

## WHAT'S THE DEFERENCE? WHY THE FEDERAL CIRCUIT'S TREATMENT OF ITC SECTION 337 CASES RAISES AGENCY-SPECIFIC PRECEDENT CONCERNS

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### I. INTRODUCTION

In a recent article titled, *Agency-Specific Precedents*, Richard E. Levy and Robert L. Glicksman explore the possibility of a “silo effect” occurring within administrative law jurisprudence.<sup>1</sup> Largely, administrative law as a concept presumes a body of generally applicable legal principles and doctrines concerning administrative agencies.<sup>2</sup> However, recently, Levy and Glicksman noticed that judicial precedents tend to rely most heavily on other cases involving the agency under review.<sup>3</sup> They observed a phenomenon where courts developed unique precedents concerning the specific agency on review.<sup>4</sup> In some cases, the jurisprudence deviated significantly from the general principles applicable under administrative law.<sup>5</sup>

In the article, the authors examine five case studies to show how review boards and courts have deviated from general administrative law as significant case law on agency-specific issues develops.<sup>6</sup> At one point, the authors suggest, “we might expect to see a larger number of agency-specific precedents arising in the Federal Circuit.”<sup>7</sup> Later, the article discusses patent law within the United States Patent and Trademark Office (USPTO), a specialized area of law typically under the appellate jurisdiction of the Federal Circuit.<sup>8</sup> With regard to the USPTO, the article shows how the standard of judicial review of patent law cases arising out of the USPTO has deviated from

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1. *See generally* Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499 (2011).

2. *Id.* at 500.

3. *Id.*

4. *Id.*

5. *Id.*

6. *See generally id.* at 515-51.

7. *Id.* at 515 n.92.

8. 28 U.S.C. §1295(a)(4)(A) (2006).

general administrative law.<sup>9</sup> The article posits that if examined further, other areas will also show the development of agency-specific precedent where the Federal Circuit is the only court of review for specialized agencies.<sup>10</sup>

The authors initiated an exploration of the topic that is ripe for further research. In a response to Levy and Glicksman, Kristin E. Hickman expanded further on the agency-specific precedent within tax law.<sup>11</sup> Now, this article intends to further explore the phenomenon within the Federal Circuit. However, finding another example of agency-specific precedent did not require expansive research. Even within the area of patent law, another agency, the International Trade Commission (ITC), has dealt with a similar hesitance by the Federal Circuit to adopt generally applicable administrative law. Unlike the USPTO, the ITC is a strong agency with significant power.<sup>12</sup> Allowing the Federal Circuit to continue its exceptionalism within patent law in the ITC may have an even greater effect than within the PTO.

This article discusses relevant history, cases, rationales, and solutions. In Part II, it will provide the general overview of administrative law, highlighting relevant areas of discussion. In Part III, it will discuss examples of agency-specific precedent addressed by the United States Supreme Court, as well as introduce an example not yet settled within the ITC. The article will continue to address potential causes to agency-specific precedent in Part IV. In Part V, the article will suggest potential solutions to curbing the agency-specific precedent phenomenon. The article will conclude by suggesting the best possible solution lies with the judiciary, in particular, the Supreme Court of the United States.

## II. BACKGROUND

Administrative law has been a part of American law since the founding of the United States.<sup>13</sup> Initially, the law governing administrative agencies included constitutional principles, common law remedies, and agencies' organic statutes.<sup>14</sup> Unfortunately, early administrative law "disappeared into common law subjects like torts, contracts, property, and civil procedure or into constitutional law."<sup>15</sup> Additionally, a general attitude of reluctance towards government intervention into economic affairs did not change until the Progressive Movement, and was not reflected in the courts until the Lochner Era ended in 1937.<sup>16</sup> Since the Lochner Era, the area of law has transformed

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9. See Levy & Glicksman, *supra* note 1, at 569-71.

10. *Id.* at 567.

11. See generally Kristin E. Hickman, *Agency-Specific Precedents: Rational Ignorance or Deliberate Strategy?*, 89 TEX. L. REV. See also 89 (2011).

12. Sapna Kumar, *The Accidental Agency?*, 65 FLA. L. REV. 229, 239 (2013).

13. Levy & Glicksman, *supra* note 1, at 502.

14. *Id.*

15. *Id.* at 503 (quoting Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1258 (2006)) (internal quotation marks omitted).

16. *Id.*; Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional*

into a comprehensive and generally applicable body of jurisprudence concerning the structure, procedures, and judicial review of agencies.<sup>17</sup> The modern era of administrative law is centered on a single, overarching statute: The Administrative Procedure Act (APA).<sup>18</sup>

The APA includes two key characteristics that have helped mold modern administrative law.<sup>19</sup> First, it governs the procedures agencies must follow.<sup>20</sup> For the most part, the important procedural provisions are rulemaking and adjudication. These are the two basic modes of agency action.<sup>21</sup> Second, the APA governs the availability and scope of judicial review of agency decisions.<sup>22</sup> A reviewing court may compel agency action unlawfully withheld or unreasonably delayed, or set aside an agency action if it violates a standard of review.<sup>23</sup> The most significant of those standards include the “arbitrary and capricious” standard of review and the “substantial evidence” standard for factual determinations in formal hearings.<sup>24</sup> Thus, the APA is “at the core of what we may call administrative law even if it interacts with an agency’s organic statute in important ways and is supplemented or informed by preexisting doctrines and underlying constitutional principles.”<sup>25</sup>

