1992).

28. 541 U.S. 401, 410–12 (2004).

29. 553 U.S. 571, 575 (2008).

30. 543 U.S. 631, 635–36 (2005). The Tenth Circuit denied a breach-of-contract claim brought by the Cherokee Nation of Oklahoma against the Department of the Interior after the Department's Board

of the Indian Self-Determination and Education Assistance Act across all lower courts.[31]

Despite the existence of these cases, a clear majority (sixty-three of seventy-one, or 88.7%) of Supreme Court merits opinions based on Federal Circuit cases did not involve circuit conflicts. The Supreme Court's published criteria for case selection state that in the absence of a circuit conflict, the Court should decide whether to hear a petition for certiorari from the Federal Circuit based either on the importance of the question presented or on conflicts with the Court's existing precedent.[32] Direct conflicts by appellate courts with Supreme Court precedent sufficient to satisfy the Court's understanding of what constitutes a conflict are rare.[33] Despite this lack of circuit conflicts, the Supreme Court nevertheless reviewed eighty decisions of the Federal Circuit from that court's founding in 1982 through the 2012 Term (publishing seventy-three merits opinions covering seventy-eight Federal Circuit decisions and dismissing three petitions as improvidently granted).[34] This is comparable to the number of cases heard from a smaller regional court of appeals during the same period.[35] How does the Court determine which questions are sufficiently important to deserve review? The next Part examines the Court's internal attitudes toward Federal Circuit review and discusses recent apparent changes to those attitudes. Part III discusses three factors that appear to guide the certiorari process for Justices considering Federal Circuit cases.

II. HISTORICAL CHANGES IN FEDERAL CIRCUIT REVIEW BY THE SUPREME COURT

A. EARLY HISTORY

In the first ten years following the formation of the Federal Circuit, the Supreme Court published a total of twenty-one merits opinions in cases from

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of Contract Appeals rejected administrative claims under the Contract Disputes Act of 1978. *See id.* The Federal Circuit found for the Cherokee Nation in an "identical" case where the Department of the Interior Board of Contract Appeals granted the Cherokee Nation's administrative claims and the Secretary of the Interior administratively appealed to the Federal Circuit. *See id.* at 636.

31. *See id.*

32. *See* GRESSMAN, *supra* note 4, at 286–87; *see also* SUP. CT. R. 10(c) (stating that the Court would consider a petition where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court").

33. *See* GRESSMAN, *supra* note 4, at 250–51.

34. *Analysis Overview*, SUPREME COURT DATABASE, http://scdb.wustl.edu/analysis.php (search for all Federal Circuit cases decided between 1982 and 2011); s*ee infra* Appendix A.

35. From 1982–2011, the Court took 71 cases from the First Circuit, 184 from the Second Circuit, 161 from the Third Circuit, 184 from the Fourth Circuit, 220 from the Fifth Circuit, 210 from the Sixth Circuit, 168 from the Seventh Circuit, 170 from the Eighth Circuit, 594 from the Ninth Circuit, 111 from the Tenth Circuit, 181 from the Eleventh Circuit, and 134 from the D.C. Circuit. *Analysis Overview*, *supra* note 34 (search for all Supreme Court cases, both among all federal appeals courts and limited to the Federal Circuit, decided between 1982 and 2011).

that circuit.[36] This section demonstrates that during this period, the Supreme Court focused on impacts to the United States Treasury when selecting cases from the Federal Circuit's nonpatent docket and took a hands-off approach to the Federal Circuit's patent docket.

1. The Federal Circuit Nonpatent Docket

Most of the Court's Federal Circuit docket during the first ten years of the Federal Circuit's existence involved cases outside the Federal Circuit's patent docket—appeals from the Court of Federal Claims, Court of Appeals for Veterans Claims, and Merit Systems Protection Board.[37] During this period, the Court appeared to prioritize reviewing decisions where either the United States lost in the Federal Circuit or the Federal Circuit expressed internal disagreement over the correct resolution of the case.

The vast majority of Federal Circuit cases during this period came from the Federal Claims docket—fifteen cases in all.[38] In twelve of the fifteen granted cases (80%), the United States suffered an adverse ruling against the United States Treasury at the Federal Circuit;[39] the remaining three cases featured a dissent or concurring opinion by a Federal Circuit judge.[40] In two of those three cases in which the United States was the respondent, the Supreme Court ultimately affirmed the Federal Circuit ruling in favor of the United States.[41]

One Federal Circuit appeal from the Court of Appeals for Veterans Claims was reviewed during this time; that case involved a Federal Circuit ruling adverse to the United States' position, which was affirmed by the Supreme Court.[42] The Supreme Court heard two Federal Circuit appeals from decisions heard by the Merit Systems Protection Board during this period; in both cases the Federal Circuit had ruled against the United States' position, and the

36. *See infra* Appendix A (certiorari petitions considered between 1983–1992). In five of these opinions, the Court expressly mentioned a circuit conflict. *See* United States v. Thompson/Ctr. Arms Co., 504 U.S. 505, 509–10 (1992); Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 803 (1988); O'Connor v. United States, 479 U.S. 27, 29–30 (1986); United States v. Hughes Props., Inc., 476 U.S. 593, 597–99 (1986); United States v. Morton, 467 U.S. 822, 826 (1984). *United States v. Morton* involved a split between a Federal Circuit opinion and a pre-1982 regional circuit decision that could not occur following the reorganization of the federal courts. *See* 467 U.S. at 826.

37. As shown in Appendix A, the Supreme Court took only four patent cases from the Federal Circuit during the 1983–1992 period, compared to eighteen cases from the other Federal Circuit dockets.

38. *See infra* Appendix A (Federal Claims cases considered during the certiorari process between 1983–1992).

39. *See id.* (considering Federal Claims cases decided between 1983–1992 where the United States was petitioner).

40. *See id.* (considering Federal Claims cases decided between 1983–1992 where United States was respondent).

41. Keene Corp. v. United States, 508 U.S. 200, 218 (1993); O'Connor v. United States, 479 U.S. 27, 35 (1986).

42. *See* Brown v. Gardner, 513 U.S. 115, 122 (1994).

Supreme Court reversed.[43]

Overall, when reviewing the portion of the Federal Circuit's docket where the United States was a party, every single granted case featured either a Federal Circuit court ruling adverse to the United States or a concurrence or dissent to a Federal Circuit panel's decision in the United States' favor. In fourteen of the eighteen cases where the United States was a party to the case, the United States ultimately prevailed on the merits.[44]

2. The Federal Circuit Patent Docket

The Supreme Court appears to have taken a largely hands-off approach toward patent cases during the Federal Circuit's initial years.[45] During the 1982–1991 period, the Supreme Court took a total of five patent cases from the Federal Circuit, issuing four opinions and dismissing one case as improvidently granted.[46] Certiorari pool memoranda discussing patent cases during this time show a desire to defer to the Federal Circuit on patent issues. Multiple memoranda written by law clerks to Supreme Court Justices for use in voting on whether to grant certiorari from the 1986 Term, a Term in which the Court did not grant cert on a single patent case, describe patent cases as "unbelievably fact-bound."[47] Other memoranda describe patent cases as being "peculiarly within the expertise" of the Federal Circuit,[48] and presenting "no issues of broad significance" meriting the Court's attention.[49]

This hands-off approach was remarked upon by the legal community at the

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43. *See* Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 434 (1990); Dep't of the Navy v. Egan, 484 U.S. 518, 534 (1988).

