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ABOLISHING EXCLUSIVE JURISDICTION IN THE FEDERAL CIRCUIT: A RESPONSE TO JUDGE WOOD

*Rochelle C. Dreyfuss**

Got along without ya before I met you
*[Can I] get along without ya now?*¹

Chief Judge Diane Wood's discussion of appellate authority over patent law brings a welcome new voice to the debate over the Federal Circuit's jurisprudence.² Her article adds considerable insight into the process of appellate court decision making and provides an insider's account of the value of percolation in "sharpening" judicial writing, "testing" positions, and occasionally persuading a judge that "someone else's perspective is preferable."³ In a follow-up interview, she elaborated on what she sees as a deliberative deficit at the Federal Circuit:

I've been struck by how different [the Federal Circuit judges'] process is from the other courts In the circuits, we pay attention to opinions of other circuits and if we create conflict, we do it with our eyes open. We get a real exchange of ideas in a way the Federal Circuit doesn't.⁴

Judge Wood's recommendation for changing the mechanism for adjudicating patent appeals is provocative. To enrich the Federal Circuit's interchange with other federal appellate courts, she would bring the regional circuits back into the game. That is, she would give appellants in patent cases a choice between appealing to the Federal Circuit and appealing to the regional court overseeing the district where the trial was held; in cases where both sides

* Copyright © 2014 Rochelle C. Dreyfuss. I am grateful to the New York University students in my 2013 Patent Law course who opted to answer an exam question on the wisdom of Judge Wood's proposal. Their views informed this discussion.

¹ MILTON KELLE, *GONNA GET ALONG WITHOUT YA NOW* (1952).

² Hon. Diane P. Wood, *Keynote Address: Is It Time to Abolish the Federal Circuit's Exclusive Jurisdiction in Patent Cases?*, 13 CHI.-KENT J. INTELL. PROP. 1 (2014).

³ *Id.* at 4–6.

⁴ Lisa Shuchman, *Judge Wood Proposes Changing Jurisdiction for Patent Cases*, CORPORATE COUNSEL (Dec. 2, 2013), available at <http://www.corpcounsel.com/id=1202621813096/Judge-Wood-Proposes-Changing-Jurisdiction-for-Patent-Cases?slreturn=20140231134450>.

appeal, or when the same patent is put into issue in multiple courts, the Judicial Panel on Multidistrict Litigation (JPML) would choose the route of the appeal.⁵

Admittedly, I see Judge Wood's contribution as especially welcome because her views, if not her eclectic taste in music,⁶ are so close to my own. In a speech last March at Southern Methodist University Law School, I noted growing unrest with Federal Circuit law and cited as examples the Supreme Court's accelerating interest in reviewing—and reversing—the court's decisions,⁷ as well as critiques by organizations such as the National Academies, the Federal Trade Commission, and the Secretary of Health and Human Services' Committee on Genetics, Health & Society.⁸ Like Judge Wood, I traced this dissatisfaction to the long-term effects of abolishing opportunities for percolation to the lack of robust exchange among appellate courts on novel questions of patent law and to the system's inability to exploit circuit boundaries to experiment with solutions to the problems posed by disruptive innovations and novel business models.

In my talk and in a subsequent article, I, like Judge Wood, proposed institutional changes designed to expand the epistemic community.⁹ However, my suggestions were very different from hers. First, I argued that recent developments in the Patent and Trademark Office (PTO), including new adjudicatory responsibilities under the America Invents Act (AIA),¹⁰ new positions for economists and policy advisors, and satellite offices located in important industrial centers, suggest that one way to enlarge the conversation

⁵ Wood, *supra* note 2, at 9–10 (citing 28 U.S.C. § 2112(a) (2006)).

⁶ See Wood, *supra* note 2, at 4, 6, 8 (citing the Dixie Chicks, Robin Thicke, and the British New Wave Band).

⁷ See generally Rochelle C. Dreyfuss, *Percolation, Uniformity, and Coherent Adjudication: The Federal Circuit Experience*, 66 SMUL REV. 505 (2013).

⁸ *Office of Biological Studies*, NATIONAL INSTITUTE OF HEALTH, http://oba.od.nih.gov/oba/sacghs/reports/SACGHS_patents_report_2010.pdf (last visited Mar. 14, 2014); U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (2007), available at <http://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.pdf>; COMM. ON INTELLECTUAL PROP. RIGHTS IN GENOMIC AND PROTEIN RESEARCH AND INNOVATION, NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., REAPING THE BENEFITS OF GENOMIC AND PROTEOMIC RESEARCH: INTELLECTUAL PROPERTY RIGHTS, INNOVATION, AND PUBLIC HEALTH 133–44 (2006); COMM. ON INTELLECTUAL PROP. RIGHTS IN THE KNOWLEDGE-BASED ECONOMY, NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., A PATENT SYSTEM FOR THE 21ST CENTURY 9 (Stephen A. Merrill et al. eds., 2004); FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY 1–36 (Oct. 2003).

⁹ See generally Dreyfuss, *supra* note 7.

¹⁰ Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2012) (codified as amended in scattered sections of 35 U.S.C.).

would be to accord PTO decision-making greater deference. An obligation to defer may raise questions about agency capture. However, it would have the considerable advantage of requiring the Federal Circuit to grapple seriously with the views of other experts—to wit, the technologists within the PTO. In addition, greater deference would give the satellite offices space to experiment with new legal approaches to the fields practiced by neighboring industries. If these approaches were to remain in place long enough to determine how well they work, the system would have an empirical basis on which to decide whether they should be more widely adopted.¹¹

Second, I noted that the new Patent Cases Pilot Program will put district court judges in a position to enhance the impact of the PTO's new role.¹² As with the satellite offices, the judges participating in the program will likely develop special expertise in local technologies and gain unique perspectives on the problems these industries encounter. These trial courts could provide the Federal Circuit with an opportunity to debate not only the patentability questions with which the PTO deals (nonobviousness, patentable subject matter, disclosure, etc.), but also problems that arise at the enforcement stage (claim construction, contributory liability, remedies, and the like). Additionally, they will be in a position to watch these industries mature, to learn whether, over time, patenting changes in significance, and to decide whether the law should be modified to reflect industrial evolution. Deference to these select district courts would also introduce a geographic variable and thus allow experimentation with particular rules within each Pilot Program's territory.¹³

Finally, I looked to developments in foreign countries. Somewhat ironically, given the domestic unease with the Federal Circuit, other nations have jumped on the specialization bandwagon. Over ninety countries have adopted some form of specialized tribunal for patent (or intellectual property) cases¹⁴ and the European Union is currently in the process of establishing a Unified Patent Court, which would hear cases regarding the European Union's proposed Unitary Patent.¹⁵ Admittedly, the laws of other countries differ from U.S. law, thus reducing opportunities for dialogue. However, obligations under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) create many commonalities and common responsibilities. In addition, the AIA's switch from a first-to-invent to a first-to-file priority rule brings the US patent

¹¹ Dreyfuss, *supra* note 7, at 532–34.

¹² Patent Pilot Program in Certain District Courts, Pub. L. No. 111-349, § 1, 124 Stat. 3674, 3674–76 (2011).

¹³ Dreyfuss, *supra* note 7, at 534–36.

¹⁴ ROHAZAR WATI ZUALLCOBLEY ET AL., INT'L INTELLECTUAL PROP. INST., STUDY ON SPECIALIZED INTELLECTUAL PROPERTY COURTS 2 (2012), *available at* <http://iipi.org/wp-content/uploads/2012/05/Study-on-Specialized-IPR-Courts.pdf>.