Levy and Glickman’s central thesis is that the agency-specific precedent phenomenon is a manifestation of the “silo effect.”<sup>26</sup> The term is typically used in business and organizational-management.<sup>27</sup> Its origins are attributed to Al Gore, having been derived from his use of the term “information silo.”<sup>28</sup> As stated by Levy and Glickman, “[t]he isolated silo rising above the plains is an evocative metaphor for the propensity of departments or divisions within a large organization to become isolated, with a resulting failure to communicate and pursue common goals.”<sup>29</sup> With regard to administrative law, the effect is seen at both the agency level, and within the courts of review.

At the agency level, the tendency for agencies to lack adequate information sharing and other forms of cooperation is not novel.<sup>30</sup> For instance, the Department of Homeland Security was created as a result of poor

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*Tradition*, 70 N.C. L. Rev. 1, 4 fn.9 (1991) (describing the early, middle, and late periods of the Lochner Era).

17. Levy & Glickman, *supra* note 1, at 502.

18. *Id.* at 504.

19. *Id.* at 505.

20. *Id.*

21. *Id.*

22. *Id.* at 506.

23. *Id.*

24. *Id.* at 506-07.

25. *Id.* at 505.

26. *Id.* at 501.

27. *Id.* at 510.

28. See Geoffrey C. Bowker, *Biodiversity Datadiversity*, 30 SOC. STUD. SCI. 643, 646 (2000).

29. Levy & Glickman, *supra* note 1, at 510.

30. *Id.* at 511.

interagency communication prior to 9/11.<sup>31</sup> Additionally, centralized regulatory review in the Office of Information and Regulatory Affairs can be understood as an attempt to coordinate policy.<sup>32</sup> However, this article is more concerned with the prevalence of the agency-specific precedent phenomenon within the courts.

Levy and Glicksman posit that one might expect any silo thinking that occurs at the agency level to be counteracted by the courts use of generally applicable administrative law doctrines.<sup>33</sup> However, by highlighting five case studies, the authors demonstrate that precedents concerning particular agencies have emerged that diverge and remain isolated from the larger body of administrative law.<sup>34</sup> The five agencies include the Internal Revenue Service, the Federal Communications Commission, the Social Security Administration, the Environmental Protection Agency, and the National Labor Relations Board.<sup>35</sup> The article is able to describe agency-specific precedent present on both “pure” administrative law issues and compound issues where the agency’s organic statute is relevant.<sup>36</sup>

Though the case studies are admittedly anecdotal, Levy and Glicksman believe they are not isolated instances and that the phenomenon of agency-specific precedents is real and worthy of further investigation.<sup>37</sup> They hypothesize the role of agency costs, specifically information costs, make specialized courts more prone to the development of agency-specific precedents.<sup>38</sup> Examples include the Court of Appeals for Veterans Claims and the Tax Court.<sup>39</sup> Later, Levy and Glicksman conduct a more in depth analysis of the Patent and Trademark Office to demonstrate the possibility of increased potential for agency-specific precedent within the Federal Circuit.<sup>40</sup> It is from there that this article continues the discussion.

### III. RELEVANT CASES TO CONSIDER

Levy and Glicksman showed that the agency-specific precedent phenomenon is present throughout different courts.<sup>41</sup> Additionally, they hypothesized the Federal Circuit would see an increased propensity for the

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31. *Id.* The term “9/11” is used here as a reference to the coordinated terrorist attacks on the United States targeted at New York City, New York, and Washington, D.C., on Tuesday, September 11, 2001.

32. *Id.* at 511-12 (citing Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 *HARV. L. REV.* 1075, 1081 (1986)).

33. *Id.* at 515.

34. *Id.*

35. *Id.* at 515-16.

36. *Id.*

37. *Id.* at 552.

38. *Id.* at 556.

39. *Id.* at 552.

40. *Id.* at 555-56.

41. *Id.* at 515-51.

phenomenon.<sup>42</sup> But, they also used a Federal Circuit case to show a clear example where such a practice has been rejected.<sup>43</sup> More recently, Hickman observed a similar rejection of agency-specific precedent relating to Treasury regulations.<sup>44</sup> This article will review the relevant cases, then introduce another area where agency-specific precedent is still unsettled, and present why this area should be addressed.

#### A. *Dickinson v. Zurko*<sup>45</sup>

One notable example where the specialized Federal Circuit Court of Appeals and the Supreme Court have sparred involves the USPTO. The Supreme Court's decision in *Dickinson v. Zurko*<sup>46</sup> provides a good illustration.

