

## **CHEVRON DEFERENCE AND PATENT EXCEPTIONALISM**

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### INTRODUCTION

The *Duke Law Journal's* Forty-Sixth Annual Administrative Law Symposium addresses the timely and important topic of patent exceptionalism.<sup>1</sup> As I have explored elsewhere, administrative law exceptionalism—the misperception that a particular regulatory field is so different from the rest of the regulatory state that general administrative law principles do not apply—is by no means unique to patent law.<sup>2</sup> Scholars, attorneys, and agency officials in various regulatory fields ranging from immigration to tax have sought, contrary to the Supreme Court's general guidance, “to carve out an approach to administrative review good for [the regulatory field's] law only.”<sup>3</sup> It appears that similarly exceptionalist views pervade

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† Assistant Professor of Law, Michael E. Moritz College of Law, The Ohio State University. Thanks are due to the *Duke Law Journal* editors and the Symposium organizer, Melissa Wasserman, for inviting me to participate in this terrific Symposium and to the Symposium participants and my colleague, Guy Rub, for helpful comments.

1. For an overview of the Symposium, see James Donald Smith, *Foreword: Patent Exceptionalism with Presidential Advice and Consent*, 65 DUKE L.J. 1551 (2016).

2. See, e.g., Stephanie Hoffer & Christopher J. Walker, *Is the Chief Justice a Tax Lawyer?*, 2015 PEPP. L. REV. 33, 42–43; Stephanie Hoffer & Christopher J. Walker, *The Death of Tax Court Exceptionalism*, 99 MINN. L. REV. 221, 222 (2014); Christopher J. Walker, *The Costs of Immigration Exceptionalism*, YALE J. ON REG. NOTICE & COMMENT BLOG (Feb. 9, 2016), <http://www.yalejreg.com/blog/the-costs-of-immigration-exceptionalism-by-chris-walker> [<https://perma.cc/82QT-4VTV>].

3. *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 55 (2011); see *id.* at 56 (finding “no reason why . . . review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as . . . review of other regulations”). To be sure, this does not mean that administrative law is uniform across all regulatory contexts.

patent law, although the patent law scholars assembled for this Symposium do not seem to share those exceptionalist views.<sup>4</sup>

This Essay focuses on one of the main debates from the Symposium: whether courts should apply *Chevron* deference to interpretations of substantive patent law advanced by the U.S. Patent and Trademark Office (PTO). Part I frames the debate about whether *Chevron* deference should apply, contrasting the positions taken by Stuart Benjamin and Arti Rai on the one hand,<sup>5</sup> and John Golden on the other.<sup>6</sup> After agreeing with Professors Benjamin and Rai that certain PTO interpretations of substantive patent law are probably eligible for *Chevron* deference, Part II outlines how a stronger case could be made for why it is worth the PTO's time and energy to seek *Chevron* deference from the Supreme Court. Among other reasons, the PTO and its U.S. Department of Justice (DOJ) lawyers should request such deference to weaken the Federal Circuit's control over substantive patent law and reverse an era of patent *stare decisis*. The Essay concludes by urging patent law

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Instead, the Administrative Procedure Act and the Supreme Court's administrative law doctrines set the default standards for agency action and for judicial review of agency action. As the Court has explained (in the patent law context, no less), congressional departures from these defaults "must be clear." *Dickinson v. Zurko*, 527 U.S. 150, 154-55 (1999); *see also* 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 11.2 at 772 (4th ed. 2002) (explaining that *Dickinson* "seemed to establish a presumption in favor of uniformity in standards for judicial review of agency actions that can be overcome only by 'clear' evidence in support of a departure").

4. These nonexceptionalist views are on full display in the scholars' written contributions to the Symposium. *See* Stuart Minor Benjamin & Arti K. Rai, *Administrative Power in the Era of Patent Stare Decisis*, 65 DUKE L.J. 1563 (2016); Michael D. Frakes & Melissa F. Wasserman, *Patent Office Cohorts*, 65 DUKE L.J. 1601 (2016); John M. Golden, *Working Without Chevron: The PTO as Prime Mover*, 65 DUKE L.J. 1657 (2016); Jonathan S. Masur, *CBA at the PTO*, 65 DUKE L.J. 1701 (2016). *But see* Orin Kerr, *Should the U.S. Patent and Trademark Office Get Chevron Deference?*, VOLOKH CONSPIRACY (Feb. 19, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/19/should-the-u-s-patent-and-trademark-office-get-chevron-deference> [<https://perma.cc/6Y9F-JJN6>] (responding to comments by Jonathan Masur, one of the Symposium participants); Orin Kerr, *The Case for Patent Law and Criminal Law Exceptionalism in the Administrative State*, VOLOKH CONSPIRACY (Feb. 12, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/12/the-case-for-patent-law-and-criminal-law-exceptionalism-in-the-administrative-state> [<https://perma.cc/MV5N-R2ZC>] ("[P]atent law and criminal law do not rely on delegations of lawmaking authority. As a result, I think it would be a bad idea to apply deferential standards in patent law or criminal law.").