44. For the list of the ten cases where the United States prevailed as petitioner before the Supreme Court, see *infra* Appendix A. The United States prevailed in two federal claims cases as respondent: *Keene Corp. v. United States*, 508 U.S. 200 (1993), and *O'Connor v. United States*, 479 U.S. 27 (1986). Finally, the United States prevailed as petitioner in two administrative appeals: *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), and *Department of the Navy v. Egan*, 484 U.S. 518 (1988).

45. This appears to echo the views of the Supreme Court toward patent cases during the 1976–1980 era, immediately before the formation of the Federal Circuit. *See* PERRY, *supra* note 11, at 230.

46. *See* Asgrow Seed Co. v. Winterboer, 513 U.S. 179 (1995); Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27 (1993) (writ dismissed as improvidently granted); Eli Lilly & Co. v. Medtronic, Inc., 496 U.S. 661 (1990); Christianson v. Colt Indus. Operating Corp., 486 U.S. 800 (1988); Dennison Mfg. Co. v. Panduit Corp., 475 U.S. 809 (1986).

47. Memorandum to the Supreme Court Certiorari Pool, Eastman Kodak Co. v. Polaroid Corp., No. 86-96 16 (Aug. 30, 1986), *available at* http://epstein.usc.edu/research/blackmunMemos/1986/MissedMemos-pdf/86-96.pdf; *see also* Memorandum to the Supreme Court Certiorari Pool, Obiaya v. Comm'r, No. 86-425 3 (Oct. 20, 1986), *available at* http://epstein.usc.edu/research/blackmunMemos/1986/MissedMemos-pdf/86-425.pdf ("This factbound question [of nonobviousness] does not warrant review.").

48. Memorandum to the Supreme Court Certiorari Pool, Dura Corp. v. TWM Mfg. Co., No. 86-145 5 (Aug. 28, 1986), *available at* http://epstein.usc.edu/research/blackmunMemos/1986/MissedMemos-pdf/86-145.pdf.

49. Memorandum to the Supreme Court Certiorari Pool, J.A. LaPorte, Inc. v. Norfolk Dredging Co., No. 86-215 5 (Sept. 20, 1986), *available at* http://epstein.usc.edu/research/blackmunMemos/1986/MissedMemos-pdf/86-215.pdf.

time. One set of commentators, Mark Abate and Edmund Fish, reviewing the Federal Circuit's record before the Supreme Court, noted that "[t]he Court, in its consideration of Federal Circuit substantive law, appears less willing to address substantive patent law than the other areas of Federal Circuit substantive law."[50] The contrast between Supreme Court review of the substantive law issues in the patent docket compared with the rest of the Federal Circuit docket interested Abate and Fish, who noted that "[t]he Court has addressed many cases raising issues of substantive merit systems protection, tax and claims law; however, it has only addressed one case raising an issue of substantive patent law."[51]

At the same time that the Supreme Court was deferring to the Federal Circuit on substantive patent issues, the Federal Circuit was making significant reforms to patent law.[52] These reforms included several opinions that seemed to conflict indirectly, or even directly, with prior Supreme Court precedent.[53] The Supreme Court nevertheless refused to hear all but one substantive patent law case.[54] Interestingly, that case featured a dissent by a Federal Circuit judge on denial of petition for rehearing en banc, as did one of the other three granted patent cases from the Federal Circuit during the relevant time frame.[55] A third case, *Christianson v. Colt Industries Operating Corp.*, featured an obvious circuit split on the matter of whether the Federal Circuit or Seventh Circuit properly had jurisdiction over the case.[56]

B. RECENT HISTORY

After the first ten years of the Federal Circuit's existence, the Supreme Court began to make changes in its review of that court. This section shows that, while the number of federal claims, veterans, Merit Systems Protection Board, and other administrative cases declined, the number of patent cases granted by the Supreme Court rose significantly following the 1992 Term.

The relative quantity of nonpatent Federal Circuit cases on the Supreme Court's docket declined slightly following the 1992 Term. Eighteen cases on the federal claims, veterans, and administrative appeals docket were granted review

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50. Mark J. Abate & Edmund J. Fish, *Supreme Court Review of the United States Court of Appeals for the Federal Circuit 1982–1992*, 2 FED. CIR. B.J. 307, 333 (1992).

51. *Id.*

52. *See generally* Martin J. Adelman, *The New World of Patents Created by the Court of Appeals for the Federal Circuit*, 20 U. MICH. J.L. REFORM 979 (1987) (describing significant changes to interpretation of the patent statute by the Federal Circuit since its formation).

53. *See* Robert Desmond, Note, *Nothing Seems "Obvious" to the Court of Appeals for the Federal Circuit: The Federal Circuit, Unchecked by the Supreme Court, Transforms the Standard of Obviousness Under the Patent Law*, 26 LOY. L.A. L. REV. 455, 473–83 (1993) (describing significant changes to patent-law standards of obviousness in early Federal Circuit case law).

54. Abate & Fish, *supra* note 50, at 330–31 (noting that *Eli Lilly & Co. v. Medtronic, Inc.*, 496 U.S. 661 (1990), was the only case squarely raising a substantive patent law issue).

55. *See* Asgrow Seed Co. v. Winterboer, 989 F.2d 478, 479 (Fed. Cir. 1993) (Newman, J., dissenting), *cert. granted*, 511 U.S. 1029 (1994); Eli Lilly & Co. v. Medtronic, Inc., 879 F.2d 849, 849 (Fed. Cir.) (Newman, J., dissenting), *cert. granted*, 493 U.S. 889 (1989).

56. *See* 486 U.S. 800, 803 (1988).

by the Supreme Court between 1983 and 1992, or about 1.8 per year.[57] Between the 1993 and 2012 Terms, the Court reviewed twenty-one federal claims cases, five administrative appeals, and four veterans' cases, totaling 1.5 cases per year (83% of the prior rate).[58]

The number of patent cases heard by the Supreme Court increased significantly during the same period. Only four patent cases were granted between 1983 and 1992 (none featuring the United States as a party), or 0.4 cases per year.[59] But between 1993 and 2012, twenty-two patent opinions were issued.[60] Including dismissed and pending cases, this averages a grant rate of 1.2 cases per year, representing a 200% increase from the first ten years of the Federal Circuit's existence, and suggesting a significant shift in the Court's attitude towards reviewing the Federal Circuit on matters of patent law.

Judge Arthur J. Gajarsa on the Federal Circuit believes that the Supreme Court's changed attitude toward making substantive challenges to patent law began when the Court took the *Christianson* case in 1988, noting that the Federal Circuit opinion in that case assumed the Supreme Court's disinterest in hearing patent-related cases, which may have (along with the jurisdictional circuit split in that case) militated toward review.[61] But he believes that the Supreme Court's real involvement in matters of substantive patent law did not begin until the Court granted certiorari on the *Markman*[62] case in 1995.[63] Since that time, Judge Gajarsa has noted the Supreme Court reviewed "almost three times as many patent cases after *Markman* than before."[64]

Other commentators hold similar views but find slightly different dates to be important to the Supreme Court's changed stance on reviewing patent law issues. Professor Golden notes that the Supreme Court's 1997 decision in *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*[65] was "a watershed" because, "[f]or the first time, the Court reviewed a Federal Circuit decision on core questions of substantive patent law—namely, the continued viability and scope of a judge-made doctrine, the doctrine of equivalents."[66] Professor Duffy notes that Justice Breyer's appointment to the Court in 1994 may have played a

57. *See supra* section II.A.

58. *See infra* Appendix A (examining cases granted during the 1993–2012 Terms).

59. *See supra* section II.A.

60. *See infra* Appendix A (examining cases granted during the 1993–2012 Terms).

61. Arthur J. Gajarsa & Lawrence P. Cogswell, III, Foreword, *The Federal Circuit and the Supreme Court*, 55 AM. U. L. REV. 821, 824–26 (2006).

62. Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996). The *Markman* case affirmed a Federal Circuit decision that construction of a patent's claim terms was a legal question to be determined by a judge and not a fact question for a jury. *See id.* at 391.

63. *See* Gajarsa & Cogswell, *supra* note 61, at 828.

64. *Id.*

65. 520 U.S. 17 (1997).

66. John M. Golden, *The Supreme Court as "Prime Percolator": A Prescription for Appellate Review of Questions in Patent Law*, 56 UCLA L. REV. 657, 669 (2009).

role in an increased number of grants in patent cases.[67] Finally, Duffy also notes that the 1994 Term featured the first-ever Call for the Views of a Solicitor General in a patent case, a factor that significantly affected the Supreme Court's case-selection process in subsequent years.[68]

The Court's deference to the views of the United States appears to have declined, at least when considering nonpatent cases, between the first ten years of Federal Circuit cases and the more recent period. The Supreme Court granted certiorari on twenty-four federal claims cases between 1993–2012, and only twelve involved the United States losing in the Federal Circuit (57%, compared with twelve of fifteen, or 80%, from 1983–1992).[69] The United States won on the merits in eleven federal claims cases, also a lower rate than during the first ten years of the Federal Circuit's existence (46%, compared with ten of fifteen, or 67%, from 1983–1992).[70] Of the nine cases where the United States was the respondent during certiorari proceedings, only five featured a dissenting Federal Circuit opinion, leaving four grants unexplained by either a U.S. loss or an additional lower-court opinion.[71]

Between 1993 and 2012, the Supreme Court granted two veterans cases where the United States was the petitioner[72] and two cases where the United States was the respondent.[73] The two cases where the United States was the respondent both featured dissents by the Federal Circuit panel.[74] The United States only won one of the four cases.[75] Finally, the United States was the petitioner in all five of the Federal Circuit administrative appeals heard by the

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67. *See* John F. Duffy, *The Federal Circuit in the Shadow of the Solicitor General*, 78 GEO. WASH. L. REV. 518, 524–25 (2010). Duffy notes that Justice Breyer "built a reputation as one of the leading scholars of antitrust, administrative law, and regulatory theory," and that "[p]atent law, which combines intellectual property with issues of antitrust, regulatory theory, and administrative law, seems like a natural area for Justice Breyer." *Id.*

68. *See id.* at 525–26. When reviewing a petition for certiorari, the Supreme Court, instead of granting or denying the petition, may delay its decision and invite the Solicitor General's office to submit its views on whether the petition should be granted. *See* GRESSMAN, *supra* note 4, at 516–17. Although the Court frames this request as an invitation, the Solicitor General's office does not typically decline. *See id.* at 516 n.178. For a more full discussion of the Solicitor General's role in case selection, see *infra* section III.A.

69. *See infra* Appendix A.

70. *See infra* Appendix A.

71. *See* Ark. Game & Fish Comm'n v. United States, 637 F.3d 1366, 1379 (Fed. Cir. 2011) (Newman, J., dissenting), *cert. granted*, 132 S. Ct. 1856 (2012); Richlin Sec. Serv. Co. v. Chertoff, 472 F.3d 1370, 1381 (Fed. Cir. 2006) (Plager, J., dissenting), *cert. granted*, 552 U.S. 1021 (2007); John R. Sand & Gravel Co. v. United States, 457 F.3d 1345, 1361 (Fed. Cir. 2006) (Newman, J., dissenting), *cert. granted*, 550 U.S. 968 (2007); Marathon Oil Co. v. United States, 177 F.3d 1331, 1340 (Fed. Cir.) (Newman, J., dissenting), *cert. granted sub nom.*, Mobil Oil Exploration & Producing Se., Inc. v. United States, 528 U.S. 1002 (1999); Hercules, Inc. v. United States, 24 F.3d 188, 205 (Fed. Cir. 1994) (Plager, J., dissenting), *cert. granted*, 514 U.S. 1049 (1995).

72. *See infra* Appendix A.

73. *See infra* Appendix A.

74. *See* Henderson v. Shinseki, 589 F.3d 1201, 1221 (Fed. Cir. 2009) (Mayer, J., dissenting), *cert. granted*, 130 S. Ct. 3502 (2010); Scarborough v. Principi, 319 F.3d 1346, 1355 (Fed. Cir.) (Mayer, C.J., dissenting), *cert. granted*, 539 U.S. 986 (2003).

75. *See* Shinseki v. Sanders, 556 U.S. 396 (2009).

Supreme Court and won in four of the five cases.[76] In total, the percentage of U.S.-as-party cases where the United States was petitioner declined from fourteen of the eighteen (78%) to nineteen of thirty (63%), and the rate of the United States' success on the merits decreased from fourteen of the eighteen (78%) to sixteen of thirty (53%).

What explains the Court's changing views? The next Part explains a three-factor test that the Supreme Court appears to use when reviewing Federal Circuit petitions for certiorari that account for the more modern paradigm in Federal Circuit case selection.

III. EXPLAINING FEDERAL CIRCUIT CASE SELECTION

How does the Supreme Court determine which questions presented by Federal Circuit cases merit review in the absence of circuit conflicts? Examining the seventy-one merits opinions where the Supreme Court reviewed decisions of the Federal Circuit, and eliminating the eight cases presenting a conflict between the Federal Circuit and another court on an issue of interpreting federal law, all but three of the remaining cases had one of the following factors present: a desire expressed by the United States at the certiorari stage that review be granted; a dissent by a member of the Federal Circuit panel; or a significant alteration of the Federal Circuit's legal conclusion by the Supreme Court on merits review.

A. THE ROLE OF THE UNITED STATES

The United States plays a larger role in the Federal Circuit's caseload than it does in most other federal courts of appeals at the certiorari stage. For all nonpatent cases within the Federal Circuit's appellate jurisdiction, the United States, a United States agency, or an officer of the United States is either the appellee or appellant.[77] These nonpatent cases make up a slight majority of the Federal Circuit's docket. For example, from November 1, 2011 to October 31, 2012, the Federal Circuit issued forty-five precedential opinions on appeal from the Court of Federal Claims, fifteen precedential opinions on appeal from the Court of Appeals for Veterans Claims, sixteen precedential opinions on appeal from the Court of International Trade, one precedential opinion on review pursuant to 38 U.S.C. § 502, six precedential opinions on review from the International Trade Commission, eighteen precedential opinions on review from the Merit Systems Protection Board, and thirty-five precedential opinions on

76. *See infra* Appendix A. Of the five Federal Circuit administrative appeals heard by the Supreme Court following the 1992 Term, the United States only lost in *United States v. U.S. Shoe Corp.*, 523 U.S. 360 (1998).

