

# Optimal Centralization in Patent Institutions

John F. Duffy

Professor of Law

George Washington University Law School

# Forthcoming Paper

- Craig Allen Nard and John F. Duffy, *Rethinking Patent Law's Uniformity Principle*, 101 Nw. U. L. Rev. \_\_\_ (forthcoming June, 2007).
- Basic thesis: While centralization and uniformity have value, decentralization and disuniformity have benefits too. The correct approach to the institutional problem involves choosing the optimal degree of centralization. Polar outcomes – complete centralization or atomistic fragmentation – are rarely the optimal.

# Centralization Generally

- What is the optimal degree of centralization and concentration of power?
- Governmental institutions (e.g., Should government powers be separated into distinct institutions such as in the United States or concentrated as in Parliamentary systems?);
- International law (e.g., To what extent should Europe integrate its markets across the continent?);
- Antitrust and competition analysis (e.g., Should a particular industrial merger be permitted?);
- Theory of business organizations (e.g., Should economic transactions be integrated into a firm or be subject to the forces of a decentralized market?);
- Theory and policy governing research and development (e.g., Should R&D be coordinated or uncoordinated?).

# Centralization Generally

- Many examples of positive centralizations of power (e.g., the integration of the United States into a common market; the ongoing integration of the European market).
- Many examples where centralization has not worked well (e.g., the centralization of power in autocratic leaders; attempts to cartelize certain markets; mergers that create unwieldy conglomerates such as AOL-TimeWarner, DaimlerChrysler)