In *Zurko*, the issue was “whether the substantial evidence standard from § 706(2)(E) of the APA applies when the Federal Circuit reviews the PTO's findings of fact.”<sup>47</sup> “The Federal Circuit held that the ‘clearly erroneous’ standard normally applicable to appellate court review of trial court findings applied to review of the PTO's findings of fact rather than the APA's substantial evidence standard of review.”<sup>48</sup> “The Federal Circuit relied on § 559 of the APA, which provides that the APA does ‘not limit or repeal additional requirements . . . recognized by law.’”<sup>49</sup> It supported its decision with evidence of the standard applied by the Court of Customs and Patent Appeals (CCPA), the predecessor to the Federal Circuit and relevant court at the time the APA was adopted.<sup>50</sup> The court went so far as to say, “[the] special tradition of strict review consequently amounted to an ‘additional requirement’ that under § 559 trumps the requirements imposed by § 706.”<sup>51</sup> This also led Levy and Glicksman to opine that when considered from an agency cost perspective, the Federal Circuit may also have had an institutional interest in maintaining this agency-specific precedent to increase its ability to overturn USPTO findings.<sup>52</sup>

The Supreme Court did not agree. In rejecting the appellate court's decision, the Court highlighted the “importance of maintaining a uniform approach to judicial review of administrative action.”<sup>53</sup> Moreover, the Court made clear that, pursuant to § 559 of the APA, “[n]o subsequent legislation shall be held to supersede or modify the provisions of this Act except to the

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42. *Id.* at 567.

43. *Id.* at 567-71.

44. Hickman, *supra* note 11, at 109-10.

45. *Dickinson v. Zurko*, 527 U.S. 150 (1999).

46. *Id.*

47. Levy & Glicksman, *supra* note 1, at 567-68.

48. *Id.* at 568.

49. *Id.* (quoting 5 U.S.C. § 559 (2006)).

50. *Id.*

51. *Zurko*, 527 U.S. at 154.

52. See Levy & Glicksman, *supra* note 1, at 568.

53. *Zurko*, 527 U.S. at 154.

extent that such legislation shall do so expressly,<sup>54</sup> and concluded that § 559's clause saving pre-APA law applies only when the "[e]xistence of the additional requirement [is] clear."<sup>55</sup> The Court reviewed CCPA jurisprudence and concluded that the use of the clearly erroneous standard to review to USPTO findings of fact was not sufficiently clear.<sup>56</sup>

The Federal Circuit responded that changing the standard of review used by the USPTO would undermine public confidence and conflict with stare decisis.<sup>57</sup> Additionally, others argued that it was "better that the law remained settled than that it be settled correctly."<sup>58</sup> However, the Supreme Court was still unimpressed. Instead, the Court was concerned allowing such a precedent might "[permit] other agencies to depart from uniform APA requirements."<sup>59</sup>

The last argument in favor of the old USPTO standard, and perhaps most relevant for this discussion, was that the Federal Circuit's expertise in patent law differentiates its agency review of the PTO and supports the departure from normal APA scope-of-review principles.<sup>60</sup> The Court recognized the importance of the Federal Circuit's capacity to examine PTO factual findings with its expertise.<sup>61</sup> However, it was unconvinced that this expertise should be used for anything more than a better understanding of the basis for the PTO's finding of fact.<sup>62</sup> The Court saw no reason to give the Federal Circuit a stricter fact-related review standard than is applicable to other agencies.<sup>63</sup>

The Court's decision in *Zurko* was an express recognition of agency exceptionalism and an unequivocal rejection of the practice. However, the end result was unchanged.<sup>64</sup> On remand, application of the newly required standard resulted in the same outcome.<sup>65</sup> Even so, ultimately, "[t]he Supreme Court's decision in *Zurko* emphasized the desirability of a uniform and consistent administrative law doctrine and rejected policy arguments in favor of departures from generally applicable doctrine."<sup>66</sup> Regardless of whether the outcome was unchanged here, requiring the use of administrative law principles where appropriate may affect case outcomes in the future.

### **B. *Mayo v. U.S.*<sup>67</sup>**

Any potential interpretation that *Zurko* only discouraged exceptionalism

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54. *Id.* at 155.

55. *Id.*

56. Levy & Glicksman, *supra* note 1, at 569.

57. *Id.*

58. *Id.*

59. *Zurko*, 527 U.S. at 162.

60. Levy & Glicksman, *supra* note 1, at 570.

61. *Zurko*, 527 U.S. at 163.

62. *Id.* at 163-64.

63. *Id.* at 165.

64. Levy & Glicksman, *supra* note 1, at 570 n.378.

65. *Id.*

66. *Id.* at 571.

67. *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704 (2011).

within the Federal Circuit was squashed following the Supreme Court's decision in *Mayo*.