5. Benjamin & Rai, *supra* note 4, at 1597. This Symposium contribution builds on their prior work in the area. *See, e.g.*, 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 (2007).

6. Golden, *supra* note 4, at 1658.

scholars to play a more active role in urging courts to abandon patent exceptionalism.

### I. CHEVRON DEFERENCE AND SUBSTANTIVE PATENT LAW

Featured at this Symposium is a growing scholarly debate about whether agency statutory interpretations embraced by the PTO's Patent Trial and Appeal Board (PTAB) are eligible for *Chevron* deference. Put differently, the question is whether courts must defer to the PTAB's reasonable interpretation of ambiguous provisions of the Patent Act.<sup>7</sup> This is a new debate in light of new legislation. Congress created the PTAB in 2011 as part of the Leahy-Smith America Invents Act (AIA),<sup>8</sup> which was "the most significant overhaul to our patent system, since the founding fathers first conceived of codifying a grand bargain between society and invention."<sup>9</sup> Professors Benjamin and Rai argue that certain PTAB interpretations of substantive patent law would be entitled to *Chevron* deference if the agency sought such deference.<sup>10</sup> John Golden, by contrast, contends that the PTO still does not have *Chevron*-level interpretive authority regarding substantive patent law—at least for core questions of substantive patent law such as the patentability requirements in the Patent Act. Instead, Professor Golden argues that such lack of deference may not be too important in light of the agency's position as a prime mover in developing patent law.<sup>11</sup>

Understanding their disagreement requires a deep dive into *Mead*'s muddy waters. The inquiry from *United States v. Mead*<sup>12</sup> remains the Supreme Court's governing standard for determining whether Congress intended for an agency's statutory interpretation to carry the force of law such that it becomes eligible for *Chevron* deference.<sup>13</sup> As many administrative law scholars have noted over the

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7. See *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

8. Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified in scattered sections of 35 U.S.C.).

9. David Kappos, *Re-Inventing the US Patent System*, DIRECTOR'S FORUM: A BLOG FROM USPTO'S LEADERSHIP (Sept. 16, 2011), [http://www.uspto.gov/blog/director/entry/re\\_inventing\\_the\\_us\\_patent](http://www.uspto.gov/blog/director/entry/re_inventing_the_us_patent) [https://perma.cc/3KCT-SSEV].

10. Benjamin & Rai, *supra* note 4, at 1597.

11. Golden, *supra* note 4, at 1658.

12. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

13. *Id.* at 227–30.

years, the *Mead* standard is hopelessly confusing.<sup>14</sup> To be sure, in *City of Arlington v. FCC*,<sup>15</sup> the Court clarified that *Chevron* deference applies whenever “Congress has unambiguously vested the [agency] with general authority to administer the [statute] through rulemaking and adjudication, and the agency interpretation at issue [is] promulgated in the exercise of that authority.”<sup>16</sup> But uncertainty persists when Congress has not granted general rulemaking or formal adjudicative authority. As the *Mead* opinion itself noted, the Supreme Court has “sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded.”<sup>17</sup>

Professors Benjamin, Golden, and Rai all agree that PTAB decisions fall into this uncertain category—even after the AIA granted the PTO rulemaking power to “prescribe regulations . . . establishing and governing” certain PTAB review proceedings as well as “the relationship of such review to other proceedings under [the Patent Act].”<sup>18</sup> As Professor Golden contends, the AIA provides the PTO rulemaking authority over agency procedures, but generally not over substantive patent law.<sup>19</sup> In other words, the AIA’s “provisions and broader context provide little reason to suspect that Congress snuck delegation of *Chevron*-level authority for the PTO through the back door of PTAB post-issuance proceedings.”<sup>20</sup> Moreover, as Professor Golden argues, the PTAB adjudicatory processes fall short of formal adjudication (as that term is contemplated by the Administrative Procedure Act (APA)) and seem more analogous to the type of agency rulings at issue in *Mead*, which the Court deemed ineligible for *Chevron* deference.<sup>21</sup>

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14. See, e.g., Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2005); Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 480 (2002); Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 361 (2003); see also *Mead*, 533 U.S. at 241 (Scalia, J., dissenting) (“The Court’s new doctrine is neither sound in principle nor sustainable in practice.”).

15. *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013).

16. *Id.* at 1874.

17. *Mead*, 533 U.S. at 231.

18. 35 U.S.C. §§ 316(a)(4), 326(a)(4) (2012).

19. Golden, *supra* note 4, at 1672–76.

20. *Id.* at 1675–76.

