

# Response Comment: Innovation, Aggregation, and Specialization

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## I. THE VALUE OF RETHINKING

In his fascinating critique of Federal Circuit jurisdiction, Professor Gugliuzza employs multiple tools of institutional analysis in order to explore the “dark matter” that comprises most of that Court’s docket—its unsung caseload of the nonpatent variety—and to stimulate our institutional imagination in search of a better jurisdictional structure.<sup>1</sup> Through a combined analysis of its theoretical and ideological foundations, its institutional practices, and its doctrinal proclivities, Gugliuzza deconstructs the Court of Appeals for the Federal Circuit, only to imagine its reconstruction as a forum for the production of more accurate, more effective, and more just legal norms.

After locating the discussion within the context of ongoing scholarly and policy debates over the costs and virtues of court specialization as a general institutional trend in contemporary judiciaries, Gugliuzza turns to the Federal Circuit. The court, which stands out in conventional discourse as the “Supreme Patent Court,”<sup>2</sup> centralizing all patent appeals under an effective near—though not complete—exemption from Supreme Court review, in fact dedicates only one third of its formal docket to intellectual property cases.<sup>3</sup> Another small share of the court’s jurisdiction concerns international trade cases, but the bulk of the caseload encompasses various administrative appeals whose relation to intellectual property or to innovative market activity remains unclear—veterans’ appeals, federal-personnel appeals, government-contracts appeals, and more.

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<sup>1</sup> Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 GEO. L.J. 1437 (2012).

<sup>2</sup> See, e.g., Jens H. Hillen, *The Court of Appeals for the Federal Circuit: Independent Review of Patent Decisions and the Constitutional Facts Doctrine*, 67 S. CAL. L. REV. 187, 214 (1993).

<sup>3</sup> See *Court Jurisdiction*, U.S. COURT OF APPEALS FOR THE FED. CIRCUIT, <http://www.cafc.uscourts.gov/the-court/court-jurisdiction.html> (last visited June 12, 2012) (“The court’s jurisdiction consists of administrative law cases (55%), intellectual property cases (31%), and cases involving money damages against the United States government (11%).”).

Although case quantities do not necessarily correlate with degrees of complexity or with amounts of allocated judicial effort, the fact that a court, which draws practically all public, industry, professional, and academic focus and prestige for its patent jurisprudence,<sup>4</sup> actually does *a lot* of other work calls for an assessment of the power relations that have enabled this combination and of the institutional conditions implicated by it. Gugliuzza provides a revealing etiology of the Federal Circuit's odd jurisdictional purview, summed up by the succinct if deflating conclusion that "the court's current jurisdiction seems to be a function of the lobby for a national patent court, historical accident, and convenience."<sup>5</sup> We may like to think of our social institutions as deliberately designed systems of purpose, but they often turn out to embody no more than fortuitous combinations of contingent circumstances.

Although compounding the new court for patent and international trade appeals with additional fields was explained as a means of countering the tunnel-vision and groupthink effects that tend to plague overly specialized institutions,<sup>6</sup> Gugliuzza shows it is difficult to provide a rational explanation for the *kinds* of cases chosen to join the court's patent docket. Those various cases do not help to improve the court's patent law, he argues, and in fact are more likely to have hampered the quality of its ostensible subject-matter expertise; they fail to provide the court with valuable information on innovation market dynamics, leaving it insulated from the economic realities it is supposed to regulate, and they also tend to render deciders formalistic and committed to government interests. At the same time, the court's nonpatent docket is too broad and too diverse—and perhaps not exciting or prestigious enough—to incentivize and indeed enable Federal Circuit judges to specialize in the fields it comprises. The nation's specialized court for multiple administrative matters is designed, Gugliuzza contends, in a way that impedes the possibility of specialization, only to grant the federal government several repeat-player advantages that invoke distributive in addition to epistemic concerns.<sup>7</sup>