77. *See* 28 U.S.C. § 1295 (2006). The United States or one of its agencies or officers is a party to all suits before the U.S. Court of Federal Claims. Appeals from the U.S. Court of International Trade and the various Article I tribunals enumerated in the Federal Circuit's jurisdictional statute involve challenges to decisions of a U.S. agency, with that agency as a party to the case.

review from decisions of the U.S. Patent Office.[78] This totals 136 cases, slightly more than the 105 patent infringement cases (almost all of which were between private parties) the Federal Circuit heard on appeal from federal district courts.[79]

Given that the United States is a party to the majority of the cases in the Federal Circuit (and a party to every nonpatent case), one would expect this to remain true of the cases that reach the Supreme Court, and indeed this is so. Of the seventy-three merits opinions in Federal Circuit cases heard by the Supreme Court to date, the United States was a party to the case in fifty-one, or 70%.[80] This percentage is bolstered by the Court's historical antipathy to taking patent cases—the only cases within the Federal Circuit's jurisdiction involving private-party disputes.[81] This percentage dwarfs the percentage of U.S.-as-party cases that arrive at the Supreme Court from the other twelve federal appellate courts; of the 2388 cases originating in those courts and heard by the Supreme Court from 1982–2011, the United States was a party in 1266, or 53%.[82]

Because the United States is a party to so many cases, what distinguishes the cases the Supreme Court chooses to hear? Where the United States is a party to a case, the institutional interests of the United States may play a role in a decision to grant review, particularly if the decision is one adverse to the U.S. Treasury.[83] Given the presence of U.S. Court of Federal Claims appeals and veterans' appeals within the Federal Circuit's jurisdiction, the percentage of cases affecting the U.S. Treasury is greater within the Federal Circuit than in other circuits. The Supreme Court seems particularly sensitive to this issue: it granted certiorari in both *United States v. Hill*[84] and *Keene Corp. v. United States*[85] over recommendations of denial in the pool memo distributed by the

78. *Opinions and Orders Search*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, http://www.cafc.uscourts.gov/opinions-orders/search/report.html (search for precedential opinions for each type of case from November 1, 2011, to October 31, 2012).

79. *See id.*

80. *See infra* Appendix A.

81. *See supra* section II.A.

82. *Analysis Overview*, SUPREME COURT DATABASE, http://scdb.wustl.edu/analysis.php (search for all Supreme Court cases decided between 1982 and 2011 on appeal from the First through Eleventh and D.C. Circuits where the United States or a U.S. agency or officer was a party).

83. *See, e.g.*, Memorandum to the Supreme Court Certiorari Pool, United States v. Goodyear Tire & Rubber Co., No. 88-1474-CFX 19 (Apr. 15, 1989), *available at* http://epstein.usc.edu/research/blackmunMemos/1989/GM-1989-pdf/88-1474.pdf ("In any event, the question of certworthiness seems to boil down to whether the Government's interest in raising revenue . . . is of sufficient importance to merit a grant of cert in a case that would almost certainly be uncertworthy if it involved only private litigants or a smaller amount of money. I suppose the answer to that question is probably 'yes.'").

84. Memorandum to the Supreme Court Certiorari Pool, United States v. Hill, No. 91-1421-CFX 11 (Apr. 15, 1992), *available at* http://epstein.usc.edu/research/blackmunMemos/1992/Granted-pdf/91-1421.pdf ("I therefore recommend that the Court deny cert, unless the SG's argument about how much this could cost the Treasury is an independent basis for granting plenary review.").

85. Memorandum to the Supreme Court Certiorari Pool, Keene Corp. v. United States, No. 92-166-CFX 11 (Oct. 7, 1992), *available at* http://epstein.usc.edu/research/blackmunMemos/1992/Granted-pdf/92-166.pdf.

Court's law clerks.[86] That the Justices overrode the recommendations of these pool memos lends additional credence to the theory that the Justices consider impacts to the Treasury to be important—only a minority of cases are heard despite a recommended denial in a certiorari pool memorandum.[87]

This increased sensitivity to U.S. interests can be seen in the Federal Circuit cases selected by the Court—the Supreme Court since 1982 has granted fifty-three Federal Circuit cases where the United States is a party (dismissing one), and of those cases, the United States was the losing party at the Federal Circuit in thirty-five (66%).[88] This is much higher than the rate for the Supreme Court generally; the total number of U.S.-as-party cases heard by the Court during the same period was 1266, of which only 503 (40%) featured the United States as petitioner.[89]

Even when the United States is not party to a case, the government's institutional interests play a role in case selection. When examining the Federal Circuit's patent docket, where the United States is frequently not a party to a given case, the Solicitor General's office can still play a role in influencing whether the case is heard by the Supreme Court. The outcome of many of these cases is of importance to the U.S. Patent and Trademark Office (PTO) because of the precedential effect of Federal Circuit decisions on patent law.[90] The Supreme Court, knowing this, can ask the PTO (by means of asking the Solicitor General's office) for advice whether a given case merits a certiorari grant. The Supreme Court increasingly relies on this tool for Federal Circuit patent cases. The first-ever Call for the Views of the Solicitor General (CVSG) on whether a patent case should be heard by the Supreme Court occurred in 1994, twelve years after the formation of the Federal Circuit.[91] Between 1994 and 2007, the Supreme Court requested the views of the Solicitor General in seventeen Federal Circuit patent cases and did not follow the Solicitor General's recommendation on whether to take the case only twice.[92] Most significantly, patent cases accounted for over 10% of the Court's CVSG orders between 2000 and 2008, a time where patent cases only took up 2.25% of the Supreme Court's

86. *See* David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 975, 980 (2007) (book review) (noting that although institutional concerns make law clerks more conservative than Supreme Court Justices when giving certiorari recommendations, only 25–30% of the Court's cases are granted over a recommendation of the clerks to deny certiorari).

87. *See id.* at 980 tbl.2 (showing that cases where the certiorari pool recommended granting certiorari represented between 70 and 74% of the Supreme Court's opinions during the years surveyed: 1984, 1985, 1991, and 1992).

88. *See infra* Appendix A.

89. *Analysis Overview*, SUPREME COURT DATABASE, http://scdb.wustl.edu/analysis.php (search for all Supreme Court cases decided between 1982 and 2011 where the United States or a U.S. agency or officer was a party).

90. *See* Duffy, *supra* note 67, at 527.

91. *See id.* at 525.

92. *Id.* at 531 fig.5.

docket.[93] The Solicitor General's views in patent cases are given deference at the merits stage as well—the Court reached the Solicitor General's recommended legal result in thirteen consecutive patent merits cases,[94] a streak only broken by the Court's more recent disagreement with the Solicitor General's views in the *Bilski v. Kappos* and *Mayo Collaborative Services v. Prometheus Laboratories, Inc.* cases.[95]

B. A SUBSTITUTE FOR CIRCUIT SPLITS: FEDERAL CIRCUIT DISSENTS

The Supreme Court relies on intercircuit conflict, in part, to determine whether there is enough disagreement over a particular federal law question to necessitate Supreme Court resolution of the issue.[96] Where no intercircuit conflict can exist, could intracircuit conflict provide a substitute?[97] Where Federal Circuit judges provide either dissents from panel opinions or en banc review, the Supreme Court appears to use the presence of these indicators as a signal that a case merits review.[98]

During a year when a particularly large number of Federal Circuit cases (seven) were reviewed by the Supreme Court, former chief judge of the Federal Circuit, the Honorable Helen Nies, noted that all but one case involved a dissent by a member of a Federal Circuit panel.[99] Judge Nies noted that "[i]n the areas in which this court exercises exclusive jurisdiction, this traditional type of intercircuit debate cannot arise. Thus, the presentation of a conflict in judicial positions on a particular issue of law within our exclusive jurisdiction can

93. *See id.* at 530.

94. *See id.* at 540.

95. In *Bilski*, the Solicitor General recommended that the Federal Circuit's "machine-or-transformation" test for patent-eligible subject matter be affirmed by the Court. *See* Brief for the Respondent at 29–46, Bilski v. Kappos, 130 S. Ct. 3218 (2010) (No. 08-964), 2009 WL 3070864. The Court repudiated the recommendation that the test be determinative. *Bilski*, 130 S. Ct. at 3226–27. In *Mayo*, the Solicitor General as amicus stated the view that the processes at issue were patent-eligible subject matter. *See* Brief for the United States as Amicus Curiae Supporting Neither Party at 12–26, Mayo Collaborative Servs. v. Prometheus Labs., Inc., 132 S. Ct. 1289 (2012) (No. 10-1150), 2011 WL 4040414. The Court found otherwise. *Mayo Collaborative Servs.*, 132 S. Ct. at 1296–97.