21. See *id.* at 1678–81. Note that the Federal Circuit seems to believe that at least one PTAB proceeding—*inter partes* review—requires APA-level formal adjudication. See, e.g., *Dell Inc. v. Accelaron, LLC*, No. 2015-1513, 2016 WL 1019075, at \*6 (Fed. Cir. Mar. 15, 2016); *Synopsys, Inc. v. Mentor Graphics Corp.*, No. 2014-1516, 2016 WL 520236, at \*10 (Fed. Cir. Feb.

Professors Benjamin and Rai agree that PTAB review proceedings do not meet the APA's definition of formal adjudication. They argue, however, that the review procedures nevertheless have sufficient rigor and formality to be eligible for *Chevron* deference, at least where the PTO Director has exercised her authority to "declar[e] an opinion precedential or conduct[] a rehearing or both."<sup>22</sup> Professors Benjamin and Rai conclude that "[t]he tools . . . for *Chevron* deference, in other words, are in the Director's hands."<sup>23</sup>

Both sides make reasonable arguments about whether PTAB interpretations of substantive patent law are eligible for *Chevron* deference. If pressed to take sides, Professors Benjamin and Rai seem to have the better argument under *Mead* and its progeny—especially in light of the sweeping authority the AIA grants to the PTAB. As another contributor to this Symposium has persuasively argued in a previous article, the AIA "rejects over two hundred years of court dominance in patent policy by anointing the PTO as the chief expositor of substantive patent law standards."<sup>24</sup> It is, however, a close question in an area of the law that is quite uncertain. Congressional action in the form of the AIA, coupled with the PTO Director's ability to seek rehearing and declare a PTAB decision precedential, tip the scales—at least for me—in favor of *Chevron* deference applying under *Mead* and its progeny.

## II. THE STRONGER CASE FOR SEEKING *CHEVRON* DEFERENCE

This Essay does not endeavor to bring more clarity to this question, which is already well argued in the other contributions to this Symposium. Instead, it pushes back on another conclusion reached by Professors Benjamin and Rai, namely, that "the PTO's failure to push for deference may reflect a calculation that the benefits of such a push will be fairly low, because of uncertainty about

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10, 2016); *Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1080 (Fed. Cir. 2015). That the PTAB may already have to adhere to the procedures required for APA-level formal adjudication may be an additional reason why the PTO should seek *Chevron* deference. Thanks to Melissa Wasserman for bringing this development to my attention.

22. Benjamin & Rai, *supra* note 4, at 1590; *see id.* at 1578–90 (providing extended analysis of the legal question).

23. *Id.* at 1590.

24. Melissa F. Wasserman, *The Changing Guard of Patent Law: Chevron Deference for the PTO*, 54 WM. & MARY L. REV. 1959, 1965 (2013); *see also id.* at 1966 ("Applying administrative law principles to the AIA provides that the PTO's legal interpretations of the Patent Act, as announced by its new adjudicatory proceedings, are entitled to the highly deferential standard of review articulated in *Chevron* . . .").

the Court actually deferring in situations in which it seems appropriate.”<sup>25</sup> They base this argument in part on “the Supreme Court’s recent lack of interest (and the Federal Circuit’s longstanding lack of interest) in applying conventional administrative law principles in the patent context.”<sup>26</sup> As further detailed below, Professors Benjamin and Rai could and should make a stronger case for the PTO to urge the Court to reject patent exceptionalism and apply *Chevron* deference to certain PTAB interpretations of substantive patent law.

#### A. *The Relationship Between the PTO and the DOJ*

Professors Benjamin and Rai mainly focus their analysis on whether the PTO Director will seek *Chevron* deference.<sup>27</sup> That inquiry is too limited. The cost-benefit analysis about whether to seek *Chevron* deference is calculated not only by the agency head, but also by the agency’s litigators. For the PTO, those litigators include attorneys outside of the agency who work on the DOJ’s Civil Appellate Staff and in the Solicitor General’s Office. Importantly, these DOJ attorneys are administrative law generalists who represent diverse federal agencies and defend agency statutory interpretations in a variety of contexts. Unlike officials at agencies that may have long suffered from administrative law exceptionalism, the DOJ attorneys should be much more receptive to an argument that patent law is not exceptional and that general administrative law principles apply. Indeed, as I have explored elsewhere (and experienced firsthand working on the DOJ’s Civil Appellate Staff), the DOJ litigators have a “playbook for developing and defending [agency] statutory interpretations.”<sup>28</sup> And that playbook tends to be based on general principles of administrative law that apply irrespective of the particular regulatory context.

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25. Benjamin & Rai, *supra* note 4, at 1599.

26. *Id.* at 1597.

27. To be fair, Professors Benjamin and Rai recognize the interaction between the PTO and its DOJ lawyers. *See, e.g., id.* at 1597 (noting that “the agency and its lawyers (both at the PTO and the DOJ)” must consider courts’ “recent lack of interest” in applying administrative law principles to patent law).

