

Patent Law Uniformity
Lee Petherbridge

Following the difficult economic conditions of the 1970s the United States Congress decided in 1982 to create the United States Court of Appeals for the Federal Circuit. In making the court Congress thought it was a good idea to confer national appellate jurisdiction, but to limit the jurisdiction to various subject matter areas. One subject matter area was patent law. An area in which Congress hoped that unification of appellate jurisdiction would produce a more coherent, more predictable, and more useful legal infrastructure.

This controversial institutional design has always had its share of critics, but it has recently reached the point that two well known law Professors, Craig Nard and John Duffy, make the normative claim that the current institutional arrangement should be dismantled in favor an arrangement where more judges that those currently on the federal circuit and Supreme Court are able to hear appeals of claims related to patent law. This forcefully presented normative claim is primarily founded on a single empirical supposition: that the current institutional arrangement—in which most patent appeals are heard by the federal circuit subject to review by the Supreme Court—has caused a lack of diversity in patent jurisprudence, and suppressed its development in a socially harmful way.

Using empirical techniques this Article explores the supposition that there is a lack of diversity in patent jurisprudence. What it finds across a number of major variables is that the evidence does not support the conclusion that there is a lack of diversity. Although the results do not paint a complete picture of whether there is “optimal” diversity in patent jurisprudence, the weight of the evidence suggests the interpretation that federal circuit patent jurisprudence is diverse. This in turn suggests the interpretation that patent jurisprudence may well have mechanisms for incremental innovation that permit the jurisprudence to evolve in response to the various and changing technofactual circumstances with which it is faced.