The possible answer for these problems, says Gugliuzza, lies in the promise of institutional imagination grounded in a measure of political-institutional realism. Assuming a centralized court for patent appeals is here to stay, we may be able to improve the quality and fairness of its economic jurisprudence by tinkering with the large amount of nonpatent cases it is made to entertain. Gugliuzza suggests dispersing the administrative appeals of the Federal Circuit among the regional circuits and replacing them with an assortment of general-jurisdiction cases normally heard by the regional circuits—an assemblage of civil and criminal appeals (perhaps with a preference for antitrust cases), selected at random or through a geographical choice mechanism—that would turn Federal Circuit judges into generalists with a knack for patent.<sup>8</sup>

The Article is important in its choice of focus on institutionalism rather than on doctrinal analysis. It stresses that people—judges included—work in context, be it social, cultural, or indeed institutional; and that context matters. As Gugliuzza reminds us, the creation of a federal circuit was meant not only to make patent litigation cheaper and uniform but also to change patent law itself.<sup>9</sup> Recreating the institutional design of the court is thus one of the methods—arguably the most effective method—of affecting the content of its normative commitments; and tending primarily to court opinions, rather than to the conditions that regulate their production,

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<sup>4</sup> See Gugliuzza, *supra* note 1, at 1485–86.

<sup>5</sup> *Id.* at 1464; see also LAWRENCE BAUM, SPECIALIZING THE COURTS 5 (2011) (“[T]he movement toward greater judicial specialization has been a product of inadvertence rather than design.”).

<sup>6</sup> See Gugliuzza, *supra* note 1, at 1458–59.

<sup>7</sup> See *id.* at 1477.

<sup>8</sup> See *id.* at 1494–1504.

<sup>9</sup> See *id.* at 1499.

can make us forget that. Gugliuzza's article is therefore a fruitful exercise in bridging the gap between "substantive" and "procedural" legal discourse.

While I find both the article's critical and normative moves to be mostly persuasive, several questions remain—as they should when novel ideas are in consideration—and some are discussed and elaborated upon in this Comment. In what follows, I will briefly touch upon a few of the claims and ideas presented in the Article in order to suggest some further implications and possibilities that emanate from Gugliuzza's work. I first ask what additional social benefits we might want to elicit from a "specialized court," beyond the perfection of adjudication in a certain field, and how different systemic functions can lead to diverging institutional choices in the design of court systems. Embracing Gugliuzza's model of "limited specialization,"<sup>10</sup> I then explore the prospects of generalizing it as an effective norm-innovation tool beyond the patent context. I also consider some further arguments that might justify the model, as well as the mechanics suggested in order to implement it.

## II. COURTS AS INNOVATORS, COURTS AS AGGREGATORS

### A. A KNOWLEDGE–PRODUCTION PARADIGM TO COURT SYSTEM DESIGN

As Gugliuzza's article shows, one of the institutional peculiarities that characterize the Federal Circuit is the fact that it is a specialized appellate court—which in much of its patent jurisdiction reviews the decisions of nonspecialized (generalist) district courts—whose own decisions are reviewed by a nonspecialized (generalist) Supreme Court. The Federal Circuit could thus be thought of as an "epistemic bottleneck,"<sup>11</sup> or perhaps as an hourglass neck. It reviews determinations of generalist lower courts without a comparable level of familiarity with nonpatent law and context, limiting its capacity to provide a higher quality of adjudication, as appellate courts are often expected to do,<sup>12</sup> and it also distorts the selection mechanism on the way up to the Supreme Court, which can choose to review (or not to review) patent cases only after they have gone through the slanted screening of a too specialized court of appeals. In this depiction, the Federal Circuit is both a deficient corrector of district court errors and an inadequate agenda setter for Supreme Court precedent making.

One possible implication of this two-way malfunction is that centralized–specialized courts should not be located at an intermediate level of a judicial system's hierarchical structure. They should either exist at the trial level, producing their unique kind of knowledge but leaving appellate review to generalists with access to the "big picture," or they should be located at the final appellate level, like some state criminal-appeals courts,<sup>13</sup> in conscious embrace of the institutional bias embedded in the court of last resort for a given subject matter.