96. *See* PERRY, *supra* note 11, at 249.

97. The Federal Circuit does issue dissents at a slightly higher rate than most other federal courts of appeals but only issued a dissent in 3.51% (compared with a rate of 2.85% when averaging the dissent rates of the Third, Fifth, Ninth, Tenth, and D.C. and Federal Circuits collectively) of its opinions from 1998–2009. Christopher A. Cotropia, *Determining Uniformity Within the Federal Circuit by Measuring Dissent and En Banc Review*, 43 LOY. L.A. L. REV. 801, 815 tbl.1 (2010). The dissent rate rises to 9.28% when only considering patent opinions. *Id.* at 816 tbl.2.

98. *See* Helen Wilson Nies, *Dissents at the Federal Circuit and Supreme Court Review*, 45 AM. U. L. REV. 1519, 1519–20 (1996) (categorizing Federal Circuit cases with dissenting opinions that the Supreme Court subsequently reviewed and advocating the position that written dissents are useful to the Supreme Court); *see also* Duffy, *supra* note 67, at 536 (advocating a possible approach where the Supreme Court decides to hear Federal Circuit cases where the Federal Circuit judges split on the outcome of the case during en banc review); Gajarsa & Cogswell, *supra* note 61, at 843 (suggesting increased Supreme Court review in the presence of Federal Circuit dissents).

99. Nies, *supra* note 98, at 1520.

develop only through a dissent from a member of our court."[100] Judge Nies argued that dissents by the Federal Circuit did not provide a disservice to that court; to the contrary, dissents provide an impetus for Supreme Court review and "pique the [Supreme] Court's interest" more than attempts to "skirt around" a disputed issue by distinguishing from a prior panel opinion on the facts.[101]

Federal Circuit dissents can account for a high percentage of the Supreme Court's granted cases from that court. Of the seventy-three cases where the Supreme Court reviewed the Federal Circuit and issued a merits opinion, twenty-seven featured a dissent or concurrence from a member of the panel (or en banc court) in the Federal Circuit's published opinion.[102] Two additional cases featured a dissent from denial of en banc review,[103] and two cases featured a unanimous en banc ruling of the Federal Circuit.[104] This totals thirty-two of the seventy-three cases, or 44%.

When cases involving the United States as a party recommending certiorari are removed from consideration, the correlation between a Federal Circuit en banc opinion or dissent and a Supreme Court grant of certiorari becomes even more noticeable. Of the sixteen decided merits cases featuring the United States as respondent and therefore not requesting review, a Federal Circuit dissent or concurrence was present in eleven (69%).[105] And seven of the sixteen decided merits cases between private parties featuring no involvement of the Solicitor General's office at the certiorari stage featured a Federal Circuit dissent or concurrence (44%).[106] Totaling these two factors, eighteen of the thirty-two cases (56%) where the United States opposed certiorari or was not invited to express its views can be explained by the presence of a Federal Circuit dissent. Considering that the Federal Circuit issues dissents in fewer than 4% of its cases,[107] this is a significant factor.

C. DESIRE TO CORRECT LEGAL WRONGS: ATTITUDINAL VIEWS OF THE JUSTICES

The majority of the Supreme Court's grants of Federal Circuit cases are explained by either involvement of the United States or a Federal Circuit dissent. Thirty-four of the Supreme Court's Federal Circuit merits opinions involve the United States as petitioner, and an additional six involved a CVSG

100. *Id.* at 1519.

101. *Id.* at 1519–20.

102. *See infra* Appendix A.

103. Asgrow Seed Co. v. Winterboer, 989 F.2d 478 (Fed. Cir. 1993), *cert. granted*, 511 U.S. 1029 (1994); Eli Lilly & Co. v. Medtronic, Inc., 879 F.2d 849 (Fed. Cir.), *cert. granted*, 493 U.S. 889 (1989).

104. Hatter v. United States, 203 F.3d 795 (Fed. Cir.) (en banc), *cert. granted*, 531 U.S. 943 (2000); *In re* Zurko, 142 F.3d 1447 (Fed. Cir.) (en banc), *cert. granted sub nom.*, Lehman v. Zurko, 525 U.S. 961 (1998).

105. *See infra* Appendix A (noting cases where the United States is respondent in the case which do not feature a unanimous Federal Circuit panel).

106. *See infra* Appendix A.

107. *See supra* note 97.

at the certiorari stage.[108] Sixteen separate Supreme Court merits opinions reviewed a Federal Circuit decision featuring either a separate written opinion by a Federal Circuit judge or en banc review by that court.[109] Overall, fifty-eight of the Supreme Court's seventy-two Federal Circuit merits cases (81%) can be explained by the presence of one of those two factors, leaving fourteen grants unexplained by either theory.

What factors did the Supreme Court consider in granting certiorari in the remaining fourteen cases? Looking at the results in those cases, eleven featured either a reversal of the Federal Circuit by the Supreme Court or an affirming decision by the Court repudiating the Federal Circuit's legal reasoning.[110] This rate (eleven of fourteen, or 79%) is higher than the average Supreme Court reversal rate of the Federal Circuit (63%) or amongst all federal courts of appeals (also 63%).[111] In addition, eleven of the fourteen (79%) are patent cases, and thirteen of the fourteen were decided in 1994 or later.[112]

1. The Special Need for Error Correction at the Federal Circuit

To be sure, the Supreme Court is not a court of errors, and Justices have repeatedly claimed that the Court's role is not to remedy incorrect legal conclusions of the lower courts.[113] In most cases at the appellate level, a given constitutional or statutory provision at issue can be and is reviewed by multiple courts of appeals. This "percolation" often negates any need for Supreme Court review—if an appeals court decides a question of federal law one way as a matter of first impression, only to have the majority of its sister circuits decide the question another way, the first court may come into line with the others in the future without the need for the Supreme Court to speak. A Supreme Court Justice, speaking about the certiorari process on the condition of anonymity, provides this view, stating that if an appeals court "has a ruling that seems to create a conflict, we will let it percolate to see if the conflict will work itself out. Conflicts often work themselves out . . . ."[114] Particularly if the question of federal law is unlikely to come up often in a given circuit, or if the question arises for the first time, the Court is more willing to let the lower courts examine the issue further and delay its own review until more voices have weighed in.[115]

For the Federal Circuit, however, many of the factors weighing in favor of

108. *See infra* Appendix A (examining nondismissed cases where the Solicitor General was invited to participate as amicus during the certiorari stage).

109. *See supra* section III.B.

110. *See infra* Appendix A.

111. *Analysis Overview*, SUPREME COURT DATABASE, http://scdb.wustl.edu/analysis.php (search for all Supreme Court cases, both among all federal appeals courts and limited to the Federal Circuit, decided between 1982 and 2011).

112. *See infra* Appendix A.

113. *See, e.g.*, Chief Justice Fred M. Vinson, Work of the Federal Courts, Address Before the American Bar Association (Sept. 7, 1949).