28. Christopher J. Walker, *How to Win the Deference Lottery*, 91 TEX. L. REV. SEE ALSO 73,77 (2013).

This is not just a theory. Take, for instance, *Cuozzo Speed Technologies, LLC v. Lee*<sup>29</sup>—a case the Supreme Court will decide later this Term.<sup>30</sup> One of the questions presented in *Cuozzo* is “[w]hether the PTO acted within its rulemaking authority in promulgating 37 C.F.R. 42.100(b), which . . . provides that patent claims shall be given their ‘broadest reasonable construction’ during *inter partes* review proceedings.”<sup>31</sup> In upholding the regulation, the U.S. Court of Appeals for the Federal Circuit found it appropriate to apply *Chevron* deference: “Because Congress authorized the PTO to prescribe regulations, the validity of the regulation is analyzed according to the familiar *Chevron* framework.”<sup>32</sup>

In its briefing before the Supreme Court, the PTO—through its DOJ lawyers in the Solicitor General’s Office and on the Civil Appellate Staff—advanced a generalist administrative law position to defend the PTO’s regulation. It argued, first and foremost, that under the AIA “Congress has granted the PTO broad authority to ‘prescribe regulations . . . establishing and governing *inter partes* review.’”<sup>33</sup> The PTO then made a *Chevron*-eligible argument relying on *Mead*:

Pursuant to [the America Invents Act’s] grant of rulemaking power, and following notice and comment, the PTO promulgated a regulation . . . . Such a regulation is “binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.” *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). The PTO acted well within its discretion in adopting [that regulation].<sup>34</sup>

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29. *In re Cuozzo Speed Techs., LLC*, 793 F.3d 1268 (Fed. Cir. 2015), *cert. granted*, 84 U.S.L.W. 3218 (U.S. Jan. 15, 2016) (No. 15-446).

30. *Id.*

31. Brief for the Respondent in Opposition at I, *In re Cuozzo Speed Technologies, LLC*, 793 F.3d 1268 (Fed. Cir. 2015), *cert. granted*, 84 U.S.L.W. 3218 (U.S. Jan. 15, 2016) (No. 15-446) [hereinafter Fed. Gov’t Br. in Opp.].

32. *Cuozzo*, 793 F.3d at 1279. The Federal Circuit made clear that it did “not draw that conclusion from any finding that Congress has newly granted the PTO power to interpret substantive statutory ‘patentability’ standards.” *Id.*; *see id.* at 1290 (Newman, C.J., dissenting) (analyzing the text of the AIA and “discern[ing] no authorization to the PTO to change the law of how claims of issued patents are construed”).

33. Fed. Gov’t Br. in Opp., *supra* note 31, at 9 (quoting 35 U.S.C. § 316(a)(4) (2012)).

34. *Id.*; *accord* Brief for the Respondent at 34, *In re Cuozzo Speed Technologies, LLC*, 793 F.3d 1268 (Fed. Cir. 2015), *cert. granted*, 84 U.S.L.W. 3218 (U.S. Jan. 15, 2016) (No. 15-446) [hereinafter Fed. Gov’t Merits Br.].

Indeed, the PTO expressly rejected the argument that was raised by the petitioner and arguably supported by Federal Circuit precedent, that is, that the PTO's rulemaking authority does not extend to substantive patent law.<sup>35</sup> "Within the four corners of the AIA itself," the PTO argued, the "petitioner identifies no indication that the PTO's rulemaking authority is limited to procedural matters."<sup>36</sup>

The importance of *Cuozzo* should not be overstated. Even if the Supreme Court agrees that *Chevron* deference applies to the PTO's regulation, that does not necessarily mean that PTAB adjudicatory decisions are similarly eligible for *Chevron* deference. (If the PTO is found to have substantive interpretive authority under the AIA, however, that certainly bolsters Professors Benjamin and Rai's argument.) Nor would such a victory necessarily mean that the PTO has broad, substantive interpretive authority that would extend to core questions of patent law, such as the requirements for patentability.<sup>37</sup> Instead, *Cuozzo* is offered as an example of the dangers of focusing myopically on the PTO Director as the decisionmaker.

As discussed in Part II.B, the PTO and its DOJ litigators have not yet aggressively pushed for the end of patent exceptionalism. But especially in light of the enactment of the AIA, the creation of the PTAB, and the PTO's briefing in *Cuozzo*, the time seems ripe for such a move.

### B. *Chevron's Weakening of the Federal Circuit*

Professors Benjamin and Rai argue that the Supreme Court is unlikely to embrace calls to abandon patent exceptionalism because, "*Zurko* . . . notwithstanding, recent Supreme Court opinions in the patent arena have tended to reject standard administrative law principles. These opinions have instead given precedence to a forceful

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35. Fed. Gov't Merits Br., *supra* note 34, at 34–37; *accord* Fed. Gov't Br. in Opp., *supra* note 31, at 15 (arguing that "nothing in the AIA's delegation of rulemaking authority limits the agency to 'procedural' rules" (citing 35 U.S.C. § 316(a)(4))).

