

# Optimal Judicial Centralization: The U.S.'s Federal Circuit and Europe's Unified Patent Court

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# Basic Thesis: Optimal Centralization

- Basic thesis: The U.S.'s Federal Circuit and Europe's Unified Patent Court raise a problem of **optimizing** the degree of centralization.
  - While centralization and uniformity have value, decentralization and disuniformity have benefits too.
  - Polar outcomes – complete centralization or atomistic fragmentation – are rarely the optimal.
- Basic Prior Paper: Craig Allen Nard and John F. Duffy, *Rethinking Patent Law's Uniformity Principle*, 101 Nw. U. L. Rev. 1619 (2007).

# Centralization Generally

- **General Issue:** What is the optimal degree of centralization and concentration of power?
- **Government** — Should government powers be separated, as in the U.S., or be more concentrated, as in Parliamentary systems?
- **International law** — Should Europe integrate more or less?
- **Antitrust / competition law** — Should a particular industrial merger be permitted?
- **Theory of business organizations** — Should economic transactions be integrated into a firm or be conducted via contract in a decentralized market?
- **Theory and policy governing innovation** — Should R&D be coordinated or uncoordinated?

# Centralization Generally

- Many examples of positive centralizations of power:
  - the integration of the United States into a single sovereign entity and a common market;
  - the ongoing integration of the European market.
- Many examples where centralization has not worked well:
  - the centralization of power in autocratic leaders;
  - attempts to cartelize certain markets;
  - mergers that create unwieldy conglomerates such as AOL-TimeWarner (2000-2009); DaimlerChrysler (1998-2007).

# Benefits of Centralization

- 1. **Development of Expertise:** Whether in courts, companies or countries, larger entities can foster the development of expertise. (Example: Building large jet aircrafts requires such expertise that only two firms exist in the entire world).
- 2. **Uniformity:** Centralization can eliminate the costs of disuniformity. (Example: Starbucks).
- 3. **Economies of scale for governance.** Increasing the size of entities sometimes decreases the fraction of resources spent on governance. (E.g., Modern nation-states).

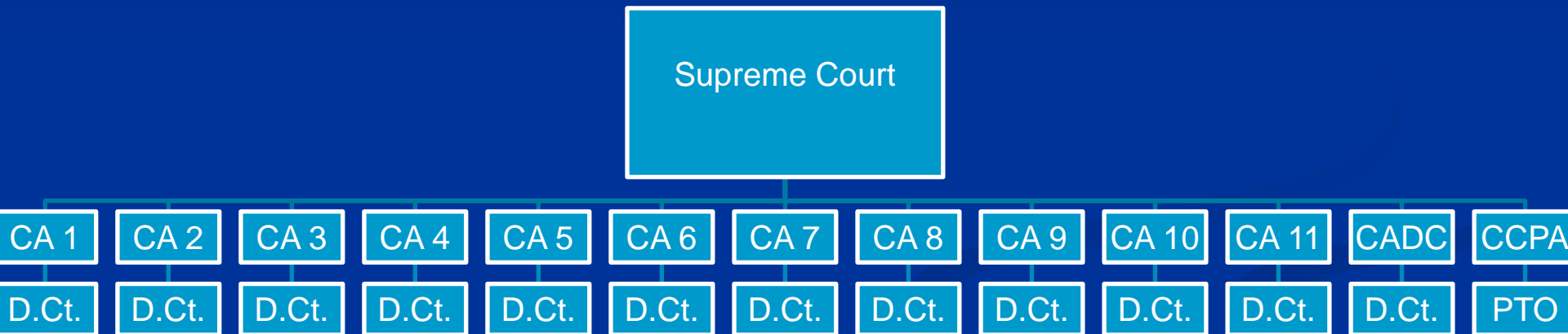
# Benefits of Decentralization

- 1. **Competition:** Decentralization increases competition, which can impose a useful check on institutions and individuals. (Competition Law)
- 2. **Information gathering:** Decentralized institutions may be better able to gather information. (Theory of the Free Market)
- 3. **Innovation:** Multiple institutions can produce and test a greater number of possible innovations.
- 4. **Economies of scale for governance.** This factor generally favors centralization, but there are limits on the principle.