¹⁵ *Unified Patent Court*, EUROPEAN PATENT OFFICE (Mar. 6, 2013), <http://www.epo.org/law-practice/unitary/patent-court.html>.

regime into greater conformity with foreign law.¹⁶ Significantly, it also raises questions that other countries have already answered. As a result, foreign courts offer exciting opportunities for interchange and an experiential basis for choosing among approaches to open questions.¹⁷

These proposals differ from Judge Wood's in more than simply the institution chosen to generate dialogue. Judge Wood's idea, to revive the patent jurisdiction of the regional circuits, reintroduces the exact sort of percolation envisioned by the Evarts Act¹⁸—genuine interchange among courts of equal stature. My proposals do not. Formal deference requirements, whether to the PTO or to pilot program district courts, do not create conversations among judges of equivalent authority; thus, they are unlikely to spark the same level of sharpening, testing, and persuading. Moreover, there are those who would question whether international exchanges could be at all fruitful.¹⁹ Nonetheless, my proposals do something Judge Wood's does not: they preserve the exclusivity of the Federal Circuit. The question thus arises: now that the nation has had thirty years' experience with exclusivity in patent adjudication, can it get along without it now?

This Essay is in two parts. Part I examines the policies underlying the move to exclusive appellate jurisdiction in the Federal Circuit and explains why none of the proponents of the court thought the absence of percolation would be a problem. Part II then considers Judge Wood's proposal and shows how profoundly it would undermine the objectives of those who established the court. To be sure, in the thirty years of the court's existence, much has changed; accordingly, there is now reason to question the need for exclusivity. Nonetheless, I conclude that this is not the time to bring the other circuits back into patent adjudication. In the last three years, the Federal Circuit has undergone rapid turnover with more expected in the near future.²⁰ A bolus dose of new judges is likely to affect deliberations in the court, especially as several of these jurists have backgrounds (and priors) significantly different from those who served in the past. In my view, it is worth waiting to see if this third generation of judges will be the one to integrate into the judicial mainstream or

¹⁶ See generally Rochelle Cooper Dreyfuss, *The Leahy-Smith America Invents Act: A New Paradigm for International Harmonisation?*, 24 SINGAPORE ACAD. L.J. 669 (2013).

¹⁷ Dreyfuss, *supra* note 7, at 536–39.

¹⁸ Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.

¹⁹ Indeed, to some, citing foreign law should be an impeachable offense. See, e.g., Linda Greenhouse, *Rehnquist Resumes His Call for Judicial Independence*, N.Y. TIMES (Jan. 1, 2005), http://www.nytimes.com/2005/01/01/politics/01scotus.html?_r=1&ei=5094&en=75b1057f5338b27c&hp=&ex=1104642000&adxnml=1&partner=homepage&adxnmlx=1104588958-mdVdpUq4V7dUVBvFBzqbpg; David J. Seipp, *Our Law, Their Law, History, and the Citation of Foreign Law*, 86 B.U.L. REV. 1417, 1420 (2006).

²⁰ See generally *Judges*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, <http://www.cafc.uscourts.gov/judges> (last visited Apr. 11, 2014).

become receptive to other mechanisms for improving the quality of patent law, either through my proposals or those of other commentators.²¹

I. THE DECISION TO ESTABLISH A COURT WITH EXCLUSIVE AUTHORITY OVER PATENT LAW

The Federal Circuit's history is well rehearsed elsewhere.²² For these purposes, it is sufficient to note that of the two possible objectives for establishing a specialized court—improving the efficiency of adjudication or refining the quality of decisions—the former goal was clearly dominant in Congress's thinking.²³ While some consideration was given to quality, the overall aim was docket control. Indeed, the proceduralists of the day thought little of the judiciary's role in crafting law in statutory cases. Predictable law and uniform national application were, of course, important because achieving these objectives might well reduce the number of litigated cases. But accuracy—law faithful to legislative intent, responsive to the needs of the patent industry, and

²¹ See, e.g., Arti K. Rai, *Patent Validity Across the Executive Branch: Ex Ante Foundations for Policy Development*, 61 DUKE L.J. 1237, 1240–41 (2012) (suggesting greater dialogue among federal agencies); Craig Allen Nard & John F. Duffy, *Rethinking Patent Law's Uniformity Principle*, 101 NW. U. L. REV. 1619, 1625 (2007) (suggesting that one regional circuit be designated as an alternative to the Federal Circuit to hear appeals from trial courts and that the D.C. Circuit share responsibility with the Federal Circuit for appeals from the PTO); John M. Golden, *The Supreme Court as "Prime Percolator": A Prescription for Appellate Review of Questions in Patent Law*, 56 U.C.L.A. L. REV. 657, 720 (2009) (suggesting that the Supreme Court step on only when it perceives the Federal Circuit rule as "ossified."); Cf. Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 GEO. L.J. 1437, 1445 (2012) (proposing to revamp the jurisdiction of the Federal Circuit to include other commercial cases or consolidating it into the D.C. Circuit).

²² See, e.g., Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1 (1989) [hereinafter *Specialized Courts*]; see also Rochelle Cooper Dreyfuss, *What the Federal Circuit Can Learn From the Supreme Court—and Vice Versa*, 59 AM. U. L. REV. 787 (2010); Rochelle Cooper Dreyfuss, *The Federal Circuit as an Institution: What Ought We to Expect?*, 43 LOY. L.A. L. REV. 827 (2010); Rochelle Cooper Dreyfuss, *In Search of Institutional Identity: The Federal Circuit Comes of Age*, 23 BERKELEY TECH. L.J. 787 (2008) [hereinafter *Institutional Identity*]; Rochelle Cooper Dreyfuss, *The Federal Circuit: A Continuing Experiment in Specialization*, 54 CASE W. RES. L. REV. 760 (2004) [hereinafter *Continuing Experiment*]; Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 BYU L. REV. 377, 412–14 (1990).

²³ I use the term "specialized" with considerable imprecision. The Federal Circuit has jurisdiction over a wide range of subject matter. See 28 U.S.C. § 1295(a) (2012). However, it is specialized in the sense that it hears almost all the appeals of patent cases in the nation. Moreover, these cases constitutes close to half the court's docket (measured by raw numbers). See *Appeals Filed, by Category FY 2013*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, available at <http://www.cafc.uscourts.gov/images/stories/Statistics/fy%2013%20filings%20by%20category.pdf> (last visited Mar. 14, 2014).

considerate of the access interests of the public and future innovators²⁴—was viewed as best left to Congress.

A. Efficiency

To be sure, during the run-up to the establishment of the Federal Circuit, there were many reasons to worry about efficient adjudication. The idea for the court grew out of two studies, the Freund Commission Report of 1972, which considered the then-burgeoning docket of the Supreme Court, and the Hurska Commission Report of 1974, which dealt with workload problem at the appellate level.²⁵ The commission reports argued that these problems could not be solved by adding new judges or circuit courts. New judges would create disuniformity within each circuit and thus generate additional appellate work; new circuits would lead to more circuit splits, thereby increasing pressure at the Supreme Court. In contrast, channeling a class of cases out of the regional circuits and into a separate tribunal would both relieve the workload of the other circuits and generate nationwide rules that would reduce the Supreme Court's need to intervene.

Patent law appeared the ideal place to start. Because the law was esoteric and the facts often extremely complex, lay judges complained about the disproportionate time spent on the cases. As Learned Hand once put it at the end of a case about the patentability of purified adrenaline: "I cannot stop without calling attention to the extraordinary condition of the law which makes it possible for a man without any knowledge of even the rudiments of chemistry to pass upon such questions as these. The inordinate expense of time is the least of the resulting evils"²⁶

The creative industries were unhappy as well. Because the law encourages innovation with the promise that costs will be recaptured ex post through national exploitation of successful inventions, industry regarded uniformity and predictability as critical. Yet there were deep divisions among the courts adjudicating patent cases. The Court of Customs and Patent Appeals (CCPA), which reviewed the PTO, along with some regional circuits, saw patents as essential to progress. Thus, they were inclined to issue, validate, and

²⁴ For more on the distinction between precision and accuracy in this context, see Dreyfuss, *Specialized Courts*, *supra* note 22, at 5.

²⁵ See REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972), reprinted in 57 F.R.D. 573, 573–628 (1973) (named for its Chairman, Professor Paul A. Freund); COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE (1973), reprinted in 62 F.R.D. 223, 228 (1974) (named for its Chair, Senator Roman Hruska).