In response to Levy and Glicksman's case study with regard to tax law and the potential for agency-specific precedent, Kristin E. Hickman wrote an article titled, *Agency-Specific Precedents: Rational Ignorance or Deliberate Strategy*.<sup>68</sup> In her response, Hickman goes so far as to question, as she puts it, whether there is or should be "a body of general principles labeled administrative law?"<sup>69</sup> Additionally, while acknowledging Levy and Glicksman's theory of the "silo effect" occurring as the result of rational ignorance from attorneys may be one cause of agency-specific precedent, Hickman argues the phenomenon observed in some agencies and courts may be more the result of deliberate strategy by attorneys.<sup>70</sup>

But, more relevant to our discussion here, Hickman also acknowledges the confusion within the tax community resulting from agency-specific precedent.<sup>71</sup> Traditionally, tax practitioners and several courts used the tax-specific *National Muffler Dealers Ass'n v. United States*<sup>72</sup> standard of review "for legal interpretations advanced in general authority Treasury regulations."<sup>73</sup> However, after the Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,<sup>74</sup> practitioners were unsure of what standard would apply with regard to Treasury regulations.<sup>75</sup> Unlike Levy and Glicksman's examples of the Supreme Court displacing agency-specific precedent in *Zurko*, Hickman cites a line of cases from the Court that lack uniformity.<sup>76</sup> Indeed, she traces the inconsistency to the parties' failure to bring attention to the *Chevron* versus *National Muffler* debate.<sup>77</sup>

Fortunately, in *Mayo*,<sup>78</sup> the Supreme Court unanimously rejected the continued use of *National Muffler* in favor of *Chevron* review for general authority Treasury regulations.<sup>79</sup> In doing so, the Court quoted itself in *Zurko* and reiterated the need for the uniform application of administrative law principles.<sup>80</sup> *Mayo* is important because it is a recent case showing the Supreme Court's continued rejection of agency exceptionalism. This is also significant because the judiciary is likely in the best position to combat this phenomenon.<sup>81</sup>

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68. Hickman, *supra* note 11, at 89.

69. *Id.* at 89.

70. *Id.* at 91-92, 111.

71. *Id.* at 92.

72. Nat'l Muffler Dealers Ass'n, Inc. v. United States, 440 U.S. 472 (1979).

73. Hickman, *supra* note 11, at 92-93.

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

75. *See* Hickman, *supra* note 11, at 92-93.

76. *See id.* at 104-10.

77. *Id.* at 108.

78. *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704 (2011).

79. Hickman, *supra* note 11, at 109-10.

80. *Mayo*, 131 S. Ct. at 713 (quoting *Dickinson v. Zurko*, 527 U.S. 150, 154 (1999)).

81. *See infra* Part V.

### C. Cases within the ITC

Having shown that the highest court is unwilling to accept continued use of agency-specific precedent, this article will now give an example of an unsettled area of law where agency-specific precedent is causing problems. Turning back to the Federal Circuit, the Court's decision in *Zurko* demonstrated a clear rejection of the Federal Circuit's exceptionalism, which it had attempted to justify, in part, because of its expertise in patent law. The Federal Circuit's expertise in patent law has also affected the outcomes within another agency under its purview: the ITC. The jurisprudence relating to the ITC may be an even more concerning case of agency-specific precedent within the area of patent law.

Some may consider the USPTO to be a weak agency because it lacks any substantive rulemaking authority.<sup>82</sup> Conversely, the ITC is the administrator of the Tariff Act of 1974.<sup>83</sup> As such, the agency is considered a relatively strong, and has recently emerged as a popular choice to bring claims in which parties attempt to protect intellectual property rights.<sup>84</sup> Though much scholarly literature has focused on the relationship between the USPTO and the Federal Circuit, concern should also be placed on the current relationship between the ITC and the Federal Circuit.

The ITC is a government agency that deals with numerous aspects of trade, including the import of foreign goods. One aspect to this determination is that the ITC makes decisions regarding patent validity and infringement in accordance with its own statute, § 337 of the Tariff Act.<sup>85</sup> This section gives the ITC discretion to block goods from entering the country that “infringe a valid and enforceable United States patent . . . .”<sup>86</sup> Additionally, “[w]hat constitutes a ‘valid and enforceable’ patent is undefined in the statute,” and § 337 does not reference the Patent Act.<sup>87</sup> In addition to interpreting patents for its own purposes, the ITC is also allowed to make policy considerations regarding whether imported goods should be excluded.<sup>88</sup> Lastly, and perhaps most importantly, the ITC engages in formal adjudication and is the administrator of the Tariff Act.<sup>89</sup> Thus, under *Chevron*, the ITC should be granted deference.<sup>90</sup>

However, the Federal Circuit did not use that standard until *Kinik v.*

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82. Kali Murray, Sapna Kumar, Jason Mazzone, Hannibal Travis & Jasmine Abdel-Khalik, *An Uncomfortable Fit?: Intellectual Property Policy and the Administrative State*, 2009 Southeastern Association of Law Schools Panel Discussion (Aug. 4, 2009), in 14 MARQ. INTELL. PROP. L. REV. 441, 467 (2010) [hereinafter *Southeastern*] (stating the ITC holds “far more power than the USPTO”).

83. 19 U.S.C. § 1337(c) (2006).

84. See *Southeastern*, *supra* note 82, at 444.

85. 19 U.S.C. § 1337(c) (2006).

86. 19 U.S.C. § 1337(a)(1)(B)(i) (2004).

87. *Southeastern*, *supra* note 82, at 445; See 35 U.S.C. §§ 101-376 (2003).

88. *Southeastern*, *supra* note 82, at 444-45.