114. PERRY, *supra* note 11, at 233.

115. *See id.*

delaying review of what Supreme Court Justices view as incorrect legal conclusions are not present. Like with most other federal courts of appeals, the first decision of a Federal Circuit panel creates binding precedent on that panel.[116] However, unlike most other federal courts of appeals, any incorrect decisions of the Federal Circuit, particularly on matters of patent law, are unlikely to be corrected by any amount of "percolation." Despite the Supreme Court's 2002 decision in *Holmes Group, Inc, v. Vornado Air Circulation Systems, Inc.*, which allowed issues of patent law to be decided by regional courts of appeals or state courts when the patent law issue is in a counterclaim and the case does not "arise under" the patent statute,[117] regional federal circuits and state courts have decided few patent law cases since.[118] And even when a regional circuit can decide an issue of patent law, the Supreme Court has not made it clear whether the regional circuit should deviate from the presumption against deference to the views of a sister circuit, due to the Federal Circuit's role in the patent law field.[119]

This uniformity in patent law created by the Federal Circuit has led to substantial criticism in the academic community.[120] Commentators have suggested that the Federal Circuit, due to its centralized nature and the repeat business of patent interest groups before it, risks "capture," or a disproportionate amount of time before the court, by those interest groups more easily than a generalized court.[121] An increase in Supreme Court review may be an effective check against such "capture."[122]

Indeed, the Supreme Court's changing approach to the Federal Circuit's patent cases can be read as a series of changing approaches before settling on an error-correcting role. At first, the Justices maintained their pre-Federal Circuit hands-off approach to patent law, treating patent cases as "clear denies"[123] and finding solace in the unique role of the Federal Circuit when dealing with patent issues.[124] Then, the Court attempted to solicit views from other courts of appeals on patent law issues by noting the possibility of circuit splits on patent law issues where the case is properly within the jurisdiction of a regional circuit

116. *See* Nies, *supra* note 98, at 1519.

117. *See* Holmes Grp., Inc, v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 834 (2002).

118. *See* Duffy, *supra* note 67, at 531 fig.5 (identifying only three patent or patent-antitrust cases decided by the regional circuits through the 2007 Term).

119. *See* Larry D. Thompson, Jr., *Adrift on a Sea of Uncertainty: Preserving Uniformity in Patent Law Post-*Vornado *Through Deference to the Federal Circuit*, 92 GEO. L.J. 523, 564–68 (2004).

120. *See, e.g.*, Craig Allen Nard & John F. Duffy, *Rethinking Patent Law's Uniformity Principle*, 101 NW. U. L. REV. 1619 (2007).

121. *See id.* at 1628–29 (citing William M. Landes & Richard A. Posner, *An Empirical Analysis of the Patent Court*, 71 U. CHI. L. REV. 111, 111–12 (2003)).

122. *See id.* at 1629.

123. PERRY, *supra* note 11, at 230.

124. *See, e.g.*, Memorandum to the Supreme Court Certiorari Pool, Dura Corp. v. TWM Mfg. Co., No. 86-145 5 (Aug. 28, 1986), *available at* http://epstein.usc.edu/research/blackmunMemos/1986/MissedMemos-pdf/86-145.pdf (recommending denial of cert where the problem in the case is "peculiarly within the expertise of [the Federal Circuit]").

for failure to "arise under" patent law.[125] After that failed to create the desired circuit conflicts, the Court settled into a phase of increased review of the Federal Circuit on substantive patent law questions.[126]

2. The Possible Role of Individual Justices in the Increased Substantive Patent Law Caseload

As Supreme Court observers have noted, a change in the composition of the Supreme Court results in changes to the Supreme Court's certiorari practice because different Justices have historically expressed interests in different areas of the law, and their interests influence their case-selection decisions to some extent.[127] The increase in the Supreme Court's substantive patent caseload began in 1994, the same year Justice Breyer joined the Supreme Court.[128] Since 1994, the Supreme Court has issued merits opinions on twenty patent cases decided by the Federal Circuit. Justice Breyer has written a majority opinion, a concurrence, or a dissent in seven of the twenty cases, and a dissent from dismissal of certiorari as improvidently granted in one other case.[129] Only Justice Thomas (with six majority opinions and one concurrence) matches this total, but many of his opinions in Federal Circuit patent law cases have dealt with jurisdictional or procedural issues.[130] If this increased level of opinion writing is indicative of increased interest in substantive patent law, Justice Breyer's interest in patent law could lead to his recommending a grant of certiorari to the conference more often where he sees incorrect decisions at the Federal Circuit.[131]

If one believes that Justice Breyer is more interested in patent law because he writes more patent opinions than the average Supreme Court Justice does, one would do well to examine Justice Sotomayor's jurisprudence in the future. Justice Sotomayor's early career involved a partnership in the New York law

125. *See* Holmes Grp., Inc, v. Vornado Air Circulation Sys., Inc., 535 U.S. 826, 839 (2002) (Stevens, J., concurring) ("An occasional conflict in decisions may be useful in identifying questions that merit this Court's attention.").

126. *See* Golden, *supra* note 66, at 670–71.

127. *See* PERRY, *supra* note 11, at 260–65.

128. *See* Duffy, *supra* note 67, at 524–25.

129. *See infra* Appendix A.

130. For example, Justice Thomas's opinion in *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006), dealt with details of post-trial motions practice, not substantive patent law. Similarly, Justice Thomas's opinion in *Carlsbad Technology, Inc. v. HIF Bio, Inc.*, 556 U.S. 635 (2009), dealt with jurisdictional questions relating to a district court's remanding of a removed case to state court for declining to exercise supplemental jurisdiction, not questions of substantive patent law. Justice Thomas has written only one concurrence, *see* Microsoft Corp. v. i4i Ltd. P'ship, 131 S. Ct. 2238, 2253 (2011) (Thomas, J., concurring), and no dissents in patent cases. Justice Thomas did, however, write the Court's opinion in its recent substantive patent law case, *Association for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 (2013).

131. For a discussion of Justice Breyer's possible interest in patent law, see *supra* note 67 and accompanying text.

firm Pavia & Harcourt,[132] where she specialized in, among other things, intellectual property litigation.[133] In just three Terms on the Supreme Court to date, Justice Sotomayor has already written one majority opinion and three concurring opinions in cases involving substantive patent law.[134] Although three Terms is insufficient to draw firm conclusions as to her long-term interest in patent issues, those interested in the Court's role in patent law would do well to continue to observe this trend.

CONCLUSION

After looking at the complete set of Federal Circuit cases reviewed by the Supreme Court, several things become clear. First, the Supreme Court initially reviewed federal claims, veterans appeals, and administrative appeals where the United States is a party; it gave deference to the views of the Solicitor General and found in favor of the United States in the vast majority of the cases it heard. More recently, the Court, while maintaining some deference to the views of the United States, has augmented its case-selection process by paying increased attention to dissents by Federal Circuit judges.

When considering whether to review patent cases from the Federal Circuit, the Court initially took a hands-off approach, which resulted in lessened review of significant changes to substantive patent law by the Federal Circuit in the first ten years of its existence. Since that time, the Court has—along with an as-of-yet unproductive attempt in the *Holmes Group*[135] case to create circuit splits—attempted to replicate the factors it uses in reviewing the Federal Circuit's nonpatent docket by means of increasingly issuing Calls for the Views of the Solicitor General, relying on disagreement amongst federal circuit judges on matters of patent law, and an increased desire to correct what it senses to be legal error. Finally, views of individual Supreme Court Justices may also play an increased role in case selection, with Justice Breyer having shown an interest in patent law issues via numerous opinions, and Justice Sotomayor, during her short tenure on the Court to date, showing a possible similar interest that may merit attention in the future.

132. Jo Becker, *Behind Judge's Spending and Income*, N.Y. TIMES, June 5, 2009, http://www.nytimes.com/2009/06/06/us/politics/06assets.html.

133. Rob Kuznia, *Hispanics Praise Selection of Sotomayor for Supreme Court; Republicans Wary*, HISPANICBUSINESS.COM, May 26, 2009, http://www.hispanicbusiness.com/2009/5/26/hispanics_praise_selection_of_sotomayor_for.htm.