# Optimal Decentralization

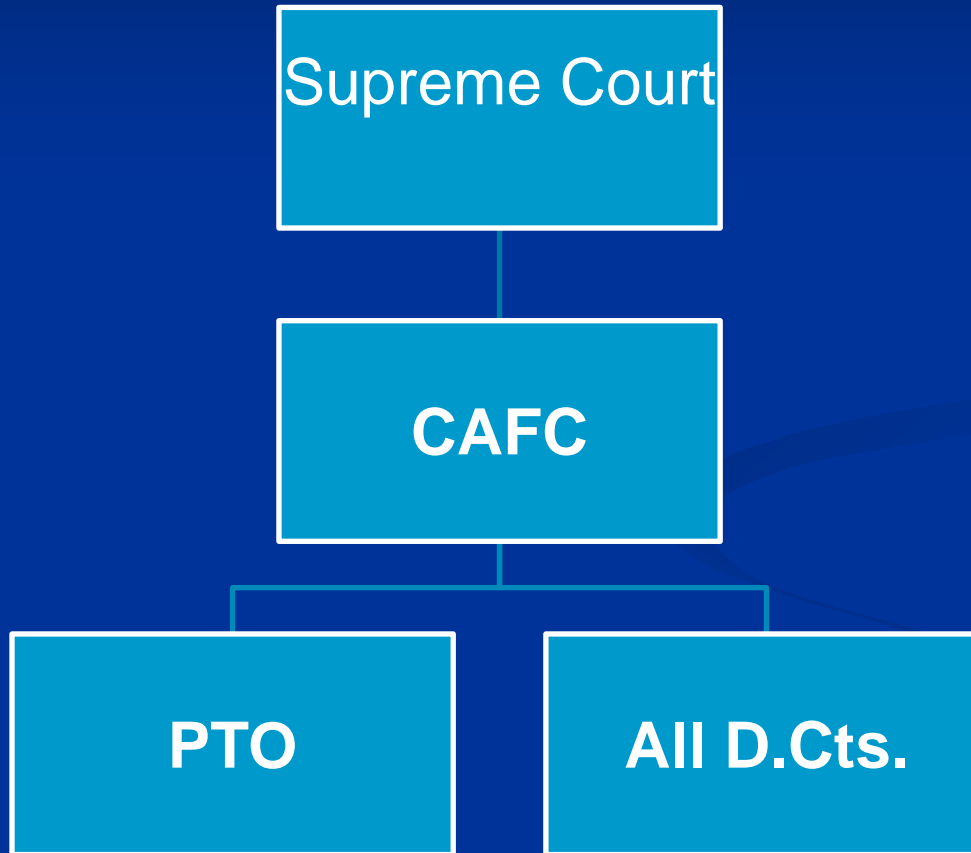
- The best solution is almost never complete centralization or complete decentralization.
- A historical example: Lenin promised to organize all of Russia into “one big factory.”
- Ronald Coase’s question: Why doesn’t a firm expand until it is the size of a country?
  - Answer (for which Coase won a Nobel Prize): There are costs to centralizing authority. A firm grows until the costs of centralized management equal the costs of decentralized (or market) organization. “The Nature of the Firm.”

# U.S. Experience with Judicial Centralization: Patent Cases Before 1982 Were Distributed Across 13 Intermediate Appellate Courts