89. *Id.*

90. See *id.* at 457 (implying the ITC is entitled to *Chevron* deference).

*International Trade Commission*.<sup>91</sup> In *Kinik*, the ITC had determined Patent Act defenses under § 271(g) could not be used in ITC adjudication.<sup>92</sup> In doing so, the Federal Circuit granted *Chevron* deference to the ITC.<sup>93</sup> Though only dicta, this portion of the opinion sparked controversy, even leading to Senate Hearings in 2007.<sup>94</sup> Interestingly, a few years later, the Federal Circuit decided *Amgen v. International Trade Commission*.<sup>95</sup> In *Amgen*, the court affirmed the ITC's decision that § 271(e)(1) of the Patent Act does apply in ITC proceedings.<sup>96</sup> Unfortunately, the court did not consider whether *Chevron* applied, and thus, it remained unclear how much deference courts must give the ITC in patent-related decisions.<sup>97</sup>

Most recently, the Federal Circuit had the opportunity to clarify this issue in *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n*,<sup>98</sup> but, perhaps unknowingly, declined. There, the court addressed whether it had the power to hear an appeal by InterDigital Communications, LLC, even though the ITC had ruled its own determination was not final.<sup>99</sup> Interpreting Section 1337 of the Tariff Act, the ITC said it had not made a final determination under subsections (d), (e), (f), or (g) of that section.<sup>100</sup> Citing to 28 U.S.C. § 1295, the court stated it had exclusive jurisdiction to hear appeals of any final determination under § 1337.<sup>101</sup> However, it analyzed the statutory construction of the Tariff Act and related authority without mention of any deference to the ITC interpretation of its own statute.<sup>102</sup> Yet again, the court left unsettled what standard of review it applies to statutory interpretation of the Tariff Act by the ITC. There is no indication it considered *Chevron* deference appropriate.

Issues relating to agency-specific precedents aside, this uncertainty is problematic for numerous reasons. First, the ITC has more power than the USPTO, as it currently acts as the administrator of its own act.<sup>103</sup> While it is the administrator of the Tariff Act, and under § 337 it may exclude foreign imports, it may not order damages.<sup>104</sup> However, the ability of the ITC to exclude goods from entering American ports may cause significant expense to importers, in the form of storage fees, shipping fees to return the goods, and costs of litigation. Second, the America Invents Act will take effect in the near

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91. See *Kinik Co. v. Int'l Trade Comm'n*, 362 F.3d 1359, 1363 (Fed. Cir. 2004).

92. *Southeastern*, *supra* note 82, at 445.

93. *Id.*

94. Sapna Kumar, *The Other Patent Agency: Congressional Regulation of the ITC*, 61 FLA. L. REV. 529, 553 (2009).

95. *Amgen, Inc. v. Int'l Trade Comm'n*, 565 F.3d 846, 846 (Fed. Cir. 2009).

96. *Id.* at 854-55.

97. *Southeastern*, *supra* note 82, at 445.

98. See *InterDigital Commc'ns v. Int'l Trade Comm'n*, 718 F.3d 1336, 1341 (Fed. Cir. 2013).

99. *Id.*

100. *Id.*

101. *Id.*

102. See *generally id.* at 1341-45.

103. See *infra* notes 76-77 and accompanying text.

104. 19 U.S.C. § 1337 (2006).

future and will likely give the USPTO *Chevron* deference.<sup>105</sup> This could effectively remove any agency-specific precedent problem, as the agency's organic statute would then be the cause of any divergence from general administrative law. Conversely, the ITC has no new amendment(s) pending. Moreover, amendments in the past have not clarified the appropriate standard the Federal Circuit should apply to its interpretations. As will be discussed below, the situation provides an excellent opportunity for the Supreme Court to remind agencies and courts below it of the need to apply general administrative law.

However, proponents of the opinion that patent law is unique and that deference is incorrect argue the specific expertise needed to rule on patent cases justifies their approach.<sup>106</sup> Apparently, it follows that because the USPTO and ITC are interpreting different statutes, the Federal Circuit may act as a filter to promote consistency within patent law.<sup>107</sup> Additionally, the ITC's protectionist purposes may frustrate the goals of the patent system.<sup>108</sup> Thus, one proposed solution is to amend § 337 of the Tariff Act so that the ITC is bound by the Patent Act.<sup>109</sup> Accordingly, the ITC would not be entitled to *Chevron* deference because it would not be interpreting its own statute.<sup>110</sup>

This solution is incorrect for three reasons. First, there no longer remains any logical reason for the Federal Circuit's continued overuse of its expertise in USPTO and ITC cases. Specifically, with regard to the ITC, there may arguably have been a point in time in which the ITC's patent knowledge was still relatively novice. However, the emergence of the ITC as a major tool against intellectual property infringement has required the ITC to employ or contract experts in patent law. If the correct standard is applied, the Federal Circuit's expertise will be useful, but this is no reason to deviate from the general principles of administrative law. As discussed above, in *Zurko* and *Mayo*, the Court rejected this expertise justification.<sup>111</sup>

Second, the purposes of the ITC and the USPTO are vastly different. In *Mars Inc. v. Kabushiki-Kaisha Nippon Conlux*,<sup>112</sup> the Federal Circuit stated that, in general, the infringement of patent rights is not recognized "as coming within the rubric of 'unfair competition.'" <sup>113</sup> The court differentiated between the abilities of the ITC and USPTO by stating that "[t]he law of unfair competition generally protects consumers and competitors from deceptive or unethical conduct in commerce," whereas patent law "protects a patent owner

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105. Sarah Tran, *Patent Powers*, 25 HARV. J.L. & TECH. 609, 626-50 (2012) (discussing how the America Invents Act gives the USPTO substantive rule-making powers, and thus *Chevron* deference).