²⁶ See, e.g., *Parke-Davis & Co. v. H.K. Mulford Co.*, 189 F. 95, 115 (C.C.S.D. 1911) (Hand, J.).

enforce these rights.²⁷ Other circuits followed the rather more jaundiced view Justice Douglas had promoted at the Supreme Court.²⁸ Thus, they were much more likely to invalidate the patents presented to them.²⁹

Because Supreme Court intervention was sporadic, these differences could persist for long periods of time. *Graham v. John Deere Co.* furnishes an example.³⁰ Congress had codified the judge-made requirement of nonobviousness in 1952 in an apparent attempt to reduce the high standard for inventiveness imposed by earlier Supreme Court cases.³¹ But because Justice Douglas had considered that high standard to be constitutionally-based,³² the appellate courts were confused about how to interpret the new statute. Nonetheless, it took fourteen years for the Supreme Court to step in. Even then it waffled. On the one hand, the *Graham* Court stated that “the general level of innovation necessary to sustain patentability remains the same [post codification].”³³ On the other hand, it announced a test that could be satisfied by considerably less inventive advances. The result was chaos: repetitive litigation, forum shopping, and (arguably) a flight to trade secrecy.³⁴

²⁷ See, e.g., *Graham v. John Deere Co. of Kan. City.*, 383 U.S. 1, 18 (1966) (“We have observed a notorious difference between the standards applied by the Patent Office and by the courts. While many reasons can be adduced to explain the discrepancy, one may well be the free rein often exercised by Examiners in their use of the concept of ‘invention.’”).

²⁸ See, e.g., *Gottschalk v. Benson*, 409 U.S. 63 (1972) and *Funk Bros. Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127 (1948) (restricting patentable subject matter); *Anderson’s-Black Rock, Inc. v. Pavement Salvage Co.*, 396 U.S. 57 (1969) (raising the standard of nonobviousness); *Wilbur-Ellis Co. v. Kuther*, 377 U.S. 422 (1964) (limiting the reach of infringement); *Schultz v. Moore*, 419 U.S. 930, 930 (1974) (Douglas, J., dissenting from denial of certiorari on the ground that patents should not be presumed valid); *Great Atl. & Pac. Tea Co. v. Supermarket Equip. Corp.*, 340 U.S. 147, 154–55 (1950) (Douglas, J., concurring in a judgment of obviousness on the ground that “[t]he invention, to justify a patent, had to serve the ends of science—to push back the frontiers of chemistry, physics, and the like; to make a distinctive contribution to scientific knowledge.”); *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605, 612 (1950) (Black, J., dissenting from a judgment applying the doctrine of equivalents to expand patent scope).

²⁹ Dreyfuss, *Specialized Courts*, *supra* note 22, at 6–7. For an example of an attempt to switch between fora with radically different views on patents, see generally *Hoffman v. Blaski*, 363 U.S. 335 (1960).

³⁰ 383 U.S. 1 (1966).

³¹ See 35 U.S.C. § 103 (1952). Prior to that time, the nonobviousness doctrine derived from *Hotchkiss v. Greenwood*, 52 U.S. 248 (1850).

³² See *Great Atl. & Pac. Tea Co.*, 340 U.S. at 154 (Douglas, J., concurring), *cited in Graham*, 383 U.S. at 5).

³³ *Graham*, 383 U.S. at 4–5.

³⁴ See, e.g., *Industrial Innovation and Patent and Copyright Law Amendments: Hearings on H.R. 6033, H.R. 6934, H.R. 3806, and H.R. 2414 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the H. Comm. on the Judiciary*, 96th Cong. 574–75 (1980).

In this environment, it is clear why Congress would be attracted to the idea of a specialized patent tribunal. As Howard Markey, destined to be the first Chief Judge as the Federal Circuit, put it during the hearings on creating the court: “[I]f I am doing brain surgery every day, day in and day out, chances are very good that I will do your brain surgery much quicker, or a number of them, than someone who does brain surgery once every couple of years.”³⁵ In later writing, he expanded on the advantages of a specialized court: it would produce a “uniform, reliable, predictable, nationally-applicable body of law.”³⁶

And, indeed, it has. As the patent bar’s vociferous reaction to Judge Wood’s proposal suggests, practitioners are largely delighted with the court.³⁷ Arguably, its success accounts for the significant increase in patenting that has occurred in the years since its founding,³⁸ as well as for the rush of other countries to create their own specialized intellectual property courts. The Federal Circuit has, in the words of Randall Rader, Judge Markey’s successor as chief judge, “accomplished a great mission in bringing uniformity, predictability, and enforceability to [patent] law.”³⁹

³⁵ *Court of Appeals for the Federal Circuit: Hearing on H.R. 2405 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 42–43 (1981) [hereinafter *Federal Circuit Hearings*] (statement of the Honorable Howard T. Markey, Chief Judge, Court of Customs and Patent Appeals); see also Charles W. Adams, *The Court of Appeals for the Federal Circuit: More than a National Patent Court*, 49 MO. L. REV. 43, 61–62 (1984) (stating that creation of CAFC promoted efficiency, flexibility, and uniformity).

³⁶ Hon. Howard T. Markey, *The Court of Appeals for the Federal Circuit: Challenge and Opportunity*, 34 AM. U. L. REV. 595, 595 (1985).

³⁷ See, e.g., Ed Reines, *In Defense of the Federal Circuit: A Response to Judge Wood*, PATENT DOCS (Oct. 7, 2013), <http://www.patentdocs.org/2013/10/in-defense-of-the-federal-circuit-a-response-to-judge-wood.html>, and comments; Beth Z. Shaw, *A Dissent to Chief Judge Wood’s Call to Remove Exclusive Patent Appeal Jurisdiction from Federal Circuit*, WASHINGTON LEGAL FOUNDATION (Oct. 18, 2013), <http://wfllegalpulse.com/2013/10/18/a-dissent-to-chief-judge-woods-call-to-remove-exclusive-patent-appeal-jurisdiction-from-federal-circuit/>; Comments following Debra Cassens Weiss, *What the Dixie Chicks and Robin Thicke Know About Fixing the Patent System*, ABA JOURNAL (Oct. 8, 2013, 7:43 AM), http://www.abajournal.com/news/article/what_the_dixie_chicks_and_robin_thicke_know_about_fixing_the_patent_system/; Tony Dutra, *Donald Dummer Rejects Call for Ending Exclusive Federal Circuit Patent Jurisdiction*, 87 PAT. TRADEMARK & COPYRIGHT J. 220 (Nov. 26, 2013).

³⁸ Dreyfuss, *supra* note 7, at 507.

³⁹ Randall R. Rader, *The United States Court of Appeals for the Federal Circuit: The Promise and Perils of a Court of Limited Jurisdiction*, 5 MARQ. INTELL. PROP. L. REV. 1, 3 (2001).

B. Quality

Notice, however, what the Federal Circuit jurists did not say. Chief Judge Markey would do your brain surgery *quicker*—not *better*. Chief Judge Rader claims uniformity, predictability, and enforceability—not responsiveness to congressional purpose or public policy. Indeed, the history of the court is replete with judicial denial that law responsive to social interests is its objective. As Judge Alan Lourie has said, “not once have we had a discussion as to what direction the law should take.”⁴⁰ In keeping with Judge Wood’s comment about differences in the Federal Circuit’s processes,⁴¹ the tribunal is also largely dismissive of academic scholarship⁴² and even Supreme Court guidance.⁴³ The result is evident in the court’s decisions. They are formalistic and rigid, with a heavy emphasis on bright line rules.⁴⁴

Once again, nonobviousness is a good example. To bring uniformity and predictability to lower court decision-making, the Federal Circuit’s early decisions insisted that when an invention involved contributions based on multiple sources, the literature must include a “teaching, suggestion, or motivation” to combine the sources in order for the invention to be considered obvious in light of the references. The inflexibility of the approach led to a long series of cases like *In re Dembiczak*,⁴⁵ where the Federal Circuit found an orange leaf bag printed with the face of a jack o’lantern patentable because the prior art—ordinary leaf bags, a book describing how to stuff a sandwich bag and paint a jack o’lantern on it—did not include a suggestion to combine. These decisions certainly produced predictable results in that most patents were upheld against obviousness challenges. However, the Supreme Court, increasingly worried

⁴⁰ Alan D. Lourie, *A View from the Court*, 75 PAT. TRADEMARK & COPYRIGHT J. (BNA) 22 (Nov. 2, 2007); see, e.g., Dreyfuss, *Continuing Experiment*, *supra* note 22; see also Paul Michel, *Judicial Constellations: Guiding Principles as Navigational Aids*, 54 CASE W. RES. L. REV. 757, 762–65 (2004); *Judge Lourie Provides Tips for Patent Appeals to Federal Circuit*, 67 PAT. TRADEMARK & COPYRIGHT J. (BNA) 501 (Apr. 2, 2004) (stating that that lawyers should “[a]void emphasis on policy and legislative history ‘Such arguments telegraph to us that you’ll probably lose on the law.’”).