36. Fed. Gov't Merits Br., *supra* note 34, at 37.

37. In particular, the PTO later suggests that the AIA may not have granted the PTO the authority "to issue legislative rules governing the basic conditions for patentability," *id.* at 39, and that, in all events, the regulation at issue—the PTO's embrace of the broadest-reasonable-construction approach—is procedural, not substantive, under Federal Circuit precedent. *Id.* at 39–41. In other words, the substantive–procedural debate in *Cuozzo* is much narrower than the question of whether the PTO has broad interpretive authority over core substantive questions of patent law, such as patent-eligibility, novelty, and nonobviousness.



reading of the Court's own pre-APA cases.”<sup>38</sup> It is true that in at least one recent case, *Kappos v. Hyatt*,<sup>39</sup> the Court seemed to reject the PTO's call to apply general administrative law principles.<sup>40</sup> But in most cases to date, the PTO has not aggressively argued against the Federal Circuit's longstanding position of patent exceptionalism. Nor has the PTO asked the Court to weigh in on whether courts or the agency should be the authoritative interpreter of substantive patent law. Things would change if the PTO actually requested *Chevron* deference.

One reason for optimism is the Supreme Court's growing discontent with the patent law precedent created by the Federal Circuit, which is the federal court of appeals with exclusive jurisdiction over patent-related disputes.<sup>41</sup> For example, in the last five years, the Court has reviewed twenty-four cases from the Federal Circuit, and it has reversed two-thirds of the time.<sup>42</sup> With respect to October Term 2013, in which the Court considered six patent cases, “the Court unanimously reversed in the first five (a remarkable 0-for-45 record for the Federal Circuit in terms of persuading Supreme Court justices), and in a sixth and final case the Court upheld a

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38. Benjamin & Rai, *supra* note 4, at 1591. In *Dickinson v. Zurko*, the Court rejected the Federal Circuit's tax exceptionalist view and held that the APA's “standards governing judicial review of findings of fact made by federal administrative agencies” should apply “when the Federal Circuit reviews findings of fact made by the Patent and Trademark Office (PTO).” *Dickinson v. Zurko*, 527 U.S. 150, 152 (1999).

39. *Kappos v. Hyatt*, 132 S. Ct. 1690 (2012).

40. *Id.* at 1696 (“We reject the Director's contention that background principles of administrative law govern the admissibility of new evidence and require a deferential standard of review in a § 145 proceeding.”). It is important to note that the PTO Director conceded that the administrative-record rule established by the APA did not apply because the Patent Act allows for the introduction of new evidence. *See id.* And the Court limited its holding to those circumstances where the general APA provisions do not apply: “In light of these aspects of § 145 proceedings—at least in those cases in which new evidence is presented to the district court on a disputed question of fact—we are not persuaded by the Director's suggestion that § 145 proceedings are governed by the deferential principles of agency review.” *Id.* at 1697.

41. *See* 28 U.S.C. § 1295(a)(1) (2012) (granting the Federal Circuit exclusive appellate jurisdiction over “any civil action arising under . . . any Act of Congress relating to patents or plant variety protection”); *id.* § 1295(a)(4) (granting the Federal Circuit exclusive appellate jurisdiction over decisions from, *inter alia*, the PTAB and the PTO Director).

42. These numbers are from October Term 2010 through October Term 2014, as collected by SCOTUSBLOG. *See Stat Pack Archive*, SCOTUSBLOG, <http://www.scotusblog.com/reference/stat-pack> [<https://perma.cc/PU8U-5DG8>]. To be sure, a two-thirds reversal rate is not atypical among circuits. *See, e.g., SCOTUSBLOG Stat Pack, Oct. Term 2014*, SCOTUSBLOG 3 (June 30, 2015), [http://sblog.s3.amazonaws.com/wp-content/uploads/2015/07/SB\\_scorecard\\_OT14.pdf](http://sblog.s3.amazonaws.com/wp-content/uploads/2015/07/SB_scorecard_OT14.pdf) [<https://perma.cc/YH95-2GKT>] (noting an overall 72% reversal rate).

splintered en banc Federal Circuit decision but took exception to much of the doctrine that had produced the ruling.”<sup>43</sup> As one commentator noted earlier this year, “[t]he U.S. Supreme Court has tried for 10 years to rein in the U.S. Court of Appeals for the Federal Circuit and its strongly pro-patent interpretations of the law, yet the tug-of-war does not appear to be letting up.”<sup>44</sup>