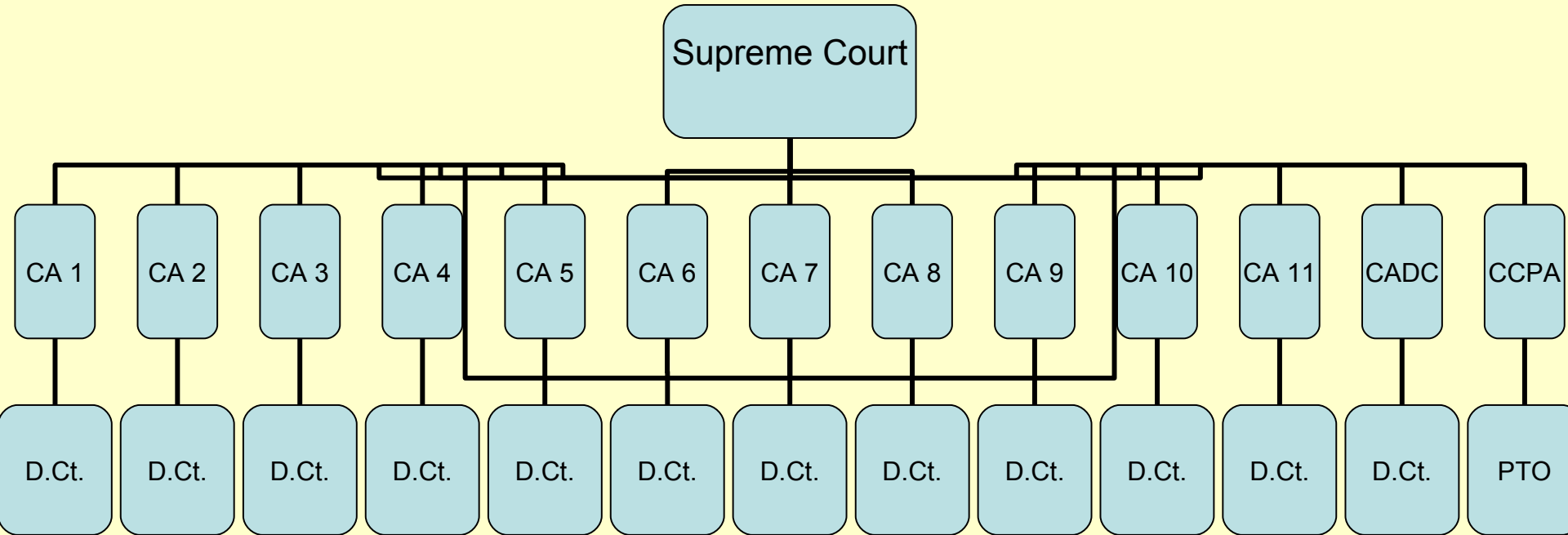
# Benefits of Decentralization

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

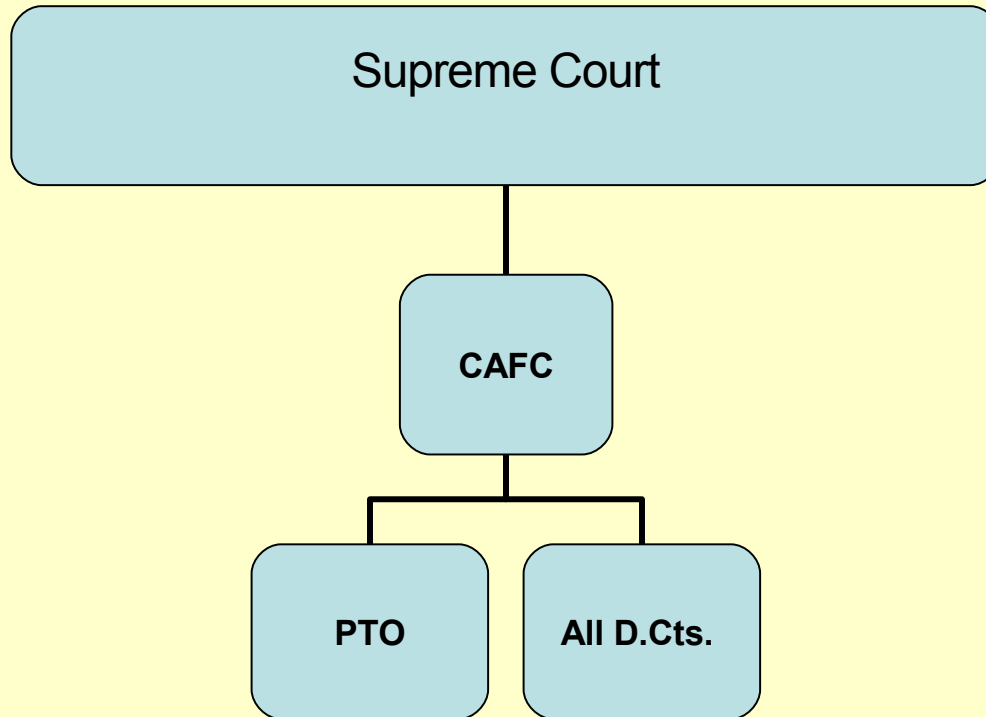
# Optimal Decentralization

- 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.

# Jurisdiction of Patent Cases Before 1982: 13 Intermediate Appellate Courts



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





# Centralization in U.S. Judicial Structure

- 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.
- The choice of complete centralization – which is the current structure – is not likely to be optimal.

# Harms of Centralization: Obviousness Example

- U.S. Supreme Court (1976) – Obviousness doctrine includes a “test of validity of combination patents” which generally precludes patent protection where a claimed invention “only unites old elements with no change in their respective functions.”
- Federal Circuit (1983 & 1984): “It but obfuscates the law to posit a non-statutory, judge-created classification labeled ‘combination patents.’”  
“Reference to ‘combination’ patents is, moreover, meaningless.”

## Harms of Centralization: Obviousness Example

- Federal Circuit (1983-2007) required proof of a “teaching, suggestion or motivation” in order to establish that it was obvious to combine prior art references. The court stressed that there must be “rigorous application” of this test.