106. See *Southeastern*, *supra* note 82, at 458.

107. See *id.* at 457-58.

108. *Id.* at 457.

109. *Id.* at 457-58.

110. *Id.* at 458.

111. See *supra* text accompanying notes 45-80.

112. *Mars Inc. v. Kabushiki-Kaisha Nippon Conlux*, 24 F.3d 1368 (Fed Cir. 1994).

113. *Id.* at 1373.

from the unauthorized use by others of the patented invention, irrespective of whether deception or unfairness exists.”<sup>114</sup> Moreover, § 337(d)(1) states that the ITC may choose not to issue an exclusion order if it will have a detrimental effect “upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers . . . .”<sup>115</sup> Thus, unlike with the USPTO, Congress expressly included language allowing the ITC to include broad policy considerations in its decision. The codified ability of the ITC to consider such broad factors only further supports the proposition that it should be granted greater deference in its decisions.

Third, this solution is not one for the courts. An amendment to § 337 of the Tariff Act requires legislative action. By failing to grant deference to the ITC, courts are not only imposing on the powers of the executive branch, they are usurping the role of Congress. If an amendment to § 337 is preferable, courts should continue granting *Chevron* deference to the ITC until either constituents or the legislature take notice. In addition to this suggested action by the appellate courts, the Supreme Court should grant certiorari to a relevant case and again chastise a lower court for its exceptionalist practices. The Supreme Court’s decisions in *Zurko* and *Mayo* show that the Court values uniform application of administrative law, and just as it did in those cases, the Court must again remind the Federal Circuit of its wrongdoings.

#### IV. POTENTIAL CAUSES

As introduced above, though Levy and Glicksman’s central thesis blames the silo effect for the agency-specific precedent phenomenon, they consider the effect the result of three factors generally recognized in the field of organizational economics: 1) agency costs; 2) transactional costs; and 3) information costs.<sup>116</sup> Though the article elaborates on each of these factors, a majority of the discussion is focused on problems relating to information costs.<sup>117</sup> This is because precedents are information, the value of which is “reflected in their influence on or support for the outcome of judicial proceedings.”<sup>118</sup> In addition to the causes related to information costs introduced by Levy and Glicksman, Hickman added to the discussion by showing that another potential cause of agency-specific precedents could be deliberate strategy by attorneys, even rising to the level of manipulation.<sup>119</sup>

Relevantly, with regards to the Federal Circuit, Levy and Glicksman state they “would expect these specialized courts to be more prone to the development of agency-specific precedents that reduce information costs to the

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114. *Id.*

115. 19 U.S.C. § 1337(d)(1) (2006).

116. Levy & Glicksman, *supra* note 1, at 512.

117. *Id.* at 556.

118. *Id.* at 555.

119. *See* Hickman, *supra* note 11, at 111.

court and increase the weight and durability of the court's precedents."<sup>120</sup> One example would be that judges may be prone to rely on decisions within their own circuit because doing so reduces information costs.<sup>121</sup> However, according to Levy and Glicksman, the critical factor relating to information costs is actually "the judicial-review process itself, in which courts rely heavily on the attorneys representing the parties as providers of information regarding precedents."<sup>122</sup> In contrast, European courts expend more resources researching the issues themselves.<sup>123</sup> When analyzing the sources of the silo effect in relation to information costs in our adversarial system, Levy and Glicksman discuss attorney specialization, judicial review, and judicial structure and precedential silos.<sup>124</sup>

Thus, the first culprit may be the tendency for the administrative law bar to specialize, both in the public and in private sectors.<sup>125</sup> Attorneys invest resources to familiarize themselves with particular agencies and lower the marginal information costs within that area.<sup>126</sup> However, doing so also means those attorneys will devote fewer resources to learning the statutes, regulations, precedents, and other sources of law and policy dealing with other agencies.<sup>127</sup> It is not that specialized attorneys are incapable of conducting the research, but attorneys are unlikely to do so if the incentives to do so are limited.<sup>128</sup> Logically, as time goes on, more cases are available as precedent, and the probability of similar factual circumstances increases. Voluntarily expanding research to agencies outside a specific issue may not only create an unmanageable number of precedents needing to be "combed for favorable and unfavorable doctrine," but it may also entail mastering an entirely new statute.<sup>129</sup> Partaking in such labor will only occur if doing so creates benefits that outweigh the costs.<sup>130</sup>

On a related note, even if it is worthwhile to partake in such labor, the cost of presenting that precedent to the court may be outweighed by the benefit of not presenting the court with general administrative law. If we consider Hickman's observations, attorneys may have knowledge of broad administrative law, but deliberately omit its presentation to the court.<sup>131</sup> This could be because an attorney was unsure whether the court would accept the non-agency-specific precedent, or because, as we saw in cases leading to *Mayo*, an attorney (there, the Solicitor General) did not want to negatively

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120. Levy & Glicksman, *supra* note 1, at 556.