In such an environment, the Supreme Court may be more willing to embrace *Chevron* deference as a means of weakening the Federal Circuit. After all, as Melissa Wasserman has argued, “the PTO has a comparative institutional advantage over the Federal Circuit and . . . the Federal Circuit does not emerge as a clear winner with respect to the comparative risk of interest group influence.”<sup>45</sup> By declaring the agency the authoritative interpreter of patent law, which is what *Chevron* deference entails,<sup>46</sup> the Supreme Court would be shifting power away from the Federal Circuit at a time when the Court seems frustrated with the Federal Circuit’s substantive approach to patent law. This shift has the additional value of “usher[ing] the patent system into the modern administrative era, which has long recognized the deficiencies associated with judge-driven policy.”<sup>47</sup>

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43. Jeff Bleich & Josh Patashnik, *The Federal Circuit Under Fire*, SUPREME COURT WATCH, Fall 2014, at 40, <http://www.mto.com/Templates/media/files/Reprints/Josh%20Patashnik/Bleich%20%20Patashnik%20--%20Supreme%20Court%20Watch%20Fall%202014.pdf> [https://perma.cc/RR84-FN6Z]; accord Roy E. Hofer, *Supreme Court Reversal Rates: Evaluating the Federal Courts of Appeals*, 2 LANDSLIDE, Jan.-Feb. 2010, at 2, [http://www.americanbar.org/content/dam/aba/migrated/intelprop/magazine/LandslideJan2010\\_Hofer.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/intelprop/magazine/LandslideJan2010_Hofer.authcheckdam.pdf) [https://perma.cc/L8KZ-QCWW] (“Though the sample size of patent-related cases reviewed and decided by the Supreme Court is small, the trend is clear. The Supreme Court is actively seeking to assert its views in patent law rather than letting the Federal Circuit determine the fate of patent law on its own.”).

44. Steven Seidenberg, *Patent Tension: The Federal Circuit and the Supreme Court Continue Their Tug-of-War over Interpretations of Patent Law*, ABA J. (Jan. 2016), [http://www.abajournal.com/magazine/article/tug\\_of\\_war\\_over\\_interpretations\\_of\\_patent\\_law\\_continues\\_between\\_federal](http://www.abajournal.com/magazine/article/tug_of_war_over_interpretations_of_patent_law_continues_between_federal) [https://perma.cc/UFB6-6LW3]. Patent law scholarship has documented this trend. See, e.g., J. Jonas Anderson, *Patent Dialogue*, 92 N.C. L. REV. 1049, 1076–83 (2014); Rochelle Cooper Dreyfuss, Lecture, *What the Federal Circuit Can Learn from the Supreme Court—and Vice Versa*, 59 AM. U. L. REV. 787, 792–93 (2010); Timothy R. Holbrook, *Explaining the Supreme Court’s Interest in Patent Law*, 3 IP THEORY 62, 63–64 (2013).

45. Wasserman, *supra* note 24, at 1967; see *id.* at 2007–18 (exploring in greater detail this normative case for *Chevron* deference to PTO legal interpretations).

46. See, e.g., *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 983 (2005) (noting that when *Chevron* applies, the agency—not the reviewing court—is “the authoritative interpreter (within the limits of reason) of such statutes”).

47. Wasserman, *supra* note 24, at 1966.

### C. Chevron's Displacement of the Era of Stare Decisis

A core reason why Professors Benjamin and Rai believe that it is not expedient to ask the Supreme Court for *Chevron* deference to PTAB legal interpretations centers on “the Supreme Court’s apparent decision to deprioritize administrative law in favor of the stare decisis effect of Court cases that predate the rise of the modern administrative state.”<sup>48</sup> To borrow from the title of their article, they argue that we live in “an era of patent stare decisis,” where judicial precedent trumps agency statutory interpretation.<sup>49</sup> This explanation, however, underestimates the Supreme Court’s breathtaking extension of *Chevron* deference to trump judicial precedent in *National Cable & Telecommunications Ass’n v. Brand X Internet Services*.<sup>50</sup>

In *Brand X*, the Court reaffirmed the *Chevron* doctrine: “If a statute is ambiguous, and if the implementing agency’s construction is reasonable, *Chevron* requires a federal court to accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.”<sup>51</sup> The Court then took that principle one step further. The Ninth Circuit below had refused to afford *Chevron* deference because it had already construed the same statutory provision in a conflicting manner. It thus held that its precedent foreclosed the agency’s interpretation.<sup>52</sup> The Supreme Court reversed, concluding that “[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency’s interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction.”<sup>53</sup> Once a court has identified an ambiguity, there is a “presumption” that Congress “desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.”<sup>54</sup>

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48. Benjamin & Rai, *supra* note 4, at 1565.

49. *Id.* at 1563.

50. *Brand X*, 545 U.S. at 982–83; *cf.* Benjamin & Rai, *supra* note 4, at 1594 (noting that, if *Brand X* were to apply here, “administrative interpretations of the patent statute could trump prior judicial interpretations unless those prior judicial determinations held that the interpretation in question was the only permissible one”).