⁴¹ See Shuchman, *supra* note 4.

⁴² Craig Allen Nard, *Toward a Cautious Approach to Obeisance: The Role of Scholarship in Federal Circuit Patent Law Jurisprudence*, 39 HOUS. L. REV. 667, 678–83 (2002) (finding that the regional circuits cite scholarship roughly four times as often as the Federal Circuit).

⁴³ See, e.g., Gene Quinn, *Chief Judge Rader Says KSR Didn’t Change Anything, I Disagree*, IP WATCHDOG (Oct. 6, 2011), <http://www.ipwatchdog.com/2011/10/06/chief-judge-rader-says-ksr-didnt-change-anything-i-disagree/id=19603/>.

⁴⁴ See, e.g., *Bilski v. Kappos*, 130 S. Ct. 3218, 3227–28 (2010); John R. Thomas, *Formalism at the Federal Circuit*, 52 AM. U. L. REV. 771 (2003).

⁴⁵ See 175 F.3d 994 (Fed. Cir. 1999).

about patent thickets,⁴⁶ eventually stepped in. In *KSR v. Teleflex*,⁴⁷ the Court began by “rejecting the rigid approach of the Court of Appeals,” and then went on to criticize the court’s rigidity five more times.⁴⁸ For its part, however, the Federal Circuit has barely taken this reversal on board. Indeed, Chief Judge Rader believes the case changed nothing.⁴⁹

Thirty years into the Federal Circuit’s existence it may seem curious that its creators did not worry more about the quality—accuracy—of its decision-making. In fact, at the time of the court’s founding, there were concerns about certain aspects of quality, including capture by the patent industries, tunnel vision, and the willingness of smart jurists to serve.⁵⁰ Congress responded by broadening the court’s jurisdiction to encompass other areas of law and by giving it case (rather than issue) jurisdiction.⁵¹

Interestingly, however, percolation was not considered an important component of the judicial process. To the contrary, in the statutory context, the leading proceduralists of the day saw percolation as a negative:

As applied to judicial interpretations of federal statutes, “percolation” is a euphemism for incoherence. The argument has the earmark of being an effort to put a good face on a bad situation. Whatever modest value there may be in these regional discrepancies as to federal statutory provisions, the benefit is outweighed by the cost to the system and to American citizens. . . . The percolation that produces intercircuit inconsistencies and

⁴⁶ Cf. *Lab. Corp. of Am. Holdings v. Metabolite Labs., Inc.*, 548 U.S. 124, 126 (2006) (Breyer, J., dissenting from dismissal of certiorari in a case about patentable subject matter) (“sometimes too much patent protection can impede rather than ‘promote the Progress of Science and useful Arts’”).

⁴⁷ 550 U.S. 398 (2007).

⁴⁸ *Id.* at 415, 419 (twice), 421, 422, 428.

⁴⁹ See, e.g., Quinn, *supra* note 43. For an example, see *C.W. Zumbiel Co., Inc. v. Kappos*, 702 F.3d 1371, 1386 (Fed. Cir. 2012) (Prost, J., dissenting). This is not, however, to say that Judge Rader is correct in his assessment of outcomes. See Jason Rantanen, *The Federal Circuit’s New Obviousness Jurisprudence: An Empirical Study*, 16 STAN. TECH. L. REV. 709 (2012) (showing differences between pre- and post-*KSR* decisions). However there are other examples of the court’s intransigence. See, for example, *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722 (2002), where the Supreme Court granted certiorari because it did not think the Federal Circuit had followed its mandate in *Warner-Jenkinson Co. v. Hilton Davis Chem. Co.*, 520 U.S. 17, 39 n.8 (1997) to implement the Court’s approach to the doctrine of equivalents. See also *Medtronic Inc. v. Mirowski Family Ventures*, 134 S. Ct. 843 (2014), which the Court took to prevent the Federal Circuit from eviscerating the decision in *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007), to facilitate challenges to patent licenses. *MedImmune* was heard for similar reasons: otherwise, the Federal Circuit would have eviscerated the decision in *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969).

⁵⁰ See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 335 (2003).

⁵¹ See Dreyfuss, *supra* note 7.

incoherence may provide intellectual stimulation for academicians, but in the world of human activity it works costly inequities.⁵²

To these thinkers, settling statutory questions was more important than getting them right.⁵³ Presumably, getting questions decided correctly was the province of the legislature. As long as the law was uniform and predictable, Congress could always correct mistakes by amending the legislation to clarify its import.

The Federal Circuit experience suggests, however, the proceduralists' assumption of legislative oversight is flawed. In part, the problem may be patent law. Although invention is by its very nature disruptive, patent policy may not have the political salience that draws immediate legislative attention to the problems of adapting old law to new technology and business practices. Furthermore, while there may have been a time when the patent industries were united enough to agree on legislation and move its passage, there are now deep divisions among various sectors.⁵⁴ Industries such as the pharmaceutical industry that use discrete patents to protect individual and easily reverse-engineered products, do not see the problems experienced by the electronics and information technology industries, where products often involve multiple patents, some with claims of unclear scope. Both are differently positioned from biotechnology, where many inventions are in Pasteur's Quadrant and have both upstream (research) use and downstream applications, which confound prescriptive approaches to infringement.

⁵² Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeal*, 56 U. CHI. L. REV. 603, 634 (1989); see also HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 161–62 (Columbia Univ. Press 1973), cited in Paul D. Carrington & Paulina Orchard, *The Federal Circuit: A Model for Reform?*, 78 GEO. WASH. L. REV. 575, 583 (2010) (noting that the lack of sub-Supreme Court capacity for “authoritative determination” of statutory issues was the most significant question facing the judicial system); Paul M. Bator, *What Is Wrong with the Supreme Court?*, 51 U. PITT. L. REV. 673, 690 (1990) (“percolation is not a purposeful project. It is just a way of postponing decision”); Erwin M. Griswold, *The Federal Courts Today and Tomorrow: A Summary and Survey*, 38 S.C. L. REV. 393, 409 (1987) (“the law’ has become a gossamer web with very little in it on which a lawyer or judge can firmly and safely rely”).

⁵³ Carrington & Orchard, *supra* note 52, at 583.

⁵⁴ Michael S. Mireles, Jr., *The United States Patent Reform Quagmire: A Balanced Proposal*, 8 MINN. J.L. SCI. & TECH. 709, 711 (2005); Jay P. Kesan & Thomas S. Ulen, *Intellectual Property Challenges in the Next Century*, 2001 U. ILL. L. REV. 57, 58 (2001) (attempts at patent reform can be compared with the description of industry cooperation over copyright reform); see Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857 (1987); see, e.g., WILLIAM KINGSTON, *BEYOND INTELLECTUAL PROPERTY: MATCHING INFORMATION PROTECTION TO INNOVATION* 87 (2010) (citing Judge Rich as explaining that “The [1952] Patent Act was written basically by patent lawyers A good 95% of the members [of Congress] never knew that the legislation was under consideration, or that it had passed, let alone what it contained”).