But a more nuanced approach can also be articulated. It begins with the question of purpose: what do we want to get out of the judicial treatment of a certain subject matter? This question is often answered with a focus on the individual case or category of cases: forums are designed to secure more just, more accurate, or more efficient results one case at a time, or to produce greater uniformity in a given field over a series of similar cases. But from a broader, systemic

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<sup>10</sup> See *id.* at 1498–99.

<sup>11</sup> See Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. OF LEGAL ANALYSIS 1, 33–35 (2009).

<sup>12</sup> For good reasons or bad ones. See JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 222–24 (1949) (ridiculing the "upper-court myth" of a hierarchy–competency correlation).

<sup>13</sup> See Gugliuzza, *supra* note 1, at 1451 n.68.

perspective, the judicial treatment of a given subject matter can also be considered as a mechanism for producing normative knowledge over time and across multiple and diverse cases, both within and beyond the limits of the specific doctrinal field. We may call this the *knowledge-production paradigm* of adjudication. It stresses less the centrality of reaching the “best” result (somehow measured) in each and every case and more the *process* of amassing information and experience through recurrent litigation, in expectation of gradual convergence toward settled norms.

In a diffuse and multilayered judicial system, the knowledge-production paradigm would distinguish between two important court functions: innovation and aggregation. Thus, lower courts serve in this model as units of experimentation and innovation in legal doctrine and procedure in the context of multiple, specific cases, while higher courts work as aggregators and formulators of the knowledge produced in diffuse fashion by the lower levels of the system. This paradigm consciously brackets the error-correction function normally attributed to appellate courts. Instead, it envisions appellate courts primarily as institutional units that are intended not so much to discipline trial courts as to survey the field of lower-court experimentation in search of novel ideas, arguments, test cases, procedures, and other discursive tools developed in diverse, localized contexts.<sup>14</sup> Higher courts have the benefit of the “view from above,” and so can be useful in collecting, analyzing, and comparing the products of lower courts in order to facilitate better coordination and exchange of information. They can also instruct courts as well as nonjudicial policymakers about the innovative dynamics taking place in different parts of the system.<sup>15</sup>

If one accepts, in principle, the viability of the knowledge-production paradigm, then the institutional-design question becomes one of context: what sort of innovators/aggregators combination would best serve the development of a certain legal subject matter? Wholesale answers will not do here—a topic-specific approach is needed. Thus, for example, we might find that a field like patent law prioritizes resolution, in which case it may be best developed by a combination of generalist trial courts (innovators that keep in touch with on-the-ground market realities) and a specialized appellate court (an aggregator concerned mostly with tying together the different treatments of a single issue in multiple trial courts), with a diminished role for another level of review in the form of Supreme Court discretionary jurisdiction. Still other fields—perhaps constitutional interpretation—might stress deliberation and visibility as their central procedural ideals and therefore they would benefit by locating the main load of innovation with multiple courts of appeals of concurrent subject matter jurisdiction, meaning that aggregation would be left to the Supreme Court as the single centralized court, and political focal point, of last resort. Due to its intermediate status, the Federal Circuit can be seen to play both roles in different contexts, and Gugliuzza’s article is facilitative in recognizing both prospects.

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<sup>14</sup> Cf. Ori Aronson, *Inferiorizing Judicial Review: Popular Constitutionalism in Trial Courts*, 43 U. MICH. J.L. REFORM 971, 994–1002, 1009–17 (2010) (discussing the potential for innovation in diffuse trial-court adjudication, in the context of constitutional interpretation).

<sup>15</sup> To fulfill the aggregator potential of appellate courts, a sophisticated mechanism of feeding them with cases has to be devised. The normal rule of litigants’ choice whether to appeal will not necessarily coalesce with the social interest in sending enough cases up the ladder of judicial hierarchy. *But see* Steven Shavell, *On the Design of the Appeals Process: The Optimal Use of Discretionary Review Versus Direct Appeal*, 39 J. LEGAL STUD. 63 (2010) (relying on litigants’ information and choice as basic elements in a suggested appeals-screening procedure).

