Formalism and Antiformalism in Patent Law Adjudication:
Precedent and Policy

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My work-in-progress relates to the Federal Circuit and Supreme Court’s use of precedent- and policy-based reasoning to decide disputed issues of patent law.

In recent years law professors have unleashed withering criticism on the Federal Circuit for overlooking the value of policy-guided analyses of patent law and instead engaging in formalistic parsing of precedent. The Supreme Court, by contrast, has received more mixed reviews but ultimately is viewed as an antiformalist alternative to the Federal Circuit. In this Article, I reconsider the role of the Federal Circuit as an intermediate appellate court with exclusive jurisdiction over appeals in patent cases in analyzing and expressing policy related to patent law.

The Federal Circuit has been criticized as a formalist court based in part on its purported failure to consider and analyze policy governing patent law doctrines in its written opinions in patent cases. Indeed, law professors have been as critical of the Federal Circuit as the Federal Circuit judges themselves have been defensive. After cataloging the views of Federal Circuit judges and academic critics regarding the value of policy-based analysis in patent cases, the Article provides a close analysis of the track record of both the Federal Circuit and the Supreme Court regarding expression of policy-based justifications for legal doctrines in patent law. Significantly, this analysis challenges views of both the academic critics as well as the Federal Circuit judges. The reality, having studied the Federal Circuit’s opinions in patent cases subsequently reviewed by the Supreme Court, lies somewhere between the extremes.

This Article then examines the importance of the Federal Circuit and its judges engaging actively in the ongoing policy debate at the Supreme Court regarding various patent law doctrines, ultimately taking and defending the position that the Federal Circuit and its judges should engage in a healthy policy discourse with the Supreme Court and suggesting several specific ways the court and its judges might better engage in this discourse.