The problem, however, likely goes well beyond patent law. In the statutory context, it can be difficult to fix individual mistakes legislatively, for the fix can distort other provisions in the statute. Furthermore, it may be misconstrued by the courts. Consider, for example, business method patents. Patents on business techniques were almost unknown until the Federal Circuit decided *State Street Bank v. Signature Financial Group, Inc.*, which held that any advance that produces a useful, concrete, and tangible result is patentable.⁵⁵ The absence of a literature on business methods in the PTO (or, in fact, anywhere else) meant that many business techniques that had long been practiced suddenly became subject to patent rights. The resulting possibilities for infringement produced its own little havoc. As *Forbes* magazine put it in connection with Priceline's patent for matching travelers to hotel rooms:

Cool! Jay Walker has apparently patented the 'business method' known as a Dutch auction – a method by which the U.S. Treasury sells hundreds of billions of dollars' worth of securities each year.⁵⁶

The problem quickly came to Congress's attention. But rather than do the hard work of drawing up legislation to target the sorts of advances that should not be protectable, Congress fixed the problem with a band-aid. It grafted onto the statute a provision to exempt prior users of business methods from infringement liability.⁵⁷ The provision was not the subject of significant litigation. However, when the Supreme Court tried, in *Bilski v. Kappos*, to clean up the mess that business method patents produced, the provision stood in its way. Rather than see it as expressing legislative *skepticism* about the need for these patents, Justice Scalia interpreted it as congressional *approval* of business method patenting.⁵⁸ The fractured decision in *Bilski* later required the Supreme Court to hear another business method case to clarify when these advances are patentable.⁵⁹

Centralizing adjudication has two other problems. First, while a national rule may be better at drawing the legislature's attention to a problem, it deprives lawmakers of experience with alternative approaches. For example, had more

⁵⁵ 149 F.3d 1368, 1373 (Fed. Cir. 1998).

⁵⁶ *Readers Say*, FORBES (May 31, 1999), <http://www.forbes.com/forbes/1999/0531/6311018a.html>. (statement by Byron L. Winn).

⁵⁷ 35 U.S.C. § 273(b) (2006).

⁵⁸ See *Bilski v. Kappos*, 130 S. Ct. 3218, 3228 (2010) ("A conclusion that business methods are not patentable in any circumstances would render § 273 meaningless. This would violate the canon against interpreting any statutory provision in a manner that would render another provision superfluous."); see also *OddzOn Products, Inc. v. Just Toys, Inc.*, 122 F.3d 1396, 1401–02 (Fed. Cir. 1997) (interpreting the meaning of a legislative amendment designed to improve internal communication within firms in a way that inhibits the free flow of information outside firms).

⁵⁹ See *Petition for Writ of Certiorari, Alice Corp. Pty. Ltd. v. CLS Bank Intern.*, 134 S. Ct. 734 (Mem) (2013) (No. 13-298).

than one court confronted claims to business methods, the legislature could have compared experience in jurisdictions that recognized these patents with results in places that did not.⁶⁰ Second, centralization can change the court's perception of its relationship to Congress. The reaction to patent assertion entities (so-called patent trolls) is telling. As noted earlier, Federal Circuit adjudication is highly formalistic. But some judges have not been content with blind fidelity to the plain meaning of statutory language. When Congress tried to deal with the problems posed by opportunistic litigation—a problem the Federal Circuit arguably created through its liberal attitude towards injunctive and monetary relief⁶¹—then-Chief Judge Michel took the somewhat unusual step of personally going up to Capitol Hill and (successfully) persuaded Congress to retain the remedies provisions of the 1952 Act.⁶²

II. PERCOLATION VS. EXCLUSIVE JURISDICTION

Experience with the Federal Circuit is, in short, a lesson on the relationship between statutes and judge-made law. The legislature is not as well positioned to oversee the implementation of legislation as the proceduralists of the late twentieth century assumed; high quality judicial decisions appear to be necessary to a well-functioning statutory system and dissatisfaction with the Federal Circuit's output suggests that percolation is a key to quality. As Judge Wood argues, percolation encourages more persuasive writing—which arguably requires harder thinking about the contents of decisions. It also provides input to sister circuits and signals to the Supreme Court when to step in to hear a case. The availability of multiple courts creates a way for litigants to revisit an issue without offending the judges who decided it in the first place. John Duffy and Craig Nard note another advantage: an early decision in one court can spur the lawyers in subsequent cases to find better arguments.⁶³ Finally, as I argued in my article on percolation, multiple adjudications can wash out the framing and

⁶⁰ Cf. *Kirtsaeng v. John Wiley & Sons, Co.*, 133 S. Ct. 1351, 1366 (2013) (comparing experience on the circuits that recognized international exhaustion and those that did not); *id.* at 1389 (Ginsburg, J., dissenting and making a similar comparison).

⁶¹ See, e.g., *Polaroid Corp. v. Eastman Kodak Co.*, 789 F.2d 1556, 1557 (Fed. Cir. 1986); Mark A. Lemley & A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 COLUM. L. REV. 2117, 2141 (2013).

⁶² See Patent Reform: The Future of American Innovation: Hearing on S. 1145 Before the S. Comm. on the Judiciary, 110th Cong. 278 (2007) (submission for the record of Paul Michel, C.J.), available at <http://www.patentreform.info/Emails%20from%20JM/Senate%20hearing%20June%206,%202007.pdf>; Letter from Paul Michel to Chairman Leahy and Ranking Member Specter (June 13, 2007), available at <http://www.intellectualpropertylawblog.com/wp-content/uploads/sites/98/2007/06/Michel-letter-to-Senators-6-13-071.pdf>.

⁶³ Craig Allen Nard & John F. Duffy, *Rethinking Patent Law's Uniformity Principle*, 101 Nw. U. L. REV. 1619, 1633 (2007).

anchoring effects that can make for bad law and it can provide opportunities to see how different approaches work in practice.⁶⁴

Hence Judge Wood's suggestion that appellants be given a choice between the regional circuit overseeing the district court where the case was decided and the Federal Circuit. She paints an especially attractive picture with her example of the software industry. Noting the problems this sector is encountering and Dan Burk and Mark Lemley's comments on how badly the law is currently tailored to that industry, she argues that the Ninth Circuit, where a disproportionate share of software cases arise, would be extremely well positioned to find law responsive to those innovating in this space.⁶⁵ In fact, the Ninth Circuit may be better positioned than the Federal Circuit, for while there are judges on the Federal Circuit with prior experience in various technical fields, no one on the current bench has a background in computer science. Once the Ninth Circuit speaks, its opinion (or subsequent experience) can influence other courts grappling with software questions. At some point, courts will converge on that solution or the Supreme Court will create a nationwide rule. Further, if successful, the approach might be expanded to other sectors with similar characteristics. Judge Wood also suggests that she would welcome reintegration of patent cases into her circuit. Because of the Seventh Circuit's preeminence in antitrust law, its participation could make an important contribution in restoring the balance between exclusive rights and competition.⁶⁶

A. Assessing Judge Wood's Position

The question Judge Wood's proposal raises is whether the quality benefits of the sort of percolation envisioned by the Evarts Act outweigh the potential losses in efficiency, which, as we saw, was Congress's prime objective in establishing the Federal Circuit. Surely, there will be losses. Convergence will not be automatic and in the meantime, circuit splits and forum shopping are

⁶⁴ Dreyfuss, *supra* note 7, at 524–26 (discussing Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 884–85 (2006)). For an example of experience-based decision-making, see *Kirtsaeng*, 133 S. Ct. at 1366–67, 1389–90 (2013), which considers the question whether copyright law recognizes an international exhaustion doctrine by looking at the experience of circuits that had adopted opposing approaches. See also *id.* at 1366–67; *id.* at 1389–90 (Ginsburg, J., dissenting).

⁶⁵ Wood, *supra* note 2, at 10 (citing Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575, 1577–78 (2003)).