121. *Id.*

122. *Id.* at 557.

123. *See id.* at 558 n.302.

124. *Id.* at 558-59.

125. *Id.* at 558.

126. *Id.* at 559.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 560.

131. Hickman, *supra* note 11, at 111.

affect future cases by presenting unsettled law.<sup>132</sup> Additionally, it could simply be that the possibility of an ethical violation is so small as compared to the possibility of a favorable decision. It seems when we consider Levy and Glicksman observations, as well as Hickman's observations, we are left with doubt about potential causes, insofar as they relate to attorneys.

"The silo effect produced by attorney specialization [also] has a significant impact on the information costs [relating to] . . . judicial review."<sup>133</sup> In our adversarial system, courts rely on the parties to present the law.<sup>134</sup> With heavy caseloads and limited resources, courts have little incentive to look further.<sup>135</sup> Typically, judges are incentivized for three reasons: (1) because they value "craft" and their reputation for craft;<sup>136</sup> (2) because the case outcomes are consistent with their ideology;<sup>137</sup> and (3) because of "leisure," defined as "time that may be devoted to more highly valued uses."<sup>138</sup> Thus, the amount a judge will go outside agency-precedent likely depends on the extent to which a judge will improve their craft, or reputation, or whether a decision will enable a judge to achieve a preferred outcome.<sup>139</sup> This is a cause that this article does not dispute. Moreover, though not directly addressed by Hickman, she does imply she agrees it is a cause when she acknowledges that courts lack the resources to counteract strategic behavior by attorneys before it.<sup>140</sup> The proper use of judicial incentives to curb agency-specific precedent is a likely solution to the problem.<sup>141</sup>

Information costs creating and sustaining agency-specific precedent are also likely affected by the nature and level of court.<sup>142</sup> Similar to the assertion above that judges are disincentivized to look beyond the agency which is before them,<sup>143</sup> courts are also more likely to rely on their own decisions, which will be familiar, and require minimal information costs.<sup>144</sup> In addition to information costs, agency costs may also contribute to the problem because a court that relies on its own opinions may increase their weight and durability.<sup>145</sup> This is likely one reason we see the agency-specific precedent issue within the USPTO and ITC decisions within the Federal Circuit.<sup>146</sup>

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132. *Id.* at 110-11.

133. Levy & Glicksman, *supra* note 1, at 561.

134. *Id.*

135. *Id.* at 561-62.

136. *Id.* at 562.

137. *Id.*

138. *Id.*

139. *Id.*

140. *See* Hickman, *supra* note 11, at 112.

141. *See infra* Part V.

142. Levy & Glicksman, *supra* note 1, at 563.

143. *See supra* text accompanying notes 134-41.

144. Levy & Glicksman, *supra* note 1, at 556-57.

145. *Id.* at 563-64.

146. *Id.* at 564 (discussing how in most cases the appellate court's jurisdiction extends to a review of a wide variety of federal agencies, and the court is more likely to know about and apply general administrative law doctrine).

Because the Supreme Court is the final arbiter, it is a good example of a court where the benefits of searching outside agency-specific precedent may outweigh not doing so. There are numerous incentives built into the level of the Court that support this proposition.<sup>147</sup> First, the Solicitor General has an incentive to keep rulings consistent by the Court.<sup>148</sup> Second, the Supreme Court typically hears cases of greater importance, thus are more worth the cost of expanded research.<sup>149</sup> Third, other agencies' precedents may have more value because there are generally less Supreme Court cases that are on point.<sup>150</sup> And last, the Court hears less cases than lower courts, spends more time on each opinion, along with arguably more resources to engage in extensive research.<sup>151</sup> These notions seem to be supported by the decisions in *Zurko* and *Mayo*.<sup>152</sup>

Interestingly, Hickman noted that the Solicitor General had opted not to argue for *Chevron* deference until after the Court's 2001 decision in *United States v. Mead Corp.*,<sup>153</sup> where the Court clarified the proper use of *Chevron* deference.<sup>154</sup> Thus, Hickman said until the Court made clear which standard it considered proper, the Solicitor General did not want to attempt using *Chevron* because of the potential for an adverse ruling against its use.<sup>155</sup> Though Hickman's observation shows hesitancy by a generalist attorney before the highest court, the point is weakened because of the decision in *Mayo* itself. By reiterating its decision in *Zurko*, the *Mayo* decision should give confidence to attorneys, particularly the Solicitor General, to argue *Chevron* deference, and other general administrative law principles in the future.