51. *Id.* at 980 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44, 834 n.11 (1984)).

52. *Id.* at 982.

53. *Id.* at 982–83.

54. *Id.* at 982 (quoting *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740–41 (1996)). *See generally* Christopher J. Walker, *Avoiding Normative Canons in the Review of Administrative Interpretations of Law: A Brand X Doctrine of Constitutional Avoidance*, 64 ADMIN. L. REV. 139, 183–89 (2012) (exploring the application of *Brand X* in a variety of regulatory contexts).

To the extent *Brand X* could have been viewed as an outlier, one need look no further than the Court's subsequent decision in *Negusie v. Holder*.<sup>55</sup> There, the agency had interpreted a provision of the Immigration and Nationality Act to require the denial of asylum to any otherwise qualifying noncitizen if he had persecuted others in his native country, even if his participation in persecution was *not* voluntary.<sup>56</sup> The Court concluded that *Chevron* deference did not apply because the agency had erroneously believed that it was bound by prior Supreme Court precedent and thus had not exercised its *Chevron* discretion to provide an alternative interpretation. The Court, however, did not provide its own interpretation either. It instead remanded the question to the agency, concluding that, when "the [agency] has not yet exercised its *Chevron* discretion to interpret the statute in question, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."<sup>57</sup> The Court grounded its remand decision in *Brand X*: "This remand rule exists, in part, because 'ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion.'"<sup>58</sup>

It is worth noting that *Negusie* also illustrates the limitations of Professor Golden's PTO-as-prime-mover argument.<sup>59</sup> There are no doubt many unanswered questions of substantive patent law where the PTO can move first, but the PTO nevertheless operates in an era of patent stare decisis that limits many potential moves. Indeed, as Professor Golden has argued elsewhere, the agency's "visible struggles to make sense of the court's rulings [on subject-matter eligibility] have strengthened my sense that, at least absent congressional action to clarify subject-matter eligibility directly, the [PTO] will have trouble improving the situation as long as it has only 'interpretive authority bound to preexisting judicial precedent.'"<sup>60</sup> If

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55. *Negusie v. Holder*, 555 U.S. 511 (2009).

56. *Id.* at 514 (interpreting 8 U.S.C. § 1101(a)(42) (2012)).

57. *Id.* at 523.

58. *Id.* (quoting Nat'l Cable & Telecomms. Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005)). See generally Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553, 1561–79 (2015) (exploring the evolution of the ordinary remand rule).

59. Golden, *supra* note 6, at 1689–95.

60. John M. Golden, *Flook Says One Thing, Diehr Says Another: A Need for Housecleaning in the Law of Patentable Subject Matter*, 82 GEO. WASH. L. REV. 1765, 1775

*Chevron* deference were to apply, *Brand X* and *Negusie* would remove any such limitations.

When *Brand X* and *Negusie* are read together, it is easier to appreciate the PTO's powerful argument in favor of reversing the prior era of patent stare decisis. To date, the PTO has not invoked *Brand X* to trump Supreme Court or Federal Circuit precedent on substantive patent law. But from its experience in *Negusie* and *Brand X*, the DOJ is no doubt well aware of the power of *Brand X* to trump any stare decisis effect of prior judicial precedent. So perhaps it is only a matter of time.

#### D. *Chevron's Power to Reorient the Agency–Court Relationship and Rein in Lower Courts*

Professors Benjamin and Rai also question the potential benefits of *Chevron* deference, in that it may not make a difference in whether a court upholds an agency's interpretation.<sup>61</sup> To support this conclusion they cite the empirical work of Bill Eskridge and Lauren Baer, which “suggests that the Supreme Court often fails to apply *Chevron* in many areas of substantive law” and “that at the Supreme Court win rates under *Chevron* are lower than win rates under seemingly less deferential regimes.”<sup>62</sup> The Eskridge and Baer study, however, did not focus on the effect of *Chevron* deference on displacing prior judicial precedent; indeed, it predated *Negusie*. The *Brand X* version of *Chevron* deference, as discussed in Part II.C, would force the Supreme Court to reconsider its prior precedent interpreting substantive patent law—at least where the Patent Act is found to be ambiguous.<sup>63</sup>

Moreover, for purposes of evaluating the benefits of *Chevron* deference for PTAB interpretations, the more important court is not the Supreme Court, but the Federal Circuit, which, as noted in Part

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(2014) (quoting John M. Golden, *Patentable Subject Matter and Institutional Choice*, 89 TEX. L. REV. 1041, 1110–11 (2011)).

61. Benjamin & Rai, *supra* note 4, at 1597–98.

62. *Id.* (citing William N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1125, 1142–43 (2008)).