⁶⁶ See, e.g., *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 33–34 (2006) (heavily criticizing the Federal Circuit's approach); *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2230–37 (2013) (coming to a different conclusion on reverse-payments from the one announced by the Federal Circuit in *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323, 1336 (Fed. Cir. 2008)).

inevitable.⁶⁷ These splits are likely to be more disruptive than they are in other kinds of cases. In ordinary circuit splits, the parties know where they do business and thus have some basis on which to predict what law will govern their behavior. Even if the prediction is wrong, they will know the applicable law as soon as a suit commences. In Judge Wood's system, the parties learn the applicable law only after one of them loses and chooses where to appeal.

Not only will this make planning primary conduct problematic, it will make litigation extremely difficult. If, for example, the Federal and regional circuits were to take different views on claim construction (a hotly contested area⁶⁸), it will be impossible for the district judge to know, at the time of the trial, what evidence on infringement will be considered relevant to the court of appeals.⁶⁹ Worse, the incentives at trial could become very peculiar indeed. If the patentee (or patent troll) knows the Federal Circuit is likely to look at its case more favorably than courts more closely attuned to social policy, it may prefer to try the case halfheartedly, with the idea that it would be better to lose at trial and obtain the right to choose the appellate court than to win at trial and lose on appeal in a court chosen by its adversary.

Finally, Judge Wood's proposal does not account for appeals from the PTO. These will significantly increase under the AIA because the statute includes several new procedures for challenging issued patents administratively.⁷⁰ Presumably, appeals from these adjudications will continue to be heard by the Federal Circuit. But, as we saw, Congress was motivated to create the Federal Circuit in part because of the "notorious differences" between the law laid down by the CCPA and the regional circuits. If the Federal Circuit

⁶⁷ Significantly, forum shopping for a favorable district court persists despite the existence of the Federal Circuit. *See, e.g.*, Jeanne C. Fromer, *Patentography*, 85 N.Y.U. L. REV. 1444, 1462–68 (2010).

⁶⁸ *See generally* R. Polk Wagner & Lee Petherbridge, *Did Phillips Change Anything? Empirical Analysis of the Federal Circuit's Claim Construction Doctrine*, in *INTELLECTUAL PROPERTY AND THE COMMON LAW* (Shyamkrishna Balganes, ed. 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1909028 (analyzing all observable Federal Circuit claim construction opinions between 1996 and 2007); David L. Schwartz, *Practice Makes Perfect? An Empirical Study of Claim Construction Reversal Rates in Patent Cases*, 107 MICH. L. REV. 223 (2008) (analyzing Federal Circuit reversal rates of U.S. district court judges on claim construction issues); Mark A. Lemley, *The Changing Meaning of Patent Claim Terms*, 104 MICH. L. REV. 101 (2005) (examining two different doctrines of claim construction); *cf.* *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 723 F.3d 1363 (Fed. Cir. 2013), *cert. granted*, 82 U.S.L.W. 3469 (Mar. 31, 2014) (No. 13-854) (raising the question of the degree of deference to be accorded to district court claim constructions).

⁶⁹ *See, e.g.*, *CVI/Beta Ventures, Inc. v. Tura LP*, 112 F.3d 1146, 1162 (Fed. Cir. 1997) (refusing to grant a new trial after the Federal Circuit disagreed with the trial court on claim construction). Presumably, the appellate route problem is the reason the Federal Circuit defers to the regional circuits on procedural rules that do not implicate patent law questions. *See, e.g.*, *Rentrop v. Spectranetics Corp.*, 550 F.3d 1112, 1118 (Fed. Cir. 2008).

⁷⁰ 35 U.S.C. §§ 257(a), 311, 321 (2006 & Supp. V 2011).

and regional circuits fail to converge on particular positions, then this differential will also recur. As with the trial judges, the PTO would have no way to predict what court will hear the appeal of an enforcement action and ultimately consider whether a patent it has issued is valid.

It is also unclear whether the benefits will be as great as Judge Wood envisions. Foremost is the possibility of selection effects. While patentees will probably prefer appeals to the Federal Circuit, alleged infringers with defenses sounding in public policy will likely choose a regional circuit. That will leave the Federal Circuit hearing even fewer cases involving weighty social interests and could make the court even less receptive to taking countervailing considerations into account.

In addition, the Federal Circuit may be as reluctant to follow a regional court's view as it is to follow Supreme Court decisions. To be sure, the circuit is in a curious position vis-à-vis the Supreme Court. The Supreme Court tends to grant certiorari when the Federal Circuit hears cases en banc and issues multiple opinions. In that situation, reluctance to conform to Supreme Court mandates is not surprising as almost every judge will have staked out a position in writing. It will be much easier to converge with, say, the Ninth Circuit on an issue that the Federal Circuit judges have not already exhaustively argued. At the same time however, the court also has a very firm belief in its own expertise. As former Chief Judge Michel once said, "There's . . . a certain amount of suspicion that there might be some deeper immersion, deeper familiarity, harder thinking and greater exposure [to patent law] at the Federal Circuit than the Supreme Court itself can offer."⁷¹ Whether the court would be willing to believe that other circuits have more expertise in issues touching on patent law is an open question.

Most significantly, the Wood proposal does not truly duplicate the kind of percolation created by the Evarts Act. Because the route of appeal is indeterminate, it does not allow for experimentation across either technological or geographic variables. While Judge Wood is surely right that enlarging the epistemic community would enhance quality, in an empirical age, evidence-based decision-making is increasingly valued.⁷² Sacrificing uniformity without creating "laboratories of experimentation" seems like a lost opportunity.

Clearly, Judge Wood believes that the gains in quality are worth any concomitant loss in efficiency. She presents three arguments. First, she does not believe the loss in efficiency is likely to be significant. She notes that there are

⁷¹ Roy Zwahlen, *Mayo v. Prometheus: Thought Leaders Express Concern and Evaluate the Impact*, BIOTECHNOW (May 21, 2012), <http://www.biotech-now.org/public-policy/patently-biotech/2012/05/mayo-v-prometheus-thought-leaders-express-concern-evaluate-business-impact-and-discuss-the-future>.

⁷² See, e.g., Lisa Larrimore Ouellette, *Patent Experimentalism*, 101 VA. L. REV. (forthcoming 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2294774.

some patent issues that even now are resolved outside the Federal Circuit. She points to cases like the recent *Gunn v. Minton*,⁷³ which use the well-pleaded complaint rule to direct cases raising patent issues tangentially or in the defense's case, to other tribunals. She notes that these adjudications do not significantly affect uniformity. Second, she would avoid inconsistent interpretations of the same patent by relying on the JPML to select a single forum to hear all the cases involving the same invention.⁷⁴ Third, she argues that the "Federal Circuit would still play a leading role in shaping patent law." Here, she relies on the adjudication of administrative law cases, where the regional circuits tend to adhere to the D.C. Circuit's jurisprudence.⁷⁵

These arguments are not persuasive. *Gunn* is a patent malpractice case. While the case raises a question on the applicability of the experimental use exception to the on-sale bar of the 1952 Patent Act,⁷⁶ the answer is to be supplied by a state court in the context of determining whether failure to raise the exception caused the patentee to lose its case. Whatever the decision, it will not create disuniformity because no one will be bound by the holding on the patent law issue. There are so few such cases in any one state, the decision is also not likely to affect very many litigants through stare decisis. In contrast, the cases Judge Wood envisions the regional circuits deciding will bind the patentee and its licensees,⁷⁷ and create federal precedent that will affect future cases, at least in the same circuit. During the Federal Circuit's early years, patent issues appearing in compulsory counterclaims were heard in the regional circuits, where they had a similar effect. It is not insignificant that the AIA changed that approach to promote uniformity.⁷⁸

Judge Wood's idea for having the JPML consolidate cases involving the same patent in the same appellate court is also problematic. Apparently, she assumes that challenges to the same patent occur simultaneously (as with some mass torts). But that is not necessarily so: as long as the patentee wins the first case, it will live to enforce the same patent in subsequent proceedings for the

⁷³ 133 S. Ct. 1059, 1066–68 (2012).

⁷⁴ Wood, *supra* note 2, at 9.

⁷⁵ *Id.* at 10.

⁷⁶ Patent Act of 1952, ch. 950, § 102(b), 66 Stat. 792, 797 (current version at 35 U.S.C.A. § 102(a)(1) (current through P.L. 113-92 (excluding P.L. 113-76, 113-79, and 113-89))).