## B. THE FEDERAL CIRCUIT AS GENERALIST INNOVATOR

If we choose to leave aggregation and centralization to the Supreme Court alone, we may still want to design our innovator courts—for example the multiple courts of appeals—in a more sophisticated way. Such design would keep them generalist enough to maintain sufficient measures of openness and originality in the development of general legal norms but at the same time also distinct enough *from each other* so as to ensure that the higher aggregator—the Supreme Court—in fact receives a diverse input of normative visions from the levels below. One way of doing this is designing each of the generalist innovators with a distinct institutional characteristic that would affect the way it treats common legal questions. To some extent we already do this by locating the various courts of appeals in different geographical regions, which variously reflect in their practices the cultural and ideological idiosyncrasies of localized communities (East/West Coast, Deep South, Midwest, etc.). That’s one of the reasons we have circuit splits, and the knowledge–production paradigm is one of the reasons we ought to celebrate them.<sup>16</sup>

But another way of making generalist courts usefully distinct innovators is by entrusting each one with a unique field of interest or expertise that would enrich its generalist jurisdiction with the field’s discursive traits, perspectives, and biases. This is, in essence, what Gugliuzza suggests in the current article, if only in the context of a single court—the Federal Circuit. His notion of “limited specialization”<sup>17</sup> envisions a court that is generalist but whose “generalism” is superimposed with a unique normative perspective drawn from an institutional commitment and a discursive partiality to patent law. Gugliuzza develops this idea as a means for improving the quality of the court’s patent jurisprudence (I return to that below), but it can also be told the other way around—as a means of producing a unique kind of *generalist* appellate law, offering the aggregator court—the Supreme Court in this case—a special take on generalist issues infused by the point of a view of a patent specialist. Its field-specific heuristics, its ideological idiosyncrasies, and even its reflection of interest-group politics—are all useful resources for a normative aggregator in need of diverse input.<sup>18</sup>

Is Gugliuzza’s model institutionally generalizable? Should we design all our courts of appeals in this fashion—as innovators of combined generalist/specialist jurisdiction that would feed the Supreme Court’s aggregative function with diverse judicial outcomes? As others have noted, to some degree this already happens.<sup>19</sup> While the Second and Ninth Circuits are not officially specialized courts of immigration appeals, they hear the vast majority of those cases, which take up huge portions of their dockets. The D.C. Circuit entertains much of the federal government’s litigation, the Fifth Circuit is known for its energy-industry litigation, and so on. It would be a significant empirical challenge to try and gauge how exactly these combinations

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<sup>16</sup> See, e.g., Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981); cf. Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 397–400 (1997) (assessing the judicial “laboratories for experimentation” theory).

<sup>17</sup> See Gugliuzza, *supra* note 1, at 1498–99.

<sup>18</sup> In analyzing the various nonpatent elements of the Federal Circuit’s jurisdiction, Gugliuzza notes that some categories of cases are in fact subject to informal arrangements of concurrent jurisdiction. See *id.* at 1492 (tax refunds and takings); *id.* at 1493–94 (trademark). Gugliuzza therefore questions the validity of the specialization rationale for entrusting them with the Federal Circuit at the first place. See *id.* at 1496. But if we are concerned with innovation, we might in fact embrace this kind of concurrence, because it allows similar matters to be sometimes adjudicated by generalists and other times by specialists, each offering a different institutional take.

<sup>19</sup> See, e.g., BAUM, *supra* note 5, at 11–12.

affect the general-jurisdiction adjudication of those courts,<sup>20</sup> but I think we can share at least an intuitive grasp of the usefulness of heterogeneous expertise within a deliberating group, which is what the circuits comprise when thinking on joint questions.<sup>21</sup> Think of your typical law faculty, in which most members share a similar kind of basic education and professional knowledge but each has developed in addition an expertise in a specific legal field. Discussions on general legal issues are accessible to all members, but each brings with her to the table the added element—experience, insight, bias—of the field of her expertise. Groupthink is countered and mutual stimulation is promoted.

As a general systemic matter, therefore, if we designate a certain level of courts as innovators, with an effective aggregator court sitting on appeal,<sup>22</sup> then institutional diversity is a virtue to be sought. Making each of the courts of appeals a semi-expert in a specific field, while still holding jurisdiction over generalist matters, can provide the basis for fruitful deliberation in advance of centralizing resolution by the higher court.