134. *See infra* Appendix A.

135. Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc., 535 U.S. 826 (2002).

APPENDIX A: TABLE OF CASES

Case Name	Reporter and Year	Year of Cert. Petition	Case Type	Supreme Court Result	Status of United States	Federal Circuit Opinion Type	Circuit Split Mentioned?	Supreme Court Opinion Author(s)
United States v. Morton	467 U.S. 822 (1984)	1983	Federal Claim	Reversed	Petitioner	Unanimous panel	Yes	Stevens
Lindahl v. Office of Pers. Mgmt.	470 U.S. 768 (1985)	1983	Federal Claim	Reversed/ Remanded	Respondent	En-banc with dissent	No	Brennan; White dissent
Cornelius v. Nutt	472 U.S. 648 (1985)	1983	Federal Claim	Reversed	Petitioner	5-judge unanimous panel	No	Blackmun; Marshall dissent
United States v. City of Fulton	475 U.S. 657 (1986)	1984	Federal Claim	Reversed	Petitioner	Unanimous panel	No	Marshall
Dennison Mfg. Co. v. Panduit Corp.	475 U.S. 809 (1986)	1985	Patent	Vacated/ Remanded	No role	Unanimous panel	No	Per curiam; Marshall dissent
United States v. Am. Coll. of Physicians	475 U.S. 834 (1986)	1984	Federal Claim	Reversed	Petitioner	Unanimous panel	No	Marshall; Burger concurrence
United States v. Hughes Props., Inc.	476 U.S. 593 (1986)	1985	Federal Claim	Affirmed	Petitioner	Unanimous panel	Yes	Blackmun; Stevens dissent
United States v. Am. Bar Endowment	477 U.S. 105 (1986)	1985	Federal Claim	Reversed/ Remanded	Petitioner	Unanimous panel	No	Marshall; Stevens dissent
O'Connor v. United States	479 U.S. 27 (1986)	1985	Federal Claim	Affirmed	Respondent	5-judge panel with concurring opinion	Yes	Scalia
United States v. Gen. Dynamics Corp.	481 U.S. 239 (1987)	1985	Federal Claim	Reversed	Petitioner	Unanimous panel	No	Marshall; O'Connor dissent
Van Drasek v. Webb	481 U.S. 738 (1987)	1986	Admin. Appeal	Dismissed as Improvidently Granted	Respondent	Unanimous panel	No	Per curiam
United States v. Fausto	484 U.S. 439 (1988)	1986	Federal Claim	Reversed	Petitioner	Unanimous panel	No	Scalia; Blackmun concurrence; Stevens dissent

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Dep't of the Navy v. Egan	484 U.S. 518 (1988)	1986	Admin. Appeal	Reversed	Petitioner	Panel with dissent	No	Blackmun; White dissent
Christianson v. Colt Indus. Operating Corp.	486 U.S. 800 (1988)	1987	Patent	Vacated/ Remanded	None	Panel with dissent	Yes	Brennan; Stevens concurrence
United States v. Sperry Corp.	493 U.S. 52 (1989)	1988	Federal Claim	Reversed/ Remanded	Petitioner	Unanimous panel	No	White
United States v. Goodyear Tire & Rubber Co.	493 U.S. 132 (1989)	1988	Federal Claim	Reversed/ Remanded	Petitioner	Unanimous panel	No	Marshall
Office of Pers. Mgmt. v. Richmond	496 U.S. 414 (1990)	1988	Admin. Appeal	Reversed	Petitioner	Panel with dissent	No	Kennedy; White and Stevens concurrences; Marshall dissent
Eli Lilly & Co. v. Medtronic, Inc.	496 U.S. 661 (1990)	1989	Patent	Affirmed/ Remanded	None	Dissent from motion to rehear en banc	No	Scalia; Kennedy dissent
United States v. Thompson/Ctr. Arms Co.	504 U.S. 505 (1992)	1991	Federal Claim	Affirmed	Petitioner	Unanimous panel	Yes	Souter; Scalia concurrence; White and Stevens dissents
United States v. Hill	506 U.S. 546 (1993)	1991	Federal Claim	Reversed	Petitioner	Unanimous panel	No	Souter
Keene Corp. v. United States	508 U.S. 200 (1993)	1992	Federal Claim	Affirmed	Respondent	Panel with dissent	No	Souter; Stevens dissent
Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.	510 U.S. 27 (1993)	1992	Patent	Dismissed as Improvidently Granted	None	Unanimous panel	No	Per curiam; Stevens dissent
Asgrow Seed Co. v. Winterboer	513 U.S. 179 (1995)	1992	Patent	Reversed	None	Dissent from motion to rehear en banc	No	Scalia; Stevens dissent
Brown v. Gardner	513 U.S. 115 (1994)	1993	Veterans	Affirmed	Petitioner	Unanimous panel	No	Souter

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Shalala v. Whitecotton	514 U.S. 268 (1995)	1994	Federal Claim	Reversed/ Remanded	Petitioner	Unanimous panel	No	Souter; O'Connor concurrence
Hercules, Inc. v. United States	516 U.S. 417 (1996)	1994	Federal Claim	Affirmed	Respondent	Panel with dissent	No	Rehnquist; Breyer dissent
Markman v. Westview Instruments, Inc.	517 U.S. 370 (1996)	1995	Patent	Affirmed	None	Panel with Dissent	No	Souter
United States v. Int'l Bus. Machs. Corp.	517 U.S. 843 (1996)	1995	Federal Claim	Affirmed	Petitioner	Unanimous panel	No	Thomas; Kennedy dissent
United States v. Winstar Corp.	518 U.S. 839 (1996)	1995	Federal Claim	Affirmed	Petitioner	En-banc with dissent	No	Plurality opinion by Souter; Breyer and Scalia concurrences; Rehnquist dissent
Warner-Jenkinson Co. v. Hilton Davis Chem. Co.	520 U.S. 17 (1997)	1995	Patent	Reversed/ Remanded	None	En-banc with dissent	No	Thomas; Ginsburg concurrence
LaChance v. Erickson	522 U.S. 262 (1998)	1996	Admin. Appeal	Reversed	Petitioner	Unanimous panel	No	Rehnquist
United States v. U.S. Shoe Corp.	523 U.S. 360 (1998)	1997	Admin. Appeal	Affirmed	Petitioner	5-judge panel with dissent	No	Ginsburg
Pfaff v. Wells Elecs., Inc.	525 U.S. 55 (1998)	1997	Patent	Affirmed	Amicus at merits stage	Unanimous panel	No	Stevens
United States v. Haggar Apparel Co.	526 U.S. 380 (1999)	1997	Federal Claim	Vacated/ Remanded	Petitioner	Unanimous panel	No	Kennedy; Stevens dissent
Dickinson v. Zurko	527 U.S. 150 (1999)	1998	Patent	Reversed/ Remanded	Petitioner	Unanimous en-banc court	No	Breyer; Rehnquist dissent