63. The PTO should exercise caution, however, in reading too much into pre-*Chevron* judicial declarations of statutory ambiguity. See *United States v. Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1842–44 (2012) (reaffirming the *Brand X* principle but rejecting the agency's argument that a 1958 Supreme Court opinion stating that a statute is ambiguous creates space for subsequent agency interpretation when the statute is in fact unambiguous).

II.B, has exclusive jurisdiction over patent-related appeals. At the lower-court level, the effect of *Chevron* deference would be greater. After all, the Supreme Court reviews only a fraction of Federal Circuit opinions. The Court might well be less likely to review a Federal Circuit opinion that merely affirms the agency's statutory interpretation as reasonable under *Chevron*. Conversely, a Federal Circuit decision refusing to defer to the agency's interpretation would arguably be an even more attractive candidate for Supreme Court review; not only did the Federal Circuit potentially get substantive patent law wrong, but it also overturned an agency's authoritative interpretation of that law.

Indeed, if the Eskridge and Baer findings about the Supreme Court's inconsistent application of *Chevron* deference hold true today, a declaration that *Chevron* applies to the PTO's interpretation of substantive patent law would rein in the Federal Circuit without limiting the Supreme Court's subsequent review. Accordingly, the impact of a Supreme Court declaration that the PTO—not the Federal Circuit—is the authoritative interpreter of substantive patent law should not be undervalued.<sup>64</sup>

#### CONCLUSION

Professors Benjamin and Rai have made a strong case for the Supreme Court to abandon patent exceptionalism and apply *Chevron* deference to certain PTAB interpretations of substantive patent law. But they stop short of making the case for the PTO to request such deference. Instead, they conclude that “the PTO's failure to push for deference may reflect a calculation that the benefits of such a push will be fairly low.”<sup>65</sup> To the contrary, the PTO—with the help of its DOJ litigators—has potent legal arguments to overturn an era of

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64. Professors Benjamin and Rai also theorize that “[i]t could be that agencies are much more aggressive when they know that *Chevron* deference will apply, so the lower rate in *Chevron* cases simply reflects agencies' greater aggressiveness in statutory interpretation.” Benjamin & Rai, *supra* note 4, at 1598. My empirical work seems to support this intuition. See Christopher J. Walker, *Chevron Inside the Regulatory State: An Empirical Assessment*, 82 FORDHAM L. REV. 703, 721–25, 722 fig.3 (2014) (finding that the vast majority of agency rule drafters surveyed understand that their chances in court are better under *Chevron* than *Skidmore* and that two in five rule drafters surveyed agreed or strongly agreed—and another two in five somewhat agreed—that a federal agency is more aggressive in its interpretive efforts if it is confident *Chevron* deference applies); see also Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1048–66 (2015) (exploring the study's administrative law findings in greater detail).

65. Benjamin & Rai, *supra* note 4, at 1599.

patent stare decisis and disempower the Federal Circuit as primary interpreter of substantive patent law. Perhaps the Court's forthcoming decision in *Cuozzo* will spark this movement against patent exceptionalism.

Administrative law exceptionalism, however, does not usually die on its own. Among the important lessons learned from tax law's retreat from exceptionalism is that law professors can play a crucial role. As I have detailed elsewhere, in the case of tax exceptionalism, Kristin Hickman led a decade-long charge in both law reviews and amicus briefs by calling for, among other things, *Chevron* deference to apply to statutory interpretations promulgated by the Internal Revenue Service (IRS).<sup>66</sup> Those efforts culminated in 2011, when the Supreme Court agreed that certain IRS statutory interpretations are eligible for *Chevron* deference.<sup>67</sup> The D.C. Circuit and the Tax Court have since followed suit by rejecting administrative law exceptionalism in other areas of tax law.<sup>68</sup>

Hopefully patent law scholars will follow Professor Hickman's lead and make similar calls for the Supreme Court to reverse course in patent law. Professors Benjamin and Rai have established a solid substantive foundation for such advocacy.

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66. See Christopher J. Walker, *Taking Administrative Law to Tax Exceptionalism*, JOTWELL (Aug. 12, 2014), <http://adlaw.jotwell.com/taking-administrative-law-to-tax-exceptionalism> [<https://perma.cc/D6KC-75D7>].

67. *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. 44, 55–56 (2011).

68. See, e.g., *Cohen v. United States*, 650 F.3d 717, 723, 736 (D.C. Cir. 2011) (en banc) (holding that the judicial review provisions of the APA apply with full force to an IRS notice because “[t]he IRS is not special in this regard; no exception exists shielding it—unlike the rest of the Federal Government—from suit under the APA”); *Altera Corp. v. Comm’r*, 145 T.C. No. 3, 2015 WL 4522662, at \*28 (T.C. July 27, 2015) (invalidating income tax regulations because they were not the product of “reasoned decisionmaking” as required by the APA and related administrative law precedent).