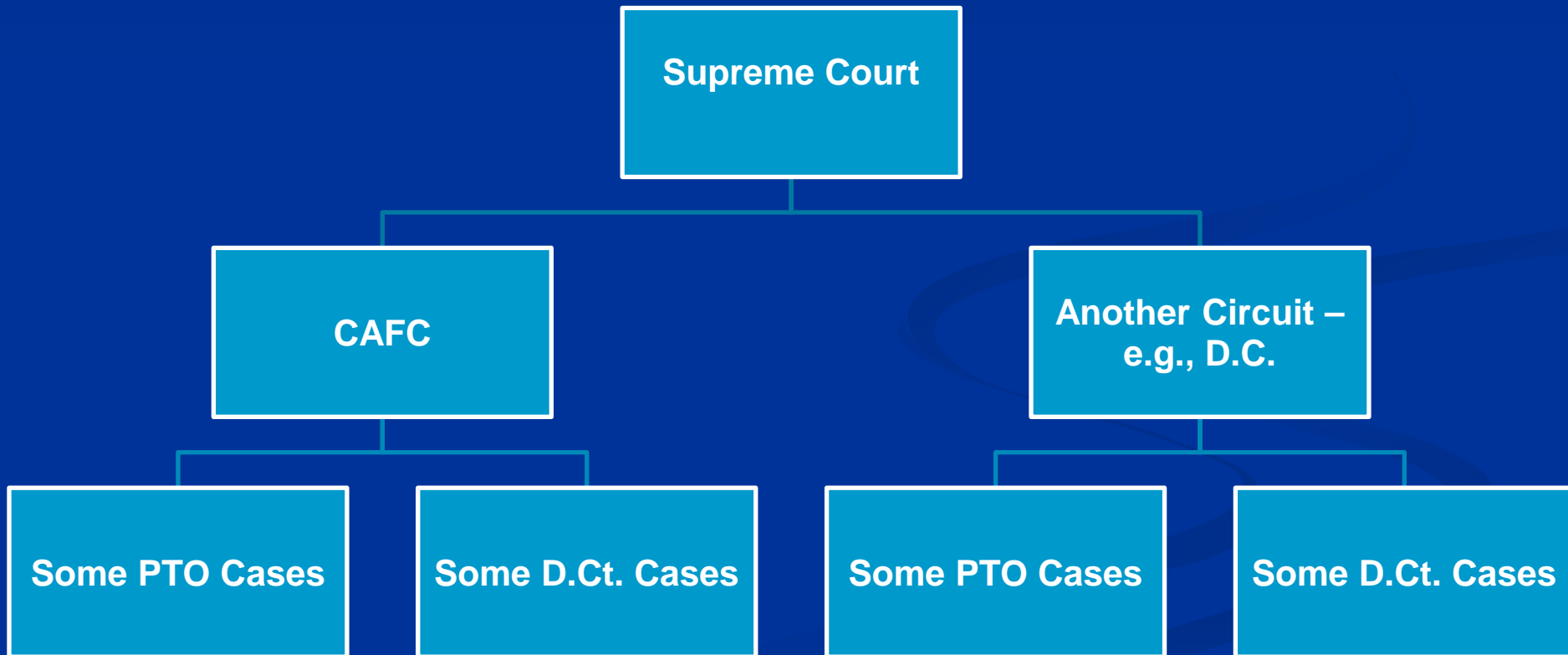




# Jurisdiction of Patent Cases After 1982: One Intermediate Appellate Court



# Nard & Duffy Proposed Patent Jurisdiction: More Than One Intermediate Appellate Court



# Optimal Decentralization

- The choice of complete centralization – which is the current structure – is not likely to be optimal.
- In the past, we consider the Federal Circuit to be a centralized authority because it has no peer.
  - The institution has superiors (Congress and the Supreme Court) and inferiors (the district courts and, to some extent, the Patent & Trademark Office), but nothing at the same level.
- Some decentralization may improve (i) judicial reasoning in patent cases, (ii) the quality of attorney arguments, and (iii) the ability of the Supreme Court to supervise the development of law in the area.

# Checks the Federal Circuit

- Even in the United States, significant checks on the Federal Circuit have developed.
- Most interestingly, the Executive Branch of Government has emerged as a major locus of power by filing amicus briefs both at the Federal Circuit itself and at the Supreme Court.
- Other institutions—such as the U.S. Federal Trade Commission—have also emerged as a check on the Federal Circuit.

# What Does All This Mean for the UPC?

- There's one good reason to support the creation of the Unified Patent Court –
- It's not a Unified Patent Court.
- There are other institutions in Europe to check the UPC.
- More importantly, the UPC could supply a needed peer check on the Federal Circuit ... and vice-versa.