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Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank	527 U.S. 627 (1999)	1998	Patent	Reversed/ Remanded	Respondent	Unanimous panel	No	Rehnquist; Stevens dissent
Mobil Oil Exploration & Producing Se., Inc. v. United States	530 U.S. 604 (2000)	1999	Federal Claim	Reversed/ Remanded	Respondent	Panel with dissent	No	Breyer; Stevens dissent
United States v. Hatter	532 U.S. 557 (2001)	1999	Federal Claim	Affirmed in part/ Reversed in part/ Remanded	Petitioner	Unanimous panel	No	Breyer; Scalia and Thomas dissents
United States v. Mead Corp.	533 U.S. 218 (2001)	1999	Admin. Appeal	Vacated/ Remanded	Petitioner	Unanimous panel	No	Souter; Scalia dissent
J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.	534 U.S. 124 (2001)	1999	Patent	Affirmed	Call for Views of the Solicitor General during certiorari stage	Unanimous panel	No	Thomas; Scalia concurrence; Breyer dissent
U.S. Postal Serv. v. Gregory	534 U.S. 1 (2001)	2000	Admin. Appeal	Vacated/ Remanded	Petitioner	Unanimous panel	No	O'Connor; Thomas and Ginsburg concurrences
Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.	535 U.S. 722 (2002)	2000	Patent	Vacated/ Remanded	Amicus at merits stage	En-banc with dissent	No	Kennedy
Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.	535 U.S. 826 (2002)	2001	Patent	Vacated/ Remanded	None	Unanimous panel	No	Scalia; Stevens and Ginsburg concurrences
Franconia Assocs. v. United States	536 U.S. 129 (2002)	2001	Federal Claim	Reversed/ Remanded	Respondent	Unanimous panel	No	Ginsburg

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United States v. White Mountain Apache Tribe	537 U.S. 465 (2003)	2001	Federal Claim	Affirmed/ Remanded	Petitioner	Panel with dissent	No	Souter; Ginsburg concurrence; Thomas dissent
United States v. Navajo Nation	537 U.S. 488 (2003)	2001	Federal Claim	Reversed/ Remanded	Petitioner	Panel with dissent	No	Ginsburg; Souter dissent
Scarborough v. Principi	541 U.S. 401 (2004)	2002	Veterans	Reversed/ Remanded	Respondent	Panel with dissent	Yes	Ginsburg; Thomas dissent
Cherokee Nation of Okla. v. Leavitt	543 U.S. 631 (2005)	2003	Federal Claim	Affirmed in part/ Reversed in part/ Remanded	Petitioner	Unanimous panel	Yes	Breyer; Scalia concurrence
Merck KGaA v. Integra Lifesciences I, Ltd.	545 U.S. 193 (2005)	2003	Patent	Vacated/ Remanded	Call for Views of the Solicitor General during certiorari stage	Panel with dissent	No	Scalia
Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.	546 U.S. 394 (2006)	2004	Patent	Reversed/ Remanded	Amicus at merits stage	Unanimous panel	No	Thomas; Stevens dissent
Lab. Corp. of Am. Holdings v. Metabolite Labs., Inc.	548 U.S. 124 (2006)	2004	Patent	Dismissed as Improvidently Granted	Call for Views of the Solicitor General during certiorari stage	Panel with dissent	No	Per curiam; Breyer dissent

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KSR Int'l Co. v. Teleflex, Inc.	550 U.S. 398 (2007)	2004	Patent	Reversed/ Remanded	Call for Views of the Solicitor General during certiorari stage	Unanimous panel	No	Kennedy
eBay Inc. v. MercExchange, L.L.C.	547 U.S. 388 (2006)	2005	Patent	Vacated/ Remanded	Amicus at merits stage	Unanimous panel	No	Thomas; Roberts and Kennedy concurrences
Hinck v. United States	550 U.S. 501 (2007)	2006	Federal Claim	Affirmed	Respondent	Unanimous Panel	No	Roberts
John R. Sand & Gravel Co. v. United States	552 U.S. 130 (2008)	2006	Federal Claim	Affirmed	Respondent	Panel with dissent	No	Breyer; Stevens and Ginsburg dissents
Richlin Sec. Serv. Co. v. Chertoff	553 U.S. 571 (2008)	2006	Federal Claim	Reversed/ Remanded	Respondent	Panel with dissent	Yes	Alito; Scalia and Thomas concurrences
United States v. Clintwood Elkhorn Mining Co.	553 U.S. 1 (2008)	2007	Federal Claim	Reversed	Petitioner	Unanimous panel	No	Roberts
United States v. Eurodif S. A.	555 U.S. 305 (2009)	2007	Admin. Appeal	Reversed/ Remanded	Petitioner	Unanimous panel	No	Souter
United States v. Navajo Nation	556 U.S. 287 (2009)	2007	Federal Claim	Reversed/ Remanded	Petitioner	Unanimous panel	No	Scalia; Souter concurrence
Shinseki v. Sanders	556 U.S. 396 (2009)	2007	Veterans	Reversed/ Remanded	Petitioner	Unanimous panel	No	Breyer; Souter dissent
Carlsbad Tech., Inc. v. HIF Bio, Inc.	556 U.S. 635 (2009)	2007	Patent	Reversed/ Remanded	None	Unanimous panel	No	Thomas; Stevens, Scalia, and Breyer concurrences

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Bilski v. Kappos	130 S. Ct. 3218 (2010)	2008	Patent	Affirmed	Respondent	En-banc with dissent	No	Kennedy; Stevens and Breyer concurrences
Henderson v. Shinseki	131 S. Ct. 1197 (2011)	2009	Veterans	Reversed/ Remanded	Respondent	En-banc with dissent	No	Alito
United States v. Tohono O'Odham Nation	131 S. Ct. 1723 (2011)	2009	Federal Claim	Reversed/ Remanded	Petitioner	Panel with dissent	No	Kennedy; Sotomayor concurrence; Ginsburg dissent
Gen. Dynamics Corp. v. United States	131 S. Ct. 1900 (2011)	2009	Federal Claim	Vacated/ Remanded	Respondent	Unanimous panel	No	Scalia
Bd. of Trs. of the Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc.	131 S. Ct. 2188 (2011)	2009	Patent	Affirmed	Call for Views of the Solicitor General during certiorari stage	Unanimous panel	No	Roberts; Sotomayor concurrence; Breyer dissent
Global-Tech Appliances, Inc. v. SEB S.A.	131 S. Ct. 2060 (2011)	2010	Patent	Affirmed	None	Unanimous panel	No	Alito; Kennedy dissent
Microsoft Corp. v. i4i Ltd. P'ship	131 S. Ct. 2238 (2011)	2010	Patent	Affirmed	Amicus at merits stage	Unanimous panel	No	Sotomayor; Breyer and Thomas concurrences
United States v. Jicarilla Apache Nation	131 S. Ct. 2313 (2011)	2010	Federal Claim	Reversed/ Remanded	Petitioner	Unanimous panel	No	Alito; Ginsburg concurrence; Sotomayor dissent

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Mayo Collaborative Servs. v. Prometheus Labs., Inc.	132 S. Ct. 1289 (2012)	2010	Patent	Reversed	Amicus at merits stage	Unanimous panel	No	Breyer
Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S	132 S. Ct. 1670 (2012)	2010	Patent	Reversed/ Remanded	Call for Views of the Solicitor General during certiorari stage	Dissent from motion to rehear en banc; panel dissent	No	Kagan; Sotomayor concurrence
Kappos v. Hyatt	132 S. Ct. 1690 (2012)	2010	Patent	Affirmed/ Remanded	Petitioner	En-banc with dissent	No	Thomas; Sotomayor concurrence
Ark. Game & Fish Comm'n v. United States	133 S. Ct. 511 (2012)	2011	Federal Claim	Reversed/ Remanded	Respondent	Panel with dissent	No	Ginsburg
Bowman v. Monsanto Co.	133 S. Ct. 1761 (2013)	2011	Patent	Affirmed	Call for Views of the Solicitor General during certiorari stage	Unanimous panel	No	Kagan
Ass'n for Molecular Pathology v. Myriad Genetics, Inc.	133 S. Ct. 2107 (2013)	2012	Patent	Affirmed in part/Reversed in part	Amicus at merits stage	Panel with dissent	No	Thomas; Scalia concurrence