# Harms of Centralization: Obviousness Example

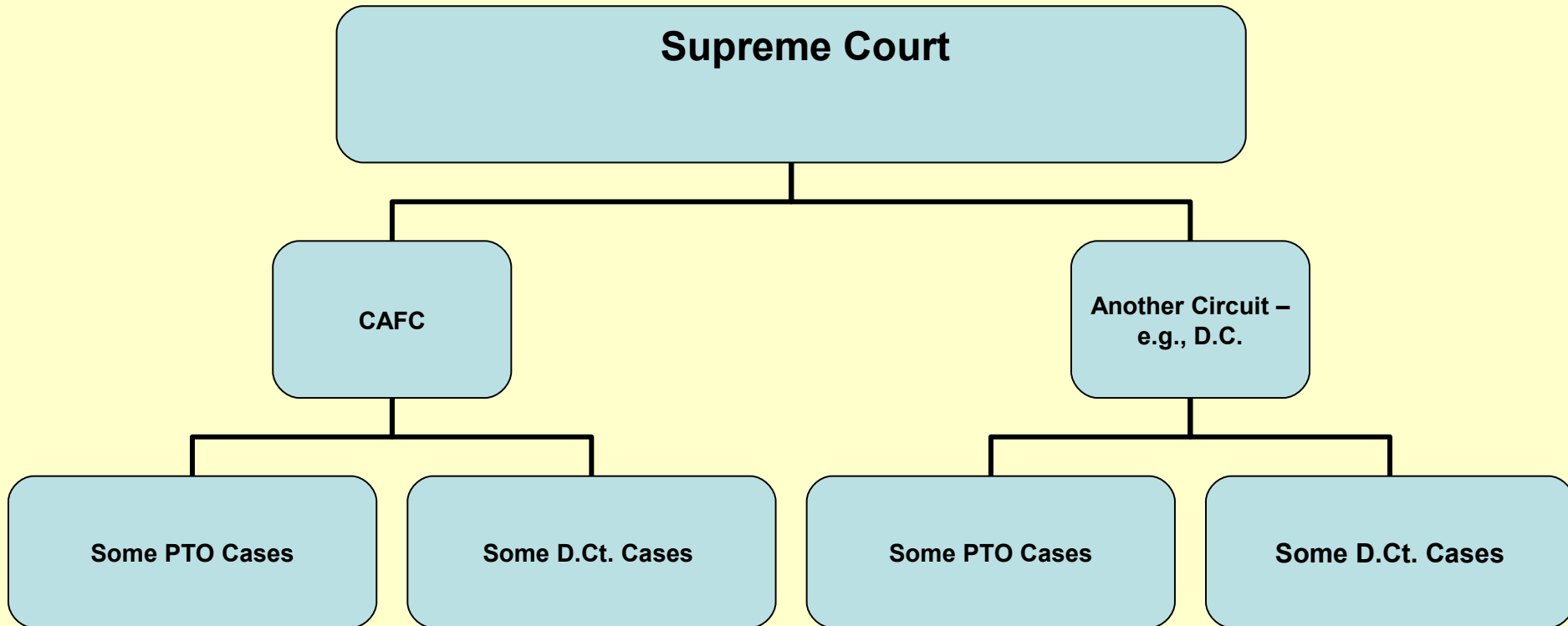
IN RE DEMBICZAK, 175 F.3d 994 (Fed. Cir. 1999)



# Harms of Centralization: Obviousness Example

- Supreme Court argument:
  - Justice Scalia – “This is gobbledeygook. It really is, it's irrational.”
  - Chief Justice – “it's worse than meaningless.”
- Supreme Court opinion: “The obviousness analysis cannot be confined by a formalistic conception of the words teaching, suggestion, and motivation.”

# Proposed Patent Jurisdiction: More Than One Intermediate Appellate Court



## Lessons for Europe

- There may be a legitimate need for increased centralization and uniformity in Europe. The current system may be too fragmented, as was the U.S. court system in 1982.
- In addressing that need, policymakers should resist the simple instinct to have complete centralization with a single specialized court or administrative body.