### C. THE FEDERAL CIRCUIT AS SPECIALIZED AGGREGATOR

The alternative perspective considers the Federal Circuit as primarily an aggregator in charge of patent law, as it is mostly seen today. Intellectual property practitioners and scholars tend to think of the court as effectively the final stop in all patent-related respects and sometimes view with wariness certiorari grants by the Supreme Court, which are seen as haphazard interventions in an otherwise steady process of legal policy development by an expert forum. Gugliuzza's limited-specialization model views the court mostly in this capacity and seeks to improve its design in order to make it a better aggregator of trial court innovations and a more informed producer of patent law precedents.

Gugliuzza persuasively argues that for a court to be a significant contributor to the settlement of patent law, it must be made cognizant of the broader legal-economic context with which patent law corresponds. Specifically, he stresses the need for the Federal Circuit to have a solid grasp of antitrust and commercial law and policy, due to the theoretical and doctrinal similarities between the fields, as well as their combined impact on economic activity and productivity.<sup>23</sup> But the Article goes further than that and suggests methods of institutional reform that would broaden the Federal Circuit's jurisdiction potentially to encompass the whole array of cases entertained by a regional court of appeals.<sup>24</sup> The implied message is that to be a good specialist, you must also be a pretty good generalist in the broadest of terms—that is, to have usable access to normative worlds that might not seem related to your expertise at first blush. Gugliuzza does not develop this point in the article (he focuses mostly on the need for a better understanding of economic realities), so I'd like to reinforce it here.

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<sup>20</sup> Gugliuzza similarly acknowledges that rigorous empirics are needed in order to go beyond tentative accounts of the mutual effects of the Federal Circuit's patent and nonpatent cases. *See* Gugliuzza, *supra* note 1, at 1445.

<sup>21</sup> *See* Ori Aronson, *Out of Many: Military Commissions, Religious Tribunals, and the Democratic Virtues of Court Specialization*, 51 VA. J. INT'L L. 231, 263–66 (2011).

<sup>22</sup> This is a phenomenon of institutions engaged in dispensing power; there are of course no formal aggregators in the academic context alluded to above.

<sup>23</sup> *See* Gugliuzza, *supra* note 1, at 1497–99.

<sup>24</sup> *See id.* at 1499 (“[T]here are particular methods of implementing a system of limited specialization that would . . . give the Federal Circuit a nonpatent jurisdiction that encompasses nearly all areas of federal law.”).

There are good reasons to believe that the Federal Circuit's specialization would in fact thrive from an infusion of seemingly unrelated adjudication—be it of criminal, immigration, civil rights, or indeed federal administrative cases. Most basically, this understanding stems from a legal realist point of view, which denies hard-line distinctions between legal fields. While doctrinal thought is often premised on such distinctions, “the life of the law,”<sup>25</sup> to draw on a canonical phrase, is characterized by a network of normative regimes which work together to regulate activity, affect behavior, and allocate power. A person who considers engaging in innovative activity, for example, usually does not act with only a specific legal doctrine in mind such as patent or copyright; rather she takes into account background rules of property and contract, the enforcement possibilities of criminal norms, the cost and availability of work (affected by labor law and immigration regime), the extent of regulatory governmental involvement, etc. Economic reality, in short, is regulated by the full array of legal devices that might be entertained by a generalist court. If judicial specialization in an economic context is chosen, then it should be designed to reflect an understanding of the full impact a legal regime has on economic activity. Gugliuzza's model of limited specialization ensures that it does.

Involving specialized judges in the adjudication of “distant” fields can also be justified from the point of view of patent law itself. Though patent, nominally understood, is a means of regulating innovative activity in a competitive market setting, it is also a vehicle for expressing public values and facilitating a certain distribution of resources among members of a political community. In that sense at least, patent law is public law (like many other “private” legal spheres). It employs coercive state power to affect power divisions among market actors and between market and state actors. It seems reasonable therefore to expect patent judges to be part of a normative discourse that encompasses the regulation of state authority more generally, for example through the adjudication of constitutional rights and administrative law cases.