⁷⁷ See, e.g., *Blonder-Tongue Labs. v. Univ. Ill. Found'n*, 402 U.S. 313, 350 (1971).

⁷⁸ See *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830–354 (2002) (leaving compulsory counterclaims to appeal in the regional circuits). The AIA changed the procedure, providing that:

The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction . . . of an appeal from a final decision of a district court of the United States . . . in any civil action arising under, or in any civil action in which a party has asserted a compulsory counterclaim arising under, any Act of Congress relating to patents or plant variety protection.

28 U.S.C. § 1295(a)(1) (2012).

duration of the life of the patent.⁷⁹ Presumably, the JPML could channel later cases to whatever court heard the first one. However, that possibility only intensifies the incentives problem at trial. Even the patentee who is confident in the first case of a win on any circuit, may worry about the arguments that later litigants might assert. If so, the patentee will prefer to find a way to acquire the right to choose the route of appeal in the first case so that it can subject later litigants to the same court. To be sure, all choices made by the JPML are somewhat coercive, but in the usual case, the choice is not preordained by an adversary's strategic manipulation in earlier litigation.

It is harder to evaluate Judge Wood's third argument on the Federal Circuit's leading role in patent jurisprudence. At the same hearing at which Judge Markey testified about brain surgery, it was opined that patent cases were "the most unattractive thing about being a Federal judge."⁸⁰ A court unhappy to be stuck with such a case might well convince itself that the best course would be to defer to the Federal Circuit's alleged expertise.⁸¹ A decision to defer would certainly make for greater uniformity, and eliminate forum shopping and skewed incentives at trial. But it would not create a dialogue. To improve quality, the regional circuits would have to *refrain* from following Federal Circuit precedent in cases of national importance. Or, at least, the Federal Circuit would have to be worried enough about the possibility to write more persuasively. However, the fear of being overruled by the Supreme Court has not led to more thoughtful output.⁸² Perhaps the fear of disuniformity would be a better motivator than the fear of Supreme Court reversal (which the Federal Circuit has shown itself to be adept at ignoring). But to make the threat credible, the regional courts will have to do *some* branching out on their own, and that will reintroduce the inefficiencies that plagued the system in the 1980s.

B. A Changing Landscape

Arguably, however, the system can better tolerate these inefficiencies now. The docket problems that were the object of the Freund and Hruska Commissions' studies appear to have abated. There is considerable controversy

⁷⁹ See, e.g., *CVI/Beta Ventures, Inc. v. Tura LP*, 112 F.3d 1146, 1162 n.7 (Fed. Cir. 1997) (noting that the same patent had been the subject of litigation a year earlier); *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 4 (1966) (noting that two litigations over the same patent had occurred nine years apart).

⁸⁰ Federal Circuit Hearings, *supra* note 35, at 46 (statement of Rep. Sawyer).

⁸¹ Cf. Paul R. Gugliuzza, *The New Federal Circuit Mandamus*, 45 IND. L. REV. 343, 405 (2012).

⁸² See generally Ryan Stephenson, *Federal Circuit Case Selection at the Supreme Court: An Empirical Analysis*, 102 GEO. L.J. 271 (2013).

as to the current workload of the courts of appeals,⁸³ but the backlog in judicial appointments makes it difficult to accurately assess whether there are enough judgeships to meet the nation's needs. Obviously, however, Chief Judge Wood believes that her circuit could absorb some patent cases without undue hardship. At the Supreme Court, the situation is clearer: the docket is significantly smaller than it was in the 1980's.⁸⁴ Furthermore, the Court has been hearing several patent cases each Term for more than a decade.⁸⁵ Disagreement among the regional circuits and the Federal Circuit could therefore be resolved more quickly today than in the *Graham* era. In fact, these splits would probably be better at directing the Court's attention to important national issues than the current practice of relying on dissents and en bancs in the Federal Circuit.⁸⁶ As *Dembiczak* illustrated, the judges of the Federal Circuit can be in agreement on a rule that is less than ideal from a social perspective.

As to the benefits, it is also possible that past experience with the Federal Circuit is not helpful in predicting how amenable the Federal Circuit would be to percolation in the future. Several new judges have joined the court, and these jurists have backgrounds significantly more varied than those of the earlier judges.⁸⁷ That is, the first generation of judges came from the CCPA and the United States Court of Claims.⁸⁸ Both tribunals had limited jurisdiction and rarely (or in the case of the CCPA, never) entertained infringement actions. Accordingly, no one on the court had enjoyed the opportunity to focus systematically on the impact of patenting on creative production. Several judges in the second generation were drawn from legislative circles. They joined Judge Rich, one of the drafters of the 1952 Patent Act.⁸⁹ Arguably, these jurists had a predilection for adhering closely to the legislative language their former employers (or they themselves) had drafted. As I have earlier argued, the judges in both these groups may have also seen formalism as a way to establish

⁸³ See generally Diarmuid F. O'Scannlain, *Striking A Devil's Bargain: The Federal Courts and Expanding Caseloads in the Twenty-First Century*, 13 LEWIS & CLARK L. REV. 473 (2009); Chad M. Oldfather, *Limitations (A Response to Judge Posner)*, 51 DUQ. L. REV. 67 (2013).

⁸⁴ See, e.g., Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219 (2012); Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1373–74 (2006).

⁸⁵ See Dreyfuss, *supra* note 7, at 510 nn.42–43 (tracking the cases by Term).

⁸⁶ See Stephenson, *supra* note 82, at 286–87.

⁸⁷ See *Judges*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, <http://www.cafc.uscourts.gov/judges> (last visited March 14, 2014).

⁸⁸ See generally Elizabeth I. Rogers, *The Phoenix Precedents: The Unexpected Rebirth of Regional Circuit Jurisdiction over Patent Appeals and the Need for Considered Congressional Response*, 16 HARV. J.L. & TECH. 411 (2003).

⁸⁹ See Dreyfuss, *Institutional Identity*, *supra* note 22, at 822; Donald R. Dunner, *Giles Sutherland Rich*, 9 FED. CIR. B.J. 71, 71 (1999).

legitimacy—or at least as a way to refrain from ruffling the feathers of important interest groups.⁹⁰

The newest generation is different. Kathleen O'Malley is the first Federal Circuit judge to have previously served on a federal district court, Evan Wallach was elevated from the Court of International Trade, and Raymond Chen was formerly Solicitor at the PTO.⁹¹ Not only have these three experienced first-hand the costs of the court's rigidity, they have joined the court almost simultaneously. Indeed, since 2010, six of the twelve seats on the Federal Circuit have changed hands.⁹² While one new judge may have a difficult time altering the karma of a courthouse, a 50% turnover creates a cohort better able to withstand pressure to pursue "business as usual." Thus, as with immigrant families,⁹³ the third generation may integrate more fully into the larger judicial culture. It may be more willing to adopt processes similar to those of the other circuits, more receptive to policy arguments, and more disposed to engage in dialogue with other courts and with scholars, federal agencies, and other institutions.⁹⁴

At the same time, however, the changing landscape can cut two ways. On the one hand, new developments suggest that Judge Wood's proposal would work better than past experience predicts—it would be less costly because the Supreme Court could end splits quickly and it would be more productive of discourse because the new judges may be receptive to arguments that prior generations dismissed. On the other hand, these changes also make it less necessary to implement the Wood proposal. The new judges may shake up the status quo without introducing disuniformity. Furthermore, the Supreme Court's greater availability enlarges opportunities for dialogue. Patentable subject matter

⁹⁰ Dreyfuss, *Institutional Identity*, *supra* note 22, at 823–26.

⁹¹ See generally *Judges*, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, <http://www.cafc.uscourts.gov/judges> (last visited March 14, 2014).

⁹² Don W. Martens, *Filling the Vacancies on the Federal Circuit*, LANDSLIDE, Mar.-Apr. 2010, at 1, 1 (noting that by the end of 2010, only four judges would not be eligible for retirement or senior status, leaving the possibility of nine vacancies by the end of President Obama's first term). In addition to Judges Wallach, O'Malley, and Chen, the new judges are Jimmie Reyna, Richard Taranto, and Todd Hughes.