## V. SUGGESTED RESPONSES

In their article, Levy and Glicksman acknowledge they are only attempting to initiate further exploration of the occurrence of agency-specific precedent, its potential problems, and any suggested solutions.<sup>156</sup> Though educating generalist and specialized administrative law attorneys, or even encouraging collaboration between the two groups, may help alleviate the problem, Hickman's observations show there is potential such an approach would prove to only be a partial solution, or worse, could "perpetuate or even exacerbate" the problem.<sup>157</sup> Unfortunately, Hickman chose not to offer an additional solution. Instead, she seems to accept it is unlikely a solution

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147. *Id.* at 565.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Supra* notes 45-80 and accompanying text.

153. *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001).

154. Hickman, *supra* note 11, at 110-11.

155. *Id.* at 111.

156. Levy & Glicksman, *supra* note 1, at 580-81.

157. Hickman, *supra* note 11, at 111.

exists.<sup>158</sup> Regardless, potential problems with attorney education and awareness suggest alternative solutions should be considered. This article suggests using recognized judicial incentives to encourage application of general administrative law within the judiciary.

As discussed above, judges are incentivized for three reasons, including 'craft' and 'leisure.'<sup>159</sup> Thus, the amount a judge will go outside agency-precedent likely depends on the extent to which a judge will improve their craft, or reputation for craft, or whether a decision will enable a judge to achieve a preferred outcome.<sup>160</sup> Accordingly, focusing on a judge's value for craft and reputation for craft, as well as leisure, may facilitate alleviation of agency-specific precedent issues.

One solution may be to incentivize courts to conduct further research, and be more cognizant of general administrative principles in order to increase their craft. Doing so may require what could be considered as shaming certain courts. Here, instead of academics and generalists focusing their labor on increasing attorney education and awareness, perhaps articles critical of particular judges or courts will help sour a judge's reputation for craft and incentivize proper use of general administrative law principles. Additionally, lobbying and consideration for increased judicial budgets may be appropriate. The number of judicial research staff, paid clerks, or even unpaid clerks, should all be increased. Moreover, all parties should be trained and encouraged to include general administrative law principles in their bench memorandum. Actions such as these would better equip courts to conduct the appropriate research and properly use administrative law principles in practice.

However, even with this suggestion, we must consider, as Levy and Glicksman argued, some courts, particularly specialized courts like the Federal Circuit Court of Appeals, may have an institutional incentive to continue using agency-specific precedent.<sup>161</sup> An agency or court may be able to increase its stature or weight in the legal community by repeatedly relying on its own precedents.<sup>162</sup> Thus, to balance against this benefit, the Supreme Court may be in the best position to counter the use of agency-specific precedent, especially by appellate courts. To do so, the Supreme Court must continue to reject and chastise a lower court's attempts at exceptionalism. By continually ruling in favor of uniform administrative law, lower courts and agencies will adjust and be forced to begin merging their jurisprudence with the general administrative law principles.

Judges may also find some value in reducing the number of cases remanded back to their court. If higher courts begin applying proper administrative law principles, then in some instances it may need to return a

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158. *Id.* at 112.

159. *See supra* text accompanying notes 134-41.

160. Levy & Glicksman, *supra* note 1, at 562.

161. *Id.*

162. *Id.*

case to a lower court on remand (as seen in *Zurko*).<sup>163</sup> If judges value leisure, they will be incentivized to rule in ways less likely to produce more work on remand. Thus, allowing for more time to be devoted to highly valued uses. But, this suggestion is still dependent on the first. The best chance for reduced agency-specific precedent lies within the judiciary's purview. With proper encouragement, proper and consistent administrative law decisions are possible.

## VI. CONCLUSION

As this article has shown, the agency-specific precedent phenomenon introduced by Levy and Glicksman is also present within another agency in the Federal Circuit's purview. Additionally, the additional cause posited by Hickman may show that the agency-specific precedent phenomenon may not be due solely to the "silo effect" caused by rationally ignorant attorneys as hypothesized by Levy and Glicksman.<sup>164</sup> Instead, one cause may be deliberate strategy employed by attorneys searching for a favorable outcome. This article considers these causes and acknowledges that a solution relating to attorneys may not be practical because of the conflict shown by Hickman. A better approach to curbing agency-specific precedent may instead lie within the judiciary. Incentivizing an increase in craft, and encouraging academics and courts to shame improper decisions by judges, could prove to be a more favorable response.

Moreover, when presented the opportunity, the Supreme Court should not hesitate to again reiterate its position regarding agency exceptionalism. Its decisions in *Zurko* and *Mayo* provided useful reminders that courts and agencies need to apply general principles of administrative law.<sup>165</sup> However, there remain numerous circuits or agencies that could be relying improperly on agency-specific precedent. This article examined only the Federal Circuit, and more specifically, patent cases in the ITC. Though concern may be drawn from this circuit, as shown by Levy and Glicksman, generalist courts may continue to contain the same phenomenon. The overwhelming number of agencies and cases before them require a proactive response to eliminate the improper use of agency-specific precedent. Absent such a response, there is a risk courts will deviate more and more from generally applicable administrative principles.

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163. See *supra* text accompanying note 65.

164. Hickman, *supra* note 11, at 110-11.

165. *Supra* notes 45-80 and accompanying text.