Gugliuzza considers three mechanisms for achieving this goal: (1) randomly allocating nonpatent cases from the regional circuits; (2) extending the court's jurisdiction over a certain geographical region; or (3) consolidating it with one of the regional circuits, preferably the D.C. Circuit. I wonder whether the last possibility, which the article explores in slightly greater detail than the other two possibilities, would manage to serve the purposes of the limited-specialization model. Although formally a court of regional jurisdiction, the D.C. Circuit is also, in many ways, a largely specialized court because of its role as reviewer of many governmental, military, and regulatory bodies. Indeed, the D.C. Circuit and the Federal Circuit share between them much of the centralized appellate jurisdiction in matters concerning the federal government. Gugliuzza notes this as a reason to consolidate both courts' administrative dockets,<sup>26</sup> but how much would the court's patent law expertise gain from more governmental involvement in its agenda? Earlier in the article Gugliuzza draws important attention to the risk of progovernmental bias in a patent court that is at the same time a centralized administrative law tribunal.<sup>27</sup> Adding the D.C. Circuit's jurisdiction to the mix would hardly alleviate this concern.

Random circulation of cases to the Federal Circuit from other courts of appeals, on the other hand, is perhaps the more promising of the mechanisms the article envisions. Random-allocation mechanisms are attractive because they can be tailor-made to fit changing circumstances or

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<sup>25</sup> O. W. HOLMES, JR., *THE COMMON LAW* 1 (1881).

<sup>26</sup> See Gugliuzza, *supra* note 1, at 1500–01.

<sup>27</sup> See *id.* at 1489.

institutional needs, while still keeping their fairness qualities intact.<sup>28</sup> Thus, for example, lotteries can be intentionally biased in order to allow any specific share of cases to be circulated, without relaxing equal-treatment demands—if we want only ten percent of all criminal cases in nearby circuits to go to the Federal Circuit, we can apply to *all* appeals filed a biased lottery, in which each case has a ninety percent chance of remaining with the original court and a ten percent chance of removal. In such an arrangement all litigants are treated equally (same probability distribution *ex ante*), and the system gets its share of allocated cases. These probabilities can of course be gauged and tweaked over time and across case categories as the limited-specialization model gets studied and its mechanics become clearer. And while it is true the randomization sometimes foils strategic planning,<sup>29</sup> an institutional designer who is concerned with the distributive advantage of litigation’s sophisticated and repeat players<sup>30</sup> might in fact embrace a choice-of-forum mechanism that is less predictable—and thus less susceptible to strategic manipulation—than the current regime.

### III. CONCLUSION: SPECIAL(IZED) COURT?

The United States Court of Appeals for the Federal Circuit is one of the classic examples of a seemingly successful case of judicial specialization: a court that has managed to position itself at the apex of an essential economic nexus through near complete control of a specific doctrinal field. In his enlightening article, Professor Gugliuzza questions this success, framing it in the context of the institutional, political, and distributive costs that came along with the evolution of the country’s sole “patent court.” But the article does more than that. Through careful analysis of the multiple elements that constitute the Federal Circuit’s specialization, Gugliuzza has enabled us to rethink the institutional design of multiunit court systems more generally. The Federal Circuit, albeit specialized, may not be so special after all if we think of it as but one of various institutional permutations in an endeavor to design a judicial *system* that would be a network of interconnected, deliberative forums for normative innovation and articulation.

There is little to disagree with in the article from that point of view. But there is much in it to build upon, as institutional designers and institutionalist scholars are sure to do.

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<sup>28</sup> See generally Lewis A. Kornhauser & Lawrence G. Sager, *Just Lotteries*, 24 SOC. SCI. INFO. 483 (1988) (discussing how lotteries may be used in fair, just, social decision making).

<sup>29</sup> See Gugliuzza, *supra* note 1, at 1500.

<sup>30</sup> See *id.* at 1477 & n.213 (citing Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 124–25 (1974) (famously discussing the division among “haves” and “have-nots” as a consideration in crafting judicial-specialization schemes)).