⁹³ See generally Grace Kao & Marta Tienda, *Optimism and Achievement: The Educational Performance of Immigrant Youth*, 76 SOC. SCI. Q. 1 (1976), available at <http://globalnetwork.princeton.edu/piirs/Kao%20and%20Tienda.pdf>.

⁹⁴ See, e.g., *id.*; Dreyfuss, *Institutional Identity*, *supra* note 22, at 823–26; see also Dennis Crouch, *Dissenting Opinions at the Federal Circuit*, PATENTLY-O (Sept. 2, 2012), <http://www.patentlyo.com/patent/2012/09/dissenting-opinions-at-the-federal-circuit.html> (showing a high dissent rate for Judges O'Malley and Reyna, appointed in 2010 and 2011, respectively); cf. James D. Ridgway, *Fresh Eyes on Persistent Issues: Veterans Law at the Federal Circuit in 2012*, 62 AM. U. L. REV. 1037, 1098 (2013) (noting that the turnover in judges has prompted new thinking in the Federal Circuit's veterans law jurisprudence).

is a good example: after Justice Breyer announced his doubts about expanding the ambit of patent law in *Lab Corp. v. Metabolite*,⁹⁵ the Supreme Court heard three subject matter cases and granted certiorari in a fourth.⁹⁶ One of these cases went up and down twice, and thus created considerable interchange with the Federal Circuit.⁹⁷

By the same token, as the dependence of the economy on knowledge production has become evident, Congress has become much more attentive to patent policy. The AIA made many significant changes in the statute in 2011 and other modifications are under consideration.⁹⁸ Thus, the assumption of the early proceduralists may, in the end, turn out to be closer to the truth. Even if not, patent law is certainly receiving greater attention elsewhere. In the last few years, the Solicitor General's office, the National Institutes of Health, the Antitrust Division of the Department of Justice, the Centers for Disease Control and Prevention, the Office of Science and Technology Policy, the National Economic Council, the Office of Information and Regulatory Affairs, and the Federal Trade Commission have expanded the community debating patent policy.⁹⁹ Increasing numbers of amicus briefs also supply the court with valuable information about broader social interests.¹⁰⁰

In evaluating the Wood proposal, it is also worth noting that in the last thirty years, significant changes have occurred that raise the costs of disuniformity. Whereas in earlier times, the need for uniformity arose principally because of the interstate nature of patent exploitation, there has been a revolution in the conduct of research, development, and manufacturing. Invention is less a matter of relying on in-house staff scientists, and more of a collaborative enterprise, involving geographically dispersed participants in ever-

⁹⁵ *Lab. Corp. of Am. Holdings v. Metabolite Labs., Inc.*, 548 U.S. 124, 126 (2006) (Breyer, J., dissenting from dismissal of certiorari in a case about patentable subject matter).

⁹⁶ See *Bilski v. Kappos*, 130 S. Ct. 3218 (2010); *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 132 S. Ct. 1289 (2012); *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 (2013); *Alice Corp. Pty. Ltd. v. CLS Bank Intern., cert granted*, 134 S. Ct. 734 (Dec. 06, 2013) (No. 13-298).

⁹⁷ See *supra* note 49; see also Golden, *supra* note 21; John F. Duffy, *Federal Circuit En Bancs in an Era of Active Supreme Court Review*, 4 LANDSLIDE, Nov.-Dec. 2011, at 8, 8; John F. Duffy, *The Federal Circuit in the Shadow of the Solicitor General*, 78 GEO. WASH. L. REV. 518 (2010).

⁹⁸ See, e.g., Patent Litigation and Innovation Act of 2013, H.R. 2639, 113th Cong. (2013); Stopping the Offensive Use of Patents Act, H.R. 2766, 113th Cong. (2013); Saving High-Tech Innovators from Egregious Legal Disputes Act of 2013, H.R. 845, 113th Cong. (2013); Patent Abuse Reduction Act, S. 1013, 113th Cong. (2013); Innovation Act, H.R. 3309, 113th Cong. (2013); Patent Litigation Integrity Act of 2013, S. 1612, 113th Cong. (2013).

⁹⁹ See generally Rai, *supra* note 21; Stuart Minor Benjamin & Arti K. Rai, *Fixing Innovation Policy: A Structural Perspective*, 77 GEO. WASH. L. REV. 1 (2008).

¹⁰⁰ See, e.g., Colleen V. Chien, *Patent Amicus Briefs: What the Courts' Friends Can Teach Us About the Patent System*, 1 U.C. IRVINE L. REV. 397, 405-408 (2011).

changing affiliations.¹⁰¹ Some industries have adopted a value-chain development and manufacturing strategy, which can similarly involve actors in many different locations.¹⁰² Furthermore, the Internet has facilitated peer production, with participants drawn from all over the nation (or the world).¹⁰³ In all of these cases, predictable law is key. Without knowing what law will apply to their behavior, it is impossible for participants in these arenas to determine rights or freedom to operate. And because venue rules have changed since the Federal Circuit was created, these actors are much more vulnerable to aggressive forum shopping.¹⁰⁴ Taking these costs and the uncertain benefits of Judge Wood's proposal into account, the best course may be to wait, at least a few years, to see how the new bench performs before destroying the exclusivity Congress worked so hard to create.

CONCLUSION

Chief Judge Wood has performed a valuable service in reviving the debate over the wisdom of channeling all patent appeals to the Federal Circuit. She paints an appealing picture of the benefits of reintroducing circuit dialogue into the adjudicatory process. Changes in the composition of the Federal Circuit and in the attentiveness of Congress and the Supreme Court to patent problems make her proposal especially viable. However, these factors may also render her proposal unnecessary. More important, the AIA raises many new questions. But because the Wood proposal makes neither technological or territorially distinctions, experimenting with different solutions to these problems would not be possible. Better, then, would be to see whether the newly-composed Federal Circuit and greater national focus on innovation changes the dynamics of deliberation internally or in relation to the Supreme Court or to other entities engaged in thinking about innovation. A reconstituted PTO, the district court

¹⁰¹ Jonathon N. Cummings & Sara Kiesler, *Collaborative Research Across Disciplinary and Organizational Boundaries*, 35 SOC. STUDIES SCI. 703 (2005); Arti K. Rai, "Open and Collaborative" Research: A New Model for Bio-medicine, in INTELLECTUAL PROPERTY RIGHTS IN FRONTIER INDUSTRIES: SOFTWARE AND BIOTECHNOLOGY 131, 141, 143, 152 (Robert W. Hahn ed., 2005); Rochelle Cooper Dreyfuss, *Collaborative Research: Conflicts of Authorship, Ownership, and Accountability*, 53 VAND. L. REV. 1161, 1166 (2000).

¹⁰² See generally Stefan Tamme et al., *Trend and Opportunities in Semiconductor Licensing*, 48 LES NOVELLES 216 (2013).

¹⁰³ Cf. James Boyle, *Open Source Innovation, Patent Injunctions, and the Public Interest*, 11 DUKE. L. & TECH. REV. 30, 53 (2012) (noting the difficult interplay between patent law and peer production).

¹⁰⁴ See *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1583 (Fed. Cir. 1990) ("[U]nder amended § 1391(c) as we here apply it, venue in a patent infringement case includes any district where there would be personal jurisdiction over the corporate defendant at the time the action is commenced."); Fromer, *supra* note 67, at 1451–55.

pilot program, and the newly-created foreign analogues to the Federal Circuit will also enlarge the epistemic community and create opportunities for natural experiments without significantly sacrificing predictability. Admittedly, these experiments will affect uniformity, but they do so in ways with which the parties—who know which districts and technologies they work with—can cope. Perhaps these developments will not make a difference: at that point, it will be worthwhile to reconsider Chief Judge Wood’s proposal. But while we got along without exclusivity before we met the Federal Circuit, it would be a pity to get along with it just yet.